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Federal Transportation Administration Proposes Procedures to Address Impediments to the Use of P3s and Private Investment in Transportation Projects

Federal Transportation Administration Proposes Procedures for Requesting Waivers or Modifications of Certain Regulatory Requirements to Increase Use of P3s and Private Investment in Transportation Projects

INTRODUCTION

On July 31, 2017, the United States Department of Transportation's Federal Transportation Administration (the "FTA") proposed a Private Investment Project Procedures rule (the "Proposed Rule") that would allow sponsors of public transportation capital projects benefiting from some form of Federal financial assistance to submit an application to the FTA requesting a modification or waiver of certain FTA regulations, practices or procedures that in the sponsors' view present impediments to the use of public-private partnerships ("P3s") or private investment in such projects.¹ The FTA defines a P3 as an agreement between a public agency and a private sector entity involving private sector investment and the sharing of risk between the agency and the private sector partner in the delivery, financing and operation of a project.

Comments on the Proposed Rule are due by September 29, 2017.

BACKGROUND

The Proposed Rule is consistent with a general trend in the U.S. Federal government over the past decade of developing a regulatory regime that is more conducive to the use of P3s and private

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investment in public transportation capital projects. In 2007, for instance, the U.S. Secretary of Transportation (the “Secretary”) established “Penta-P,” a pilot program to demonstrate the advantages and disadvantages of P3s for certain new fixed guideway (*i.e.*, rail, bus, rapid transit, ferry, etc.) projects. More recently, in December 2015, the Fixing America’s Surface Transportation Act authorized an expedited project delivery program for capital investment projects, requiring that projects be supported, at least in part, by P3s. The FTA has tried to facilitate and streamline P3s and private sector participation by creating a Private Sector Participation Website, which provides technical support and other resources to project sponsors considering P3s, and by issuing guidance such as Circular 7050.1, which provides guidance on joint development between transit agencies and the private sector.

The FTA reported that, despite its efforts in this area, it has continued to receive comments from grant recipients and other stakeholders proposing, among other things, that

- FTA grant processes be further streamlined;
- Timing of grant awards be more compatible with the timing of financing and procurement schedules;
- Federal oversight be more flexible and dependent upon industry expertise; and
- The grant approval process rely more heavily on reviews by third parties with jurisdiction over a project to avoid duplicative reviews and expedite the process.

In light of these comments, and to address other barriers identified by the FTA, the FTA developed the Proposed Rule pursuant to a statutory mandate under Section 20013(b)(5) of the Moving Ahead for Progress in the 21st Century Act (MAP-21) to issue a rule to implement procedures and approaches to address impediments to the greater use of P3s and private investment.

The Proposed Rule is modeled after the Federal Highway Administration’s (“FHWA”) Special Experimental Project Number 15 (“SEP-15”), which created a procedure by which the FHWA may waive certain statutory and regulatory requirements related to, among other things, contracting, project finance, right-of-way acquisition and compliance with Federal environmental requirements on a case-by-case basis as a means of encouraging private investment, project management flexibility, innovation and efficiency in project implementation. For example, the Pennsylvania Department of Transportation applied for and received approval pursuant to SEP-15 to deviate from certain FHWA design-build regulations with respect to its P3 project to replace 558 bridges. The project reached financial close in March 2015. Similarly, the Idaho Transportation Department recently completed a program that added 120 miles to the state’s highway system after receiving approvals under SEP-15 to deviate from existing regulations.

OVERVIEW OF THE PROPOSED RULE

The FTA has stated that it intends that the Proposed Rule will “encourage project sponsors to seek modifications of Federal requirements that will accelerate the project development process, attract private

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investment and lead to increased project management flexibility, more innovation, improved efficiency, and/or new revenue streams.”²

The key elements of the Proposed Rule—eligibility requirements, the scope of waiver and modification, the application process, and the reporting requirement for successful applicants—are described below:

- ***Eligibility Requirements:***

- The Proposed Rule applies to any recipient that is subject to 49 U.S.C. chapter 53 (governing public transportation) and funds an eligible public transportation capital project, at least in part, with Federal financial assistance under the Transportation Infrastructure Finance and Innovation Act (“TIFIA”),³ the Railroad Rehabilitation and Improvement Financing (“RRIF”) program⁴ or any other Federal financial assistance program.
- The Proposed Rule defines “recipient” as any entity that “proposes” to receive Federal financial assistance for an eligible project under the above-enumerated Federal financial assistance programs. An applicant need not have a commitment of Federal financial assistance at the time of application, but rather simply plan or be eligible to have such Federal financial assistance for its transportation project.⁵
- An “eligible project” is defined as any surface transportation capital project that is subject to 49 U.S.C. chapter 53 and that will be implemented as a P3 or a joint development, or implemented with other private sector investment. The FTA defines “joint development” as a public transportation project that integrally relates to and often co-locates with commercial, residential, mixed-use or other non-transit development.⁶

- ***Scope of Waiver and Modification:***

- A recipient may submit an application to modify or waive existing FTA requirements for an eligible project. “FTA requirements” is defined to include FTA regulations and mandatory provisions of practices, procedures or guidance documents, including circulars.
- The Proposed Rule explicitly limits the FTA from waiving or modifying any requirement under 49 U.S.C. 5333 (relating to labor standards), the National Environmental Policy Act of 1969 or any other provision of any Federal statute.⁷

- ***Application Process:***

- Only one application per project may be submitted. Applications must (i) describe the project’s anticipated scope, cost, schedule, and expected source and amount of Federal financial assistance; (ii) identify whether the project is to be delivered as a P3 or a joint development, or with other private sector investment; (iii) provide a detailed explanation of the role of the private sector investor, if any, in delivering the project; (iv) identify the specific FTA requirement(s) that the recipient requests to have modified or waived and a proposal as to how such requirement(s) should be modified; (v) provide a justification for the waiver or modification, including an explanation of how the FTA requirement presents an impediment to a P3, joint development or other private sector investment; (vi) explain how the public interest and public investment in the project will be protected and how the FTA can ensure the appropriate level of public oversight and control is undertaken if the modification or waiver is allowed; (vii) where the project has more than one recipient, provide evidence of such other recipients’ concurrence with submission of the application and waiver of the right to submit a separate application for the same project; (viii) provide a financial plan identifying sources and uses of funds committed to the project; and (ix) explain the expected benefits that the requested modification or waiver would provide to address impediments to the greater use of P3s and private investment.⁸

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- The FTA is specifically seeking comment from industry stakeholders “on whether requiring evidence of committed financing would be premature at the time of application” for certain projects.
- Properly submitted applications will be reviewed by the FTA. The Administrator of the FTA may modify or waive FTA requirements if it determines that the recipient has demonstrated that (i) the FTA requirement proposed for modification discourages the use of P3s, joint development or other private sector investment; (ii) the proposed modification or waiver is likely to have the effect of encouraging the use of P3s, joint development or other private sector investment; (iii) the amount of private sector participation or risk transfer proposed is sufficient to warrant the requested modification or waiver; and (iv) modification or waiver of the FTA requirements can be accomplished while protecting the public interest and any public investment.⁹
- **Reporting Requirement for Successful Applicants:**
 - The recipient of a modification or waiver of FTA requirements pursuant to the Proposed Rule must submit a report that evaluates the effect of the modification or waiver on the delivery of the project within one year after the project’s completion. Specifically, the report must evaluate the success or failure of the modification or waiver as well as the extent to which such modification or waiver addressed impediments to the greater use of P3s and private investment.¹⁰

CONCLUSION

Overall, the Proposed Rule is consistent with the current Administration’s focus on “unleash[ing] the potential for private investment”¹¹ in transportation works and developing America’s infrastructure, which the Secretary has hailed as “a key factor in productivity and economic growth, which has . . . provided our country with unprecedented mobility, safety and security.”¹² The Proposed Rule, if adopted, would in principle allow for greater use of P3s and private investment by eliminating or curbing certain regulatory impediments to obtaining FTA grants and approvals, but it remains to be seen whether industry stakeholders will consider the Proposed Rule to be an adequate solution to the perceived barriers to private participation in public projects. For instance, although the FTA intends the Proposed Rule to be used as a tool to streamline and accelerate project development processes, the proposal notably fails to establish a deadline by which the FTA must approve or deny an application for a modification or waiver.¹³

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ENDNOTES

- 1 See 82 Fed. Reg. 35,500 (July 31, 2017).
- 2 *Id.* at 35,503.
- 3 23 U.S.C. §§ 181–89, 601–09. TIFIA provides Federal credit assistance in the form of direct loans, loan guarantees and standby lines of credit.
- 4 45 U.S.C. §§ 821–23. RRIF provides Federal credit assistance in the form of direct loans and loan guarantees.
- 5 The proposed release states that the FTA Administrator’s consideration of an application under this part does not commit Federal-aid funding for the project. See 82 Fed. Reg. at 35,505.
- 6 See *id.* and U.S. Dep’t of Transp., Fed. Transit Admin., Circular 7050.1, Federal Transit Administration Guidance on Joint Development (Aug. 25, 2014).
- 7 82 Fed. Reg. at 35,505.
- 8 *Id.*
- 9 *Id.* at 35,503, 35,505.
- 10 *Id.* at 35,505–06.
- 11 Bart Jansen, *Chao Outlines Transportation Priorities from Skies to Roads*, USA TODAY, Jan. 11, 2017, <https://www.usatoday.com/story/news/2017/01/11/elaine-chao-transportation-nominee/96436210/>.
- 12 Sean Hackbarth, *Secretary Chao Outlines Trump’s Infrastructure Vision*, U.S. CHAMBER OF COMMERCE, May 16, 2017, <https://www.uschamber.com/above-the-fold/secretary-chao-outlines-trumps-infrastructure-vision>.
- 13 See 82 Fed. Reg. at 35,506.

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