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Opportunities in Infrastructure:  
Key Considerations in a New  
Landscape

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# Our Moderator and Panelists

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# Overview

- The Infrastructure Project Funding Problem
- Private Investment Is a Solution
- More About Public/Private Partnerships
- Why the Excitement About Infrastructure?
- Infrastructure as a New Asset Class



# Public/Private Partnerships



# Current Market Activity

- Greenfield Infrastructure Development
  - Transportation
    - *Ports*
    - *Toll Roads*
    - *Subways*
  - Schools
  - Hospitals
  - Energy Sector (Electricity and Oil/Gas)
- Active Regions
  - USA
  - Canada
  - Mexico
  - Central America
  - Caribbean

# Public/Private Partnerships

- Primary Reasons for Utilizing Public/Private Partnerships (PPPs)
  - Accelerating the implementation of high-priority projects
  - Accessing new technology from the private sector
  - Accessing the financial resources of the private sector
    - *Fast-tracking financing*
    - *Less cumbersome*
  - Benefiting from private sector management of projects (helps agencies reallocate resources internally)
  - Leveraging scarce public resources
    - *Personnel*
    - *Monetary resources*

Private sector has incentive to maximize performance (returns)

# Public/Private Partnerships

- What can be shifted to PPP Structure?
  - Aspects of project that private sector can undertake
    - *Design*
    - *Financing*
    - *Construction*
    - *Operation*
    - *Maintenance*
    - *Management*
    - *Revenue/Toll Collection*

# Public/Private Partnerships

- Procurement Processes
  - Traditional process
    - *Low bid tender (low -cost contractor)*
    - SHORTFALLS
      - No focus on life-cycle costs
      - No incentive for private sector to incorporate new technology
      - “Low Ball” bids to eliminate competition and then change orders to restore profitability
      - No concern for maintenance costs
  - PPP procurement process
    - *Quality-based awards*
    - *Life-cycle costs awards*
    - *Service benchmarked awards*

# Labor Issues and Concerns



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- Executive Order encouraging use of Project Labor Agreements on federal projects
- What is a Project Labor Agreement?
- What is the scope of the Executive Order?
  - \$25 million or more
  - Federally funded vs. federally assisted

# Labor Issues and Concerns

- How will the Executive Order be implemented?
  - FAR Council
  - Broader implementation on federally assisted projects through OMB
    - *Lower monetary threshold?*
  - Expect strong encouragement rather than mandate

# Labor Issues and Concerns

- Davis-Bacon Act
  - Prevailing wage requirement
  - Broad coverage under the American Recovery and Reinvestment Act of 2009 (ARRA)
    - *Projects “funded directly by or assisted in whole or in part by and through the Federal Government”*
  - Recordkeeping and compliance responsibilities

# Labor Issues and Concerns

- Other Potential Obligations
  - Whistleblower protections under stimulus bill (ARRA)
  - Office of Federal Contract Compliance Programs (OFCCP) affirmative action obligations
  - Executive Order 13494: prohibition on use of federal funds to persuade employees re: union organizing
  - Executive Order 13496: notice posting re: employees' right to organize

# ARRA “Whistleblower” Protection



# ARRA “Whistleblower” Protection

- The ARRA has created a broad new class of protected employees
  - Employees of any entity receiving stimulus money who allege that those funds have been wasted or mismanaged, or engaged in other forms of “protected conduct”
  - Such concerns cannot, in any way, “contribute” to an adverse employment action
- Similar provisions in other industries have resulted in substantial litigation
  - The number of complaints filed under recently enacted whistleblower protection laws (e.g., AIR 21, SOX) have been steadily increasing as word of such protections has percolated among the workforce

# ARRA “Whistleblower” Protection

- The provisions cast a wide net:
  - Covered employers
  - Protected employees
  - Adverse actions
- Burdens of proof are tilted in the employees’ favor:
  - Contributing factor
  - Preponderance of the evidence (employee) versus
  - Clear and convincing evidence (employer)

# ARRA “Whistleblower” Protection

- Process:
  - Agency IG investigates and files report
  - Agency head makes ultimate finding and award (reinstatement, back pay, compensatory damages, attorneys’ fees and costs)
  - Agency enforcement of adverse decision in U.S. District Court
- No provision for administrative appeals
- Either party may initiate a lawsuit in U.S. District Court
  - De novo
  - Jury trial
- Nonexclusive

# ARRA “Whistleblower” Protection

- Whistleblower claims can become highly visible
  - Whistleblower plaintiffs’ bar uses the press effectively
- Whistleblower claims can result in:
  - Enhanced governmental scrutiny
  - Challenges in managing employee performance and misconduct
- Proactive measures to prevent and detect retaliation:
  - Supervision and management having proper knowledge, tools, and expert assistance
  - Culture of compliance permeates the organization
  - Practical, useful processes exist for employees to report concerns and have them resolved in a timely and effective manner
    - *The above methods have been effective in reducing whistleblower claims in other industries*

# Essential Elements in a Successful PPP



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- Clear Project Definition
- Competitive Private Sector Market
- Value for Public
- Proper Risk Allocation
- Transparent Procurement Process
- Well-Structured Project Agreements
- Proper Contract Administration and Oversight

# Essential Elements in a Successful PPP

- Clear Project Definition (most important element)
  - Project goals must be clearly defined
  - Performance parameters must be objective and “realistic”
  - Project parameters must be flexible to ensure innovation by private sector participants
  - Think “Outside the Box”
- Competitive Private Sector Market
  - Private sector participation must be robust (ensures competitive pricing)
  - Encourage as many bidders as possible (look to traditional local players and international market)
    - *Cast a wide net*

# Essential Elements in a Successful PPP

- Value for Public
  - General public must see benefit of project
  - Public perception is critical
  - Keep public well informed and clearly articulate benefits in cost savings and resource allocation
- Proper Risk Allocation
  - Project finance principles must be adhered to
  - Each risk must be assigned to the party best able to manage risk

# Essential Elements in a Successful PPP

- Transparent Procurement Process
  - Given high costs of bid preparation, private sector participants must view selection process as fair and objective (no black-box selection process)
  - Define objective selection criteria upfront
- Well Structured Project Agreements
  - Clearly define deliverables, time tables, performance standards, and incentives/penalties
  - “Project Finance 101”
- Proper Contract Administration and Oversight
  - A well-designed project may turn out poorly if not properly administered
  - Important to keep all participants accountable

# PPP Risk Allocation

<u>Risk Type</u>	<u>Allocation</u>	<u>Mitigation</u>
1. Technology	Private	Warranties
2. Market Revenues	Private/Public	Reserves Toll Adjustment Noncompete Protections
3. Completion Risk	Private (Contractor)	Liquidated Damages Fixed Cost/Turnkey Contract
4. O&M Costs	Private (O&M Provider)	Fixed Pricing Performance Guarantees Warranties Incentives/Penalties
5. Political Risk	Public	Public Agency Involvement

# Q&A

- If we do not have an opportunity to answer your questions during the webcast, we will follow up with you shortly after the webcast concludes.

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