

TEAMFL

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# PUBLIC-PRIVATE PARTNERSHIPS

## Evaluating the Opportunities

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# Nossaman Infrastructure

- Law and consulting firm specializing in innovative procurement, contracting and financing of large infrastructure projects
- Honored to work for more than 30 State DOTs and regional transportation authorities on large signature projects
- Offices in CA; Northern Virginia; & Austin, TX

# PPPs – A Continuum

- Design-Build
  - Design-Build-Develop/Finance
    - Design-Build-Operate-Maintain
      - Private Long-Term Concession

# Concession Market

## U.S. Market Trends

- Toll road solicitations converting from DB to concession model
  - TxDOT and ODOT – new projects
  - Miami Port Tunnel – under consideration
- Indiana, Delaware and New Jersey considering leases of existing toll roads
- Virginia's Pocahontas under negotiation
- Competitive proposals for Dulles Turnpike

# Concession Market

## Will New Growth in Concessions Continue?

- Erosion of gas tax and other public funds
- Aging transportation network
- Pent-up transportation demand that cannot be met with traditional transportation financing
- PABs and TIFIA
- Improved federal laws on tolling

# Concession Market

## Will New Growth in Concessions Continue?

- Growing public acceptance of tolls
- Advances in ETC technology
- Market entry by European/Australian sponsors and banks – Cintra/Ferrovial, Transurban, Macquarie, Balfour Beatty, Skanska, Depfa
- Large pension fund appetite

# Legislative Issues

## Private Sector and Toll Projects

- The Issue – Agency contemplates awarding concession for toll highway, tunnel or bridge
- Must Have
  - Authority for Agency to contract with private entity to do **some or all of** develop, finance, design, construct, operate, maintain and own/lease a toll road
  - Ability of private entity to fix toll rates, collect and retain tolls



# Legislative Issues

## Private Sector and Toll Projects (cont'd)

- Good to Have
  - Authority to grant a lengthy concession term (50--99 years)
  - Authority not limited just to one-project, but to several pilots or unlimited
  - Right of private entity to develop, lease, operate, own ancillary facilities
  - Effective toll violation enforcement mechanism

# Legislative Issues

## Mixing Private Money with Public Money

- The Issue – Private Sector will bring \$ but public subsidy still needed
- Must Have
  - Ability for private \$ to be used on publicly owned infrastructure
  - Ability for private \$ to be mixed with public funding
  - Ability for public \$ to be used for facility operated/leased to private sector



# Legislative Issues

## Financing

- The Issue – Lots of Good New Federal Financing Tools
- Must Have
  - Ability to issue or permit securing of debt with toll revenues
- Good to Have
  - Ability to use TIFIA and seek and obtain other federal, state and local loan, grant or credit facility
  - Ability to utilize/issue private activity bonds
  - Ability to provide other credit support (e.g., backstop through guarantee of o&m)



# Legislative Issues

## Taxes

- The Issue – Concession may create a taxable real property or possessory interest;  
Sales tax exemptions may not apply
- Good to Have
  - Exemption of concession/concessionaire from real property/possessory/ad valorem taxes
  - Sales tax exemption eligibility for concession and toll projects



# Concessions: General Structure

- Developer takes over project
  - Completes development and operates and maintains
  - Meets Agency standards
  - Specified maximum term/duration
- Developer to provide Project financing with limited/no Agency financial commitment
- Developer entitled to collect project revenues subject to one or more limitations
  - Direct: Toll Rate Caps
  - Indirect: Return on Investment Caps

# Concession Contractual Framework

- Financing and Revenue Sharing/Ownership
  - Revenue Positive Project
    - ✓ Upfront payment by Developer
    - ✓ Revenue Sharing
    - ✓ Depending on Agency priorities, can maximize one or the other or do both (but won't be able to maximize either)
    - ✓ “Committed” financing
    - ✓ “Walk Away” for inability to deliver financing

# Concessions:

## Future Payment/Re-Payment Provisions

- Developer obligation to add capacity as LOS degrades
- Agency right to terminate for convenience with payment to Developer based upon pre-determined formula
- Extent (if any) to which Agency should compensate Developer for unanticipated economic effects on project revenues

# Concessions:

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# Concessions:Toll Setting

- Who has rate setting authority?
- When/how can rates be changed?
- Must return on investment be limited?
  - How is ROI determined?
- Can tolls be imposed on existing facility?
  - HOV/HOT lane conversions allowed?
- Requirement to remove tolls after debt / equity repaid?

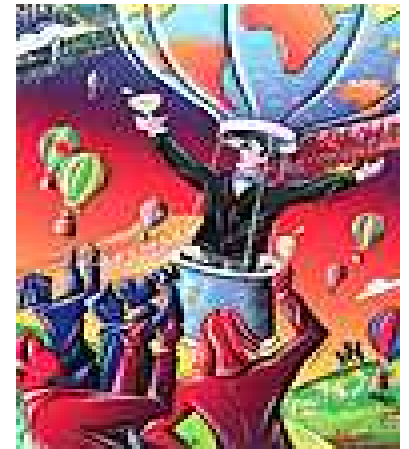
# Concession Contractual Framework

- Toll Operations and Highway Maintenance
  - Relationship/interoperability with existing Agency or regional projects
  - Maintenance and Rehabilitation Standards
  - Reserves for Major Rehab
  - “Handback” Requirements

# Procurement Issues

## Unsolicited Proposals

- The Issue – Private sector often has good ideas; can jump start projects
- Must Have (if Agency wants to have unsolicited proposals)
  - Ability to accept and review unsolicited proposals (and then commence a competitive procurement)
    - ✓ Once commenced, procurement process should be same as process for solicited procurement



# Procurement Issues

## Unsolicited Proposals (cont'd)

- Good to Have
  - Flexibility to negotiate with unsolicited proposer

# Procurement Issues

## Concessionaire Selection

- The Issue – Low/High Bid Is Problematic
- Must Have
  - Ability to select concessionaire on the basis of financial factors other than just price (financial proposal/price and other relevant factors)
    - ✓ Factors should be flexible so they may be determined on a project by project basis and not prescribed
- Good to Have
  - Flexibility to have quals/plan based selection without binding price (e.g., pre-development concession)
  - Flexibility to consider schedule, technical and other factors (best value)



# Procurement Process: 2-Step



- The Issue – 2-Step Process is Optimal
- Must Have
  - Ability to select concessionaire through a 2 step process (RFQ/RFP)
    - ✓ Submittal requirements should be flexible so they may be determined on a project by project basis and not prescribed
  - Ability to shortlist or prequalify
  - No requirement on minimum # of respondents required to proceed
  - Clarity that the defined procurement process is exempt from other general procurement laws

# Procurement Process: 2-Step (cont'd)

- Good to Have
  - Ability to pay a stipend or payment for work product to unsuccessful Proposers at the RFP stage

# Procurement Process: Negotiations

- The Issue – Proposals may be quite different
- Must Have
  - Some ability to negotiate with selected proposer
    - ✓ Scope/contract clarifications and refinements
    - ✓ Address items that have arisen since Proposal Date
- Good to Have
  - Unfettered ability to negotiate
  - Ability to negotiate in ideas of unsuccessful proposers into concession agreement pre-execution



# Procurement Process: Confidentiality

- The Issue – Proposers will provide very sensitive and proprietary financial, technical and development materials
- Must Have
  - Ability to keep all Proposal materials confidential before award/execution of concession agreement
  - Ability to keep confidential any proprietary, trade secret information of concessionaire and unsuccessful proposers both pre-award and post-award



# Contract Issues: Bonding

- The Issue – Maximum commercially available bonds approx. \$250--500mm
- Must Have
  - Ability to require less than 100% payment/performance bonding
- Good to Have
  - Ability to make bonding decisions on a project-by-project basis
  - Ability to accept alternate securities (letter of credit, parent guaranties, cash, etc.) in lieu of bonds



# Environmental Process

- The Issue – Some concessions are best undertaken as pre-development concessions
- Good to Have
  - Ability to enter into concession agreements prior to receiving all NEPA and State environmental approvals and clearances
  - Ability to have concessionaire assist DOT in environmental process



# Contract Issues

## Dispute Resolution

- The Issue – Concessionaire/Lenders want streamlined process that is not biased against concessionaire



- Must Have
  - Ability of concessionaire to pursue claims quickly through expeditious process
  - Ability to resolve disputes through a means other than having Agency unilaterally making the determination
- Good to Have
  - Flexibility in developing the dispute resolution process on a project-by-project basis
  - Access to binding arbitration (at least for smaller claims)

# Contract Issues

## Adequacy of Remedies

- The Issue – Equity/Lenders require remedy for Agency breach/termination/termination for convenience
- Must Have
  - Ability to pursue claim and get \$ in the above circumstances (Agency can transfer appropriations risk)
- Good to Have
  - Flexibility to agree to contractual provisions allowing expeditious payment and/or pre-payment for termination for convenience



# Predicates for Successful PPP Implementation

- Entrepreneurial Vision
- Organizational commitment to innovation
- Institutional capacity to manage program
- Risk management philosophy
- Access to innovative finance mechanisms
- Flexibility to respond to diverse proposals
- Innovative procurement of private partners
- Positive political climate

# Implementation Challenges

- Attracting well-developed proposals meeting agency policies and objectives
- Developing appropriate criteria
- Maintaining a competitive process
- Achieving transparency and public participation
- Allocating risks to each party appropriately
- Getting buy-in from public funding partners
- Environmental compliance
- Meeting federal regulatory challenges

# Contact

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