When the project fits...PPP it

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The use of public-private partnerships (PPPs) in the US transportation infrastructure industry emerged in the mid 1990s with the Dulles Greenway toll road in Virginia, the SR 91 tolled express lanes in California, and JFK Airport Terminal 4.

This early activity was followed by limited progress until, in 2005, an entity created by Cintra Concesiones de Infraestructuras de Transporte, S.A. (Cintra) and Macquarie Infrastructure Group (Macquarie) completed the purchase and long term financing of the 99-year concession to operate the Chicago Skyway Toll Bridge (Skyway) in exchange for an upfront payment of $1.87 billion to the City of Chicago.

In 2006, another Cintra/Macquarie consortium was awarded the 75-year concession for the 157-mile Indiana Toll Road (ITR) in exchange for the payment of $3.85 billion to the State of Indiana.

The remarkable success of the Skyway and ITR transactions in the mid-2000's attracted much attention from government officials and politicians because of the large up front payments that were realized from the disposition of assets that had long been in the public sector (and, in the case of the Skyway, had experienced a troubled history including default on the toll road revenue bonds issued to finance its original construction).

These transactions also attracted the attention of a wide range of international infrastructure project developers and financial institutions that saw an opportunity to participate in an emerging privatization boom in the US, and triggered a frenzy of privatization activity in the US transportation sector.

Federal and state legislation

Federal legislation
Generally, US federal law limits the ability of public and private operators to toll roads that were constructed using federal funding, a class that includes most interstate highways in the country. However, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), which was enacted in late-2005, contains a number of provisions that are favorable to tolling and PPPs.

Among other features, SAFETEA-LU provides for (i) an Express Lanes Demonstration Program which authorizes 15 express toll lane projects on congested interstates, (ii) HOT lanes projects where existing high occupancy vehicle lanes may charge tolls to vehicles that do not meet the passenger requirements, (iii) an Interstate Construction Toll Pilot Program under which up to three states may use toll finance to build new interstates, and (iv) up to $15 billion of tax-exempt private activity bonds (PABs) for PPPs in which a private partner has a long-term interest in the project.

In addition, the US Department of Transportation's Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA) program provides for direct loans, loan guarantees, and lines of credit to help cover up to 33% of the cost of transportation infrastructure projects, including PPPs, that are valued at least $50 million.

In the airport sector, federal law is quite restrictive to the privatization of commercial airports. However, a federal law was enacted in 1996 to authorize a pilot program to test the benefits of airport privatization. This law exempts potential participants from a number of the legal and regulatory impediments to privatization and allows five airports, including one large hub (i.e., an airport that had 1% or more of total passenger boardings in the US in the preceding calendar year), to apply for participation in the private program.

State legislation

Approximately half the states (including California, Florida, Texas and Virginia) have enacted legislation to accommodate the use of PPPs including authorization for the tolling of designated roadways, the leasing of existing facilities to private concessionaires, and the development and operation of new transportation infrastructure projects under PPP structures. Many others (including some of the most populous states) have such legislation under consideration.

Challenges to PPPs

Federal

Despite federal legislation noted above that promotes the use of PPPs for roads and airports, some members of Congress have spoken out against extensive private involvement in US transportation infrastructure. Congressmen DeFazio (Democrat from Oregon) and Oberstar (Democrat from Minnesota and the Chairman of the House of Representatives' Transportation and Infrastructure Committee) have issued highly publicized warnings against lengthy leases of public infrastructure assets to private entities. In response to calls for funding the repair of the nation's estimated 74,000 structurally deficient bridges in the wake of the recent collapse of the Interstate-35W bridge in Minneapolis, Rep. Oberstar and others in Congress are urging the creation of a new gas tax backed Federal trust fund and opposing proposals for more extensive implementation of PPPs.

In September 2007, Senator Hutchison (Republican from Texas who sits on two key Senate committees affecting transportation) announced her introduction of legislation to tighten the restrictions on tolling existing federally funded interstate freeways. Passage of this legislation would chill the prospects for many future PPPs dependent on implementation of tolling on existing interstate freeways.

In the airport sector, the Federal Aviation Administration (FAA) has proposed that the airport privatization program mentioned above be expanded to allow up to 15 airports to apply for participation, with no restriction on the number of large hub airports and a loosening of certain onerous conditions for the privatization of an existing commercial airport, including deletion of the requirement for approval by 65% of the airlines operating from the airport.

These proposed revisions would eliminate the most restrictive conditions that have thwarted the ability of the FAA to achieve the primary objective of the pilot program, which is to test the effectiveness of airport privatization on the aviation industry in the US. However, due to strong opposition from airlines and from opponents of privatization in general, there appears to be a lack of adequate Congressional support for the FAA's proposals at this time.

Moreover, legislation introduced in June by Rep. Oberstar would amend the airport privatization pilot program to make it even more restrictive, increasing to 75% the airline consent requirement, and maintaining the limitation of the program to five, rather than 15, airports and to just one large hub airport.

State and local

Texas has been at the forefront of transportation PPPs, particularly for greenfield projects. However, legislation enacted in Texas in June instituted a partial, two-year moratorium on privately financed toll roads throughout the state. While the moratorium contains exemptions for a number of existing projects, primarily in urban areas, it is expected to freeze the development of a number of proposed projects.

The moratorium also has significance beyond Texas because it echoes concerns voiced throughout the country, including opposition to tolling, complaints that PPPs unnecessarily divest the government of the minimal level of oversight or control necessary for the protection of the public interest and improperly subject vital US transportation facilities to foreign entities, and the basic issue whether PPPs provide any greater value to the public than publicly developed, funded and operated facilities.

The most troubling to sponsors of US transportation PPPs is the recent fate of the Texas SH-121 concession tender. In June 2005, TxDOT issued a request for competing proposals and qualifications from private and public entities. The North Texas Tollway Authority (NTTA) announced its intention to submit a proposal for SH-121in June 2006. But, in August 2006, NTTA indicated its plans to withdraw from the competition in order to support TxDOT's private sector initiatives for SH-121 and several other new road developments in its region. In turn, TxDOT agreed to require private sector developers to use NTTA as toll collection service provider on new private toll roads in the North Texas region for at least the first five years of operation.

However, in March 2007, after TxDOT approval of a proposal by a Cintra-led consortium that would have netted the state an upfront concession payment of $2.1 billion, TxDOT agreed to delay the signing of the contract in order to allow NTTA to submit a competing proposal. NTTA submitted a competing proposal that was approved in preference to Cintra's PPP bid, and NTTA and TxDOT recently signed a comprehensive development agreement. This experience has raised concerns among developers and financiers throughout the globe about the realistic prospect for private development and investment in US PPP projects on an even-handed basis.

After an eagerly awaited toll road study that PPP proponents hoped would lead to privatization of New Jersey's major toll roads, the state administration recently announced its intention to monetize the toll roads within a public sector framework (detailed structure still to be determined), rather than via PPP concession arrangements.

Similarly, in July, Pennsylvania enacted legislation to authorize a "public-public" partnership between the Pennsylvania Turnpike Commission and the Pennsylvania Department of Transportation for tolling its Interstate-80 freeway (subject to necessary federal government approval), leasing it, and using the lease revenues to fund projected massive annual shortfalls in the state's transportation budget.

The only completed transaction under the airport privatization pilot program has been the privatization of Stewart International Airport in Newburgh, New York in 2000 by means of a 99-year lease to the UK's National Express Group. However, that airport is on its way back to the public sector. In January 2007, the Port Authority of New York and New Jersey approved the acquisition of the lease from National Express Group for $78.5 million and the Port Authority is expected to take over operations by October 2007.

In September 2006, the City of Chicago filed a preliminary application with the FAA for participation in the pilot program to privatize Midway Airport. The FAA approved the preliminary application in October 2006, reserving for Midway the single slot in the program for a large hub airport, under terms contemplating awarding of the concession by the end of 2007. However, this PPP has been stymied by opposition from airlines at Midway whose consent is required for the privatization to proceed on the terms envisioned by the city.

US PPP evolution continues

Despite formidable challenges, the PPP movement is alive and well in the US, with many significant PPP projects in various stages of development.

Texas: Texas remains a hotbed of PPP activity. A number of PPP projects are moving forward as planned pursuant to exemptions contained in the Texas PPP moratorium legislation, including the North Tarrant Expressway northwest of Dallas (expected to require nearly $2 billion in concessionaire investment for nearly 36 miles of highway and the addition of express toll-managed lanes), the $500 million SH-161 toll road project north of Dallas (a new, 11.5-mile tolled facility with four to six lanes), and the $1.35 billion project to construct and operate Segments 5 and 6 of SH-130 (which segments will constitute a new 40-mile electronically tolled roadway between San Antonio and north Austin).

Virginia: Virginia has continued its lead role in promoting PPPs. In June 2006, Australia's Transurban acquired a 99-year concession for the existing Pocahontas Parkway (Virginia I-895) under which it is building a 1.6-mile road connecting the parkway to the Richmond International Airport and upgrading its electronic tolling system.

In April 2005, Fluor and Transurban entered a comprehensive agreement with VDOT to finance, design, build and operate the approximately $900 million high occupancy toll (HOT) lanes project on a segment of I-495 in Virginia, under a project scope for which Federal Highway Administration approval was received in May 2007.

Pursuant to an October 2006 interim agreement with VDOT, Fluor and Transurban are also planning to implement the $882 million HOT lanes project on I-95 and I-395 in northern Virginia, to be financed with PABs, TIFIA assistance, bank loans and equity contributions from Fluor and Transurban.

In addition, three consortia have submitted proposals for improvements to Route 460 between Petersburg and Suffolk with initial design-build estimates ranging from $1 billion to $1.55 billion and suggested concession terms of 50-60 years. A request for detailed proposals is imminent.

Florida: In May 2007, a 35-year concession for the new $1 billion Port of Miami Access Tunnel was awarded to a consortium led by Babcock & Brown on the basis of the lowest annual maximum availability payment. The financing plan involves two tranches of PABs.

In September, citing budget constraints associated with the substantial downturn in the new housing construction market on which Florida's fiscal health is so dependent, Florida's Governor announced plans for expansion of the state's PPP program authorized by legislation earlier in 2007.

Colorado: In June 2007, a consortium consisting of Brisa Auto-Estrada de Portugal SA and Companhia de Concessoes Redoviarias reached agreement with Colorado's Northwest Parkway Public Highway Authority on the terms of a 99-year concession for the 11 mile Northwest Parkway in Colorado.

Pennsylvania: In early September, Pennsylvania released its RFQ for the tender for the right to operate the Pennsylvania Turnpike under a long-term concession. This action resulted from a recent study to determine the viability of a potential lease or privatization of the Pennsylvania Turnpike as a means of funding the $1.7 billion required annually to operate and maintain Pennsylvania's state highways, bridges and mass transit system.

Missouri: Two private consortia are competing for the Missouri 800 Bridges project (involving the rehabilitation of 802 bridges throughout all the counties in the state) in which the concessionaire will be granted a 25-year operating concession in return for funding and completing required capital improvements. The Missouri legislature recently enacted legislative amendments to the state's performance bonding statutes necessary for the project to proceed as a PPP.

Conclusion

Although still at a very early stage in the US, the PPP concept has captured the attention of the public and private sector alike, and secured its place in the mix of alternative structures to be given serious consideration for many of the most important and challenging transportation initiatives throughout the country. Each new PPP project that unfolds presents yet another opportunity to alleviate the concerns of opponents and demonstrate the value of the concept in meeting the daunting demands for improvement and expansion of the US transportation infrastructure.