

Current Legal Issues: Bridge Privatization

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PART 1: BRIDGE INFRASTRUCTURE

Privatization of U.S. Highways

Coming full circle

- Late 18th to mid-19th centuries -- a large portion of the nation's road system developed by "for profit" toll companies;
- Federal, state and local governments entered the fray and assumed responsibility for roads;
- Federal-Aid Highway Act of 1916 -- \$75 Million made available – States must create highway departments to carry out federal aid projects;
- 1956 Federal-Aid Highway Act -- funded the Interstate and Defense Highway System;
- Fuel tax and excise taxes on automobiles and parts -- primary funding source;
- Highway maintenance is states' responsibility;

Privatization of U.S. Highways

Coming full circle

- By late 1980's, revenues failed to keep pace with infrastructure construction costs;
- Maintenance costs of growing and aging infrastructure inventory consumes significantly higher share of SHAs' annual budgets;
- Late 1980's through 1990's – states begin enacting PPP legislation (D/B/F/O) on a single project basis (e.g., Dulles Toll Road);

Privatization of U.S. Highways

Coming full circle

- 1990 -- FHWA SEP-14 introduces innovative contracting techniques -- transfer risks to private entity (party most able to control risk);
- 1994 -- Innovative Finance Program -- Test and Evaluation Project (TE-045) -- provided mechanisms for direct investment of private funds in infrastructure projects; and
- ISTEA, SAFETEA, SAFETEA-LU -- enacted between 1991 and 2005 -- increasingly encouraged Public-Private Partnerships.

Privatization of U.S. Highways

Public Private Partnerships

Innovative Contracting

Methods to transfer to the contractor/developer certain risks traditionally retained by the public entity

Financing Tools

Tools that enable the investment of private capital (at risk) in the design, financing, construction, operation and/or maintenance of public infrastructure

Privatization of U.S. Highways

Public Private Partnerships

Innovative Contracting

- *Design-Build*
- *A + B Bidding*
- *Lane Rental*
- *Warranties*
- *Operation*
- *Maintenance*
- *Right-of-way acquisition*
- *Subsurface/environmental*

*Transfer risks to party
in the best position to
management or
mitigate them*

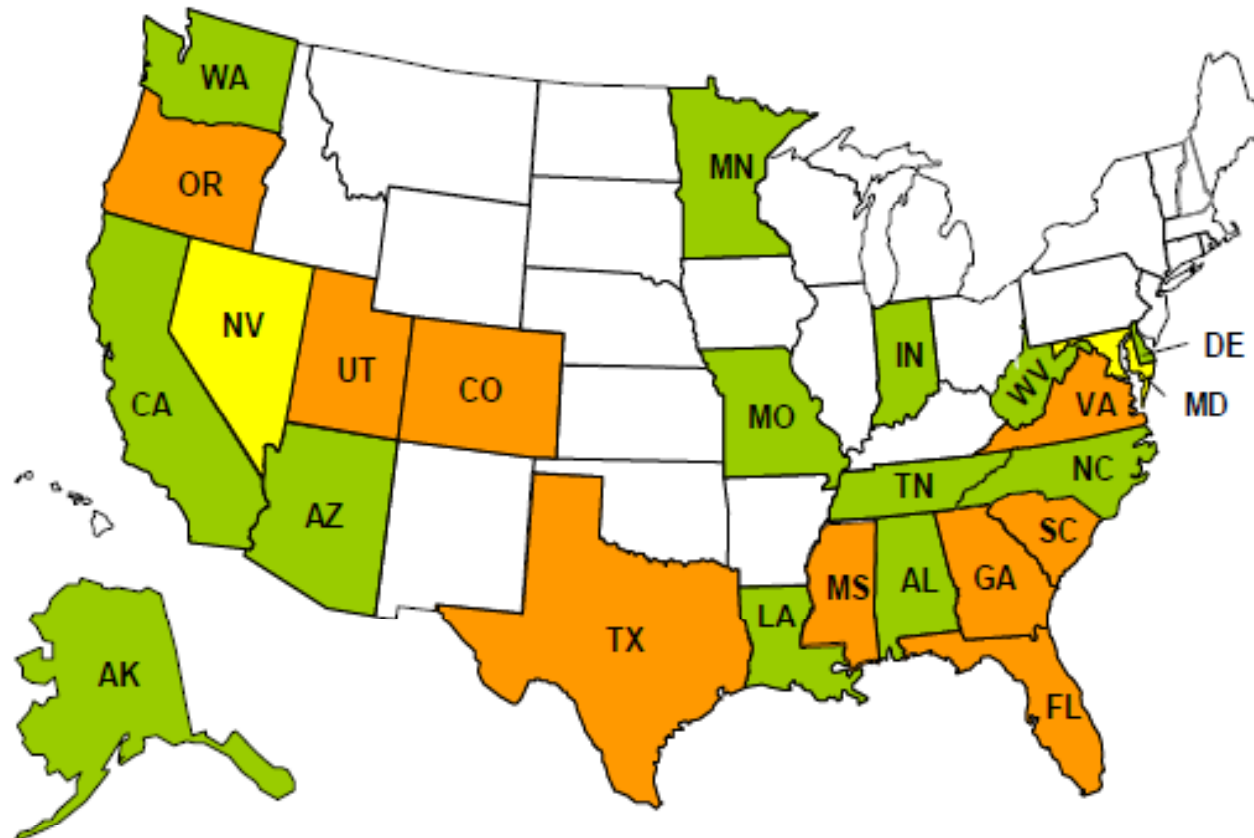
Privatization of U.S. Highways

Public Private Partnerships

Financing Tools

- *Flexible Match*
- *Grant Anticipation Revenue Vehicles (GARVEE's)*
- *Toll Credits*
- *Section 129 Loans*
- *State Infrastructure Banks (SIB's)*
- *Transportation Infrastructure Finance and Innovation Act (TIFIA)*
- *Private Activity Bonds (PAB's)*

States with Legislation Enabling PPPs



Reprinted from *Innovation Wave: An Update on the Burgeoning Private Sector Role in U.S. Highway and Transit Infrastructure* USDOT July 18, 2008

States with Broad Legislation Enabling PPPs

1. Colorado	Authorizes solicited and unsolicited proposals for PPPs and provides PPP authority to CDOT for specific projects including turnpikes and HOT lanes.
2. Georgia	Authorizes GDOT to both receive and solicit proposals for PPPs.
3. Florida	Authorizes solicited and unsolicited proposals for PPP toll roads at the State and county levels and authorizes FDOT to lease or increase capacity on existing toll facilities through PPPs.
4. Mississippi	Authorizes solicited and unsolicited proposals for PPP toll road and bridge projects.
5. Oregon	Authorizes ODOT to solicit and accept unsolicited proposals for PPP tollway projects.
6. South Carolina	Authorizes SCDOT to enter into PPPs for turnpike facilities.
7. Texas	Authorizes TxDOT and regional mobility authorities to accept solicited and unsolicited proposals for PPPs.
8. Utah	Authorizes UDOT to accept solicited and unsolicited proposals for PPPs involving tollway facilities.
9. Virginia	Authorizes solicited and unsolicited proposals for PPPs at the Commonwealth and local levels.

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States with Limited Legislation Enabling PPPs

10. Alabama	Authorizes ADOT and county commissions to license private entities to construct, own and operate toll roads, toll bridges, ferries or causeways.
11. Alaska	Authorizes the Knik Arm Bridge and Tolling Authority to utilize a PPP to finance, design, construct, operate and maintain the Knik Arm bridge.
12. Arizona	Two pilot programs each allow up to two solicited and unsolicited proposals for PPPs.
13. California	Authorizes four PPPs, two for northern California and two for southern California, each of which must improve goods movement – authorization expires on January 1, 2012.
14. Delaware	Authorizes PPP projects, including highways and bridges – specific legislative approval required for each project.
15. Indiana	Authorizes the Indiana Toll Road lease transaction and a PPP for the extension of I-69 – specifically prohibits the State from entering into PPPs for any other road or project without further legislative approval.
16. Louisiana	Authorizes PPPs for toll roads and bridges – any proposal would need the approval of the State legislature.
17. Minnesota	Authorizes solicited and unsolicited PPPs for toll facilities – PPP agreements are subject to local veto.
18. Missouri	Authorizes PPP for Mississippi River Bridge and for Safe & Sound Bridge Improvement Program.
19. North Carolina	Authorizes the North Carolina Turnpike Authority to use PPPs for up to nine toll facilities, including a toll bridge.
20. Puerto Rico	Establishes a toll transportation facility authority with broad powers to authorize private participation in public highway projects.
21. Tennessee	Authorizes two pilot toll road projects.
22. Washington	Authorizes solicited PPPs for eligible transportation projects – requires the State finance committee or the governing board of a public benefit corporation to approve the financing of any public project.
23. West Virginia	Authorizes public entities to acquire, construct or improve transportation facilities – requires the State legislature and Governor to approve the concession agreement

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States with Legislation Authorizing Non-Highway PPPs

24. Maryland	Highway projects are not currently authorized under Maryland's PPP law, but a highway PPP program has been established by regulation.
25. Nevada	Authorizes PPPs for transportation facilities, but toll bridge and toll road projects are excluded.

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The Challenge

Private capital is generally available only to income-producing assets – not for maintaining existing toll-free infrastructure – how do we maintain the nation’s existing infrastructure . . . including, most notably, our bridges?

MoDOT's Answer: *Safe and Sound Bridge Improvement Program*



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Better Bridges

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- *Objective: Bring 802 of the state's lowest-rated bridges to within satisfactory condition;*
- *Improvements performed on a design/build basis by constructor;*
- *Transfer maintenance to the constructor for a period of 25 years with return of the assets to the state in good condition;*
- *Defer payment of design/construction costs over a 25-year period along with yearly maintenance payments;*



800 BetterBridges

- *MoDOT authorized up to \$700 Million over the 30 year-period covering construction and maintenance to cover all costs;*
- *No toll revenue – payments to constructor from Department based on “availability” – Availability Payments; and*
- *MoDOT funds to come from future federal bridge replacement funds.*



800 BetterBridges

Considerations for Contractor

- No toll revenue, so no risk of user volume (other than effect of traffic count on maintenance costs);
- Design/Build/Maintenance costs;
- Asset availability;
- Finance cash flows; and
- Contractor bids minimum Availability Payments (lowest public subsidy).



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Considerations for Contractor

Under an Availability Payment approach, contractor's payments are reduced if facilities are unavailable and/or are not up to satisfactory standards (quality maintenance incentive)



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Award Consideration

- Technical + Financial proposals;
- Technical Elements (30 points);
- Price/Financial (70 points); and
- Award to highest score/Apparent Best Value.



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Technical Scoring (30 points)

- Completion Date – 12/31/2012 – pass/fail;
- Bridge deck treatment strategy (15 points);
- Maintenance of Traffic (10 points); and
- Public information (5 points).



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(Preferred Option)
Financial Scoring (70 points)

- Net present value of payments (40 points);
- If no payment before 12/31/2012 (20 points); and
- Uniformity of payments (10 points).



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(Alternative Option)

Financial Scoring (70 points)

- Net present value of payments (30 points);
- Lowest average payment (30 points); and
- Uniformity of payments (10 points).



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MoDOT Encounters Procurement Delays

- Original Plan: Launch Program in 2006 and award to constructor in July 2007; finish construction by end of 2012;
- Delays: Concerns expressed from final two proposers on bonding – 100% required for duration of contract (\$500-600 Million for 30 years) – Department seeks legislative changes;



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MoDOT Encounters Procurement Delays

- Legislation introduced in Spring 2007, but passes only the Senate;
- Special legislative session called in August – final bill signed by Governor in September;
- Final pricing proposals delayed until November 2007;
- Negotiations occurred December 2007 through February 2008 – tentative agreement reached at \$52 Million – turmoil in markets prevented firm price; and



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MoDOT Encounters Procurement Delays

- September 2008 – MoDOT discontinues negotiations in light of \$65-\$74 Million annual payment estimates (\$50 Million originally budgeted).



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REVISED PLAN

- 803 bridges complete by 2012 as originally promised;
- 100 bridges constructed immediately under accelerated project management by the Department;
- 554 bridges advertised in Spring 2009 under a single Design-Build package;
- Remaining 148 bridges constructed over remaining years under an “accelerated process”; and



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REVISED PLAN

- Financed through selling bonds and repayment through annual bridge replacement funds.

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Does the MoDOT experience suggest that Public-Private partnerships are an unworkable solution for renewing our aging bridge inventory in the U.S.?

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Conclusions from MoDOT's PPP Experience

- Ingenuity -- \$4 Million in stipends purchased innovative answers to design and construction (design promoted speedy field erection and “standardized manufacturing”); MOT. Public outreach, etc.; and
- Private Activity Bonds – USDOT authorized up to \$600 Million for use by shortlisted proposers.
- JUST BAD TIMING!