

MDOT/ACEC Partnering Workshop
February 4, 2010

Legislation to Enable Public Private Partnerships

David R. Gehr



The Legislative Hurdle



Key Elements

- ◆ Solicited and Unsolicited Proposals
- ◆ Co-mingling of Funds
- ◆ Rate-setting
- ◆ TIFIA Loans
- ◆ Limit on Number of Projects
- ◆ Geographic Location



1.SOLICITED & UNSOLICITED -- BOTH ARE IMPORTANT; SOLICITED ENABLE THE RESPONSIBLE ENTITY TO COMMUNICATE THE TRANSPORTATION PROJECT PRIORITIES. UNSOLICITED ENABLE THE PRIVATE SECTOR TO PROPOSE PROJECTS THAT THE PUBLIC ENTITY MIGHT NOT OTHERWISE HAVE CONSIDERED.

2.CO-MINGLING OF FUNDS – PERMIT LOCAL, STATE AND FEDERAL FUNDS TO BE COMBINED WITH PRIVATE SECTOR FUNDS ON THE PROJECT. MOST PROJECTS ARE SO LARGE THAT THEY WILL REQUIRE ACCESS OF THE FULL RANGE OF FUNDING OPTIONS IN ORDER TO FUND

3.RATE-SETTING – WHO HAS THE AUTHORITY TO IMPOSE USER FEES AND UNDER WHAT CIRCUMSTANCES MAY THEY BE CHANGED OR OTHERWISE REVIEWED. BOTH THE PUBLIC ENTITY AND ITS PRIVATE SECTOR PARTNER (BY CONTRACT) SHOULD HAVE THIS AUTHORITY. DETAILING WHEN AND BY HOW MUCH TOLLS CAN BE MODIFIED IS A CRITICAL COMPONENT OF THE AGREEMENT AND IMPROVES THE PROJECT'S ABILITY TO BE FINANCED ON FAVORABLE TERMS.

4.TIFIA – THESE LOANS ARE A USEFUL PUBLIC FINANCING TOOL AND SHOULD BE INCLUDED AS AN OPTION

5.NUMBER OF PROJECTS – PILOT PROJECTS CAN BE A GOOD POLITICAL COMPROMISE FOR STATES THAT DO NOT HAVE MUCH EXPERIENCE WITH PPPs. PILOT PROJECTS COULD SEND A SIGNAL THAT THERE IS A LACK OF LONG-TERM COMMITMENT TO GETTING PROJECTS DONE UNDER THE LEGISLATION.

6.GEOGRAPHIC LOCATION – IF RESTRICTED, MAY UNNECESSARILY REDUCE THE ABILITY OF THE PUBLIC AND PRIVATE SECTORS TO INNOVATE WHEN CONSIDERING POTENTIAL NEW PROJECTS

Key Elements

- ◆ Transportation Mode
- ◆ Tolls after Debt Retirement
- ◆ Conversion to Toll Facility
- ◆ Use of Revenues
- ◆ Prior Legislative Approval
- ◆ Local Veto



1. TRANSPORTATION MODE – ALLOWING THE WIDEST RANGE OF TRANSPORTATION MODES ENCOURAGES INNOVATION; ROAD, BRIDGE, TUNNEL, OVERPASS, FERRY, AIRPORT, MASS TRANSIT FACILITY, VEHICLE PARKING FACILITY, PORT FACILITY OR COMMERCIAL FACILITY USED FOR THE TRANSPORTATION OF PERSONS OR GOODS.
2. TOLLS AFTER DEBT RETIRED – WHILE IT IS SOMETIMES POLITICALLY DESIRABLE TO ELIMINATE, THIS ELIMINATES ONE IMPORTANT SOURCE OF FINANCING FOR FUTURE PROJECTS ALONG THE CORRIDOR OR REGION.
3. CONVERSION TO TOLL FACILITY – PERMITTING THIS PROVIDES ADDITIONAL FLEXIBILITY BUT OFTEN CONTROVERSIAL. SOME STATES LIMIT TO PROJECTS THAT ADD CAPACITY
4. USE OF REVENUES – IF REVENUES CAN BE DIVERTED TO THE GENERAL FUND UNDERMINES SUPPORT FROM THE PUBLIC FOR TOLLS AND OTHER USER FEES.
5. LEGISLATIVE APPROVAL – PRIVATE ENTITIES ARE LESS LIKELY TO BE WILLING TO INCUR SIGNIFICANT PROPOSAL DEVELOPMENT COSTS DUE TO THE ADDED UNCERTAINTY OF WHETHER LEGISLATIVE APPROVAL WILL BE OBTAINED
6. LOCAL VETO – SAME AS ABOVE. SOME STATUTES REQUIRE LOCAL AND REGIONAL TRANSPORTATION ENTITIES TO PROVIDE THEIR INPUT WHEN THE PROPOSAL IS FIRST ISSUED OR RECEIVED

Key Elements

- ◆ Procurement Methods
- ◆ Relevance of General Procurement Laws
- ◆ Long-term Leases/Franchises
- ◆ Authority to Issue Toll Revenue Bonds
- ◆ Authority to Form Nonprofits
- ◆ Hire Technical and Legal Consultants



1. PROCUREMENT METHODS – MORE FLEXIBILITY IS AN IMPORTANT GOAL SO AUTHORIZING A WIDER RANGE OF PROCUREMENT TOOLS IS HELPFUL; ENABLES THE RPE TO MORE EASILY SELECT THE ONE THAT IS MOST APPROPRIATE FOR A PARTICULAR PROJECT. CALLS FOR PROJECTS; COMPETITIVE RFQs AND RFPs; QUALIFICATION REVIEW FOLLOWED BY AN EVALUATION OF CONCEPTS; DESIGN BUILD; PROCUREMENT BASED ON FINANCIAL TERMS SUCH AS RETURN ON EQUITY RATHER THAN ON PRICE, LONG-TERM ASSET LEASES

2. PROCUREMENT LAWS – AN EXPLICIT EXEMPTION/SUPPLEMENTAL AUTHORITY FROM THE GENERAL PROCUREMENT LAW IS IMPORTANT BECAUSE IT PROVIDES CERTAINTY TO THE PARTICIPANTS THAT THE ALTERNATIVE PROCUREMENT PROCESS THEY ARE USING IS LEGITIMATE AND NOT SUBJECT TO LEGAL CHALLENGE

3. LONG TERM LEASE/FRANCHISE

4. AUTHORITY TO ISSUE TOLL REVENUE BONDS – SOME PPP STATUTES CONTAIN THIS; MANY STATES ALSO GRANT THE AUTHORITY IN OTHER STATUTES. IT IS AN IMPORTANT FINANCING AND PROJECT DELIVERY TOOL.

5. NONPROFITS – USE (63-20 CORPORATIONS) IS A WAY TO PRESERVE THE ABILITY FOR A PROJECT TO BE FINANCED WITH TAX-EXEMPT BONDS WHILE MAINTAINING MOST OF THE BENEFITS OF PRIVATE DEVELOPMENT.

6. HIRE TECHNICAL AND LEGAL CONSULTANTS – CRITICAL TO ASSIST THE RPE IN PREPARING IMPLEMENTATION GUIDELINES AND EVALUATING PROPOSALS. A GOOD INDICATOR FOR THE PRIVATE SECTOR THAT THE RPE INTENDS TO DEDICATE THE RESOURCES REQUIRED TO DELIVER A PPP PROJECT IN A TIMELY MANNER

Key Elements

- ◆ Payments to Unsuccessful Bidders
- ◆ Application Fees
- ◆ Time for Preparation, Submission and Evaluation
- ◆ Comparable Non-toll Routes
- ◆ Non-Compete Prohibitions
- ◆ Authority to Enter into PPPs



1. PAYMENTS TO UNSUCCESSFUL BIDDERS – FLEXIBILITY TO DO THIS ENCOURAGES THE PRIVATE SECTOR TO DEVOTE THE RESOURCES THAT ARE REQUIRED TO DEVELOP INNOVATIVE PROPOSALS AS WELL AS THEIR FINANCING

2. APPLICATION FEES – HELP THE RPE DEFRAID SOME OF THE COSTS INCURRED IN REVIEWING PROPOSALS

3. TIME – SHOULD ALLOW ADEQUATE TIME. RPE SHOULD HAVE THE AUTHORITY TO ESTABLISH THESE DEADLINES ON A CASE BY CASE BASIS DEPENDING ON COMPLEXITY AND SCOPE.

4. COMPARABLE NON-TOLL ROUTES – IF THIS IS REQUIRED, IT REDUCES THE FLEXIBILITY OF THE RPE IN OBTAINING PROPOSALS FOR NEW OR EXPANDED PROJECTS

5. NON-COMPETE CLAUSE – THIS WILL VARY ON A CASE BY CASE BASIS – FLEXIBILITY

6. AUTHORITY – STATE DOT; STATE TURNPIKE AUTHORITY, REGIONAL OR LOCAL ENTITIES. VARIES ON A STATE-BY-STATE BASIS DEPENDING ON LOCAL CONDITIONS

Key Elements

- ◆ Evaluation Criteria
- ◆ Review Process
- ◆ Public Disclosure
- ◆ Operations and Maintenance



1. EVALUATION CRITERIA – SOME STATUTES CONTAIN GENERAL CRITERIA THAT ARE THEN ELABORATED IN INTERNAL IMPLEMENTATION GUIDELINES.

2. REVIEW PROCESS – SAME AS ABOVE. SHOULD BE DETAILED IN ADVANCE

3. PUBLIC DISCLOSURE – THESE PROVISIONS REQUIRE A DELEGATE BALANCING BETWEEN COMPETING CONSIDERATIONS. DISCLOSURE IS NEEDED TO GAIN PUBLIC LEGITIMACY. ON THE OTHER HAND THE PRIVATE SECTOR WILL BE UNWILLING TO PARTICIPATE OF CERTAIN INFORMATION ABOUT THEM AND THEIR TRADE/BUSINESS SECRETS MUST BE DISCLOSED

4. OPERATIONS AND MAINTENANCE – THE AUTHORITY TO INCLUDE OUTSOURCING OF LONG-TERM OPERATIONS AND MAINTENANCE AND OTHER ASSET MANAGEMENT DUTIES PROVIDES ADDITIONAL FLEXIBILITY

Considerations for Success

- ◆ Champion
- ◆ Political Will
- ◆ Public Perceptions
- ◆ Dedicated Resources and Skills
- ◆ Understanding the Partners

