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DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

Docket No. FHWA-2014-0006

Draft Core Toll Concessions Public Private Partnership Model Contract Guide

AGENCIES: Federal Highway Administration (FHWA), USDOT

ACTION: Notice; Request for comments.

SUMMARY: The Moving Ahead for Progress in the 21st Century Act (MAP-21) requires DOT and FHWA to develop public-private partnership (P3) transaction model contracts for the most popular types of P3s for transportation projects. Based on public input on the most prevalent P3 transaction type and the need for an educational, rather than prescriptive contract model, the FHWA has developed a draft Core Toll Concession Model Contract Guide. The FHWA values public input in the development of the model contracts, and seeks continuing input. A draft of the Core Toll Concession Model Contract Guide is provided with this notice so that the general public and interested stakeholders may provide comments. This model contract guide has been prepared solely for informational purposes and should be not construed as a statement of DOT or FHWA policy.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Late comments will be considered to the extent practicable.

ADDRESSES:

To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE., W12-140, Washington, DC 20590-0001.
- Hand Delivery: West Building Ground Floor, Room W12-140, 1200 New Jersey Ave., SE., between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366-9329.
- Instructions: You must include the agency name and docket number at the beginning of your comments. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah E. Brown-Davis, Office of Innovative Program Delivery, (202) 366-4249, Ms. Alla Shaw, Office of the Chief Counsel, (202) 366-1042, Federal Highway Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, and Mr. Prabhat Diksit, Office of Innovative Program Delivery, 12300 W Dakota Ave., suite 370, Lakewood, CO 80227, (720) 963-3202, or via e-mail at prabhat.diksit@dot.gov. Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

You may submit or retrieve comments online through the Federal eRulemaking portal at: <http://www.regulations.gov>. The Web site is available 24 hours every day of

the year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at: http://www.archives.gov/federal_register and the Government Printing Office's Web page at: <http://www.gpoaccess.gov>.

Background

Public-private partnerships are contractual arrangements between public and private sector entities that allow for greater participation by the private sector in the delivery of surface transportation projects and associated services. Generally, in addition to designing or building a project, a private partner in a P3 may be involved in financing, operating, and maintaining the project. By transferring certain risks and responsibilities to the private partner, P3s can result in more efficient and effective project delivery. However, P3 contracts are complex and are of a much longer-term duration than traditional construction contracts. Their terms and conditions address many requirements not covered by traditional construction contracts such as financing arrangements and performance during a concession period, among others. Public agencies need special expertise to ensure that they can successfully negotiate P3 agreements. Section 1534(d) of MAP-21 (Pub. L. 112-141; 126 Stat. 405) requires the DOT to develop model P3 contracts that could serve as a model and a guide to States and other public transportation providers in developing their own P3 contracts. The legislation states:

“(d) STANDARD TRANSACTION CONTRACTS.—

(1) DEVELOPMENT.—Not later than 18 months after the date of enactment of this Act, the Secretary shall develop standard public-private partnership transaction model

contracts for the most popular types of public-private partnerships for the development, financing, construction, and operation of transportation facilities.

(2) USE.—The Secretary shall encourage States, public transportation agencies, and other public officials to use the model contracts as a base template when developing their own public-private partnership agreements for the development, financing, construction, and operation of transportation facilities.”

Development activities to date, include receipt of comments during a January 16, 2013, Listening Session attended by a broad cross-section of P3 stakeholders. In addition, DOT solicited comments regarding model P3 contracts in a prior notice published at 78 FR 1918, January 9, 2013. All comments may be viewed at: http://www.fhwa.dot.gov/ipd/p3/resources/model_p3_contracts.htm.

Based on comments received thus far, the DOT has advanced the development of a draft model P3 contract guide for the most popular type of P3 contract, namely the toll concession contract. We request comment from the general public and stakeholders on the Core Toll Concession Model Contract Guide provided.

About the Core Toll Concession Model P3 Contract Guide

During the January 16, 2013, Listening Session, the majority of the commenters requested that the FHWA not provide a rigid model contract that States and localities would be required or encouraged to follow, particularly when Federal grant or credit assistance was an essential element of a project. The concern was that model contract provisions would become mandatory -- an approach that would not work in a nation of many diverse States and localities. Stakeholders expressed a preference for an “educational” style of model contract that would assist State and local governments in

negotiating and developing their own P3 contracts. The FHWA agrees with these comments. The FHWA has never intended for these model contracts to be mandatory. Rather, these model contracts are merely intended as an informational tool for State and local governments to refer to whenever entering into a P3 transaction. These model contracts should be not construed as a statement of DOT or FHWA P3 contract requirements or policy.

Stakeholders also expressed a preference for a model contract that: i) does not include standard boilerplate language; ii) focuses only on those provisions specific to P3s; and iii) focuses primarily on the more controversial and/or complex provisions that warrant amplified discussion.

After considering the comments received from the January 2013 notice and listening session, FHWA has chosen to focus first on seven specific contractual provisions critical to achieving public sector objectives and protecting the interest of the taxpaying and traveling public:

1. Tolling regulation (The right to charge tolls; how tolls are set);
2. Revenue Sharing (Approaches to sharing of “excess revenues or profits” between concessionaires and a public owner for projects that produce revenue);
3. Supervening Events (Types of contractual relief typically granted for unforeseen events, and compensation as required);
4. Changes in Law (How changes in law, after a contract has been in effect, will be dealt with);
5. Changes in ownership (Restrictions on transfers and permitted transfers);

6. Default, early terminations and compensation (How the various types of terminations and default events are to be treated); and
7. Hand-back (Issues related to the hand-back of facilities on contract termination).

The draft Core Toll Concessions Model P3 Contract Guide discusses these key issues with an eye to helping states with their own P3 contracts. The draft Guide includes an introduction, discussion of the key provisions in the context of a typical contract; and an appendix with a glossary of terms as used in the Guide. An electronic copy of the draft Guide can be found at:

http://www.fhwa.dot.gov/ipd/pdfs/p3/model_p3_core_toll_concessions.pdf.

In addition to addressing the seven key provisions discussed above, FHWA will also develop several secondary, yet still important provisions, found in typical P3 tolling contracts. The secondary provisions will include issues such as performance standards, contract length, capacity triggers, consumer protections, continuing disclosure requirements, Federal requirements, and perhaps brief discussions of other provisions, as well. A draft compilation of a tolling concessions model P3 contract guide including both primary and secondary provisions will be published in the Federal Register after completion to solicit comments from stakeholders and other interested parties.

Based on public input, the second most popular type of P3 contract is the availability payment based contract. These are transactions where payments from public sector revenues are the source of payments to the private sector partner. Although this model has been implemented only three times in the U.S., FHWA will be publishing an Availability Payments Model P3 Contracts Guide in 2014. Issues such as performance

standards, hand back requirements, changed circumstances, default/termination, and Federal requirements, as well as other non-core issues will be discussed in the document. Many of the provisions from the Toll Concessions Model P3 Contracts Guide are also germane to the Availability Payments Model P3 Contracts Guide. There will be a draft version of the availability payment contract template published in the Federal Register to solicit comments from stakeholders and other interested parties.

The core Toll Concession Model Contract Guide provisions are being delivered early to ensure that the congressionally established deadline of April 1, 2014, is met. However, please be advised that FHWA will incrementally produce additional provisions to more fully build out the model contracts guide for toll and availability payment P3 concessions.

Authority: Section 1534 (d) of Moving Ahead for Progress in the 21st Century, MAP-21, enacted October 1, 2012.

Issued on: January 30, 2014.

Gregory G. Nadeau,
Deputy Administrator.

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