P3 PROJECTS: CREATING THE CONCESSIONAIRE TEAM

Presented By

Jennifer A. Mahar
Smith Pachter McWhorter PLC

Lakshmi N. Williams
Transurban (USA) Inc.
State P3 Legislation

• P3 Enabling Legislation in 36 States, the District of Columbia, and Puerto Rico

• P3 Program Requirements Vary by Jurisdiction

• Check the Jurisdiction’s Statute, Regulations, and Guidance Manuals
Steps for Creating the Concessionaire Team
Determine Project Scope

- Private Entity’s Proposal
- Procurement Documents: RFQ, RFP, Business Terms
- Comprehensive Agreement
- P3 Project Model
  - Design-Build-Finance-Operate-Maintain (DBFOM)
  - Design-Build-Finance (DBF)
  - Build-Operate-Transfer (BOT)
Determine Team Members Needed to Meet Project Scope

- Financial Advisors/Equity Investors/Lenders
- Design-Build Contractor
- Operation/Facilities Manager
- Maintenance Company
Determine Legal Structure/Contract Vehicle

• Review how the Jurisdiction’s P3 Statute defines “private entity”

• For example, Virginia P3 legislation contains broad definition:

“Any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity, or other business entity.”
Determine Legal Structure/Contract Vehicle

Teaming Agreement


Caution: Do not draft an unenforceable “agreement to agree”

Joint Venture

- Contractual
- Legal Business Entity
Determine Legal Structure/Contract Vehicle

• Key Considerations:

✓ The goals for the Concessionaire Team

✓ Must demonstrate to Public Entity that Concessionaire Team possesses resources to successfully complete the Project

✓ Risk Allocation
Determine Timing for Team Formation

• Prequalification Requirements
• Proposal Phase
• Post-Award/Closing
Determine What Provisions to Include in Legal Structure/Contract Vehicle

- STATEMENT OF BUSINESS PURPOSE

“Sole business will be to develop and operate the Project in accordance with the Comprehensive Agreement.”
Determine What Provisions to Include in Legal Structure/Contract Vehicle

MANAGEMENT AND CONTROL

• Will there be a Management Committee?
  • Who will be its members?
  • What is its scope of authority?
  • How will meetings be called?

• Will there be a General Manager for day-to-day operational decisions?
  • What is the general manager’s scope of authority?
  • What are the general manager’s reporting requirements?
Determine What Provisions to Include in Legal Structure/Contract Vehicle

- MANAGEMENT AND CONTROL
  - How will the Management Committee make decisions?

  Practice Tip: Consider using neutral party to record and maintain meeting minutes.

  - Use of majority v. supermajority vote?
Determine What Provisions to Include in Legal Structure/Contract Vehicle

MANAGEMENT AND CONTROL

• Examples of supermajority vote matters:
  • Related party transactions, subject to express, *de minimis* exceptions, and conflicts of interest
  • Material changes to the team’s legal structure or Business Purpose
  • Entering into insolvency/bankruptcy proceedings or agreements with creditors
  • Causing material default, right of acceleration or termination of a material Project-related document or agreement
  • Approving or declaring distributions or modifying rules for distributions
Determine What Provisions to Include in Legal Structure/Contract Vehicle

FINANCIAL CONTRIBUTIONS

• Initial Investment
  • Transportation Infrastructure Finance and Innovation Act (TIFIA)
  • Bonds – Private Activity Bonds (PAB)
  • Capital/Equity

• Subsequent Cash Calls
Determine What Provisions to Include in Legal Structure/Contract Vehicle

- TRANSFER OF OWNERSHIP INTEREST IN CONCESSIONAIRE TEAM
  - Procedures for buying-out team members
  - Procedures for transfer/sale of interest to third party
  - Right of first refusal of other team members
Determine What Provisions to Include in Legal Structure/Contract Vehicle

- DISPUTE PROCEDURES
  - Mediation, Arbitration, Dispute Review Board, or Court
  - Continued project performance in event of dispute
  - Choice of Law

Practice Tip: Management Committee meeting minutes maintained by neutral party can prove valuable when subsequent disputes arise
Determine What Provisions to Include in Legal Structure/Contract Vehicle

- DEFAULT PROVISIONS
  - What constitutes default?
  - Notice and Cure Process?
  - Consequences for Uncured Default?
Determine What Provisions to Include in Legal Structure/Contract Vehicle

CONFIDENTIALITY PROVISIONS

- Will sensitive or proprietary data be exchanged between members?
- Will innovative technology be used?
- How will IP data and technology be protected?
Determine What Provisions to Include in Legal Structure/Contract Vehicle

RISK ALLOCATION

• What risks are being transferred from the Public Entity to the Concessionaire Team?
• Which team member is best suited to handle each risk?
• How can risk exposure be mitigated?
• Examples of risks: Permitting, Delays, Financial Risks, Indemnity, Operations
Determine What Provisions to Include in Legal Structure/Contract Vehicle

CLOSEOUT PROVISIONS

• Disposal of assets such as equipment
• Long term storage of records
• Audit rights
Identify Additional Agreements Required for Concessionaire Team

Concessionaire Team

Financing Agreements

Design-Build Contract
Operate Contract
Maintenance Contract
The Concessionaire Team and Supporting Documents Are in Place. Now What?

• Communication – Early and Often between Team Members
• Build Trust
• Require Transparency between Team Members
• Engage a Neutral Party to record and maintain meeting minutes
• Avoid kicking the can down the road on confronting difficult issues or making important decisions
QUESTIONS

Jennifer Mahar
Smith Pachter McWhorter PLC
jmahar@smithpachter.com
703-847-6300

Lakshmi Williams
Transurban (USA) Inc.
LWilliams@transurban.com
571-421-3232