

CHARLES L. GRECO, President
MARK KNIGHT, Senior Vice President
ART DANIEL, Vice President
JOSEPH M. STELLA, Treasurer
STEPHEN E. SANDHERR, Chief Executive Officer
DAVID LUKENS, Chief Operating Officer

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.



October 29, 2015

U.S. Department of Transportation
Office of Innovative Program Delivery
1200 New Jersey Ave., S.E.
Washington, D.C. 20590

RE: FHWA-2014-0006: Draft Availability Payment Concessions Public Private Partnership Model Contract Guide

The Associated General Contractors of America (AGC) is pleased to have an opportunity to comment on the Federal Highway Administration's (FHWA's) Draft Availability Payment Concessions Public Private Partnership Model Contract Guide and on the Labor Best Practices recommendations that are proposed for inclusion in this document and in the previous model guide for toll concession P3s.

With the limited amount of time provided to review the Draft document it is difficult to make a complete side by side analysis of the differences between the original toll concession guide and the new availability payment guide. It seems that much of the language in both documents is the same except for the payment sections and items that are included in the AP guide that were later added to the toll concession guide as an appendix. Given these minimal changes AGC wishes to reemphasize the issues raised in our original comments. AGC provides separate comments on the Labor Best Practices section which is proposed to become part of both guides.

AGC believes that FHWA is missing a real opportunity to discuss a significant cost factor in P3 projects by not addressing the relationship and risk allocation between the developer and the design builder. The purported purpose for developing these guides, as well as the wealth of information on FHWA's Innovative Project Delivery website, is to promote a broader understanding of P3 transactions. Risk allocation significantly impacts the P3 market for transportation projects because unbalanced risk will discourage construction contractors from participating on these projects thereby limiting competition. Developer arrangements with design-builders for P3s vary significantly from one concessionaire to the next. Understanding how the business model for these arrangements impacts cost is important.

Public agencies and developers/concessionaires need to understand that there are contingency costs associated with project risks that can be reduced if the risk is better managed. Also there is the belief that while each P3 is unique, there are many consistent risk factors associated with each project that can be addressed in a more unified approach. Renegotiating all of these issues on each P3 creates uncertainty and is time consuming, costly and unnecessary. Owners need to understand this.

As pointed out in our previous comments, the Guide does a good job of identifying typical construction risks and financing risks and suggesting proper allocation of those risks between the developer/concessionaire and the public agency. Where the guide is lacking, however, is that it only addresses these issues from a developer/concessionaire's point of view. In most P3s, the developer/concessionaire stands in the shoes of the owner (typically the state DOT or local transit agency). The Guide recognizes that there are certain risks that are beyond the ability of the developer/concessionaire to control and therefore should be retained by the public body and the

developer/concessionaire should be provided compensation should they occur. To do otherwise would make these projects too costly to move forward.

However, the Guide fails to suggest how this compensation for unanticipated circumstances during construction should flow down to the design-builder. Many of the "Compensation Events" and "Delay Events" directly impact the design-builder's costs. By not fairly allocating these risks, the developer/concessionaire is likely to be increasing overall project costs. AGC believes that this Guide would enhance its value by discussing appropriate risk allocation between the developer/concessionaire and the design-builder much in the same way it discusses these risks between the developer/concessionaire and the owner and suggesting appropriate risk allocation in this relationship as well. The Guide includes a discussion of unanticipated circumstances during construction. These are many of the risks we are concerned with. FHWA should expand on this section of the guide to discuss risk allocation between developers and design-builders.

One risk factor that is not addressed in the Guide is the significant costs to the design-builder in putting together a proposal. Proposal costs are a factor on all design-build projects but are much more significant on P3 projects because of the many different parties that are involved on the concession teams. In addition the history of P3 projects is that they go through various stops and starts as they make their way through the political and public review process. Often various procurement options are attempted before the P3 arrangement is agreed on. This can be very time consuming and costly for design builders as they put together proposals at each stage of the process. AGC suggests that the Guide discuss the issue of the developer/concessionaire receiving a stipend to cover project design costs and that the Guide discuss the flow down of the stipend to the design-build firm.

The experience of the industry is that the various legal and transaction documents that are crafted for potential P3s are unique for each project. This can be very costly for the developer/concessionaire and the design-builder who must each have a team of legal, financial and insurance experts review, comment on, edit and negotiate each of these documents. These costs will be reflected in the overall cost of the project. While it is understood that each project is unique and therefore will require many different contract terms, it is also reasonable to expect that many contract terms and conditions need not change from one project to another. The value the Guide brings to the table is that it may lead to a more consistent and unified approach to P3s. To make the Guide of real value it must be used. Therefore, AGC suggests that where TIFIA assistance is being used as a part of the financing for a P3 project that use of this Guide (and the future guides being drafted) should be encouraged by the Office of Innovative Project Delivery.

Labor Best Practices

The US DOT has included in this Notice for Comment, a list of "Labor Best Practices" with the stated intent of including these as part of the P3 Model Contract Guides for both availability payment concessions and toll concessions. AGC believes that it is important to make concessionaires and state DOTs aware that in any P3 project delivery arrangement that receives any Federal assistance pursuant to Title 23 US Code developer[s], contractors, subcontractors, and concessionaires – are required to comply with all applicable Federal labor and employment laws. However, AGC believes it is inappropriate to include in these P3 guides "best practices" that are not federally required, are burdensome to implement, have been controversial and in

fact have not been tested or approved. It is confusing to states and concessionaires and implies that they are expected to take steps that go far beyond Title 23 requirements. The P3 model is still in its infancy in the United States but there is a great deal of hope that these arrangements will play an important part in meeting some of the Nation's overwhelming infrastructure needs now and in the future. There are many impediments that can keep P3 arrangements from moving forward and being successful. AGC believes that encouraging the use of the "labor best practices" as presented in this document only adds new impediments to the success of P3s and therefore AGC strongly recommends that labor practices highlighted in these Guides be limited to those that are actually required. The onslaught of new regulations over the past few years has contractors overwhelmed financially and with regard to staff time. Therefore, the inclusion of additional regulatory-like contractual requirements will only act to decrease contractor interest in performing work on P3 projects. This will cause contractors with a history of quality performance to exit the competition and focus exclusively on private work, leaving a smaller pool of contractors competing for the work – ultimately increasing cost and potentially decreasing quality.

AGC believes it is a misnomer to categorize the practices listed in this notice as "best practices." There is no evidence to support that these suggested labor practices are indeed "best practices." Since many of the "best practices" cited have not been implemented on federally assisted construction contracts, using them in the P3 arena will require the development of a whole new body of regulatory-type requirements. If the concessionaire requires by contract that the design-build contractor implement these requirements, it will be the responsibility of the concessionaire to determine whether or not the design-build contractor – and the likely many tiers of subcontractors – is in compliance with the contractual requirements. Concessionaires typically do not have experience with the labor requirements listed. Neither concessionaires nor developers have experience with regard to issuing regulatory guidance, conducting investigations or enforcing any of the labor requirements listed. Many of the purported "best practices" have been controversial and not generally accepted by the contracting community and that is why they have not been adopted. For example, the recommended Injury and Illness Prevention Program (I2P2) is an incomplete regulatory concept. The Occupational Safety and Health Administration (OSHA) has been engaged in an effort to promulgate an I2P2 standard since the summer of 2010. At that time stakeholder meetings were held and eventually OSHA announced plans to initiate the Small Business Regulatory Enforcement Fairness Act (SBREFA) process to better understand the economic impact of such a rule on small employers as well as solicit recommendations from employers on its proposal. However, the process has since stalled with the current rule placed in a long-term actions category of the rulemaking process. In the absence of a Federal rule, it is astonishing that DOT is recommending the Injury and Illness Prevention Program as a "best practice." In addition, this concept is not necessary, because current OSHA standards under Subpart C already require construction employers to initiate and maintain worker safety programs and to provide for frequent and regular inspections of job sites, materials, and equipment by a competent person.

Another questionable best practice is the requirement for a Project Labor Agreement (PLA). PLAs are an area where the contractor is in a much better position to evaluate their appropriate use than the federal government, a state government, or a concessionaire. AGC neither supports nor opposes contractors' voluntary use of PLAs on P3 projects or elsewhere, but strongly opposes any government mandate (at any level) for contractors' use of PLAs. AGC is committed to free and open competition for publicly funded work, and believes that the lawful labor relations policies and practices of private construction

contractors should not be a factor in a government agency's selection process. AGC believes that neither a public project owner nor its representative should compel any firm to change its lawful labor policies or practices to compete for or perform public work, as PLAs effectively do. Government mandates for PLAs can restrain competition, drive up costs, cause delays, lead to jobsite disputes, and disrupt local collective bargaining. There are no widely published studies establishing that the use of PLAs has consistently lowered the cost, shortened the completion time, or improved the quality of construction of public projects. If a PLA would benefit the construction of a particular project, the contractors otherwise qualified to perform the work would be the first to recognize that fact, and they would be the most qualified to negotiate such an agreement. We firmly believe that a government entity, including a concessionaire acting in a similar capacity, mandating or incentivizing the use of a Project Labor Agreements is not a "best practice."

Other examples of inappropriate "best practices" in this guide are policies on paid sick and family leave, wage and classification transparency. These topics are the subject of ongoing regulatory consideration. It is very difficult to describe concepts that are the subject of active or inactive rulemaking activities as "best practices." Other areas covered here are complex and will likely increase confusion and limit competition. They will likely increase costs for concessionaires, contractors, subcontractors and the traveling public. There are numerous protections in law and regulation that require compliance and vigilance. AGC believes a "best practice" should be adopted to ensure full compliance with federal, state and local laws. AGC believes state and local governments that are working on P3s should look for consistency in contracts from jurisdiction to jurisdiction. That consistency will encourage competition from contractors and build a reliability of outcome that will help promote the use of P3s nationwide.

FHWA would provide more assistance to concessionaires by instead focusing on guidance for implementation of labor law requirements such as the Davis Bacon Act. Before FHWA moves forward with implementation guidance, it is necessary for the agency to work with the U.S. Department of Labor in order to provide clarification as to where and when the Davis-Bacon Act will or will not apply and to which activities it applies. Furthermore, the Davis-Bacon Act is one of the most complex labor laws in existence today. Applying this law by concessionaires who have no basic understanding of its complexities can leave developers with tough questions about site of work, fringe benefit credits, overtime calculations and so forth. For classifications that are not listed on prevailing wage determinations, who will be tasked with determining the prevailing wage rate? Clarify how these issues apply in the P3 context would be of more use to the P3 community than the expansion of labor requirements by calling them "best practices."

Sincerely,

A handwritten signature in black ink, appearing to read "Brian Deery". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Brian Deery
Senior Director
Highway and Transportation Division