American Road & Transportation Builders Association

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March 10, 2014

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

Re: Docket ID Number FHWA-2014-0006, Draft Core Toll Concessions Public Private Partnership Model Contract Guide

The American Road & Transportation Builders Association (ARTBA) offers these initial comments on the draft guide to core toll concessions recently published by the Federal Highway Administration (FHWA). Founded in 1902, ARTBA's membership includes private and public sector members that are involved in the planning, designing, construction and maintenance of the nation's roadways, bridges, ports, airports and transit systems. Our industry generates more than $380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs.

ARTBA maintains ongoing and thorough involvement in federal legislative, policy, regulatory and legal developments relating to transportation infrastructure development and investment. This includes public private partnerships (P3s) in transportation, with which ARTBA has a long history. Our P3 Division dates back nearly 25 years and includes prominent concessionaires, planning and design firms, contractors, law firms, financial entities and other parties in the P3 field. Through the reauthorization processes which have produced a series of federal surface transportation bills in recent decades, ARTBA has advocated for provisions that have helped make P3s a viable option for the financing and delivery of transportation improvement projects in appropriate circumstances around the country.

ARTBA has also worked closely with the U.S. Department of Transportation (DOT) and its agencies as they have implemented these statutory provisions on P3s. Most recently, this has included Section 1534(d) of the Moving Ahead for Progress in the 21st Century Act (MAP-21), which became law in 2012. In this section, Congress instructed U.S. DOT to develop and disseminate model contracts for "the most popular types" of P3 arrangements relating to transportation facilities.

In this regard, ARTBA participated in a related listening session conducted by FHWA on January 16, 2013. As a follow up, ARTBA submitted detailed written comments outlining our suggested approach to and content of these forthcoming model contract documents. Accordingly, we incorporate by reference that submission, dated May 31, 2013, into our present comments.

PRIDE in Transportation Construction

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The FHWA published its draft core toll concessions P3 model contract guide February 6. This document is almost 70 pages in length and – understandably – very detailed in its subject matter. Within the 30 days allotted for the comment period, ARTBA members have reviewed the document, but it is obvious that its complexity demands further discussion. Therefore, we would respectfully suggest that FHWA engage in additional interaction with affected stakeholders before finalizing the guide's contents. This could involve an extension of the 30-day comment period and/or an interactive session of some sort. We particularly welcome this at ARTBA because, as noted above, our P3-related membership includes representatives from the entire sector who have considerable expertise – but perhaps differing viewpoints – on certain details of the model contract document.

What follows is an initial reaction to the draft model guide. Please note that, in the discussion below, the use of the terms "Department" and "Developer" is consistent with those in the model contract guide itself.[1]

Educational Nature of the Guide

There are some overarching issues that reflect consensus from ARTBA's standpoint. Chief among them is the nature of the model contract guide itself. In addressing MAP-21 Section 1534(d) through our comments last year, ARTBA's main recommendation was that FHWA's model contract documents should be educational – rather than prescriptive – in nature. Given that P3s seek to take full advantage of market efficiencies in financing and delivery projects, even the implication that FHWA's model terms were "mandatory" would be unfortunate and counterproductive. Therefore, we are pleased that the agency explicitly agreed with this viewpoint in its recent request for comments, which is also reflected in the tone and content of the model contract guide itself.

Performance Bonding and P3s

Currently, we suggest that the guide address traditional performance bonding requirements and the possible shortcomings of applying them in a P3 setting. In these projects, the risk of non-performance has been shifted to the private sector. Moreover, the private financing entity will require its own direct security from the contractors on the private sector team. While it is true that states generally require performance bonds for all projects under Miller Act laws, the toll concessions guide would benefit from a discussion of this potential disconnect and the possibility of amending state law accordingly.

As noted in ARTBA's May 31, 2013, comments:

> "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

[1] i.e. "Department" is "[t]he public authority granting rights to the Developer to design, build, finance, operate and maintain" a project in accordance with a concession agreement, and "Developer" is "[t]he private entity that contracts with the Department to undertake some or all of the design, construction, financing, operations and maintenance" relating to a project that is to become subject to a concession agreement.

> sector, and to the private sector financiers 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."

Given the complexity of this area, failing to discuss the issues surrounding performance bounds is a serious omission in the proposed guide.

Tolling Regulation

This section is the heart of the model contract guide and there would be benefit to more discussion about its details. Generally, if the Developer assumes the risk of toll collection, the Department should delegate to the Developer the authority and tools available to the Department as a public entity to collect and enforce collection of the tolls. For such instruments that may not be delegated, the Department should assume the obligation to enforce such mechanisms on behalf of the Developer.

ARTBA's May 2013 comments posed a number of specific questions that must be considered regarding the enforcement of tolls and the responsibility of each party in a P3 project, such as: the procedures available to the private sector to collect delinquent toll payments; the role of state and local police to enforce tolls and pursue violators; and the type of toll collection and monitoring technology required of the private sector and its interoperability with regional or nationwide systems.

ARTBA commentary at that time remains relevant to the proposed guide: "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." The responsibility for the collection of revenues and appropriate enforcement mechanisms can help ensure the asset achieves both traffic and revenue projections.

Risk

The concept of risk transfer to the private sector is fundamental to all P3 policy discussions. Again, however, this policy area produces complexities that are difficult to address in a short comment period. Even within ARTBA's membership, there are some related differences of opinion. Some make the point that any transfer of risk (especially traffic risk) comes at a cost which can make the project more expensive. Others contend that transfer of revenue risk to the private sector incentivizes the Developer to devise efficiencies in design, construction, operations and mechanisms for revenue.

Again, these comments constitute initial feedback upon review of FHWA's current draft document, and in many ways suggest areas for further discussion rather than definitive opinions on the many details of that draft.

We appreciate FHWA's considering these initial views and the request for more interaction as the agency further refines the draft model contract guide. As noted previously, ARTBA and its P3 Division remain available to work with U.S. DOT through the remainder of this process, as well as any other activities relating to P3 policy. Please contact ARTBA's Senior Vice President for Strategic Initiatives Rich Juliano, who serves as managing director of ARTBA's P3 Division, at any time.

Sincerely,

T. Peter Ruane

T. Peter Ruane
President & C.E.O