Testimony of

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Committee on Transportation & Infrastructure
Panel on Public-Private Partnerships

on the topic of

Overview of Public-Private Partnerships in Highway and Transit Projects

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My name is Richard Fierce and I am a Senior Vice President with Fluor. For more than 100 years, Fluor Corporation has partnered with its clients to design, build and maintain many of the world's most challenging and complex capital projects. Fluor has a global network of offices on six continents, with more than 41,000 employees. Headquartered in Irving, Texas, Fluor ranks 110 on the FORTUNE 500 list, with 2013 revenues of $27.4 billion. I am the head of sales for Fluor's Infrastructure business line. In that role I have global responsibility for sales, marketing and business development for transportation, commercial & institutional, telecommunications and offshore wind projects. I am here today representing the Associated General Contractors of America (AGC), a national association of 26,000 businesses involved in every aspect of construction, with 94 chapters representing members in every state.

In addition, I am the President of the Association for the Improvement of American Infrastructure (AIAI). AIAI is a non-profit organization whose mission is to help shape the direction of the national Public Private Partnership marketplace. AIAI membership represents consists of leading construction firms, investors, developers, service firms, designers, planners and academics.

I appreciate the opportunity to provide testimony to the Committee on Transportation & Infrastructure's Panel on Public-Private Partnerships (P3 Panel) to provide an overview of the use of Public-Private Partnerships (P3s) in Highway and Transit Projects. Fluor provides a unique perspective on the use of P3s having been active in this space for twenty years, including projects in the United States, Canada, the United Kingdom and elsewhere in western Europe.

Federal Transportation Funding

Before we get into the subject matter for today's hearing, I must make a point about the pending insolvency of the Highway Trust Fund (HTF) and the reauthorization of Moving Ahead for Progress in the 21st Century (MAP-21).

Fluor, like other contractors involved in the transportation construction market, relies on the predictability of the public sectors' bidding schedules to target opportunities that determine our resource and capital investment allocations throughout the country. Returning to a four or five-year, inflation indexed funding program in the upcoming reauthorization is critical to the continued build-out of the nation's surface transportation needs. Greater predictability in funding will enable contractors such as Fluor to invest in hiring, training and developing our workforce to build our nation's infrastructure.

Like other construction companies in the transportation business, Fluor supports continued federal investment in highway and public transportation. The level of investment that is currently provided from the HTF is in jeopardy. The Congressional Budget Office estimates the Highway account of the trust fund will have difficulty meeting obligations sometime during the latter half of Fiscal Year 2014, requiring an infusion of cash into the trust fund at some point this summer. The transit account of the HTF is projected to meet all of its obligations in FY 2014, but will be unable to meet obligations during FY 2015. Even worse, the CBO prediction last year before this committee still holds true – without a general fund transfer or additional revenue into the HTF there will be no new obligations in 2015. Every dollar going into the HTF in 2015 will be used to pay prior year obligations. In simple terms, there will be no new construction projects funded with federal-aid highway and transit dollars from the HTF next year.

These are real problems that Congress must address. While it is not central to this hearing, the funding uncertainty weighs heavily on the minds of the thousands of AGC members who have worked for decades to build the world's best transportation network.

The solution to meeting our transportation infrastructure needs is twofold. First, Congress and the Administration must work together in a bipartisan way to increase user fees and identify new revenue sources to address the solvency of the HTF, both now and in the future. Second, there must be more private-sector involvement in the construction of transportation projects. There is a growing interest in P3s and other innovative financing tools that can help deliver many of our nation's most challenging transportation needs, and federal credit programs like TIFIA can help attract private investors for these projects. It must be stressed; however, that P3s and programs like TIFIA should never be considered as a substitute for the "user pays" funding system. The number one priority for Congress and the Administration must be to ensure the short-term and long-term solvency of the HTF.

P3s - The Basics

As investment in our nation's roads, bridges, and transit systems continue to decline at the federal, state and local levels, leaders are looking toward P3s and other innovative financing options to bridge the gap between the needs of our transportation network and the realities of decreased funding. Although, the United States is relatively late to the P3 game, officials at all levels of government are increasingly recognizing that a properly executed P3 can produce a win-win solution for the public and private sectors.

The P3 market in the United States is more than 20 years old. However, we still lag far behind other counties in our use of P3s to address infrastructure needs. To date, $24.3 billion has been invested in transportation infrastructure projects that included some private sector role in the project's financing. This reflects 34 projects in 16 states. Since 2007, P3s have become more popular, with a total of $22.7 billion in public and private funds dedicated to P3 projects between 2007 and 2013. Yet P3s only accounted for 2 percent of overall capital investment in our nation's highways during that same period.

It is important to remember no two P3s are the same. P3s differ from project to project, state to state, and municipality to municipality. Some of this variability is necessary because of needs and challenges unique to a given project, geography or industry segment, although much of it is driven by the fact that we have 50 state Departments of Transportation responsible for delivering these projects, not counting transit agencies or other local organs of government. This variability is one of the challenges that the nascent U.S. P3 market must overcome.

P3s for transportation projects are summed up best by the Federal Highway Administration's (FHWA) P3 Toolkit as differing "from conventional procurements where the public sponsor controls each phase of the infrastructure development process- design, construction, finance, operations and maintenance. With a P3, a single private entity (which may be a consortium of several private companies) assumes responsibility for more than one development phase, accepting risks and seeking rewards."[1]

Some might consider the most basic form of a P3 to be Design-Build project delivery, where contractors are responsible for designing and building projects for a fixed price. More complex P3s include the private sector assuming responsibility for finance, operations, and maintenance, through a long-term concession from the public sponsor. In some instances, as in a Design-Build-Finance procurement, the private sector will design, build and provide aspects of the finance for the project, while the public

[1] FHWA P3 Toolkit Value for Money Assessment for Public-Private Partnerships: A Primer

agency operates & maintains the asset. In a Design-Build-Finance-Operate-Maintain (DBFOM) transaction, the private sector entity will also provide operations and maintenance services for the asset. These DBFOM transactions may entail the private sector partner bearing revenue risk for the project. In other transactions, revenue risk may be retained by the public sector, with the private entity's reimbursement tied to the availability of the asset to service.

AGC and Fluor would tend to agree with the following assessment by FHWA: "P3s are complex transactions, and determining that a P3 is likely to provide a better result than a conventional approach is not simple. There are many factors that must be considered when determining the best procurement approach for a given project, including long-term costs, myriad uncertainties, risks both now and in the future, and complicated funding and financing approaches." [2] The bottom line is that P3s don't work for every project, but there is real potential for a significant increase in the use of P3s for highway and transit construction.

P3 projects are complex. Since the first DBFOM project in 1989 only eighteen projects have reached financial closure. The majority of these projects have taken place in California, Texas, Virginia, and Florida. But as transportation funding continues to be outpaced by needs there is real potential for growth in the P3 markets. There are currently 30 proposals in the pipeline for DBFOM projects. In addition to the traditional states active in P3s, several states are trying P3s for the first time. These states include Alaska, Arizona, District of Columbia, Louisiana, Maryland, Mississippi, North Carolina, Ohio, Oregon, and Pennsylvania. Thirty-three states (DC and Puerto Rico) have taken the first step in securing P3 work by developing state enabling legislation. [3] Having good P3 enabling legislation is a necessary – but not sufficient – condition to success in this space. The most necessary ingredient remains strong leadership and political will at the state or agency level.

P3 Benefits and Challenges

The most obvious benefit from the use of P3s in the construction of highway and transit projects is the ability to help bridge a financing gap for a given project. A P3 may allow a state to conserve funding for other projects in a time where dedicated funding at all levels of government is on the decline. In addition, a state can avoid the up-front-costs of borrowing needed to bridge the gap until toll collections become sufficient to pay for the cost of building the asset and paying the interest on the borrowed funds. A P3 may enable the state to avoid the limits that govern the amount of outstanding debt that it can have. The quantum of private sector finance, whether debt or equity, and the timing of such finance, can give states much needed flexibility in allocating resources, prioritizing projects, and accelerating delivery of much needed improvements, sometimes by many years. This allows the public to experience the benefits of the increased efficiency and safety that comes from the improvement.

An equally important benefit, though not as obvious, is that P3 project delivery can be expected to deliver more project for each dollar of anticipated revenue. This is accomplished when the public and private sector participants collaborate earlier in the lifecycle of a project, bringing constructability concepts and lifecycle costing into consideration while the project is still being defined and designed. With the long-term equity commitments, and "skin in the game" by way of long-term operations and maintenance exposure, taxpayers can be sure that corners are not being cut while innovation and "alternative technical concepts" are being vetted. The anticipated innovation from P3 delivery is also

[2] FHWA P3 Toolkit Value for Money Assessment for Public-Private Partnerships: A Primer

[3] NCSL Public Private Partnerships for Transportation: A Toolkit for Legislators February 2014 Updates and Corrections

more likely to materialize given the nature of the competitive landscape around such procurements. Take a look at the shortlisted bidders on any U.S. P3 procurement, including concessionaires, constructors, dedicated subcontractors, consultants, financial and legal advisors, and you will find a who's who of the most experienced and creative design, construction and finance professionals from around the world. These projects regularly benefit when these world class players import best practices from a wide variety of market segments and geographies.

P3 project delivery also allows best in class performance against goals for workforce engagement and small and minority contractor participation. The selection criterion for P3 projects, with emphasis on "best value" and the ability to set the balance between price, technical competency, and other considerations, allows workforce engagement and Minority and Women Owned Business Enterprise participation to be given appropriate consideration. Fluor is very proud of the Workforce Initiative Now program on the Denver Eagle P3 project, where it collaborates with the Denver RTD and the Urban League to promote local hiring. We also delivered more than $545 million in Disadvantaged Business Enterprise/Small, Women-owned, and Minority owned participation, against an original contract value of just over $1.4 billion, on our Capital Beltway P3 here in the Nation's capital. The large and sophisticated players that tend to lead these projects take these contracting goals very seriously, often delivering outstanding results where possible.

In terms of challenges, one cost factor and potential hurdle impacting contractors participating in P3s on transportation projects are the costs associated with putting together a proposal. Proposal costs are a factor on all design-build projects but are more significant on P3 projects because of the many different parties that are involved on the concession teams. While much of the construction industry works with standard form contracts or at least a common contract framework, it is common for P3 projects to have the various legal and transaction documents newly created for each project. This reinvention of the wheel tends to be very costly for contractors and concessionaires who must have a team of legal, financial and insurance experts review, comment on, edit and negotiate each of these documents. These costs are not borne solely by the private sector – the public sector partners are also running up unnecessary costs when starting over from a blank slate on each project. These costs will be reflected in the overall cost of the project and may also limit competition. While it is understood that each project is unique and therefore will require many different contract terms, it is also reasonable to expect that many contract terms and conditions need not change from one project to another.

MAP-21 directed the FHWA to craft model P3 transaction documents to address this concern. Much to its credit, FHWA held "Listening Sessions" with a broad array of stakeholder groups and also solicited written comments on how it should approach this Congressional mandate. The message was delivered loud and clear in these two sessions that on the one hand FHWA should not create standard documents and mandate their use. Such an action was viewed as a detriment to P3s moving forward. On the other hand, there was also a call for the development of an educational guide that included recommended contract language. The reasoning behind this recommendation is that contingency costs associated with construction risks could be better managed and owners need to understand this. A number of industry groups, including both the AGC and the AIAI, strongly support the idea of collecting and disseminating best practices in terms of P3 transactional documents.

FHWA recently released a guide document for concessions using tolling as the revenue source. AGC's initial reaction to the document is that FHWA did a good job of balancing the desire for not mandating contract language with the equally strong desire to make P3s more uniform from a risk allocation point of view. Once FHWA finishes all of the documents associated with this mandate, the challenge will be to get the guide used. This is an issue that this committee should be interested in monitoring because it has the potential for significantly impacting the P3 market for transportation projects in the future.

A related challenge is that closing a P3 deal, even after selection is not always guaranteed. It is certainly not uncommon for these deals to fall apart after significant time and money has been invested in the process by the selected proponent. The reasons for this vary widely, but very often it tends to be driven by loss of political will. This does much damage to the market, and has been known to dissuade otherwise qualified participants from further activity in the market. Given that the typical transportation P3 project will often entail bidding costs of several million dollars, the costs of a project that fails to make it across the finish line because of political concerns (as opposed to issues related to technical or financial feasibility) must be borne equitably by all appropriate participants.

TIFIA and PABs

Two extraordinarily important components of any P3 agreement for transportation projects are Transportation Infrastructure Finance and Innovation Act (TIFIA) credit assistance and Private Activity Bonds (PABs). TIFIA and PABs coupled with private and other sources of funding and financing, help states better prioritize their funding to focus on their respective transportation needs.

In the last Congress, there was bipartisan recognition of the benefits of TIFIA. By increasing the budget authority of TIFIA to $1 billion in 2014, MAP-21 began laying the foundation for the approval of more TIFIA loans. In addition to the increase in budget authority, MAP-21 made meaningful reforms to TIFIA with the goal of streamlining the application process and expanding the pool of eligible projects. These reforms included: increasing the coverage of eligible costs that can be financed through TIFIA from 33 percent to 49 percent; rolling the application process; eliminating selection criteria; and adding eligibility for rural infrastructure projects.

These and other reforms to TIFIA appear to be very helpful and would likely result in greater opportunities for companies like Fluor to put its employees to work on major projects; however, the guidance from DOT on how the program has changed since MAP-21 has been slow coming. More guidance from the agency on these reforms would greatly help states understand the process. The criteria in MAP-21 for TIFIA assistance was simple, clear and flexible enough to allow a variety of different projects to be approved. But in order for the program to succeed, grow, and gain more credibility - as was the intent of MAP-21 - it would also be very helpful if there is significant geographic diversity and transparency in the project selection process.

In addition, to get the best proposals from the industry, it is important that there is increased certainty that projects will move forward. AGC believes that TIFIA credit assistance approval reduces the uncertainty and therefore adds to the likelihood that P3 projects will move forward. Streamlining the approval process using concurrent reviews as proposed in other sections of MAP-21 would also enhance the efficiency of project delivery, and reduce overall costs.

Despite the clear priority that was given to the TIFIA program in MAP-21, AGC is concerned that there has been a noticeable slowdown in the award of TIFIA financing since MAP-21 was enacted. It appears that DOT is being extremely cautious in approaching the approval of TIFIA financing. AGC recognizes that DOT must take seriously its fiduciary responsibility in managing the funds in this program and overseeing projects that are awarded TIFIA financing. Awarding financing to a project that ultimately has financial problems and puts the government at risk for a financial loss is not in the best interest of the program. However, it is equally problematic to be overly cautious, slow, and bureaucratic in making the financing decision.

Private Activity Bonds which are tax exempt securities issued by state or local governments or other permitted issuers, were originally authorized for $15 billion for surface transportation projects and rail truck transfer facilities in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). No substantive changes have been made to the program since SAFETEA-LU, and as a result there only remains slightly over $5 billion in PABs available. Considering PABs are an integral part of many P3 agreements, Congress must make it a priority to increase the availability of these bonds before capacity runs out sometime in FY 2015. The market is already seeing some impacts arising from the uncertainty of the future of PABs. As state DOTs evaluate the costs and benefits of P3 project delivery for new projects entering the procurement pipeline, they need some certainty with respect to PABs availability. We believe the PABs authority should be "topped off" to prior authorized levels, or the cap itself could be lifted.

Lessons Learned

Fluor's experience is that project value is enhanced when there is earlier communication and innovation between disciplines (planning, design, construction and O&M) and participants (public and private sector partners, including financiers). The public sector can and will accommodate more in terms of "alternative technical concepts," with the assurance that lifecycle costing has been considered and with some level of private sector skin in the game over the life of the concession. The best value selection criteria employed in P3 procurements are flexible enough to reward this innovation, and can also further the goals of local labor engagement and disadvantaged business participation. As such, P3 project delivery can offer excellent results.

Conclusion

P3s have become an important tool to finance and deliver public infrastructure projects. With current and future public funding challenges at all levels of government, P3s offer the promise of delivering high-quality infrastructure in a timely and cost effective way, and can provide up-front capital for projects that could not be done otherwise. If done correctly, P3s can be an effective means for delivering transportation infrastructure. We are encouraged by the work of this committee and the P3 Panel in taking a deeper dive into the role of P3s in transportation projects. As you seek to identify the role P3s play in the development and delivery of projects, I would like to leave you with five important points when it comes to the use of P3s: (1) P3s or any other type of innovative financing tool must be viewed as just that – a financing tool. There is no replacement for direct federal funding, and the number one priority for Congress should be to ensure there are long-term sustainable funding sources in place for our federal surface transportation programs. (2) Projects need to be technically feasible, publicly supported and financeable. Any P3 project requires a reliable revenue stream for the project to be viable. As our members like to say, no amount of magic makes an un-financeable project financeable. (3) P3s are not a panacea. Private finance may help close a funding gap, and P3 project delivery is likely to deliver more project for a given dollar of revenue, but P3s do not eliminate all risks or possibilities for conflict or claims. The same challenges that face a publicly funded project can also occur on a P3. Efficient allocation of risk is important to creating P3 value. (4) Good state-enabling legislation, expertise among state administrators, federal administrators (including advisors) and a track record of success will help build support for P3 development. (5) Facilitate the use of P3 model contract documents similar to what is being developed by FHWA as directed by MAP-21 for collecting and disseminating best practices.

Again, thank you for your leadership on this important issue. AGC, Fluor, and AIAI stand ready to work with you and the other members on the committee to ensure P3s continue to responsibly fill the void between traditional public infrastructure funding and our nation's growing infrastructure deficit.