

Raising Capital to Finance Public Transit & Intermodal Projects

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I. Intermodal Facilities Overview

A. Elements of Intermodal Facilities

- Different Types of Carriers/Modes of Transportation who Cooperate

B. Benefits of Intermodal Projects

- Transportation Efficiency – Speed and Cost Savings
- Economic Development: Close By and Farther Away
- Cooperation: Ship to Rail; Ship to Truck
- May be a single rate to customer
- Standard Sizes for Containers: big cost reduction, flexibility, warehousing, standardized dimensions [e.g., TEUs or 20 foot Equivalent Units]

C. Drawbacks

- Empty Travel Segments
- Need big loading areas, equipment
- Infrastructure is capital intensive
- Need Careful Tracking of Freight

II. Challenges to Intermodal Development

A. GAO Study (2007)

- Federal funding usually targeted at single mode of transportation.
- Governments are generally organized by transportation modes. Not always cooperation between modes or with private sector.
- Some benefits are tough to quantify [reduced congestion, better air quality]

B. Financing Issues

- Large Capital Needs
- May be Long Lead Times (permits)
- Revenue Source/Security for Debt
- Instability in Financial Markets

III. P3 As an Alternate Development Too

A. Public Private Partnership:

is a long term contractual arrangement between a governmental entity and a private party in which the private party designs, builds and operates a facility and finances all or part of the costs of doing so. In return, the government or the users of the facility pay fares, toll or similar payments to private entity. Often, the government receives an initial payment.

B. Benefits

- Transfer Risk of Construction and Operations to private sector
- Construction/Operations Efficiency
- Reduces government borrowings. Preserve government credit ratings.
- State budget deficits. PA: \$2 billion; NJ: \$1.2 billion; CAL: \$15 billion
- Pennsylvania 2006 Blue Ribbon Commission. Pennsylvania's annual transportation needs: \$1.7 billion
- Federal budget deficits
- Another source of capital. May end up with multiple sources of capital

C. Drawbacks

- Complicated
- Perceived loss of public control over facility
- Limits on government policy flexibility. e.g., “No Compete Covenants”
- Foreign Ownership can be an issue
- Excess Profits can be a concern

IV. Financing Tools for Intermodal Facilities

A. Federal Financial Assistance Programs

- Projects of National/Regional Significance: \$1.8 billion transportation infrastructure
- Transit new starts
- High speed rail funding
- National Corridor Infrastructure: \$1.95 billion Highways
- Surface Transportation Projects (STP): Mainly highways and bridges \$6.4 billion
- ARRA – 30-35% bump up in funding (for highways and bridges) this Fiscal Year and next Fiscal Year. Shovel Ready.
- SAFETEA – LU Reauthorization. Who knows?

B. Tax-Exempt Bonds: Can be issued to finance transit and modal facilities

- Plain vanilla general obligation bonds or simple revenue bonds
- Public use/public ownership needed for plain vanilla bonds

C. Private Activity Tax-Exempt Bonds: For certain types of facilities, some of which may be privately owned

- Airports (public ownership needed)
- Docks & Wharves (public ownership needed)
- Transit & Mass Commuting Facilities (public ownership needed)
- High-speed intercity rail facilities [not rolling stock]
- Limits on dollar volume of issues per state per year for mass commuting and rail

D. Qualified Highway/Surface Freight Transfer Facilities. Also called “PABs.”

Eligible Facilities:

- Must receive federal assistance [Title 23]
or
- Project for international bridge/tunnel that receives federal aid [Title 23]
or
- Truck to Rail/Rail to Truck - that receives federal aid [Title 23 or 4a]
 - No requirement for Public Ownership
 - \$13 billion of capacity, allocated by USDOT. Capacity is available – only one closed

Spending: 95% of PABs must be spent within 5 years on highway/rail transfer facility costs.

E. TIFIA Loans/Loan Guaranties

- Subordinated loan/loan guarantee program available to public and private entities.
- Transit, highway, rail, some port and freight facilities
- Limit – TIFIA assistance may not exceed 33% of estimated costs
- Applicant's senior debt must be investment grade
- Currently, ARRA authorizes \$200 million
- May include design, etc. costs
- Maturity within 35 years of completion of construction. Interest rate tied to US Treasuries
- Lines of Credit. Supplement to Project Revenues during first 10 years of operations. Pays O&M, debt service on senior debt

F. Commercial Taxable Loans to Private Concessionaire

- Banks or Capital Market
- Security is assets/revenues of project
- Lenders – rightfully want seat at table if there is a default

G. Equity

- When contributed? Who guarantees?

H. Multiple Sources in the Same Project. Not uncommon

- Government Appropriations or Government-backed Debt
- Private Activity Bonds
- TIFIA
- Bank Loans
- Equity

V. P3 Contract Issues

- A. Structure – Complex project agreements between government and single purpose private entity, with parent guarantees
- Lenders will be heavily involved. Project could be 75-80% debt financed

B. Government Team – Public officials, financial advisors, lawyers, engineering advisors, others (traffic consultants).

- KEY: Need a public person as dedicated leader/key person on government team
- KEY: Need clear, fair procurement process
- Process may be lengthy

C. Some Key P3 Contract Considerations

- Length of Term – Tax issues, economics for private concessionaire.
- Government Oversight/Accountability. Technical requirements should be clear, detailed. CC must meet ongoing maintenance, must return project to government in specified good condition. Audit, inspection rights.
- Non-compete clauses. When are they really needed? Limits on government policy options.
- Construction. Importance of price certainty and setting a completion date. Issues: change orders, delays. Performance guarantees.
- Operations. Maintenance. Closure, monitoring, force majeure. New capital projects: proposed by CC; proposed by Government; required by change in law. Commercial development rights.
- Payment. Upfront v. over term of agreement v. hybrid. Use of payment. “Profit Sharing.”
- Revenues. If tolls or user fees, who controls increases. Is there profit sharing? Government makes availability payments. What about low revenues?
- Uncontrollable Circumstances: Use limited list. Force majeure, change in law, etc. Relief: delay, financial adjustments, terminations. Compare with: Discriminatory legislation.
- Defaults: Rights of lenders? Payments? Arbitration? Termination?
- Termination: By government for convenience. Termination payments.

VI. Legal Considerations

- A. State Constitution and Laws. Do existing laws provide authority to do a P3 transportation project?
- Governments do not have implicit powers.
 - Legislation enacted upfront or after selection.

B. State Law Considerations

- Procurement laws
- Enforcing a P3 agreement against the government. Appropriations risk.
- Sovereign Immunity
- State/local taxes. Real estate tax
- Policy Objectives. Prevailing wage. Consequences of failure.
- Labor Unions/Benefits/Retirement.
- Environmental issues.

VII. Example of P3 Projects

- Denver Regional Transportation District:
 - Ballard Spahr was involved in numerous financings for the Regional Transportation District in Denver
 - served as bond counsel, underwriter's counsel, and disclosure counsel
 - bond deals for the development of infrastructure and financing of buses, light rail, and other mass transit equipment

Example of P3 Projects

- Pennsylvania Turnpike:
 - Ballard Spahr was legal counsel to the Governor of the Commonwealth of Pennsylvania
 - privatize one of the nation's oldest toll roads, as a means to solve the Commonwealth's transportation crisis
 - array of legal issues related to project, including:
 - bankruptcy and creditors' rights, taxation, zoning and real estate
 - environmental, labor and employment
 - constitutional, alternative dispute resolution and sovereign immunity, and pension and benefits

Example of P3 Projects

- SEPTA:
 - Ballard Spahr served as special legal counsel for 16 years to the Southeastern Pennsylvania Transportation Authority (SEPA)
 - represent SEPTA in real estate matters, including:
 - tax immunity and exemption; condemnation; and redevelopment of SEPTA stations in Philadelphia
 - represented SEPTA in connection with several cross-border leasing financings of buses, rail cars, and other equipment
 - currently serving as underwriter's counsel in an upcoming bond issue for SEPTA and chief labor negotiations

Example of P3 Projects

- Utah Transit Authority:
 - Ballard Spahr as legal advisers to the Utah Transit Authority (UTA)
 - UTA transformed from a bus company to a multimodal business
 - both bus and rail operations covering 78 communities in a six-country area known as the Wasatch Front
 - provided business counseling and management oversight to the capital development program
 - Involving real estate acquisition, transit-oriented development, joint development, project proposals, stakeholder issues, contracting and procurement
 - public financing, and government relations at federal and state levels, as well as legal counsel on all related matters

Example of P3 Projects

- Utah Transit Authority (continued):
 - supervised all legal aspects of the startup of the UTA TRAX light rail system
 - Sandy/Salt Lake Line was completed in December 1999, followed by the University Extension in December 2001 and the Medical Center Extension in September 2003
 - UTA completed a one-mile extension to connect the TRAX passenger system to the new passenger transportation intermodal hub, which both opened in 2008
 - startup light rail system that is more than 20 miles long and has been constructed in both railroad corridors and streets
 - currently three additional extensions, totaling approximately 20 additional miles of track, for which planning, design and/or construction have commenced

Example of P3 Projects

- Southport (Philadelphia):
 - 150 acre site in South Philadelphia and land formerly owned by Navy (almost 1/2 mile of potential berthing facilities on Delaware River)
 - Adjacent to two separate rail yards (CSX and Norfolk Southern)
 - Easy access (2.5 miles to two interstate highways; close to big markets)
 - Delaware River to be dredged to 45 feet
 - Objective: Develop, build, operate container ship port facility to be in service as Delaware River channel deepening project finishes
 - Delaware River Ports. Currently, petroleum, bulk cargo, fruit
 - Estimate of direct jobs: 1,700 growing to 7,300 jobs. Estimated increase in state/local tax revenues: \$31 million growing to \$131 million

Example of P3 Projects

- Joliet, Illinois Intermodal Facility:
 - Developed by CenterPoint on 2,500 acres as an “inland port” with 1.5mm container lifts annually
 - Two big railroads, rural setting, easy access to the interstate highways.
 - Total public/private investment of \$1 billion and creation of 8,000 new jobs
 - Designated as foreign trade zone by US Government.