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

May 31, 2013

U.S. Department of Transportation
Dockets Management Facility
Room W12-140
1200 New Jersey Ave., NW
Washington, D.C. 20590

RE: MAP-21 Standard PPP Transaction Model Contracts

Thank you for the opportunity to comment on the development of standard Public-Private-Partnership (PPPs) transaction model contracts as directed by the MAP-21 legislation. The Associated General Contractors of America (AGC) is the leading association in the construction industry representing more than 30,000 firms in 95 chapters throughout the United States. Among the association's members are approximately 7,500 of the nation's leading general contractors, more than 12,500 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. These firms are engaged in the construction of highways, bridges, tunnels, airports, transit, railroad, ports, buildings, factories, warehouses, shopping centers, water treatment plants and other public and privately owned facilities. AGC members perform construction contracts for all 50 states and other recipients of US Department of Transportation (DOT) funding and would therefore be directly impacted by rules that govern the implementation of PPPs for transportation facilities.

AGC is a strong supporter of the use of PPPs as an important component in providing financing to address transportation infrastructure needs. The Nation faces a significant transportation investment deficit. Revenues currently raised by all levels of government for capital investment will total only about one-third of the roughly $200 billion necessary each year to maintain and improve the nation's highways, bridges and transit systems. Despite this significant need, there is a reluctance to raise the revenue necessary to increase funding for transportation improvements at the federal level, and only limited support at the state and local levels. PPPs have the potential to play an important part in helping to fill this investment gap. AGC therefore urges that FHWA continue to take actions that promote and encourage this fledgling effort to bring private financing sources to the table.

AGC believes that the directive in MAP-21 for FHWA to develop standard PPP transaction model contracts provides an excellent opportunity to increase the use of PPPs and to make the PPP arrangement work better and should be read quite literally. AGC suggests that FHWA produce model documents that address concessionaire/owner agreements and concessionaire/design-builder agreements. The documents would truly be models and not be mandated. Realizing that every project is unique with unique considerations it should be stipulated that there is full anticipation that revisions will be made to the model provisions. The

2300 Wilson Blvd., Suite 400 • Arlington, VA 22201-3308
Phone: 703.548.3118 • Fax: 703.548.3119 • www.agc.org

ultimate objective would be for the model documents, over time, to promote consistency and efficiency in contract drafting for these projects just by their gradual adoption. The FHWA developed language would become the "reference" or "marker" for project documents, providing industry participants with suggested risk allocation that can be adapted to meet project-specific issues and challenges. These model documents would provide the reference against which all PPP documents are compared to identify differences and force a discussion concerning why any change from the model language is necessary or appropriate.

Concessionaire/Owner Agreement

AGC has long advocated the use of standard construction contracts, outside of the PPP context, in an attempt to efficiently and equitably allocate risks and so that industry stakeholders can save considerable transaction costs (such as legal fees to draft a contract from scratch and negotiate a unique contract for each project). The goal in standard contracts is to provide predictability and minimize adding costs to the construction process to price out unknown risk contingencies. By using an industry-accepted foundation, parties no longer need to go through a painstaking negotiation process for each transaction risk. This is the objective behind developing the model PPP documents.

Other countries with far more experience than the United States in providing needed infrastructure through PPP arrangements have developed standard terms and conditions for concession agreements. The most successful PPP markets – Canada, UK and Australia – all have standardized documents. These standard documents act as both a starting point and a benchmark for projects. In addition, these standard documents are updated periodically to reflect market changes. AGC believes that developing a model concessionaire/owner agreement would serve a similar function in reducing conflict, controlling costs and achieving consistency. Of course the US provides a far more challenging situation because of the fifty states with their own laws and requirements and because of the state/federal relationship. This is exactly why having a federal model to use as a starting point would be beneficial. While recognizing that each PPP transaction will be unique, nevertheless, having model documents for the concession/owner agreement and concessionaire/design-build agreement would provide the parties, as well as their legal, surety and insurance advisers, a well-reasoned starting point for further discussions.

AGC contractors that have experience working in PPP arrangements have suggested that documents developed by Infrastructure Ontario (IO) should be considered as precedents for the creation of standard PPP transaction model contracts. IO is a government agency in Ontario, Canada, established to focus on modernizing and financing the renewal of public infrastructure, maximizing the value of public real estate and managing government facilities. IO provides project delivery, lending, real estate management and asset planning expertise to the various government departments, agencies and municipalities within the province. IO has established a structured process for the procurement of PPPs. To do this it developed a standard set of documents that include bidding procedures and contract clauses. Its procurement process defines how qualifications and proposals will be evaluated. This has created a consistent process so that all involved parties including lenders, concessionaires and contractors know what to expect - and, most importantly, which risk allocation to expect - when getting involved in an IO sponsored PPP project.

AGC believes these documents would be a good precedent for FHWA to use in developing its own model documents. AGC is working to "Americanize" the IO concessionaire/owner agreement to make it more compatible with US law and practice, and will submit it soon for FHWA consideration as a good example of what could be included in concessionaire/owner agreements.

In addition, AGC believes it would be beneficial for FHWA to hear from the industry why the proposed model document would be beneficial to the future use of PPPs to support transportation infrastructure investment. AGC would welcome a meeting to walk you through the document's content with an explanation as to why the proposed language is suggested.

Concessionaire/Design Builder Agreement

While the concessionaire/design builder agreement is largely a private transaction it will nevertheless have an impact on overall project cost. It is therefore important for project owners and concessionaires to understand that sound principles of risk allocation do not change when a project is financed or procured in a non-traditional method. It is the owner's responsibility to assign risk, but the owner must understand that it will pay a higher price when risk items are assigned to a party that lacks the resources, expertise, relationship and authority necessary to manage them. Contractors do not merely accept risk, but instead price it according to their past experience and expertise. Assigning risk to contractors that is out of their control will inflate the cost of the project.

A guide published by FHWA, *Risk Assessment and Allocation for Highway Construction Management,* makes this point very well:

[F]our fundamental tenets of sound risk allocation should always be followed:

1. Allocate risks to the party best able to manage them.
2. Allocate the risk in alignment with project goals.
3. Share risk when appropriate to accomplish project goals.
4. Ultimately seek to allocate risks to promote team alignment with customer-oriented performance goals.

DOTs have learned through experience with their ongoing construction programs that appropriate risk allocation leads to better projects. These same principles apply to all projects, including PPPs. However, the PPP arrangement will force a change in the risk allocation model compared to other arrangements. Many risks that are typically held by the public entity in a traditional design-bid-build contract will very likely, by the nature of the PPP arrangement, be transferred to the private sector on the basis that the private sector is better than the public sector at managing these risks. AGC believes that FHWA can play an important role in 1)educating project owners contemplating use of a PPP arrangement about the costs associated with inappropriate risk allocation, and 2)developing model concessionaire/design builder agreements.

An example of the list of issues that should be addressed in the concessionaire/design builder agreement (and also in the concessionaire/owner agreement) include the following:

- Right of Way Acquisition
- Permits
- Environmental reviews
- Differing Site Conditions
- Utility Relocation
- Indemnification
- Liquidated Damages
- Express or Implied Warranties
- Reliance on Owner- Provided Information Change Orders/Interim Directed Change
- Force majeure
- Traditional but heightened contractor risk (e.g., warranty and "fitness for purpose standard")
- Extended duration of contractual warranty/liability exposure period
- Timing disconnects - between additional work performed and payment for equitable adjustment which may have to wait for the operations (revenue) period
- Disclaimer of design information and reference documents
- Flow-down provisions
- Risk from construction defects

This list is not exhaustive but it does include many of the typical risk issues that can and do lead to increased construction costs because of uncertainties and contingencies. It is important for public transportation agencies to understand that in some instances, even in the PPP arrangement, they still may be in the best position to address and manage these risks.

AGC also suggests that FHWA develop a risk matrix that identifies the various risks that suggests how they are most appropriately allocated. The matrix could be used by the owner and PPP concessionaire to thoroughly identify, assess, and analyze project risk in a transparent and informed manner and identify mitigation strategies. As pointed out in the FHWA *Risk Assessment* guide, "When risks are understood and their consequences are measured, decisions can be made to allocate risks in a manner that minimizes costs, promotes project goals, and ultimately aligns the construction team (agency, contractor, and consultants) with the needs and objectives of the traveling public."

DOTs and Concessionaires may determine to allocate the risk in a different way from the way that risk has been allocated in the standard PPP transaction model contracts but it is important that they understand the cost implications of that choice. FHWA can play an important role as an educator and facilitator. However, it is also important that FHWA not become too heavy handed in dealing with PPPs. It should be kept in mind that each PPP is unique and therefore mandates or other impediments should not be imposed. FHWA should avoid mandating that specific documents or contract language be used exclusively. In the end, every project is unique with unique considerations, and we should expect that some revisions will be made to the model provisions. That being said, the model agreements should over time promote consistency and efficiency in contract drafting for these projects just by their gradual adoption.

In conclusion, AGC is pleased that US DOT is addressing this issue and we appreciate the opportunity to comment. AGC believes that PPPs are a tool for public infrastructure development but they do not take the place of a long-term capital investment strategy at the federal and state level. We also firmly believe that efficient risk allocation is a key determinant in project success. Model owner/concessionaire documents and development of a risk matrix that highlight PPP project risks will create a common understanding of all project risks and facilitate more efficient allocation of those risks. We believe that these should be guidelines and should not include contract mandates. Also creating a common understanding within each state about the processes and procedures for using and evaluating PPPs will facilitate appropriate use of PPPs in each state. There is a role for the U.S. DOT to play in this debate and we appreciate the opportunity to comment on this issue and we look forward to working with FHWA in developing model concessionaire and design-build documents.

Sincerely,

Brian Deery

Brian Deery
Senior Director
Highway & Transportation Division