



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

[Docket No. FHWA-2014-0006]

Draft Toll Concessions Public-Private Partnership Model Contract Guide

Addendum

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice; Request for comments.

SUMMARY: The Moving Ahead for Progress in the 21st Century Act (MAP-21) requires DOT and FHWA to develop public-private partnership (P3) transaction model contracts for the most popular type of P3s for transportation projects. Based on public input favoring an educational, rather than prescriptive contract model, FHWA is publishing a series of guides describing terms and conditions typically adopted in P3 concession agreements. The publication and deployment of these model contracts is important to supporting the Administration's Build America Investment Initiative. As part of this Initiative, the U.S. Department of Transportation is committed to providing technical assistance to help project sponsors consider project financing options, including P3s.

To address the most popular types of P3s, FHWA is producing separate guides for the two most common agreements for concessionaire compensation: user tolls and availability payments. The Toll Concessions Guide (Guide) is being published in two parts. The first part, addressing the highest profile (core) provisions, comprises chapters 1 through 8 of the Guide. On September 10, 2014, at 79 FR 53825, FHWA published a

Final Core Toll Concessions Model Contract Guide (“Core Guide”) incorporating public comments received in response to the Draft Core Guide published February 6, 2014.

The second part, described herein as “the Draft Addendum,” addresses additional substantive provisions that are proposed to comprise chapters 9 through 28 of the Guide. It addresses a range of additional topics, such as construction performance security, insurance, lenders’ rights and direct agreements, performance standards and non-compliance points, consumer protections, government approvals and permits, and a number of other topics described further below. With this notice, FHWA publishes the Draft Addendum so that the general public and interested stakeholders may provide comments. The Draft Addendum can be found on the Docket (FHWA-2014-0006) and at the following link:

http://www.fhwa.gov/ipd/pdfs/p3/model_p3_toll_concessions_addendum.pdf. This model contract guide has been prepared solely for informational purposes and should not be construed as a statement of DOT or FHWA policy.

The FHWA values public input in the development of the model contract guides, and seeks continuing input. All documents in this series are available at the same docket (FHWA-2014-0006).

DATES: Comments must be received on or before February 6, 2015. Late comments will be considered to the extent practicable.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.

- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, W12–140, Washington, DC 20590–0001.
- Hand Delivery: West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329.
- Instructions: You must include the agency name and docket number at the beginning of your comments. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Mark Sullivan, Office of Innovative Program Delivery, (202) 366-5785, mark.sullivan@dot.gov, Federal Highway Administration, 1200 New Jersey Avenue SE, Washington DC 20590; Alla Shaw, Office of the Chief Counsel, (202) 366-1042, alla.shaw@dot.gov, Federal Highway Administration, 1200 New Jersey Avenue SE, Washington DC 20590, or Prabhat Diksit, (720) 963-3202, prabhat.diksit@dot.gov, 12300 W. Dakota Avenue, Suite 370, Lakewood, CO 80228.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

You may submit or retrieve comments online through the Federal eRulemaking portal at: <http://www.regulations.gov>. The Web site is available 24 hours every day of the year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at: http://www.archives.gov/federal_register and the Government Printing Office's Web page at: <http://www.gpoaccess.gov>.

Background

The P3s are contractual arrangements between public and private sector entities that allow for greater participation by the private sector in the delivery of surface transportation projects and associated services. Generally, in addition to designing or building a project, a private partner in a P3 may be involved in financing, operating, and maintaining the project. By transferring certain risks and responsibilities to the private partner, P3s can result in more efficient and effective project delivery. However, P3 contracts are more complex and of a much longer duration than traditional construction contracts. Their terms and conditions address many non-traditional requirements, such as financing arrangements and performance during the lengthy concession period. Public agencies need expertise to negotiate P3 concession agreements successfully. Section 1534(d) of MAP-21 (Pub. L. 112-41; 126 Stat. 405) requires the DOT to develop P3 contracts that could serve as a model to States and other public transportation providers in developing their own P3 contracts.

After considering written comments responding to a notice published at 78 FR 1918 on January 9, 2013, as well as those received during a Listening Session on January 16, 2013, FHWA chose to develop the model contracts as informational guides, rather than prescriptive templates, for State and local governments entering into P3 transactions.

About the Toll Concessions Model P3 Contract Guide

The Toll Concessions Model P3 Contract Guide focuses on issues critical to achieving public sector objectives and protecting the interest of the taxpaying and traveling public. The Core Guide discusses seven specific issues, per the following Table of Contents:

1. Introduction
2. Tolling Regulation
3. Benefit-Sharing
4. Supervening Events
5. Changes in Equity Interests
6. Change in Law
7. Defaults, Early Termination, and Compensation
8. Handback

The FHWA is not accepting any further comments on the Core Guide, which was published on September 10, 2014, and can be found on the Docket (FHWA-2014-0006) and at http://www.fhwa.dot.gov/ipd/pdfs/p3/model_p3_core_toll_concessions.pdf.

There are, of course, many substantive P3 contract provisions in addition to the seven discussed in the Core Guide. With today's publication of the draft Addendum, FHWA proposes to complete the Toll Concessions Guide with the following chapter topics:

9. Construction Performance Security
10. Insurance
11. Lenders Rights and Direct Agreement
12. Department step-in

13. Performance Standards and Non-Compliance Points
14. Consumer Protections
15. Federal Requirements
16. Governmental Approvals and Permits
17. Utilities and Third Party Rights
18. Financial Model Adjustments
19. Department and Developer Changes
20. Additional Capacity Construction Requirements
21. Nature of Proprietary Interest
22. Contract Term
23. Developer Indemnities
24. Dispute Resolution
25. Intellectual Property
26. Amendments to Key Developer Documents
27. Assignment
28. General Provisions

The Draft Addendum also includes the Glossary of Terms developed for the Core Guide. Comments suggesting changes to glossary terms will be evaluated in light of their impact on the entire Toll Concessions Guide.

The Draft Addendum can be found on the Docket (FHWA-2014-0006) and at the following link:

http://www.fhwa.gov/ipd/pdfs/p3/model_p3_toll_concessions_addendum.pdf.

In coming months, FHWA will publish a draft guide to availability payment concessions, in which government appropriations are the source of compensation to the private sector partner. The use of availability payments in P3 transactions is increasing, and many provisions in the Toll Concessions Model P3 Contract Guide will be germane to the Availability Payment Concessions Model P3 Contract Guide, which will be published from the start as a single, complete draft. Similar to the toll guides, FHWA will invite public comments on the Availability Payment Concessions Model P3 Contract Guide.

Authority: Section 1534 (d) of Moving Ahead for Progress in the 21st Century, MAP-21, enacted October 1, 2012.

Issued on: December 1, 2014.

Gregory G. Nadeau,
Acting Administrator,
Federal Highway Administration.

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