



**U.S. House of Representatives**  
**Committee on Transportation and Infrastructure**

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May 23, 2007

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**SUMMARY OF SUBJECT MATTER**

**TO:** Members of the Subcommittee on Highways and Transit  
**FROM:** Subcommittee on Highways and Transit Staff  
**SUBJECT:** Hearing on Public-Private Partnerships: State and User Perspectives

**PURPOSE OF HEARING**

The Subcommittee on Highways and Transit is scheduled to meet on Thursday, May 24, 2007, at 10:00 a.m., to receive testimony on the views of state and local officials and the users on transportation project delivery and financing under public-private partnership (“PPP”) arrangements. The Subcommittee will hear from state and local officials, and representatives of the trucking industry, highway user, and environmental communities.

**BACKGROUND**

**Nature of Public-Private Partnerships**

The Government Accountability Office defines public-private partnership, in part, as “a contractual agreement formed between public and private sector partners, which allows more private sector participation than is traditional. The agreements usually involve a government agency contracting with a private company to design, renovate, construct, operate, maintain, and/or manage a facility or system. While the public sector usually retains ownership in the facility or system, the private party will be given additional decision rights in determining how the project or task will be completed.” The U.S. Department of Transportation has adopted this definition for its programs. The goal of PPPs is to allocate responsibilities in the development, construction, management, and financing of a transportation project to the public and private partners in a way that will produce the best result and to share equitably the risks and rewards among the partners.

## Conventional Contracting Approach

Traditionally, delivery of highway and transit projects follows the design-bid-build sequence. The typical pattern that began in the mid-20<sup>th</sup> Century is for public transportation agencies (departments of transportation and transit authorities) to design a transportation project using in-house engineering staff until it is 100 percent complete. The project is then let out for construction bids in a competitive process. Generally, the private construction firm that offers the lowest-price bid is awarded the contract to build the project. The project is financed with public (federal, state, or local) funds on a pay-as-you-go basis. At completion, the public transportation agency inspects the project to ensure that it is built according to plan and meets various design and construction standards. The agency then operates and maintains the project during the useful life of the project. The advantages of conventional contracting for the agency are (1) complete control over project design, (2) a competitive bid price for project construction, and (3) a high degree of transparency. The disadvantages are (1) financial exposure to change orders, (2) no guarantee of the lowest final project price, and (3) a need for complete public funding.

## Use of Public Private Partnerships and Federal Tools

For a variety of reasons, both state departments of transportation and transit agencies in the mid-1980s began outsourcing to private contractors a number of the activities associated with planning and development of transportation projects. Over time, the list of such outsourced activities lengthened.

As the number of transportation PPPs grew, they were presented as a win-win proposition for governments and the private sector. For the government, it offered the opportunity to encourage entrepreneurial development and operation of transportation projects, take advantage of private-sector management skills and capital, speed up application of advanced technology, and reduce the size of public payrolls. For the private sector, it offered opportunities to participate in infrastructure investment, to expand their customer base, and to diversify their business model.

Early PPPs in the United States were mostly of the innovative procurement type. A number of models evolved, encompassing varying activities for which the private-sector partner was responsible. They ranged from design-build to design-build-operate, design-build-maintain, and design-build-operate-maintain. As more responsibilities were assumed by the private-sector partner, more of the risks relating to project costs and delays were shifted to the private-sector partner.

In 1998, Congress provided federal assistance in the Transportation Equity Act for the 21<sup>st</sup> Century to encourage greater private-sector participation. The Transportation Infrastructure Finance and Innovation Act (“TIFIA”) was enacted, and state infrastructure banks (“SIBs”) were established, as part of this legislation. These programs were designed to leverage federal transportation resources to attract non-federal or private investment in transportation projects.

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005 (“SAFETEA-LU”) expanded tools to attract private capital investment to

transportation improvement projects. The bill made improvements to the TIFIA programs to increase its utilization, and expanded SIBs to all 50 states.

The legislation also included federal income tax exemption to \$15 billion in private activity bonds (“PAB”) that would be used for highway and freight transfer facilities. Texas recently became the first state to receive an allocation under this new program to use PAB to help finance a highway project near Austin developed under a PPP. Using PAB and other types of bonding – including GARVEE bonds and municipal bonds – to finance transportation projects fundamentally changes the traditional pay-as-you-go approach (financing projects out of currently available funding) to one of debt financing (spreading project payments into the future). In addition to requiring future generations to pay part of the costs of the projects, repayment of debts often – but not always – involves tolls.

SAFETEA-LU also provided public-private partnerships opportunities for public transportation projects through the Federal Transit Administration (“FTA”) Public-Private Partnership Pilot Program, known as Penta-P, for certain new fixed guideway capital projects. The pilot program was created to demonstrate the advantages and disadvantages of public-private partnerships for transit. In its May 1, 2007 notice of agency response to comments, FTA announced its intention to consider projects including innovative procurement contracting mechanisms and financing in addition to projects involving long-term private operations or concession contracts for inclusion into the pilot program. FTA also stated that project sponsors should utilize a wide range of financing tools, including PAB, to support PPPs if the project is eligible to use such financing tools. On May 16, 2007, FTA announced that the proposed Oakland Airport Connector has been selected as the first project to take part in the transit PPP pilot program. The proposed three-mile-long connector, which features fully automated trains that operate on an exclusive right-of-way, will provide improved access to the Oakland International Airport by connecting it to the existing Coliseum Bay Area Rapid Transit station.

### **State and Local Government Perspective**

States and localities use PPPs to help develop or finance transportation projects based on the premise that private sector involvement will deliver the projects faster and more efficiently or provide financial participation to make project development possible. The goal of state and local governments under this approach is to provide better value to the public for the projects, in comparison to the traditional procurement approach of design-bid-build. Such value can be in the form of timely or early project completion, using innovative construction materials or techniques, improved project management, shifting risks to private-sector partners, or avoiding or lessening the use of public funding.

However, there is a concern that when state and local governments are considering PPPs, they do not compare the total project life-cycle costs of using a traditional procurement approach versus a PPP. This type cost comparison is typical in Europe.

PPPs may also provide access to private sector capital for state and local governments. For highway projects that add new capacity, the private sector may be willing to fund the construction and operation of the new capacity and in return receive toll revenues from the facility over a number of years. Under another approach – called

availability payments – the public authority guarantees defined payments over a period of time to the private entity in exchange for the private entity paying for the construction and operation costs. Under both of these approaches the private sector pays for the construction and operation of the facility, providing capital assistance to state and local governments in exchange for a future revenue stream dedicated to the private entity.

Recently state and local governments have looked at leasing existing facilities to private entities. These long-term concession agreements provide state and local governments with a substantial up-front payment in exchange for the authority to operate and maintain the facility and to collect toll revenue associated with the facility. In many cases the state and local governments use these up-front payments to finance infrastructure projects that the governments may not otherwise be able to afford, although Chicago used the proceeds it received from the Skyway concession agreement for non-transportation expenditures. Indiana used the proceeds from the long-term lease of the Indiana Toll Road to fund transportation projects, but most of them are outside of the corridor of the privately leased toll road.

There are also many concerns associated with long-term concession agreements. Some financial analyses have demonstrated that many of these long-term leases do not provide the best value to the public. Moreover, there is the more fundamental question of management and political control. Long-term concessions that last for 50 to 99 years cede control to the private partners for 2 to 4 generations. This may severely limit the ability of future governments to make decisions relating to transportation improvements and economic development. Similarly, non-compete clauses – or the more recent variations of such clauses – will hamper state and local governments' ability to meet their responsibility to address current and future mobility and safety needs.

Some states and local governments have legislation that allows for “unsolicited proposals” for transportation projects. Under this authority, private entities may submit ideas for projects that have not been put out to bid by the state or local government. If the unsolicited proposal is found to be feasible, the state or local government then will have to open the proposed project up to bids from other private entities in order to ensure a competitive process. Unsolicited proposals provide an avenue for state and local governments to tap into the innovation, efficiencies, and sources of capital that the private sector brings to the table.

Critics of unsolicited PPP proposals state that they have the real potential to undermine the statewide and metropolitan planning processes set forth in federal highway law. Communities that have waited many years to have their projects included in fiscally constrained transportation improvement programs (TIPs and STIPs) and long-range transportation plans may discover that they have to wait longer because a PPP project originated from an unsolicited proposal has cut into the front of the line and, as a result, state and local transportation authorities have to revise their financial commitments to projects already on the TIP, STIP, and plan to provide financial support for the PPP project. This could do significant damage to the public support for transportation planning efforts.

Finally, decisions to use PPPs to construct, operate, maintain, or finance transportation projects as well as the final agreements should be arrived at in an open and

transparent process. Timely dissemination of relevant information is critical for the public to understand what is being considered or negotiated. Without that information, stakeholders cannot participate fully in the decision-making that, in turn, can undermine the public confidence in, and erode the public support for, the projects.

### Users' Perspective

Future toll rates are one of the most important issues from the users' perspective. While users may have the opportunity to express their views on toll increases when the partnership agreement is negotiated, the agreement specifies future increases in the toll rate and the public does not have the opportunity to affect the scheduled toll increases once the agreement is put in place. Some people argue that tolls are regressive in nature, and have a disproportionate impact upon lower income individuals.

How the proceeds and revenues generated from PPPs are used has been the focus of much debate. Transportation projects are most often financed by user fees. Understandably, users want the proceeds paid by the concessionaires and toll revenues paid by those who use the facilities to be used for transportation purposes, including providing expanded or improved transit services. Examples to the contrary include the City of Chicago using the proceeds from the Chicago Skyway concession for non-transportation purposes. In addition, some proponents of PPPs have suggested using the proceeds from proposed long-term leases of certain existing toll roads in New Jersey for property tax relief, among other non-transportation uses.

Timely access to relevant information when public-private partnership agreements are being negotiated is important to the users. As explained previously, the public will be able to participate meaningfully in decision-making only if they have relevant information about the projects or the agreements governing the PPPs. Users have expressed concerns about legislation that keeps such information secret until the PPP agreements have been finalized, when it will be too late for them to influence the decision.

### PREVIOUS SUBCOMMITTEE ACTION

The Subcommittee on Highways and Transit has held three hearings on PPPs. The first hearing in May 2006 focused on long-term leases of existing highways in the United States. In February 2007, the Subcommittee held a second hearing in response to a growing interest in PPPs among the States and a strong push by the Federal Highway Administration for PPP adoption by the States. It explored the public interests at stake and how those public interests could be protected in PPP arrangements. Most recently in April, the Subcommittee held a third hearing on PPPs that examined innovative procurement practices.

WITNESS LIST

PANEL I

**Hon. Edward G. Rendell**  
Governor of Pennsylvania  
Harrisburg, PA

PANEL II

**Hon. Alan Lowenthal**  
Chair, California Senate Transportation and Housing Committee  
Sacramento, CA

**Hon. Terri J. Austin**  
Chair, Indiana House Roads and Transportation Committee  
Indianapolis, IN

PANEL III

**Mr. Bill Graves**  
President and CEO, American Trucking Association  
Alexandria, VA

**Mr. Todd Spencer**  
Owner-Operator Independent Drivers Association  
Grain Valley, MO

**Mr. Greg Cohen**  
President, American Highway Users Alliance  
Washington, DC

**Mr. Michael Replegle**  
Environmental Defense  
Washington, DC