

**Testimony on Considerations for the Use of Public Private Partnerships in Pennsylvania**

**By**

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The condition of the State of Pennsylvania's infrastructure is declining, much in the same way that we see across the United States. This decline is the result of many factors and the history of how we arrived at this point is not pretty and no party is blameless – it is not a partisan issue. None the less we are where we are and must now address this need head on. But addressing this need will be neither simple or quick and in many ways the crisis we face today could not come at a worse time, our coffers are empty, both at a federal and state level. Despite a record level of investment since 2003, Pennsylvania has the largest number of structurally deficient bridges in the nation — nearly 6,000 statewide. We face growing congestion on key routes and the backlog of deferred maintenance continues to grow. As a state, Pennsylvania has no choice but to address these needs lest we wake up one day to find the state's economy wrecked by a bridge collapse or road closure that will take months to years to fix. Let me be clear – we are already starting late.

To meet this challenge will take all the leadership, all the political will and all the tools the state currently has in its toolbox and this will still not be enough. More leadership, more political will and more tools are required. This committee has an opportunity to galvanize leadership on this issue in the legislature and to bring another critical element of the political will that will be required. Importantly, with your leadership, the legislature has the opportunity to provide new tools, specifically as it relates to public private partnerships and it this that I would like to discuss for a few minutes.

Let me start by making a few critical points.

First, public private partnerships or PPPs are not a silver bullet. There are no silver bullets to solve this problem. Rather they are another bullet to be used in a fight that will be long and hard. A fight to restore the state's infrastructure which will take every bullet we can muster.

Second, PPPs are not new and perhaps better than most this is something the state of Pennsylvania recognized with the opening in 1795 of the Philadelphia and Lancaster Turnpike Company whose construction started in 1792 and stimulated economic recovery at that time. Perhaps we can learn from history.

Third, PPP's are not about just selling existing roads and getting a check upfront. PPPs are much more than this. In many ways they are about moving forward with increased certainty of outcomes. They are not about complicated financing structures and unchecked private equity returns. They are not a battle between taxable and tax exempt debt. They are not about busting unions or displacing local construction workers. They are however, very much about changed roles and changed mindsets and that is where the legislature has a key opportunity to provide necessary leadership.

Finally, PPPs are not something beyond the capability of US firms and US industry. The Philadelphia and Lancaster Turnpike Company demonstrated that over two hundred years ago. My own firm's experience in PPPs dates back twenty years to the beginnings of the SR 125 in California and has included road projects delivered with both taxable and tax exempt financing approaches; projects in the US and Europe; facilities as diverse as road telecommunications, offshore wind farms and high speed rail systems; facilities with fixed and dynamic tolling, such as the Capital Beltway HOT Lanes now under construction; and non toll projects using availability and shadow toll concepts where our upside comes not from increasing rates but rather from better performance.

As this committee and ultimately the entirety of state government considers the addition of these new tools into its toolbox it is essential to clearly understand what PPPs can provide and what they cannot. So let me first start with what colors PPP's come in. Simplistically, they come in brown and green, or more appropriately they may be brownfield or greenfield projects. For purposes of today's testimony I will define brownfield projects as involving the long term lease of an existing state infrastructure asset to a private sector partner. This lease is not unbounded. It may carry requirements as to term, limitations on rate of growth in charges to the general public, requirements for state of repair and even required performance characteristics that will result in improvements to the facility over its lifetime. But in many ways, a brownfield transaction looks like many other real estate transactions the state has undertaken. I will not dwell on brownfield transactions further in this testimony but rather turn to greenfield transactions.

While one could argue that it would be very rare for an entirely new facility to be built today in a manner such as the Philadelphia and Lancaster Turnpike was, I will define greenfield facilities to be those where there is a substantive improvement or expansion to the existing facilities capabilities and capacity. Examples of greenfield facilities could include a significant structural upgrade or replacement of an existing bridge; addition of HOT lanes to an existing road or construction of a new high speed rail service.

Let's turn now to the three things that PPPs can bring to the state of Pennsylvania.

First and foremost, PPPs must bring **certainty** of outcome. I will talk in a second about two other things that PPPs may bring, but certainty is the sine qua non for PPPs. Given the private partner's role in standing behind certain performance aspects of facility delivery and operation and the effective disintermediation of state responsibility in these regards, investors and lenders require certainty. This must be provided by the private sector partner and represents a changed risk profile for both parties but with the changed responsibilities and authorities that changed risk allocation requires. I could talk at length about this changed risk allocation framework but rather let me use an example that illustrates the changed risk framework.

In the past I had the opportunity to look at a major program with the owner's project staff before they had selected a contracting strategy. Their typical approach was a design-bid-build approach and I sketched up on the board in the front of the room a set of boxes with the major elements of design, construction and other functions that would need to be undertaken to deliver the project. In effect I sketched out a simplified version of their usual contracting approach. I then asked the client's project delivery staff to come up and indicate where they thought the largest risk was to the project's delivery. When they were done several boxes had one or more check marks in them. I then proceeded to tell them they were all wrong. The largest risk was in the white space between the boxes. The risks in that white space are why many traditionally delivered public works projects are late and over budget. Those risks are also one of the greatest risks that are transferred in PPPs.

While I used a design and construction example to highlight the risks in the white spaces of projects, that same philosophy can be extended to consider risks inherent in how a facility is designed and constructed and how simple it will be to operate and maintain. It can be extended

to consider risks related not only related to these facility characteristics but also to how it is funded and financed.

That brings me to the second thing that PPPs may bring to the state of Pennsylvania, namely more flexible **financing** approaches. I believe that one of the greatest misconceptions in the US PPP market is that there is a defined finance approach to the delivery of infrastructure in general and PPPs in particular. Simply put the finance approach most applicable to a given project is an **“it depends”**. If the only tool you have is a hammer every problem will look like a nail. Just as PPPs represent another set up tools in the state’s infrastructure toolbox, so too does flexibility in financing approaches.

Let me define financing approaches for PPP’s to come in two **flavors** – not for profit and for profit. Currently, infrastructure delivered by the state and its various authorities is delivered utilizing a not for profit model. It is delivered utilizing senior debt financing only. But it does not need to be limited in this way. Fluor has delivered US PPP projects utilizing not for profit structures in the form of 63-20 and 501(c)(3) corporations which have incorporated the use of subordinated debt, provided by the private partner to enhance the overall financial capacity of the project. These not for profit PPPs have a lifetime that coincides with the retirement of the project’s debt and do not preclude subsequent conversion into a for profit structure as we saw with the Pocohontas Parkway in Virginia.

PPPs also come in a for profit or concession flavor where equity provides the added risk cover and patience that sub debt did in the not for profit model. Financing will be generally taxable in nature but with tax advantaged debt available in the form of Private Activity Bonds (interest included in AMT) and Buy America Bonds.

TIFIA represents an important tool under all PPP models.

So while PPPs may bring additional financial flexibility to the State of Pennsylvania as well as added financial capacity or an ability to accelerate a project, it is not a necessary component of a PPP and many states are looking at PPPs in these early days merely to provide increased certainty.

One final word on PPP flavors before I turn to the third aspect that PPPs may bring to the state. I have simplistically described two flavors – not for profit and for profit. I would be remiss if I didn’t indicate that hybrids are available and I believe they will be receiving increased attention

as we continue to work through the process of restoring our capital markets. Again, this is part of the important flexibility that PPPs can bring.

Now let me turn to the third thing that PPPs may bring, namely increased funding or maybe more appropriately increased funding certainty. Of all the benefits of PPPs this is the one which development in other markets around the world has shown to be the most transient in importance. There are no magic pots of money. PPP execution certainty and flexible financing structures can combine to lower life-cycle costs but at the end of the day there must be a source of revenue. These sources of revenue can be simply described as grants from others and payments for capacity or services provided. For the state of Pennsylvania, grants are essentially limited to those from the federal government; revenue sources related to capacity come from general state revenues; and revenue sources related to services provided derive from motor vehicle related fees and taxes and selectively in user fees such as tolls.

The revenue sources for a public private partnership fundamentally are not all that different. Capital expenditure contributions can include federal, state and local payments for specific facility features such as what we saw on the Capital Beltway HOT lanes; ongoing operating support for certain aspects of a project such as transit systems see from the Federal government; and a range of potential payment types for services provided. Let me outline these potential payment for services types because they represent a significant feature in PPP design.

The first payment for services type is the easiest to describe, namely a direct user charge such as that represented by a toll. Tolling a road is certainly something that can be done directly by the public sector. In that scenario toll rates and structure are determined by the public sector, often require legislative approval and historically have not kept up with the full funding requirements of the facility. Under a PPP, the state of repair of a facility and its operating characteristics are often memorialized by contract or covenant. This is not the case in traditionally delivered public infrastructure. PPPs can provide political disintermediation from the toll adjustment process but this does not need to be done in an unchecked manner with toll rate increases limited by index or formula or revenue sharing provisions incorporated in the PPP agreement.

The second payment for services type is an availability payment structure which is the most common form in more mature PPP markets internationally. Availability structures segregate ultimate funding responsibility from the revenue stream to the PPP provider in a way that acts to

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incentivize PPP provider performance and significantly reduce revenue risks in the PPP provider financial structure increasing overall financial capacity. An availability payment structure can best be illustrated by considering a new high speed rail line where the PPP provider is compensated at a defined rate only for those periods of time where it is able to run a train. Whether the public partner chooses to run a train; whether anybody is on the train; whether they have paid a fare or at what level is of no concern to the private partner. His focus is on being able to run the train.

A third payment for services type involves so called shadow tolls where market demand risk remains with the PPP provider but where pseudo toll rates are established for each hypothetical transaction and compensation made by the public partner. The public partner may fund these payments out of one or more ultimate funding sources which may include actual tolls, vehicle miles traveled or VMT charges or payments from general revenues.

Infinite permutations and combinations of these different payment approaches are possible.

My submitted remarks include an extensive discussions on specific regulatory aspects that I believe the legislature should consider including what "model" legislation might look like. The needs of the state are real and pressing and new approaches must be tried and proven. PPPs are one new approach that can help Pennsylvania address its infrastructure needs, achieve higher certainty of outcomes and provide needed medium term stimulus while undertaking transformational projects that provide longer term economic competitiveness.

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End of Formal Testimony

Testimony on Considerations for the Use of Public Private Partnerships in Pennsylvania

**Extended Testimony on PPP Legislation & Regulation from a Private Sector Perspective**

by

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## **Section 1 – Overview**

I could have perhaps entitled this overview the “Top Ten Things We Want When Entering A PPP,” but, while I will lay them out, I thought it best to focus on just a few of them, namely those that deal with legislation and regulation. If we can deal with those items effectively, then the work of the international bar in developing comprehensive development agreements will be greatly simplified.

The point of view from which this paper is developed is that of the contractor/developer. If I have reflected a bias in my remarks other than the obvious one that comes from our perspective as a developer, then it is towards greenfield projects versus a sale of existing assets where I feel a different and arguably simpler legislative and regulatory framework can exist.

In effect, I feel that we represent the group that is actually going out and making the investments for the private sector side in order to make these projects happen. Just to give you an example, those investments can run as high as one percent of total installed cost. For a billion dollar project, there is as much as \$10 million at risk before financial close. We need to understand that there is serious money that has to come in from the private sector side and come in early. This money will only be attracted in a sustained way if an appropriate framework for success and protection of the developer's investment exists.

A second comment is we are not in an opportunity poor environment. We are very much in an opportunity rich environment right now.

The key is picking out the attractive opportunities and answering the question posed today about what we, the Contractor/ Developer, want when entering a PPP. Of course, what we ultimately want at the end of the day is an appropriate risk-weighted return ... it must be profitable.

I thought it might be useful to look at this question from a Top 10 perspective but focus some more specific comments around the second thing that we want in a PPP (after political will). I will only touch briefly on the others.

### **1. Political will is strongly present**

How realistic is it to believe that the political will exists and that the key decision makers understand the risks and financial benefits of the project and are willing to expend their political capital on it? Also, will the decision makers' terms of office last until the likely decision point?

Political will also means that whether it is in the executive office or the legislature, the tough decisions are going to be made.

Also, there is recognition on the political side that time is of the essence and that getting to financial close, which is a very important milestone for us for many reasons, is the same milestone that they have.

**2. Good legislation exists**

Is there a legislative, legal, and institutional framework for using a PPP? Has the use of PPPs been contemplated for the particular PPP or similar PPPs?

However, legislation is not enough; the enabling rules need to be well developed. This is not just terrain for lawyers. Please, please get your prospective contractor/developers involved!

**3. A transparent procurement process exists**

You can not buy political risk insurance in the United States, but you can buy it almost everywhere else in the world. That is a very important statement; therefore, political risk and a transparent procurement process are key.

What does that mean?

- a. Objective criteria
- b. Quality, skilled staff on the government side

This is a different type of analysis than anything they have encountered before. It requires a different skill mix. And I think to protect the public interest, and to have a true partnership with the private sector, you have to have the right skills.

- c. Intellectual property rights respected

Simply put, we do not want our innovative ideas shopped.

**4. Implementing agencies embrace change**

That embracing of change needs to happen at all levels of the agency.

**5. A clear path forward is identifiable**

If we are going to invest millions we want to know where it will lead, what the path along the way looks like, and what it will take to cross the finish line. Do not make it up as you go along!

**6. Stakeholders support the project, and it FLIPS**

"FLIPS" is an acronym for the major issues to be successfully resolved by the Contractor/Developer. FLIPS stands for Financial, Legal and Risk, Innovation, Political, and Social and Environmental.

**7. The public sector partner clearly understands risks**

The risk analyses done by both the public and private sectors have to evaluate shared risks and come to agreement on the solutions for and ownership of these risks.

**8. The project addresses a real need**

How critical is the project in reality? How is it perceived in the minds of the taxpayers/voters? What options exist for dealing with the problem the project is intended to solve? If the project is publicly viewed as nice to have but not critical, the likelihood of success is reduced.

**9. The public sector partner clearly understands all obligations**

Simply, we need a good public sector partner, and they require the same thing of the private sector partner. They need to understand what they have signed up for.

**10. The PPP exhibits the three key attributes of successful PPPs:**

- It delivers the *maximum infrastructure for the lowest cost* to both the taxpayer and the user.
- It has *appropriate risk weighted returns*.
- It *protects minority interests* for lack of a better name.



## **Section 2 – Good Legislation**

A successful PPP environment must start with political will; however, political will is, in and of itself, not sufficient. It must be backed up first and foremost with good legislation. The legislative process itself helps build the political consensus necessary to implement and sustain a successful PPP program.

As we have participated in various PPP programs around the United States, Fluor has developed some specific views on elements of good legislation. We see many of these attributes embodied in the legislation of the state of Virginia, which continues to capture the experience gained from projects unfolding in that state, and more recently in the yet untested legislation passed in Louisiana in 2006. This later legislation builds on the Virginia framework but picks up some on the items which Virginia addressed through other legislative vehicles.

More recently FHWA has provide some model legislation for consideration by the states but the plusses and minuses of that legislation will not be addressed in this paper.

### **What are some of these attributes of good legislation?**

1. Clear statement of policy
2. Provision to receive unsolicited proposals – a competition of ideas
3. Approval authority delegated to DOT
4. Requirement for clear regulations including evaluation of proposals
5. Involvement of local governmental units defined
6. Clear authority to commit public property
7. Powers of private sector partner delineated
8. Right to toll or charge other user fees explicitly stated
9. Exemption from property and ad valorem taxes
10. Authority and requirements related to pre-development and comprehensive development agreements fully delineated
11. Termination provisions for cause and convenience provided for, including any remedies
12. Funding resources identified if federal, state, or local resources to be included
13. Condemnation authority defined

14. Enforcement provisions related to tolls and traffic enforcement
15. Waiver of any procurement regulations inconsistent with PPP delivery model

The legislature performs a key role in ensuring that these essential ingredients are present before moving down the PPP path; however, that role should not stop there. The legislature must be asking itself the following questions:

1. **Have we sufficiently considered what steps and activities are necessary to create a climate for a sustained use of the PPP model?**

None of us is interested in just doing a series of one-off projects. Rather, we are interested in participating on a sustained basis in well defined sectors, with sustaining project pipelines and political support that goes well beyond just the pilot project stage.

2. **Have we clearly defined the regulatory objectives in our PPP processes?**

This is an easy question, but it is not one so easily answered. The public interest must be protected but not at the cost of stifling private sector creativity.

3. **Have we clearly defined our policy priorities and reduced the non-financial barriers to financial closure?**

Prioritize! Prioritize! Prioritize! In the short term, there will always be more capital than good projects. Do we have a good process to ensure that the “proposed solutions” are solving the real problems we want to address? The absence of well-defined priorities drives the PPP provider into a role of justifying the need for a solution rather than just promoting the merits of his solution. The role of needs-definition – and communication – lies with the public sector at the outset of the process, not with the private sector PPP provider as a last hurdle before financial closure.

4. **Does the public sector have the tools it needs to broadly evaluate the financial offerings it receives in the PPP process, especially where there are competing offers with different risk structures and time frames?**

As I suggested earlier, these models are more than pure financial models in that they must allow the regulator to consider broader economic and specific user impacts. Government must be a sophisticated seller of rights, which traditionally (at least since about the 1920s) have been its purview only. A successful PPP industry in the United States cannot be built just on headlines.

Appendix A includes a template for model PPP legislation which we have developed and provided to several states over the last 18 months. It can serve as a good starting point in any state’s efforts but clearly must be adapted to fit individual state legal and constitutional frameworks.

### **Section 3 – Good Regulation**

Public Private Partnerships are just at the earliest stages of gaining traction in what has the potential to be one of the largest PPP marketplaces in the world. The United States today, however, is lacking not just the experience of many other countries that have gone down this path but also the regulatory framework necessary to create successful and transparent processes which are key to broader development of this market.

The section looks at the regulatory framework that exists internationally as a guide to facilitating U.S. PPP regulatory development. Specific advice on regulatory model design, desirable regulatory objectives, available policy tools, forms of regulation, contract, and other issues to be addressed by the regulator and bidding process design is provided with a focus on aspects unique to the U.S. PPP marketplace. The paper includes "lessons learned" from the governmental perspective that provide a good checklist for those responsible for PPP program implementation as well as those aiding in the development of both regulatory frameworks as well as specific regulations.

#### **International PPP Framework – An Analog for the United States**

Key to the development and successful sustainability of a meaningful PPP sector in the U.S. will be a transparent and predictable regulatory environment. This environment is still at the earliest stages of development today, and, while the ultimate regulatory regime must reflect the unique features of the U.S. market, many features can be reasonably expected to evolve in ways similar to what we already find in the international environment. Specifically, we find that:

- More than 200 regulatory agencies rely on United Kingdom type regulatory processes adjusted for local legal, social, political, and economic requirements. The wealth of experience represented by such a broad application provides a framework for policy, project, and procurement design.
- Government financial models are gradually evolving towards models that better allocate risk and measure the financial effects of uncertainty.
- Most regulatory regimes recognize the change that occurs in key financial variables over time and provide for renegotiation. Key in regulatory design is the definition and measurement associated with potential triggers and the basis for any subsequent renegotiation.
- Models are built for either outright sale of government assets or privately financed concessions; the opportunity for tax exempt financing through special purpose vehicles does not exist and is a unique and powerful tool for U.S. infrastructure development.
- Models take a longer term view than a traditional project-specific financial model and explicitly consider (and model) available regulatory instruments. Asset value added is specifically considered in the post concession period and is a key factor in determining appropriate concession period length.
- Models are used to monitor financial sustainability of concession operation (downside/bankruptcy risk) as well as projected returns to concessionaire (social perceptions of excessive returns). Specific bankruptcy scoring has been evaluated

for use. A robust and “living” business risk management framework is important to both the regulator and concessionaire.

### **Lesson Learned**

#### **Create a climate for sustained use of the PPP model**

- Project pipeline and sector profile
- Political support beyond pilot project stage
- Complexity and cost of procurement process
- Valuation/appropriateness of risk transfer
- Availability of appropriate funding
  - a. Short-, long-term
  - b. Equity, non-recourse debt
- Openness of market to non-domestic competition
- Political will to overcome the opposition of public sector employees

### **Designing the United States PPP Regulatory Model**

Let’s look at the design features of these regulatory models as a step towards defining what some of the requirements of a robust regulatory framework in the U.S. may include. These models are more than pure financial models in that they allow the regulator to view project financial characteristics from an external project view (economic and specific user impacts) as well as the more traditional internal project view founded on Internal Rate of Return (IRR).

This process allows the government to model different regulatory actions and their impact on project IRR and overall “social economics.” In addition, the government can model the “value” inherent in uncertainty captured by the private sector. For example, financial coverage ratios diminish as traffic and revenue history is gained, so, at projected levels, it is obvious who captures the benefit of these diminished coverage ratios.

Government can further consider the impact of regulatory instruments including toll rates and structure, quality of facility service, quality of the facility at time of reversion to government, level of investment, timing of investment (i.e., foregone benefit), and impact of exclusivity or non-compete on overall economic development. The government must be a sophisticated seller of rights which traditionally have been in its purview only.

**Lesson Learned**

**Understand which financing approach will work best for each project**

- Reasonableness and risk of private sector plan of finance clearly understood
- Project price relative to benefits to the public
- Market risk understood

The regulatory model should address the key issue of consistent project evaluation, inherently provide a framework that encourages competition by bona fide players, and withstand the examination of public scrutiny (transparency). This enables government to understand, value, and balance the concerns of the operator; availability and accessibility of the developed infrastructure; distribution of economic benefits created; and social and economics redistribution concerns.

Further, this model fosters transparency in concession operations and, equally importantly, in the regulator. This reduces opportunity for corruption, collusion, or real or perceived conflict of interest and provides a tool to explain regulatory decisions, deal restructuring, or delayed realization of infrastructure development or capture of benefits.

Ultimately, this helps define upfront data needed by government and allows a regulatory regime to be structured that considers either asymmetric data availability (i.e., private sector has invested in collecting more than the public sector at the earliest stage) or provides for structured renegotiation as data asymmetry and uncertainty is reduced.

## **Clear Regulatory Objectives**

The design of a robust regulatory framework in the U.S. must start with a clear understanding of what the regulators' objectives are in their entirety. While these may be expected to vary reasonably from state to state, there will be none-the-less a general template that will address a broad set of objectives that are likely to exist across the individual states. The development of such a template would likely foster the development of PPPs at the state and local level while reducing marketing and bidding costs by PPP providers. Herein is a role for the U.S. DOT. Let me be clear, I am not suggesting national level regulation, but I am encouraging national level facilitation of a robust PPP regulatory template. I see this as the next step for US DOT now that it has provided a model PPP legislative framework. This regulatory framework must build on the experiences not just gained to date in the U.S. market but also reflecting the vast experience in this area which international regulators and financial institutions have gained.

### **Lessons Learned**

#### **Know your priorities**

- Prioritize
- Prioritize again
- Focus on "ready to go" projects that have been "costed"
  - a. Proposed solution must accomplish project objectives
  - b. Recognize that there is always more capital than good projects – at least in the short term

These regulatory objectives must start with the recognition that they are not unitary or necessarily independent, and they are often bounded by unwillingness to deal with difficult political tradeoffs. The main objectives should include viability, efficiency, and fairness; however, they cannot stop there. These regulatory objectives must also specifically consider:

- Financial viability of PPP – The alternative is failure and potential early recapture by the government of a distressed and most likely debt-burdened asset. The regulator must understand IRR, cash flows, debt structure and coverage ratios, equity returns and time-to-target return, profitability, bankruptcy risk of project, and the concessionaire's business model. This viability and how it changes over the project lifetime must be understood in advance by government and updated as the project moves through its full life cycle.
- Toll rate structure efficiency – in non-regulated rate of return environments, toll rate structure design is intended to provide a regulatory substitute for both ensuring the operator receives a fair rate of return while protecting the general public from "unfair" monopolistic pricing. The objective of ensuring this regulatory framework provides marginal pricing equal to marginal real cost is imperfect at best and must address adjustment for factors outside the regulators (and concessionaire's control) such as difficult credit markets (for any agreed to refinancing flexibility), tight labor markets

(that cause labor costs to behave dramatically different than indexed averages that may have been used in developing the toll rate structure), and tax system changes

- Fairness of toll rate structure – in the absence of specific government subsidies to specific user classes, it is not uncommon to establish toll rate structures that incorporate inherent cross subsidies. These relationships are often fixed at initial contract award, but their recalibration over the PPP lifetime must be addressed in any developed regulatory framework
- Efficiency of delivery and operation – This is important in any regulated rate of return scenario. Early delivery of infrastructure is often a prime driver in the decision to use a PPP approach. Regulatory targets should, as a matter of policy, seek to facilitate and, more importantly, reward this early delivery. During the operating phase, targets must be set, but “hidden” profits must be identifiable through upfront definition of data requirements. Efficiency must be encouraged but with an appropriate sharing mechanism developed between government, facility user (through toll rate structure), and concessionaire.
- Reinvestment efficiency – Regulator must ensure that PPP structure does not encourage excessive early cash flow harvesting by a program of disinvestment in service capacity and quality (the facility is not run into the ground). Sinking fund requirements for anticipated capacity expansion or level of service improvements and requirements on condition and capacity of facility at turnover must be addressed. Investments linked to demand forecasts and actual demand realized must be addressed by the regulator.
- Recalibration of toll rate structure at periodic refinancing – This is especially important in concession terms extending beyond the durations served by the debt markets but is also important in valuing the recapture of debt market risk premiums (reflected in higher coverage ratios) associated with the initial ramp-up of the infrastructure project’s traffic and revenue streams. A focus on linking toll rate structure to marginal cost increases is not sufficient.
- Developed regulatory regime must be simple, transparent, non-conflictive, justifiable and justified, fair in allocation of risks, and avoid pricing discrimination and excessive price fluctuation.

### **Tools of the Trade**

The design of any robust regulatory model for the U.S. PPP market must go far beyond just having an understanding of other models and an ability to articulate the state’s regulatory objectives. It must also provide the regulator with a well-defined set of tools that are clearly understood by potential PPP providers. False starts during this initial growth period run the risk of impacting effective regulatory framework design by discouraging potential PPP providers from making the types of investments required (often exceeding one percent of total installed cost by the time of financial closure).

**Lesson Learned**

**Remove or reduce non financial barriers**

- - Legal
- - Administrative, including approvals

But what are the types of regulatory policy tools that the PPP market might demand?

- Policy framework (this is essential in any regulatory framework selected)
- Concession period and its linkage to rate of return
- Toll rate level, structure, and adjustment mechanisms
- Concession payments (or government subsidy, facilities, or services in kind)
- Penalties and fines for non-compliance
- Timing of investment and reinvestment
- Quality standards including those related to effective management and operation of the facility over time (for example, accuracy of any electronic billing to ensure that the user is not overcharged and that funds essential for subsequent investment are efficiently collected)
- Depreciation and amortization rules (tax and accounting policy issues), to the extent within the control of the regulator

**Lesson Learned**

**Understand how PPP commitments made by government will be accounted for on government books**

- Non-government assets when:
  - a. Private partner bears construction risk, and
  - b. Private partner bears at least one of either availability or demand risk

**Types of Regulation**

Broadly, three types of regulatory regimes can be considered to exist:

- Price or revenue caps
- Rate of return
- Hybrid of first two types

Let's look at each of these in turn:

**Price or revenue caps**

A regulatory regime built around price or revenue caps would provide for upper limits on toll rates for a particular class of service or revenue that can be generated by that service, drive efficiency gains in operations and maintenance, and allow for the establishment of price caps that reflect certain minimum efficiency gains on an inflation adjusted basis.

The caps established under such a regulatory regime could be either for an overall "basket" of services (and overall efficiency gain) or individual services (with individual efficiency gains).

Caps that are established under this regime can allow for periodic or event-driven (oil shock, financial crisis, or other severe economic or other shock) recalibration of cost and efficiency factors. Importantly, this re-emphasizes the need for a robust and living financial model.

A consistent application of a price or revenue cap regulatory regime would facilitate benchmarking against other projects in the U.S. and globally. The stable regulatory and political environment in the U.S. makes this approach less risky to PPP providers than in many developing countries.

**Rate of return**

The rate of return or cost of service regulatory regime provides a maximum financial return consistent with the risk weighted cost of capital. It requires the regulator to understand cost drivers and demand characteristics as well as achieve a targeted rate of return by toll adjustments.

**Hybrid**

Various combinations and permutations on the two regulatory regimes described above are possible; however, to be effective, clarity of intent and application must exist as in the other regulatory regimes previously described.

**Lesson Learned**

**Identify risk mitigation opportunities**

- Post-construction risk which cannot be mitigated in the marketplace
- Traffic and revenue shortfalls in early years of greenfield project
- Not privatizing risks best managed by the public sector

A survey of options and issues related to hybrid approaches shows that the alternatives include guarantees in incentive based regimes. The most common alternative used is price cap with pass through of costs not under the control of the PPP provider. This provides the opportunity to carve out unpredictable costs while introducing incentives.

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A key issue is how much uncertainty is passed to users versus retained by government (taxpayers) through guarantees or subsidies. **In many ways uncertainty and who owns it is what a PPP negotiation is all about.** In addition, the approach to inflation indexing is a crucial regulatory design point.

## **Section 4 – Design of an Efficient and Effective Bidding Process**

The process of selecting a PPP partner is one of the best opportunities for the regulator to get things off on the right foot and greatly increase his opportunity for a successful outcome. In designing the PPP bidding process, the regulator should:

- Encourage the bidder's creativity. This is one of the key benefits that the private sector partner can bring to a PPP process. The proposal must allow bidders to express their views, apply their know-how, and offer variants. Unsolicited proposals should be encouraged.

Two-step bidding processes with a strong filter on the proposer's capability and experience as the first step helps ensure effective use of limited regulatory resources and increases the interest in bona fide players to participate in the process.

### **Lesson Learned**

#### **Understand Private Sector Needs in a PPP**

- Four overriding needs:
  - a. Reasonable process for unsolicited proposals
  - b. Projects of scale
  - c. Design/build providing maximum flexibility in design details and construction approach
  - d. Project financing as a project feature
- Enabling legislation to permit unsolicited as well as solicited proposals to maximize innovation
- List of priority projects – Providing a clear, long-term travel time benefit to public; NEPA/location studies completed or near completion (concept of pre-cleared projects but ones that have allowed private sector to suggest alternatives in NEPA process linked to unsolicited proposal process)
- Opportunity to help build public support for the project
- Rewards that balance the intellectual and financial investment
- Buy-in by all transportation agency participants
- Single point contact on the state side to the maximum extent possible
- Use of performance specifications, not prescriptive specs
- Augmentation of the regulator team with experienced legal and financial advisors competent in the PPP arena

- Judge all proposals received by carefully assessing the capabilities, credibility, and commitment of the proposers and carefully respecting the intellectual property rights that are inherently represented in their efforts. Reserve the right to choose a proposer on the basis of known and qualitative abilities. Financial criteria cannot be sole selection criteria. At first glance, one offer may seem superior to another based on the size of an upfront payment for concession rights, but, once the “strings on the money” are better understood, differences in concession term accounted for, and ownership of upside benefits inherent in uncertainty of modeling considered, the full economic picture may be completely different
- Recognize that the concessionaire’s capital contribution is determined by financing community requirements and should not be artificially capped
- Establish the clear legal framework required, comprehensively addressing authority, process, and interrelationship with other levels of government, including overlapping areas of legislative coverage
- Provide clear definition of environmental process and an unambiguous commitment to move aggressively forward
- Implement a well-defined and transparent concession process with clearly defined selection criteria
- Clearly define the obligations of concessionaire to:
  - Build
  - Maintain in good condition
  - Operate
  - Hand over the works at end of period

A key area of focus by the regulator in the design of the bidding process is identifying rights of the concessionaire. These must be clearly defined in a number of areas including:

- Counterparty rights which arise from financial agreements, including subsidies and tariff guarantees included in the contract.
- Rights to operate the service and the degree of independence of those rights from the granting authority
- De facto monopoly rights
- Rights with respect to third parties
- State rights transferred to concessionaire (eminent domain)
- Rights to use the facility and receive fees

In the design of the bidding process, the regulator must also consider the rights of government to repurchase concession at an early date and basis for any such repurchase.

The procurement process itself should be carefully conceived and should:

- Not be built around competing on toll levels or expected usage (increase risk to government from increased likelihood of concession company default)
- Have adequate preliminary studies complete to define project scope and facilitate advancement of the environmental process
- Rely on careful pre-selection of qualified bidders to ensure capability to meet financial commitments
- Carefully define government's role and obligations at outset of process
- Provide an opportunity to comment on tender documents and negotiate contract form in advance of proposal submission
- Clearly define the evaluation criteria
- Establish a realistic timetable for the negotiation process

A draft contract where the client sets out its preferred risk allocation and payment mechanisms will also facilitate conclusion of a successful PPP process. The draft contract should build heavily on the dialogue the regulator is encouraged to have with the private sector.

Throughout the design and implementation of the bidding process, the regulator must keep several issues front and center in order to ensure ultimate success. Specifically:

- Ensure that the problem the PPP project is intended to address is clear and agreed upon. PPPs will only make sense when the actions of both parties, government and the private sector PPP provider, are necessary to solve the problem
  - Do not underestimate the transaction process
  - Continue to invest executive management time and energy. This is a high-level, strategic transaction that requires sustained involvement throughout the entire process.
  - Get the fundamentals right. Management skills, especially project management skills, are important to ensure that the critical path is aggressively managed
  - Ensure that the objectives, deliverables, and definition of success remain clear to all stakeholder groups.

**Lesson Learned**

**Form true partnership with private sector**

- Quality partners
  - a. Strength of balance sheet, ability to provide bonding or insurance required
  - b. Proven PPP record
  - c. Ability to handle projects of scale and complete the project
- Cooperation versus confrontation
- Regular contact versus formal contact only
- Recognize mutual learning curve of both partners
- Contract form that rewards quality and success in meeting project objectives
- Availability/capacity

## **Section 5 – Contract Issues to be Addressed by Regulator**

The regulator's challenge is to now turn to the key contract issues which he will be required to negotiate with the PPP provider. The more defined the regulatory framework is and the better prepared the regulator is to address the key contract issues, the more likely that an agreement will be reached in a timely manner. Key issues that the regulator must focus on include:

- **Concession period**
  - Time to recover target rate of return; repayment of debt
  - Procedure for toll rate approvals (and linkage to cash flows and costs – this is converted in toll rates and structure below)
  - Procedure for monitoring cash flows
  - Rules related to transfer of assets for non-fully amortized investments (otherwise, investment at end of concession period is discouraged)
- **Investment**, including:
  - Provisions to ensure investment commitments are met
  - Timing of toll rate increases and linkage to political cycles
  - Amortization rules (accounting, tax, and concession agreement specific)
- **Toll rates and structure**
  - Where the rubber meets the road
  - Set to allow operator to break even under targeted rate of return,
  - reflecting targeted efficiency gains (modeling of uncertainty and changing financial coverage ratios become key parameters in the negotiation process)
  - Handling of any non-regulated activities must be carefully addressed
  - Cross-subsidies clearly defined and any restrictions placed on use of cross subsidies fully understood (are they to be used only on projects which enhance the economic return to the PPP provider – feeder roads, for example; projects which may have the potential for an adverse impact on the PPP provider – a competing facility; or neutral – fund a school)
  - "Social engineering" objectives and their potential impacts on toll rates and structure must be clearly developed (for example, a facility that let HOV-2 ride for free or at a reduced rate could have an adverse impact on economic returns if growth rates in HOV-2 usage grew suddenly as a result of changed economics or policy; where as targeting a free HOV percentage as a cap would allow the HOV levels to be raised to HOV-3 or higher in response to any such change)
- **Quality**
  - Technical and service quality standards
  - Caps or floors
  - Level of fines

- Relationship between cost, quality, and level of fines

Many of the issues addressed within the contract will directly or indirectly be affected by other policy and regulatory frameworks which may or may not be specific to PPPs but which must be explicitly considered in the development of a successful PPP contract. Some of these issues would include:

- Forms and timing of restructurings allowed
- Nature and duration of any exclusivity or restrictions on competing facilities
- "Social" composition of user base (unintended social consequences)
- Idiosyncrasies/uncertainty in forecasting models
- Policy/rights retained and related to sequestration, forfeiture, withholding or suspension of guarantees, liability allocation and third party liability

## **Section 6 – Summary**

In this paper we have looked at PPP legislation and regulation from a US "Greenfield" contractor/developer's perspective. Observations on what constitutes good legislation and regulation is considered in light of international experience gained by Fluor and others in the international PPP marketplace as well as early state constructs in the US. The totality of what a "Greenfield" project developer "wants" is also defined in the context of a Top 10 list and several "Lessons Learned" from a legislative and regulatory framework are called out. Finally, the appendix which follows provides "model" legislation, structured for a US context, that provides a starting template for other states and may be adaptable to other national jurisdictions.

## Appendix A

### Public Private Partnership Act of 2006

#### § 11-000. Title.

This chapter may be cited as the "Public-Private Partnership Act of 2006".

#### § 11-001. Definitions.

As used in this chapter, unless the context requires a different meaning:

*"Affected local jurisdiction"* means any county, city or town in which all or a portion of a qualifying transportation facility is located.

*"Asset management"* means a systematic process of operating and maintaining the state system of highways by combining engineering practices and analyses with sound business practices and economic theory to achieve cost-effective outcomes, including, without limitation, ordinary, preventive and rehabilitative maintenance activities.

*"Comprehensive agreement"* means the comprehensive agreement between the private entity and the responsible public entity required by § 11-010 of this chapter.

"Develop" or "development" means to plan, design, develop, finance, lease, acquire, install, construct and/or expand.

*"Material default"* means any default by the private entity in the performance of its duties under subsection F of § 11-009 of this chapter that jeopardizes adequate service to the public from a qualifying transportation facility and remains unremedied after the responsible public entity has provided notice to the private entity and a reasonable cure period has elapsed.

Multi-modal *transportation facility* means a transportation facility consisting of multiple modes of transportation.

"Operate" or "operation" means to finance, maintain, improve, equip, modify, repair and/or operate.

*"Private entity"* means any corporation, limited partnership, general partnership, limited liability company, joint venture, business trust or other-business entity.

*"Public entity"* means the State and any agency or authority thereof, any county, city or town and any other political subdivision of any of the foregoing, but shall not include any public service company.

*"Qualifying transportation facility"* means one or more transportation facilities to be developed and/or operated by a private entity pursuant to this chapter.

*"Responsible public entity"* means a public entity that has the power to develop and/or operate the applicable transportation facility.

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*“Revenues”* means all revenues, income, earnings, user fees, lease payments, or service payments arising out of or in connection with a qualifying transportation facility, including without limitation moneys received as grants or otherwise from the United States of America, from any public entity, or from any agency or instrumentality of the foregoing in aid of such facility.

*“Service contract”* means a contract entered into between a public entity and the private entity pursuant to § 11-005 of this chapter.

*“Service payments”* means payments to the private entity in connection with the development and/or operation of a qualifying transportation facility pursuant to a service contract.

*“State”* means the State of \_\_\_\_\_.

*“Transportation facility”* means any road, bridge, tunnel, overpass, ferry, airport, mass transit facility, vehicle parking facility, port facility or similar commercial facility used for the transportation of persons or goods, together with any buildings, structures, parking areas, appurtenances and other property needed to operate such facility.

*“User fees”* mean the rates, fees or other charges imposed by the private entity for use of all or a portion of a qualifying transportation facility pursuant to the comprehensive agreement.

### **§ 11-002. Policy.**

A. The Legislature finds that:

1. It is essential for the economic, social and environmental well being of this State and the maintenance of a high quality of life that the citizens of this State have an efficient transportation system;
2. The availability of adequate transportation facilities is an important element of the ability of public entities to provide for the continuing economic growth that afford jobs for the State’s citizens;
3. Because the State and its political subdivisions have limited resources to fund the development and operation of transportation facilities, alternative funding sources must be identified to supplement public revenue sources;
4. Allowing public entities to contract with private entities for the development and/or operation of transportation facilities will provide significant public benefits to the citizens of the State by making available additional transportation facilities to the general public while minimizing the need for additional public tax revenues;
5. Further, authorizing private entities to develop and/or operate transportation facilities may result in the availability of such transportation facilities to the public in a more timely or less costly fashion, thereby serving the public safety, benefit and welfare; and
6. There is a public need for timely development and/or operation of transportation facilities within the State and such public need may not be wholly satisfied by existing methods of procurement in which qualifying transportation facilities are developed and/or operated.

B. It is the intent of this chapter, among other things, to encourage investment in the State by private entities and facilitate to the greatest extent possible the financing, development and operation of transportation facilities. Accordingly, public and private entities shall have the greatest possible

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flexibility in contracting with each other for the provision of the public services which are the subject of this chapter.

- C. This chapter shall be liberally construed in conformity with the purposes hereof.

### **§ 11-003. Prerequisite for operation.**

Any private entity seeking authorization under this chapter to develop and/or operate a transportation facility shall first obtain approval of the responsible public entity under § 11-004. Such private entity may initiate the approval process by requesting approval pursuant to subsection A of § 11-004 or the responsible public entity may request proposals pursuant to subsection B of § 11-004.

### **§ 11-004. Approval by the responsible public entity.**

- A. The private entity may request approval by the responsible public entity by submitting an unsolicited proposal. Any such proposal shall be accompanied by the following material and information unless waived by the responsible public entity with respect to the transportation facility or facilities that the private entity proposes to operate as a qualifying transportation facility:
1. A topographic map (1:2,000 or other appropriate scale) indicating the location of the transportation facility or facilities;
  2. A description of the transportation facility or facilities, including the conceptual design of such facility or facilities and all proposed interconnections with other transportation facilities;
  3. The proposed date for acquisition of or the beginning of construction of, or improvements to the transportation facility or facilities;
  4. A statement setting forth the method by which the private entity proposes to secure all property interests required for the transportation facility or facilities. The statement shall include: (i) the names and addresses, if known, of the current owners of the property needed for the transportation facility or facilities, (ii) the nature of the property interests to be acquired, and (iii) any property that the responsible public entity is expected to be requested to condemn;
  5. Information relating to the current transportation plans, if any, of each affected local jurisdiction;
  6. A list of known permits and approvals required for acquisition or construction of or improvements to the transportation facility or facilities from local, state, or federal agencies and a projected schedule for obtaining such permits and approvals;
  7. A list of known public utility facilities that will be crossed by the transportation facility or facilities and a statement of the plans of the private entity to accommodate such crossings;
  8. A statement setting forth the private entity's general plans for financing and operating the transportation facility or facilities, including identification of any dedicated revenue source or proposed debt or equity investments by the private entity or public entities;

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9. The names and addresses of the persons who may be contacted for further information concerning the request; and
  10. Such additional material and information as the responsible public entity may reasonably request.
- B. The responsible public entity may request proposals from private entities for the development and/or operation of transportation facilities. The responsible public entity shall not charge a fee to cover the costs of processing, reviewing, and evaluating proposals received in response to such requests.
- C. The responsible public entity may grant approval of the development and/or operation of the transportation facility or facilities as a qualifying transportation facility if the responsible public entity determines that it serves the public purpose of this chapter. The responsible public entity may determine that the development and/or operation of the transportation facility or facilities as a qualifying transportation facility serves such public purpose if:
1. There is a public need for the transportation facility or facilities of the type the private entity proposes to develop and/or operate as a qualifying transportation facility;
  2. The transportation facility or facilities and the proposed interconnections with existing transportation facilities, and the private entity's plans for operation of the qualifying transportation facility or facilities, are reasonable and not incompatible with the State transportation plan and with the local comprehensive plan or plans;
  3. The estimated cost of the transportation facility or facilities is reasonable in relation to similar facilities; and
  4. The private entity's plans will result in the timely development and/or operation of or improvements to the transportation facility or facilities or their more efficient operation. In evaluating any request, the responsible public entity may rely upon internal staff reports prepared by personnel familiar with the operation of similar facilities or the advice of outside advisors or consultants having relevant experience.
- D. The responsible public entity may charge a reasonable fee to cover the costs of processing, reviewing and evaluating an unsolicited proposal submitted by a private entity.
- E. The approval of the responsible public entity shall be subject to the private entity's entering into a comprehensive agreement with the responsible public entity.
- F. In connection with its approval of the development and/or operation of the transportation facility or facilities as a qualifying transportation facility, the responsible public entity shall establish a date for the acquisition of or the beginning of construction of or improvements to the qualifying transportation facility. The responsible public entity may extend such date from time to time.
- G. The responsible public entity shall take appropriate action to protect trade secrets and other confidential, privileged and proprietary information obtained from a private entity, including, but not limited to, information which is exempt from disclosure under the federal or any State Freedom of Information Act. The responsible public entity is authorized to enter into confidentiality agreements in connection with any comprehensive agreement, service contract, lease or other agreement for a qualifying transportation facility.

**§ 11-005. Service contracts.**

In addition to any authority otherwise conferred by law, any public entity may contract with a private entity for transportation services to be provided by a qualifying transportation facility in exchange for such service payments and other consideration as such public entity may deem appropriate.

**§ 11-006. Adoption of guidelines.**

Any responsible public entity requesting or considering a proposal for a qualifying transportation facility shall adopt and make publicly available procedures that are sufficient to enable the responsible public entity to comply with this chapter. Such procedures shall guide the selection of projects under the purview of the responsible public entity and include, among other things, reasonable criteria for choosing among competitive proposals and timelines for selecting proposals and negotiating a comprehensive agreement. Further, such procedures:

1. shall permit accelerated selection, review and documentation timelines for proposals that involve a qualifying transportation facility that the responsible public entity deems a priority, which will be funded, in whole or substantial part, by a dedicated revenue source, such as user fees, lease payments, service payments, special district assessments or a long-term maintenance agreement, or debt or equity investments by the private entity; and
2. may permit accelerated selection, review and documentation timelines for proposals that relate to a qualifying transportation facility with an aggregate estimated cost in excess of \$250,000,000 which, in the judgment of the responsible public entity, has a high probability of success, involves a less complex plan of finance and requires no substantial State funding.

**§ 11-007. Affected local jurisdictions.**

- A. Any private entity requesting approval from, or submitting a proposal to, a responsible public entity under § 11-004 shall notify each affected local jurisdiction by furnishing a copy of its request or proposal to each affected local jurisdiction.
- B. Each affected local jurisdiction that is not a responsible public entity for the respective qualifying transportation facility shall, within sixty days after receiving such notice, submit any comments it may have in writing on the proposed qualifying transportation facility to the responsible public entity and indicating whether the facility is compatible with the local comprehensive plan.

**§ 11-008. Dedication of public property.**

Any public entity may dedicate any property interest that it has for public use as a qualified transportation facility if it finds that so doing will serve the public purpose of this chapter. In connection with such dedication, a public entity may convey any property interest that it has, subject to the conditions imposed by general law, to the private entity, subject to the provisions of this chapter, for such consideration as such public entity may determine. The aforementioned consideration may include, without limitation, the agreement of the private entity to operate the qualifying transportation facility. The

property interests that the public entity may convey to the private entity in connection with a dedication under this § 11-008 may include licenses, franchises, easements, or any other right or interest the public entity deems appropriate.

**§ 11-009. Powers and duties of the private entity.**

- A. The private entity shall have all power allowed by law generally to a private entity having the same form of organization as the private entity and shall have the power to develop and/or operate the qualifying transportation facility and impose user fees and/or enter into service contracts in connection with the use thereof. No tolls or user fees may be imposed by the private entity on any free road or system of roads, bridge, tunnel or overpass unless such road or system of roads, bridge, tunnel or overpass is improved or expanded.
- B. The private entity may own, lease or acquire any other right to use or operate the qualifying transportation facility.
- C. Subject to applicable permit requirements, the private entity shall have the authority to cross any canal or navigable watercourse so long as the crossing does not unreasonably interfere with then current navigation and use of the waterway.
- D. In operating the qualifying transportation facility, the private entity may:
  - 1. Make classifications according to reasonable categories for assessment of user fees; and
  - 2. With the consent of the responsible public entity, make and enforce reasonable rules to the same extent that the responsible public entity may make and enforce rules with respect to a similar transportation facility, including but not limited to, rules relating to toll enforcement.
- E. The qualifying transportation facility may be granted certain characteristics typically incident to public ownership. Including but not limited to exemption from property taxes and ad valorem taxes, relief from zoning restrictions and/or tort immunity.
- F. The private entity shall:
  - 1. Develop and/or operate the qualifying transportation facility in a manner that meets the engineering standards of the responsible public entity for transportation facilities operated and maintained by such responsible public entity, all in accordance with the provisions of the comprehensive agreement;
  - 2. Keep the qualifying transportation facility open for use by the members of the public at all times after its initial opening upon payment of the applicable user fees (except when exempted), lease payments and/or service payments; provided that the qualifying transportation facility may be temporarily closed because of emergencies or, with the consent of the responsible public entity, to protect the safety of the public or for reasonable construction or maintenance procedures;
  - 3. Maintain, or provide by contract for the maintenance of, the qualifying transportation facility;

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4. Cooperate with the responsible public entity in establishing any interconnection with the qualifying transportation facility requested by the responsible public entity; and
5. Comply with the provisions of the comprehensive agreement and any lease or service contract.

**§ 11-010. Comprehensive agreement.**

- A. Prior to developing and/or operating the qualifying transportation facility, the private entity shall enter into a comprehensive agreement with the responsible public entity. The comprehensive agreement shall provide for:
1. Delivery of performance and payment bonds or other forms of completion guarantee in connection with the construction of or improvements to the qualifying transportation facility, in the forms and amounts satisfactory to the responsible public entity;
  2. Review of plans and specifications for the qualifying transportation facility by the responsible public entity and approval by the responsible public entity if the plans and specifications conform to standard conditions of the responsible public entity;
  3. Inspection of construction of or improvements to the qualifying transportation facility by the responsible public entity to ensure that they conform to the engineering standards acceptable to the responsible public entity;
  4. Maintenance of a policy or policies of public liability insurance (certificates of which shall be provided to the responsible public entity) or self-insurance, each in form and amount satisfactory to the responsible public entity and reasonably sufficient to insure coverage of tort liability to the public and employees and to enable the continued operation of the qualifying transportation facility;
  5. Monitoring of the maintenance practices of the private entity by the responsible public entity and the taking of such actions as the responsible public entity finds appropriate to ensure that the qualifying transportation facility is properly maintained;
  6. Reimbursement to be paid to the responsible public entity for services provided by the responsible public entity;
  7. Filing of appropriate financial statements on a periodic basis;
  8. Compensation for the private entity submitting or responding to the proposal in form and amount satisfactory to the responsible public entity, which may include a reasonable development fee and reimbursement of development expenses in the event of a termination for convenience by the responsible public entity; and
  9. The date of termination of the private entity's authority and duties under this chapter and dedication to the appropriate public entity.
- B. The comprehensive agreement shall provide for such user fees, lease payments, service payments, and/or availability or other performance-related payments as may be established from time to time by agreement of the parties. Any user fees shall be set at a level that, taking into account any lease

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payments, service payments and compensation to the private entity or private entity as specified in the comprehensive agreement. A copy of any lease or service contract shall be filed with the responsible public entity. A schedule of the current user fees shall be made available by the private entity to any member of the public on request. In negotiating user fees under this section, the parties shall establish fees that are the same for persons using the facility under like conditions and that will not materially discourage use of the qualifying transportation facility. The execution of the comprehensive agreement or any amendment thereto shall constitute conclusive evidence that the user fees, lease payments and service payments provided for therein comply with this chapter. User fees or lease payment established in the comprehensive agreement as a source of revenues may be in addition to, or in lieu of, service payments.

- C. In the comprehensive agreement, the responsible public entity may agree to make grants or loans to the private entity from time to time from amounts received from the federal government or any agency or instrumentality thereof.
- D. The comprehensive agreement shall incorporate the duties of the private entity under this chapter and may contain such other terms and conditions that the responsible public entity determines serve the public purpose of this chapter. Without limitation, the comprehensive agreement may contain provisions under which the responsible public entity agrees to provide notice of default and cure rights for the benefit of the private entity and the persons specified therein as providing financing for the qualifying transportation facility. The comprehensive agreement may contain such other lawful terms and conditions to which the private entity and the responsible public entity mutually agree, including, without limitation, provisions regarding unavoidable delays or provisions providing for a loan of public funds to the private entity to develop and/or operate one or more qualifying transportation facilities.
- E. Any changes in the terms of the comprehensive agreement, as may be agreed upon by the parties from time to time, shall be added to the comprehensive agreement by written amendment.
- F. Prior to the negotiation of the comprehensive agreement, the responsible public entity may enter into a pre-development agreement with the private entity proposing the development and/or operation of the facility or facilities. The pre-development agreement shall express the commitment of the responsible public entity that if it approves the transportation initiative that is the subject of the proposal, the entity will negotiate a comprehensive agreement to implement such initiative with the proposer. Any such pre-development agreement may:
  - 1. permit the private entity to commence preliminary activities for which it shall be compensated relating to the proposed qualifying transportation facility, including project planning and development, early right-of-way acquisition, preliminary design, conducting transportation and revenue studies and ascertaining the availability of financing for the proposed facility or facilities;
  - 2. establish the process and timing of the negotiation of the comprehensive agreement; and
  - 3. contain any other provisions the parties deem appropriate.
- G. If a private entity submits a proposal under this chapter relating to any road, bridge, tunnel or overpass (or system or combination thereof) that is subject to approval by more than one responsible public entity and the Department of Transportation and Development is one such responsible public entity, the Department shall determine the process for reviewing and negotiating the proposal. While each responsible public entity shall retain its right to approve the proposal for transportation facility or facilities and the comprehensive agreement, the Department shall be responsible for the coordination of the timing and the approval process for the proposal, as well as the negotiation of the comprehensive agreement. The Department may choose to

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designate another responsible public entity to carry out the Department's responsibility to coordinate and negotiate this process if the Department determines in writing that it is in the public interest to do so.

- H. The comprehensive agreement may provide for compensation for addition, or improvements to the qualifying transportation facility upon conclusion of any franchise or concession.
- I. In the event that a franchise or concession is terminated for public convenience after completion of the qualifying transportation facility, provision shall be made for compensating lenders and investors for their debt, equity and lost opportunity. In the event that a franchise or concession is terminated for operator default after completion of the qualifying transportation facility, provision shall be made to provide step-in rights or to otherwise make whole any project lenders on or prior to such termination.

### **§ 11-011. Funding resources; Federal, state and local assistance.**

- A. Any financing of a qualifying transportation facility may be in such amounts and upon such terms and conditions as may be determined by the parties to the comprehensive agreement. Without limiting the generality of the foregoing, the private entity and the responsible public entity may utilize any and all funding resources available to them and may, to the fullest extent permitted by applicable law, issue debt (both taxable and tax-exempt), equity or other securities or obligations, enter into leases, access any designated transportation trust funds, borrow or accept grants from any State infrastructure bank and secure any financing with a pledge of, security interest in, or lien on, any or all of its property, including all of its property interests in the qualifying transportation facility.
- B. The responsible public entity may take any action to obtain federal, state or local assistance for a qualifying transportation facility that serves the public purpose of this chapter and may enter into any contracts required to receive such assistance. If the responsible public entity is a state agency, any funds received from the state or federal government or any agency or instrumentality thereof shall be subject to appropriation by the Legislature. The responsible public entity may determine that it serves the public purpose of this chapter for all or any portion of the costs of a qualifying transportation facility to be paid, directly or indirectly, from the proceeds of a grant or loan made by the local, state or federal government or any agency or instrumentality thereof.
- C. The responsible public entity may agree to make grants or loans to the private entity from time to time from amounts received from the federal, state or local government or any agency or instrumentality thereof.

### **§ 11-012. Material default; remedies.**

- A. Upon occurrence and during the continuation of a material default, the responsible public entity may exercise any or all of the following remedies:
  - 1. The responsible public entity may elect to take over the transportation facility or facilities and in such case it shall succeed to all of the right, title and interest in such transportation facility or facilities, subject to any liens on revenues previously granted by the private entity to any person providing financing therefore.
  - 2. The responsible public entity may terminate the comprehensive agreement and exercise any other rights and remedies which may be available to it at law or in equity.

3. The responsible public entity may make or cause to be made any appropriate claims under the performance and/or payment bonds required by subsection A 1 of § 11-010.
- B. In the event the responsible public entity elects to take over a qualifying transportation facility pursuant to subsection A 1 of this section, the responsible public entity shall develop and/or operate the transportation facility, impose user fees for the use thereof and comply with any service contracts as if it were the private entity. Any revenues that are subject to a lien shall be collected for the benefit of, and paid to, secured parties, as their interests may appear, to the extent necessary to satisfy the private entity's obligations to secured parties, including the maintenance of reserves and such liens shall be correspondingly reduced and, when paid off, released. Before any payments to, or for the benefit of, secured parties, the responsible public entity may use revenues to pay current operation and maintenance costs of the transportation facility or facilities, including compensation to the responsible public entity for its services in operating and maintaining the qualifying transportation facility. Remaining revenues, if any, after all payments for operation and maintenance of the transportation facility or facilities, and to, or for the benefit of, secured parties, have been made, shall be paid to the private entity, subject to the negotiated maximum rate of return. The right to receive such payment, if any, shall be considered just compensation for the transportation facility or facilities. The full faith and credit of the responsible public entity shall not be pledged to secure any financing of the private entity by the election to take over the qualifying transportation facility. Assumption of operation of the qualifying transportation facility shall not obligate the responsible public entity to pay any obligation of the private entity from sources other than revenues.

**§ 11-013. Condemnation.**

- A. At the request of the private entity, the responsible public entity may exercise any power of condemnation that it has under law for the purpose of acquiring any lands or estates or interests therein to the extent that the responsible public entity finds that such action serves the public purpose of this chapter.
- B. Except as provided in subsection A of this section, until a court of competent jurisdiction has entered a final declaratory judgment that a material default has occurred and is continuing, the power of condemnation may not be exercised against a qualifying transportation facility.
- C. After the entry of such final order, any responsible public entity having the power of condemnation under State law may exercise such power of condemnation in lieu of, or at any time after taking over the transportation facility pursuant to subsection A 1 of § 11-012 to acquire the qualifying transportation facility or facilities. Nothing in this chapter shall be construed to limit the exercise of the power of condemnation by any responsible public entity against a qualifying transportation facility after the entry of a final declaratory judgment order pursuant to subsection B above. Any person that has provided financing for the qualifying transportation facility, and the private entity, to the extent of its capital investment, may participate in the condemnation proceedings with the standing of a property owner.

**§ 11-014. Utility crossings.**

The private entity and each public service company, public utility, railroad, and cable television provider, whose facilities are to be crossed or affected shall cooperate fully with the other in planning and arranging the manner of the crossing or relocation of the facilities. Any such entity possessing the power of condemnation is hereby expressly granted such powers in connection with the moving or relocation of facilities to be crossed by the qualifying transportation facility or that must be relocated to the extent that such moving or relocation is made necessary or desirable by construction of or improvements to the qualifying transportation facility, which shall be construed to include

construction of or improvements to temporary facilities for the purpose of providing service during the period of construction or improvement. Any amount to be paid for such crossing, construction, moving or relocating of facilities shall be paid for by the private entity.

**§ 11-015. Police powers; violations of law.**

- A. All police officers of the State and of each affected local jurisdiction, shall have the same powers and jurisdiction within the limits of such qualifying transportation facility as they have in their respective areas of jurisdiction and such police officers shall have access to the qualifying transportation facility at any time for the purpose of exercising such powers and jurisdiction. This authority does not extend to the private offices, buildings, garages and other improvements of the private entity to any greater degree than the police power extends to any other private buildings and improvements.
- B. To the extent the transportation facility is a road, bridge, tunnel, overpass or similar transportation facility for motor vehicles, the traffic and motor vehicle laws of the State or, if applicable, any local jurisdiction shall be the same as those applying to conduct on similar transportation facilities in the State or such local jurisdiction. Punishment for offenses shall be as prescribed by law for conduct occurring on similar transportation facilities in the State or such local jurisdiction.

**§ 11-016. Dedication of assets.**

The responsible public entity shall terminate the private entity's authority and duties under this chapter on the date set forth in the comprehensive agreement. Upon termination, the authority and duties of the private entity under this chapter shall cease, and the qualifying transportation facility shall be dedicated to the responsible public entity or, if the qualifying transportation facility was initially dedicated by an affected local jurisdiction, to such affected local jurisdiction for public use.

**§ 11-017. Sovereign immunity.**

Nothing in this chapter shall be construed as or deemed a waiver of the sovereign immunity of the State, any responsible public entity or any affected local jurisdiction or any officer or employee thereof with respect to the participation in, or approval of all or any part of the qualifying transportation facility or its operation, including but not limited to interconnection of the qualifying transportation facility with any other transportation facility. Parishes, cities and towns in which a qualifying transportation facility is located shall possess sovereign immunity with respect to its construction and operation.

**§ 11-017.1. Procurement.**

(State) Procurement Regulations promulgated pursuant to (Section Number) shall not apply to this chapter; however, a responsible public entity may enter into a comprehensive agreement only in accordance with procedures adopted by it as follows:

- 1. A responsible public entity may enter into a comprehensive agreement in accordance with procedures adopted by it that are consistent with procurement through competitive sealed bidding or competitive negotiation.

Such responsible public entity shall not be required to select the proposal with the lowest price offer, but may consider price as one factor in

evaluating the proposals received. Other factors that the responsible public entity may consider include the proposed cost of the qualifying transportation facility, the general reputation, industry experience and financial capacity of the private entity, the proposed design of the qualifying transportation facility, the eligibility of the facility for accelerated selection, review and documentation timelines under the responsible public entity's guidelines, local citizen and government concerns, benefits to the public, the private entity's compliance with a minority business enterprise participation plan or good faith effort to comply with the goals of such a plan, the private entity's plans to employ local contractors and residents and other criteria that the responsible public entity deems appropriate. A responsible public entity shall proceed in accordance with the procedures adopted by it pursuant to subdivision 1 unless it determines that proceeding in accordance with the procedures adopted by it pursuant to this subdivision is likely to be advantageous to the responsible public entity and the public, based on (i) the probable scope, complexity or priority of a project, (ii) risk sharing, added value or debt or equity investments by the private entity or (iii) an increase in funding, dedicated revenue source or other economic benefit that would not otherwise be available. When the responsible public entity determines to proceed according to the procedures adopted by it pursuant to this subdivision, it shall state the reasons for its determination in writing. If a state agency is the responsible public entity, the approval of the Secretary of Transportation shall be required before the comprehensive agreement is signed.

2. Once a comprehensive agreement has been entered into, and the process of bargaining of all phases or aspects of the comprehensive agreement is complete, a responsible public entity shall make available, upon request, procurement records in accordance with applicable public records laws.
3. Qualifying transportation facilities may be provided utilizing design-build or other innovative project delivery methodologies.

**§ 11-018. Multi-modal transportation facilities.**

Notwithstanding anything in this chapter to the contrary, a private entity may, with respect to a multi-modal transportation facility:

1. request the approval of multiple responsible public entities pursuant to § 11-004; and
2. enter into any pre-development agreement or comprehensive agreement with multiple responsible public entities pursuant to § 11-010.

While each such responsible public entity shall retain its right to approve the proposal for the multi-modal transportation facility and the terms of any pre-development agreement or comprehensive agreement to which it becomes a party, the multiple responsible public entities may designate a lead responsible public entity for purposes of determining the process for reviewing the private entity's proposal and negotiating a comprehensive agreement and any related pre-development agreement.