ARTBA American Road & Transportation Builders Association

May 31, 2013

United States Department of Transportation
Docket Management Facility
1200 New Jersey Avenue S.E.
West Building, Ground Floor, Room W12-140
Washington, D.C. 20590-0001

Re: Docket ID Number FHWA-2012-0126, Public-Private Partnerships Public Meeting and Request for Comment

The Honorable Ray LaHood
Secretary
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Dear Secretary LaHood:

On behalf of the more 5,000 members of the American Road and Transportation Builders Association (ARTBA), I commend you for continuing the process of developing model contract provisions for public-private partnership (P3) agreements, as required in Section 1534(d) of the Moving Ahead for Progress in the 21st Century Act (MAP-21). A great deal of focus has been paid recently to P3s and innovative financing and the efforts of the U.S. Department of Transportation (DOT) will help both transportation officials as well as private sector executives understand new developments.

ARTBA staff and members from various disciplines attended the January 16 stakeholder listening session held at U.S. DOT headquarters. We reiterate our chief recommendation from the session that DOT's final work product be of an educational nature rather than a set of prescriptive P3 contract terms. State and local officials acting in the public interest and private sector deliverers of transportation infrastructure improvements should retain maximum flexibility in negotiating final agreements. We hope the effort to develop model contract provisions will examine a wide variety of domestic and international transactions and identify areas of common ground and best practices.

Establishing complete model P3 contracts may actually stifle innovation if state and local departments of transportation view the final product as a prescriptive requirement. Each P3 opportunity is unique and applying a "one size fits all" paradigm would likely discourage additional private sector innovation and investment. Providing reliable educational materials will, however, allow state lawmakers and transportation officials to create or improve their own P3 programs, build a better knowledge base for working with the private sector, and improve a strained transportation network.

Additionally, to ensure public protections, contract provisions should be drafted in as plain language as possible and the procurement process should be transparent and accountable. All parties share an interest in ensuring P3 agreements are honored and promised benefits are delivered.

In an effort to aid in this educational effort, ARTBA established a working group as part of its Trans2020 MAP-21 implementation and reauthorization efforts. The group consisted of private and public sector representatives from various disciplines and worked to highlight common transactional issues that have arisen in past P3 negotiations and, where appropriate, suggest possible resolutions. The following recommendations reflect the findings of this group—in some instances, these comments will also include a brief discussion of state statutory or procurement issues. We recommend including these considerations in your process to develop model provisions and any other educational P3 materials.

Risk

One of the greatest potential benefits of a public-private partnership arrangement is the ability to allocate certain risks traditionally borne by the public sector to the private sector. The parties to a P3 project have the opportunity to evaluate and negotiate a variety of risks each will undertake throughout the life of a project agreement and how to place a monetary value on those risks.

Below are some of the major risk categories and how parties may address various issues in a contract.

Hazardous Materials
Parties must negotiate who will be responsible for the removal of any hazardous materials present on-site at the outset of the project or that are discovered or deposited there during the life of the construction and operations. Removal of hazardous materials can be very expensive and technically difficult often leading to litigation against one or multiple parties.
The parties should also negotiate the processes and responsibilities for the cleanup of any future hazardous material spills taking place on the asset. For instance, the parties should stipulate who is responsible for the costs of emergency responders if a tanker carrying hazardous materials spills its contents and who would be liable for any litigation defense resulting from any ongoing contamination.

Traffic
When a public or private sector entity builds a transportation improvement, it assumes the investment will prove its worth through providing a benefit to a certain volume of users. In some cases, the investment is recouped directly from these users or through some other means tied to the performance of an asset. A P3 allows the public to transfer the risk of the asset not performing to expectations to the private sector. For instance, the parties may stipulate that the private sector is entitled to collect tolls to recoup its investment in the asset. Alternatively, the public sector may collect tolls on the private sector's behalf or may choose not to collect tolls but compensate the private sector based on a set of performance criteria such as traffic volumes, average speeds, vehicle occupancy, or response times to various incidents. In each of these scenarios, the parties must evaluate the risk that actual traffic volumes will not meet projections. If the private sector is counting on toll revenues to recoup their investment, they are said to be

taking on the "traffic risk" and will be impacted financially if projected volumes do not materialize.

Some agreements go further to include non-performance penalties if the private sector fails to achieve the expected outcomes. In general, agreements should be structured with incentives to achieve traffic volume standards as opposed to penalties for failing to meet them—if the private sector is recouping its investment by charging tolls on a certain assumption of traffic throughput, then it is already being penalized if they fail and should not face further monetary losses through the application of penalties. However, if the private sector is charged with providing certain operational benefits and recouping its investments through scheduled availability payments from the public sector, it may then be appropriate to impose penalties. Penalties may also be appropriate for failure to meet other operational standards, such as failing to clear accidents or other incidents in the time and manner agreed to in the contract.

Even if there is not traffic risk built directly into the payment mechanism itself, as with availability payments, the parties should consider the long-term impact of actual traffic volumes on the asset itself. The contracting mechanism should provide clear definition of who is accepting the risk of actual traffic variations and its impact on the asset itself over the life of the concession period. Further, contracts should also reflect various requirements in the event traffic volumes are much higher than expected. For instance, higher volumes will lead to a shorter usable life for the asset and lead to increased maintenance costs for the private sector and changes to the projected maintenance schedule and condition of the asset at the end of the P3 agreement. The public sector may also wish to include provisions that if the private sector reach a certain traffic volume and return on investment that the public sector share in those additional profits.

Permitting Risk

Infrastructure projects require a series of permit approvals from a variety of state, local, and federal bodies. The number of permits often increases with the complexity and scope of the project. Obtaining these permit approvals can take extended periods of time or significant alterations to project plans, if they are granted at all. The parties should stipulate who is responsible for obtaining the necessary permits and what remedies are acceptable should the project need alterations or is no longer possible due to permitting denials. Further, the agreement should include stipulations that the public sector entity cooperate fully with the private sector to provide all information necessary for a successful permit application and in the case where the public entity is a permitting agency, it will not unnecessarily delay or reject the permit. This is an ongoing responsibility throughout the life of the partnership.

The project owner needs to be responsible that none of its relationships with other public and private sector parties affect the progress of the project unnecessarily. For example, if the public sector party is interfering in some way with a utility or private landowner that needs to grant an easement or permit for the project, the private sector infrastructure partner may become unable to complete the project on time as stipulated. The public sector should compensate the private sector for any delay it unreasonably causes or has reason to know it will cause.

The private sector also needs to obtain all necessary permits in a timely fashion and shall not engage in unnecessary delay or neglect in fulfilling its permitting responsibilities. The public

sector has an interest in making sure its private sector partners are providing the contracted services on time, on budget, and as specified in the agreement.

Environmental Approvals
The public sector typically obtains a number of environmental approvals for a variety of reasons, including third-party considerations beyond the private sector's control, scheduling considerations, initial definition of the project's scope, and the negotiation of any necessary environmental mitigations to offset project impacts. To the extent the private sector partner's involvement and scheduling are affected by this process, the public sector partner shall work expeditiously to resolve any conflicts.

Right of way
For any project featuring new construction, several issues may arise regarding the procurement of the additional right of way. Either the public or private sector, or a combination of both, may have to obtain additional right of way to execute the project. In some cases, the public sector will have control over the necessary right of way and thus should grant the proper authority to the private sector to construct the project as necessary. It should be recognized that if the private sector is going to take this risk, there is potential for drastic schedule impacts, as well as potential costs of the right of way itself, that are essentially beyond the control of the private sector, and will be viewed extremely conservatively if transferred to the private sector.

For some projects, the right of way will be possessed by an independent or government-sponsored entity or utility. Ideally, a comprehensive program agreement will stipulate that the public sector assist the private sector with negotiating with such an entity and should not interfere with said entity in such a way that unreasonably delays the conveyance of right of way to the private sector for the purpose of building the project improvements. If there are costs associated with procuring the right of way, the agreement should clarify who is responsible for paying those costs at the outset.

Further, the agreement should outline the processes by which the government will work with the private sector if the project will require a taking of property by condemnation, eminent domain, or other processes. The ideal scenario would involve the private sector conducting the appraisal and contract negotiations and the public sector make the property purchases. The public should solely retain its power of eminent domain and the private sector shall not engage in eminent domain proceedings or represent in any way to the public that they have been so empowered to do so.

The agreement should also outline the scope of use for the right of way as envisioned by the project. For instance, does the use of the right of way include only the building and operations of the asset or may the private partner also operate rest area concessions, sell advertising along the roadway, or add additional modes of transportation infrastructure within the right of way?

Geotechnical Risk
The parties shall negotiate who will be responsible for any delays or unforeseen expenses in overcoming difficult geotechnical conditions on the project site. The parties will have some preliminary concept of the sedimentary structures on the site but oftentimes the conditions will vary and the private sector will meet unexpected challenges. These challenges may require a

significant and potentially expensive alteration to the project's design or scope and potentially even result in a default. Typically the public sector partner in a P3 will take the risk of the factual geotechnical data and for unreasonable and unforeseen changed conditions, while the private sector will take the risk on interpretation of the geotechnical data provided and the reasonable variation of geotechnical conditions between test locations and depths.

Reference Information Documents
When pursuing a project, the private sector is often working with the government's information and may not have time to conduct their own analysis. A question can arise over what documents can be relied upon and to what extent and also what documents are for information only.

If the documents are later found to have errors, the private sector should be entitled to some form of relief. Furthermore, the private sector should be permitted to include several contractual disclaimers and relieve themselves of some forms of liability should errors be found in the government's information documents. This is an area where both public and private parties need to maintain maximum flexibility to negotiate and price risks the private sector can properly absorb and those the owners are better suited to absorb.

Owner-Induced Risks
The public sector yields tremendous power in any project procurement. As such, government entities have the potential to add unique risks to a P3 project. For instance, the government may fail to be responsive to inquiries or permitting applications, thereby creating schedule risks for the private sector. Further, the project owner may include project scope changes or force unreasonable expectations upon the private sector. A government may also enact a change in law that will apply new requirements or restrictions to ongoing construction, maintenance or operations and will materially affect the success of the project. If a project is dependent on legislative appropriations from a government, failure to pass the requisite legislation is also a risk borne by the private sector. Contract documents should identify these possibilities and allocate roles and responsibilities to each party including any compensation in the event one party is damaged by the other.

Payment Mechanism Provisions

Another significant benefit of P3 agreements is the potential for private sector infrastructure investment. The public benefits from accelerated improvements to infrastructure conditions or operations as well as an influx of private capital in many cases. In exchange for risking their private capital and incurring long-term liabilities in operating and maintaining the asset, the private sector is justifiably looking for a return on its investment over a period of time. How that potential return is realized comprises another major component of P3 agreements—payment mechanisms.

There are several ways to structure payments between the public and private sector partners. The private sector's investments may be recouped through the collection of tolls, either by the private sector itself or by a public entity. Alternatively, the parties may prefer to forgo the direct collection of tolls and instead compensate the private sector using some other source of dedicated revenues, perhaps state or local general funds, cargo fees, sales tax receipts, or a variety of tax receipts from a transportation asset's related business development.

Tolls

When collecting toll payments, there are various concerns that must be addressed to ensure both the public and private sector are maximizing the value of the transportation asset. Enforcement mechanisms for toll violators are a particularly important consideration to address in the contract. Several questions must be addressed, including:

- What actions may a private sector firm take to identifying the owners of vehicles passing through toll plazas or gantries?
- What procedures may the private sector undertake to collect delinquent toll payments?
- Will state or local police enforce the tolls and pursue violators either physically or through automated photo enforcement and collection?
- Will the private sector have access to government records regarding vehicle ownership to pursue toll payments from violators?
- If so, how much will accessing records cost?
- What, if any, additional fines will be appropriate?
- Will the public sector instead collect the tolls and pass the payments along to the private sector?
- What type of toll collection and monitoring technology will the private sector be required to employ by the public sector partner?
- Will the transponder technology be interoperable with other regional or nationwide systems?

These considerations are critically important. The private sector may base its projected return on investment on the calculation of traffic volumes or ridership and an accompanying charge to use the transportation asset. If the public sector is responsible for collection or enforcement of violations, the asset may achieve traffic or ridership projections, but fall short on collecting the appropriate revenues.

Availability Payment

Availability payments are another common form of payment mechanism where the public sector may decide it wants to retain toll collections themselves, retain the traffic volume risk, and pay the private sector availability payments from such toll collections. Availability payments may also be used in cases where no tolls are collected by either party (i.e. a "free" roadway), where the public sector builds regular availability payments into their yearly or monthly budgets over the life of the agreement. For instance, a region may not have a history of toll roads and imposing them may present significant political challenges. In some cases, there may be another reliable source of revenue that can supplant toll revenues, such as freight or cargo fees. In these instances, the private sector will make its investment in the design, construction, maintenance, or operations of the transportation asset and will in return expect regular payments over a period of time from the project owner. Oftentimes the payment schedule will begin with payments for reaching various milestones, such as substantial completion of construction or opening a new asset for operations. In general, payments will continue after these major events at periodic intervals and at variable amounts based on the ongoing performance of the asset. Each of these payment terms must be expressly stipulated at the outset of the agreement and performance measures must be clearly outlined.

Primary and Third-Party Interests Pertaining to Payment Mechanisms
Beyond the initial matters of payments to the private sector, P3 agreements should also address the parties' various rights and the rights of a third-party as they pertain to payments. For instance, what are the rights of other financial interests in the project beyond the companies involved in the winning consortium? If the project financing arrangements include the sale of bonds, will the bond holders have lien rights on account receivable tolls? If yes, how might enforcement of those lien rights differ if the tolls flow through government or through the private sector? What rights do lenders have to assume administration of the project if the consortium fails to properly exercise its fiduciary responsibilities? How are these rights affected if there is a default or termination of the contract agreement?

Further, as practically all project financing arrangements will consist of a variety of sources, what rights and responsibilities exist for each level of the so-called "waterfall of funds." These considerations are directly related to a party's willingness to invest and the expectations tied to those investments. As such, contract provisions regarding these rights should be left to contract negotiators when possible under state law.

Length of Concession Period

One of the primary components of any P3 agreement is the length of the relationship. This will help determine the risk strategy, the structure of the partnership, and the potential return on investment the private sector can expect. Some agreements contain provisions that trigger a term limit based upon achieving a specific rate of return on the investment. In such an agreement, the parties should consider including a minimum term and opportunities to alter the agreement as an alternative to outright termination or hand-back of the asset to the public sector. Some agreements contain a provision for the private sector to share a portion of revenues with the public sector in the event of higher than expected return on investment. This approach honors the length of the agreement, maintains the management structure that has made the asset successful and provides an additional benefit to the public without having to take on the risk of future operations.

Performance Standards

P3s present an enhanced opportunity to encourage higher performance standards for a transportation asset throughout the life of the contractual agreement. One key benefit of P3s is the ability to transfer long-term life-cycle risks to the private sector and allowing them to innovate how best to meet performance standards spelled out by the public sector. By including performance standards, the public sector can negotiate incentives or penalties for achieving or failing to achieve certain objectives. Examples include overall performance specifications of the final product, implementing certain traffic controls during construction and throughout the operations of the asset, societal goals such as Disadvantaged Business Enterprise, Small Business, and Buy America, and environmental goals such as minimizing stormwater runoff, increasing vehicle occupancy rates, preserving wetlands, or preserving tree canopy.

Legal questions may arise when determining the private sector has failed to meet a standard in some way. For instance, was the failure a result of the private sector partner, the public sector, or

some other externality such as economic downturns or some force majeure type of event? If the public sector is in part or wholly responsible for the failure, does the action entitle the private sector to a so-called "compensation event" to compensate the private sector for any losses, actual or potential? Likewise, if the private sector failed to meet a standard stipulated in the contract, is the public sector entitled to compensation?

It is possible for the private sector builder or operator to perform according to the contract's stipulated plans, yet the anticipated performance of the asset may not be realized. Who is responsible for the failure to meet certain levels of service because of lack of demand or other reasons and if any responsibility is assignable, does it also warrant a compensation event? Put in other words, if the private sector builds or maintains the asset in a manner "fit for intended use" can it be responsible to the government for any failure to achieve the hoped-for performance? Contracts should stipulate precisely the terms and conditions associated with the private sector's performance standards.

Substantial Completion Issues

Contracts should clearly outline standards required for various project milestones, including substantial completion of the project, and final acceptance. These milestones are important as in many cases they trigger payments or mark a period in time in which the private sector is permitted to begin performing certain actions, including collecting tolls or other user fees.

A contractor's ability to wait for payments diminishes exponentially as you go down the deal flow chain to subcontractors, suppliers, and other firms who may perform an early task in the life of the project long before the public sector reaches final acceptance. The largest firms can absorb this waiting period more easily than smaller, often local firms that may not have a broader portfolio of projects on which to rely. As such, P3 agreements should contain provisions for progress payments and protections for subcontractors and suppliers in the event of default or a rejection of some compensation triggering milestone event. Creating a more palatable risk matrix for smaller firms will allow more competition in the P3 marketplace and better value for the public.

Relief and Compensation Events

Contracts should enumerate various events that trigger compensation or relief payments to the private sector. For instance, the contract should include language outlining compensation to the private sector if the public sector decides to build, or enter a contract for another entity to build, a competing transportation facility that can be proven to negatively impact the traffic forecasts of the originally contracted asset.

As with most contracts, P3 agreements should include provisions alleviating both parties of responsibility and liability in the event force majeure events and outline what compensation may be properly made by each party in such an event.

In some cases, the public sector may prefer to give the private sector additional time to complete a project as a form of compensation. This does not help the private sector contractor in most

cases as they themselves have contractual debt payments due to financing parties on a set schedule, who will not accept delayed payback just because there is time relief in the contract. In such scenarios where time is given with no consideration of private sector finance payback requirements, this relief does not equate to true relief.

Default and Termination Provisions

As with any contractual agreement, P3 arrangements must also contain triggers for and remedies of a default and/or termination of the agreement. The contract should clearly stipulate what activities or failures will lead to penalties, default, or termination, who has the power to invoke such clauses, and what opportunities, if any, will exist to remedy the defects. For instance, if the private party fails to properly manage traffic during construction or operations, the public sector may levy a financial penalty upon the private operator or withhold some anticipated milestone or availability payment to the private operator until the defect is cured. Similarly, if the public sector is responsible for some failure, such as unreasonably delaying a permit to begin general construction, the private sector should receive some compensation or alteration to project timelines.

At the extreme, one or both of the parties may take actions resulting in an automatic default as set out in the contract or statute. Alternatively, one or both of the parties may elect to terminate the project for a variety of reasons. The triggering events for defaults and terminations need to be clearly enumerated in the comprehensive project agreement as well as the process which the parties will have to follow in the event of a default/termination event and what financial interests each party and third-party investors have in such an event. The agreement should also clearly delineate the long-stop date and any opportunities to cure defects.

If the public sector chooses to terminate for convenience, the private sector partners should be made whole in terms of both equity and debt and should also receive some compensation in light of the opportunity cost of pursuing the project at the exclusion of other bidding opportunities. The contract should also include some reciprocal contract language to allow the private sector to terminate for convenience and include appropriate compensation provisions for the expenses the public sector has and will incur to rebid the project. Typically, contracts do not give the private sector the same ability to terminate for convenience, but they do have the option of purposely defaulting. It is in the interests of all parties involved and the general public to have established all possible contingencies for the end of the public-private partnership arrangement.

In general, we recommend providing maximum opportunity to cure defects before the termination of an agreement. We also recommend having a robust appeal process in the event of a default or termination.

In some states, failure to meet the goals of the Disadvantaged Business Enterprise program or similarly targeted programs can constitute a default event. We recommend these agreements instead include opportunities to cure the defect or penalties—specifically targeted to enhance the DBE program or similar programs—short of contractual default. We also recommend the private and public sector negotiate the DBE or other goals from the outset and adopt a realistic

goal-setting process in light of technical specifications and the availability of qualified firms in the DBE or similar programs.

Establishing metrics in the contractual agreement is also critical. Will the public sector evaluate various goals during the initial construction phases or on the basis of the entire life-cycle of the agreement or some hybrid approach? Making sure each side understands the goals and specifically the metrics on which they will be evaluated is critical to ensuring a successful partnership.
Lenders should be compensated in the event of concessionaire default as well, though the stage of project development will heavily affect the potential remedies to those parties. In most cases, some physical assets would be built and may be used to evaluate the project's progress and potential remedies. Contracts can include milestone payments which could be used to make the lenders more whole beyond any direct remedies they have with the lendees under the Uniform Commercial Code or insurance policies. The agreement should also clarify any step-in rights possessed by the lenders and what events will trigger their ability to execute those rights.

Incident Management

As with any transportation infrastructure asset, involved parties should develop an emergency response plan to deal with incidents large or small. Many of these plans should be stipulated in the project agreement and completely understood between the private and public sectors to avoid any complications in emergency response as well as misunderstandings in the financial and operational administration of the project asset.

For instance, many agreements appropriately contain provisions affirming the state or local police's power to temporarily shut down a transportation asset or suspend toll collection if in the interests of public safety, to aid in incident removal, or as part of an investigation. The contract should stipulate that measured performance metrics will take into account these closures and that the private sector will not be negatively evaluated or penalized for failing to meet the stipulated performance standards during these periods.

These agreements should also address the logistics of clearing snow or other impediments on the roadway. A traditionally operated public sector asset would typically rely upon public sector efforts to remove snow or other impediments. However, with a private sector operator, there exists an opportunity for the private sector to take on these responsibilities, contract with a third party, or compensate the public sector for continuing to perform snow or impediment removal. In some places, the state or local department of transportation or a private sector firm sponsors and/or operates a roadside emergency assistance service. In cases where the private sector is undertaking operations of that transportation asset, or undertaking a private sector operation alongside a public sector operation, the contract should clearly stipulate if these services will serve both entities or if there will be any compensation for providing that service across the boundary.

Liquidated Damages

As with any contract, the agreement should clarify whether the owners will have the rights to charge liquidated damages for late substantial completion, and if so, under what circumstances are they entitled to do so. With most P3 payment mechanisms, the private sector is already drastically impacted by late completion, in that they would be losing out (and never recuperating) lost tolls or availability payments not paid due to late completion. In the case where the contractor is late in finishing, these financial impacts on the private sector team will be passed down to them, thus representing very large substantial completion liquidated damages, in most cases being much larger than in standard contract provisions. The public sector should therefore consider lost payments due to the private sector in such a delay as a "built-in" liquidated damage (for example, not having to pay an availability payment for a month would represent money retained by the public sector), and not typically consider additional liquidated damages.

Performance Security

Contract agreements should specify what level of bonding is required for various life-cycle phases of the operation. For instance, does a consortium leader have to bond 100 percent? Is a letter of credit available? Does it change in the operations and maintenance phase as compared to the construction phase if applicable?

Many states are still incorporating the P3 delivery model into their transportation programs but have bonding requirements that are structured around traditional Design-Bid-Build procurement. The public sector should recognize the historical need and requirement for performance bonds in that the public sector was paying for the asset as it was being built. In these situations, a performance bond was required to protect the public in case of default by the contractor and the potential damages to the public sector to complete the project.

Many P3 payment mechanisms are set-up such that the public has not paid anything (tolls or availability payments) until the asset is complete, thus eliminating the historical financial need for a performance bond, but not eliminating the legal need. In effect, the risk of non-performance in a P3 has been shifted from the public sector to the private sector, and to the private sector financers paying for the asset's construction during the construction phase. For this reason, public entities should consider removing (including state law changes if necessary) traditional performance bonding requirements, as the private financing entity will require their own direct security from the contractors on the private sector team. If the public sector also requires a performance bond, project costs will increase as the private sector has to obtain redundant security.

We further recommend statutory language and/or contractual exceptions to make distinctions between the construction and operations and maintenance phases. Many bonding requirements in place are based on the value of construction, but the traditional process encounters complications when the repayment mechanism is through availability payments over the span of several decades, including inflationary and performance adjustments.

Insurance and Indemnification

In some states, public owners require a developer to provide indemnification, but the public owner itself cannot or will not provide reciprocal indemnification. We recommend states provide reciprocal indemnification—by altering statute if necessary—so that the public sector and private sector are more equal partners in the agreement.

Further, a P3 consortium leader may require the various firms on the team to indemnify the leader and obtain policies to that effect even if the public owner does not require it under a traditional procurement. States should consider P3 specific procurement regulations to this effect and address the relationships between the various firms in the consortium.

Further, we recommend the Federal Highway Administration explores the products available in the commercial insurance market before crafting any insurance requirements. Few firms are writing insurance policies for these types of projects and are fairly constrained in what their underwriters will permit. This is an internal commercial issue that will determine some of the project costs and limit the ways parties may be able to work together. As a matter of process, we recommend having insurance companies and all facets of a project team involved at the earliest stages of a project's development and also allowing bidding teams to decide the appropriate insurance coverage because it will exceed the state's minimums in many cases.

Handback Provisions

P3 agreements should clearly delineate the conditions under which the public sector expects the private sector to hand back the transportation asset at the end of the P3 agreement. Some approaches may simply require the asset to be in the same condition as it would be had the public sector constructed and maintained the asset over the contract period. Alternatively, the private and public parties could negotiate some measurable standards based on commonly accepted pavement or structural conditions or by evaluating the industry standards in place at the end of the agreement. It should be noted that technology and standards may advance considerably over the length of an agreement and this approach presents both risks for the private sector in trying to predict costs of these improvements at the end of an agreement as well as potential benefits for the public sector if they are to receive a state of the art asset at the end of the contract.

Dispute Resolution

We recommend strong provisions in favor of dispute resolution and arbitration prior to court action and clear statements concerning jurisdiction and processes including which state's laws will apply in the event of a multi-jurisdictional project. The legal environment governing a major infrastructure project is a primary consideration of the firms competing for the contract. All parties should be aware of the legal standards by which any disagreements or formal litigation will be adjudicated as it may influence the decision whether and by what strategy a firm will bid on the project.

Procurement Issues

There have been several incidents of firms spending millions of dollars on a P3 procurement process only to have the public owner decide upon an alternate delivery model. Even when the public sector fulfills a P3 procurement process, there are short-listed unsuccessful bidders that have spent considerable sums of money pursuing the project in good faith. We recommend contractual agreements for the short-listed firms and providing stipends in the event of an unsuccessful bid, or cancelled procurement, including partial stipend payments depending on what stage in the process the procurement was cancelled. This will result in more accurate, competitive bidding because one of the major risks of pursuing a P3 procurement has been significantly reduced and firms can feel more confident investing in analysis and investigation.

Conclusion

We appreciate the opportunity to comment on this important project. P3s have a significant role to play in delivering infrastructure improvements where possible. Developing federal educational resources to aid states and local governments serves the public interest and encourages further participation by the private sector firms responsible for delivering the next generation of our national transportation network. We applaud your efforts and stand ready to partner with you as you develop additional resources.

Sincerely,

T. Peter Ruane
President & CEO