

United States Department of Transportation Transportation Infrastructure Finance Workshop

THE LEGAL FRAMEWORK FOR PROJECT FINANCE: GREENFIELD PROJECTS

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Overview

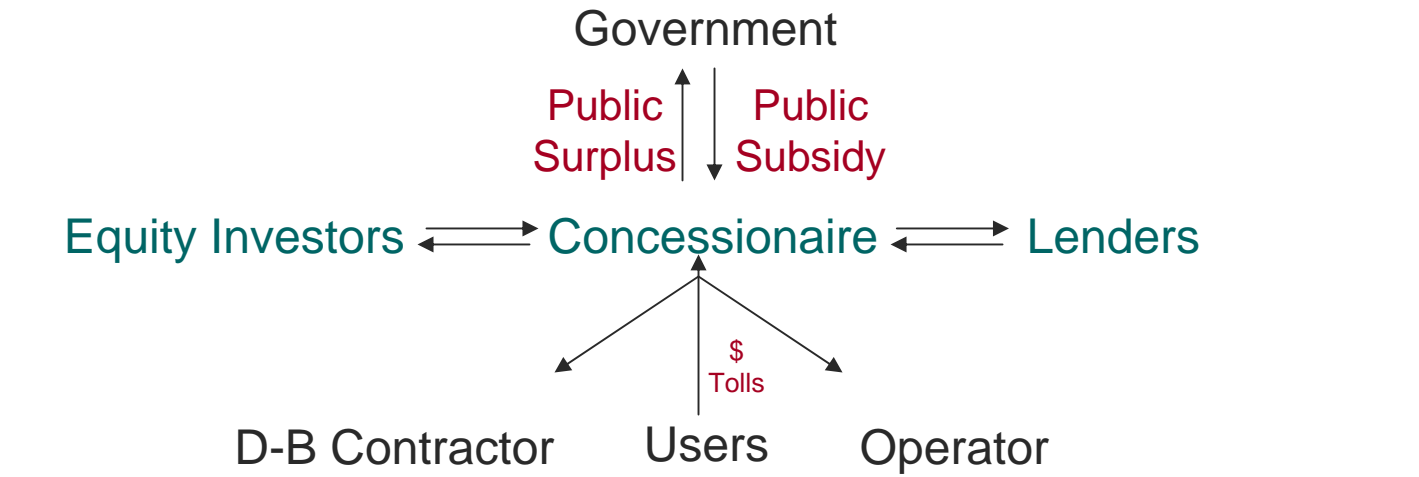
- What is a Concession
- Concession Structures
- Attributes of a Greenfield Concession
- Path from Policy to Procurement

What Is A Concession?

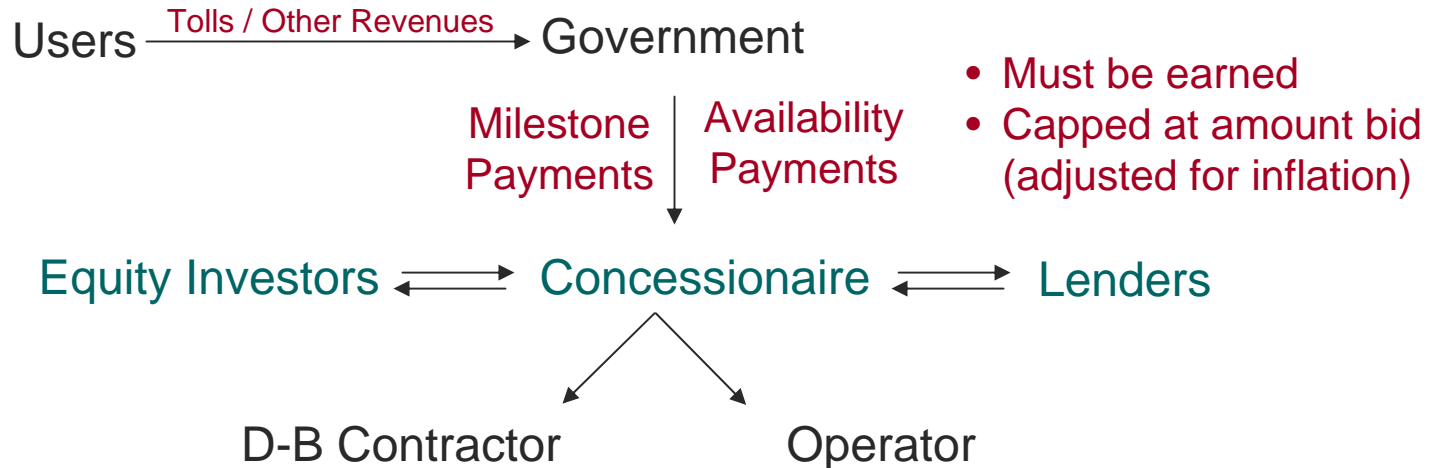
- From public agency perspective
 - Contracting mechanism to leverage scarce public resources with private capital to deliver, operate and maintain public transportation infrastructure
 - Objectives include increasing capital formation, generating revenue; speeding project delivery, improving quality, life cycle cost efficiency, reducing risk
- From private perspective
 - Investment opportunity in a limited life business in order to earn a profit
 - Subject to regulatory and contractual standards, terms and conditions
 - Reasonable ability to manage and control project and related risks
- Private partner obligations to design, build, finance, operate, maintain
- Far more than a mere construction contract
- Establishes risk allocation

Concession Structures

Toll Concession



Availability Concession



Attributes of a Greenfield Concession

○ Nature of Competition

- ✓ Qualifications submittal and short listing
- ✓ Industry workshops
- ✓ One-on-one proposal meetings
- ✓ Competing hard money bids
- ✓ Proposer assembles design, construction, O&M pricing and forces
- ✓ Proposer delivers firm equity/debt commitments
- ✓ Selection primarily a price competition

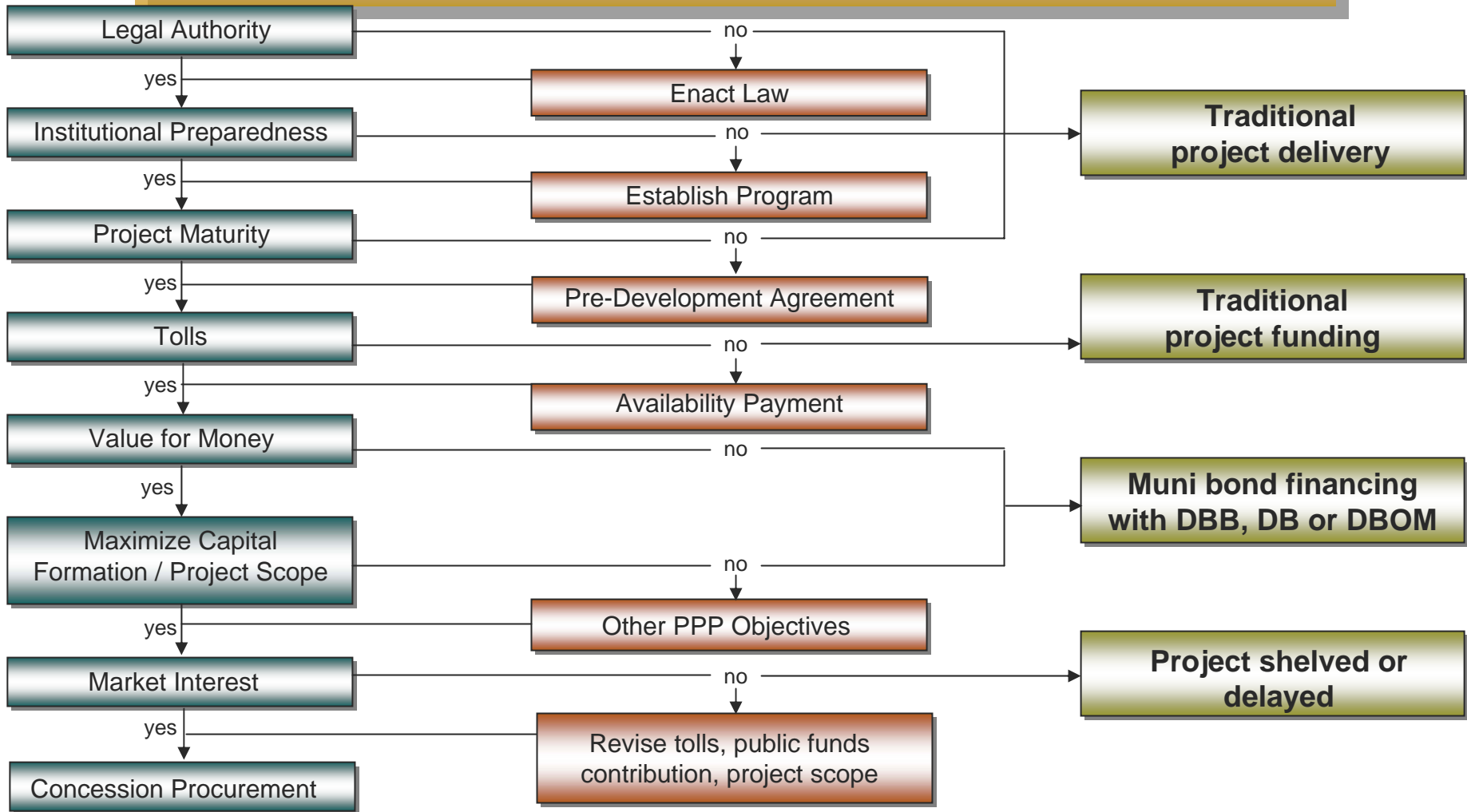


○ Examples: SH 130, 5& 6; Port of Miami Tunnel; Knik Arm Crossing

Path from Policy to Procurement (PPP for PPPs)

- How to institutionalize PPP Program
- How to select projects

Path from Policy to Procurement (PPP for PPPs)



Path from Policy to Procurement (PPP for PPPs)

- Legal Authority
 - Several sources of model legislation
 - http://www.fhwa.dot.gov/ppp/legis_model.pdf
 - ABA Comments on FHWA Model Legislation
 - ABA Model Code for Public Infrastructure Improvement
 - Nossaman's Public-Private Partnerships in Transportation Act
 - Comparison of FHWA, ABA and Nossaman model legislation

Path from Policy to Procurement (PPP for PPPs)

- Essential Elements of PPP Authorizing Legislation
 - PPP contracting authority
 - Tolling Authority
 - Electronic
 - Post-concession
 - Delegable
 - Strong toll enforcement mechanisms
 - Video tolling
 - DMV data access
 - Administrative fees and penalties
 - License/registration denial
 - Civil infraction
 - Efficient court processes
 - User privacy

Path from Policy to Procurement (PPP for PPPs)

- Financing Authority
 - To issue toll revenue bonds
 - To mix public and private capital funding
- Sovereign immunity/immunity from suit
 - Private party ability to sue and obtain enforceable judgments
- Condemnation Power
 - Right to condemn property for projects that private sector will lease and operate as a business
- Procurement Authority
 - Solicited proposals
 - Unsolicited proposals
 - Best price / best value (price and other factors) / quals-based selection
 - Negotiating authority
 - Disclosure of evaluation factors

Path from Policy to Procurement (PPP for PPPs)

- Stipends
- Alternative technical and financial concepts
- Payment and performance security
 - Other than P&P bonds
 - Less than 100%
 - Bonding at contractor (vs. concessionaire) level
- Performance-based specifications
 - Authority to vary from standard specifications and manuals

Path from Policy to Procurement (PPP for PPPs)

- Transparency Issues
 - Protect confidentiality of procurement data, documents, information before award
 - Protect confidentiality of private sector trade secrets and proprietary information
- Conflicting Procurement Laws
- Concession Duration
- Competing Facilities Protection

Path from Policy to Procurement (PPP for PPPs)

○ Fatal Flaws

- Legislative approval of contract (CA)
- No public risk allowed
- Removal of tolls upon termination (Miss.)
- 100% payment and performance bonds (various)
- No private debt issuance (WA)
- No ad valorem property tax exemption (AK)
- Short, inflexible maximum term
- Regulated utility model for setting future tolls

Path from Policy to Procurement (PPP for PPPs)

- Institutional Preparedness
 - Political support
 - Adopted rules and regulations
 - Clear decision making structure
 - Procurement plan, work allocation and schedule
 - Dedicated, capable PPP staff and consultant team
 - Evaluation criteria and process
 - Conflicts of interest policy
 - Performance specifications
 - Modified FHWA stewardship agreements
 - PPP procurement and contract documents

Path from Policy to Procurement (PPP for PPPs)

- Project Maturity and Feasibility
 - Public/political consensus on project and tolling
 - Environmental process has produced sufficiently clear project definition and alignment
 - Reasonably predictable environmental approvals
 - Project phasing / segments identified
 - Public funding sources and amounts identified
 - Project included in STIP
 - Financial feasibility validated by preliminary cost estimates and T&R studies
 - Sufficient design to permit price and completion guarantees, but not complete design
 - Engineering and technical investigations sufficient to assess project risks

Path from Policy to Procurement (PPP for PPPs)

- Tolls
 - Decision to toll
 - Toll rate structure
 - Maximum toll rates
 - Escalation
 - Managed lanes
 - Availability payments as alternative
- Value for Money
 - Comparator of costs and benefits of:
 - Traditional public sector delivery vs. PPP
 - Quantative evaluation of:
 - Capital formation
 - Value of risk transfer
 - Life cycle costs

Path from Policy to Procurement (PPP for PPPs)

- Test assumptions with sensitivity analyses of:
 - Toll rates and increases
 - Rates of traffic growth
 - Cost inflation
 - Project scope and risks
 - Length of concession
 - Schedule to construct and complete
- Qualitative evaluation
 - What are public objectives/outcomes?
 - Does PPP have advantage or disadvantage in achieving objectives?

Path from Policy to Procurement (PPP for PPPs)

- Maximizing Capital Formation or Project Size
 - Is this a necessity? A key objective?
 - Proposition: Given the same toll rate structure, private sector will form more capital for project construction than public sector
 - Examples: SH 130, 5 & 6; SH 121; SH 161; Pocahontas Parkway
 - Reasons:

Path from Policy to Procurement (PPP for PPPs)

Factor	Concession Financing	Tax Exempt Revenue Financing
Traffic and revenue projections	More aggressive	Conservative
Senior debt coverage ratios	Moderate to Conservative	Conservative
Subordinate debt coverage ratios	Moderate to liberal	Moderate to liberal
Equity	Yes	No
Federal tax subsidies		
Tax exempt interest	Yes, if use PABs	Yes
Depreciation / amortization	Yes	No
Subordinate TIFIA debt	Yes	Possible, but not likely
Blended rate of interest on debt	Comparable (with PABs + TIFIA)	Comparable
Maximum toll rates	Locked in by contract	Subject to political risk
Market appetite	Strong market demand for debt and equity	Deep, liquid bond market, but debt capacity and statutory debt limits
Life cycle cost efficiency	More efficient	Less efficient

Path from Policy to Procurement (PPP for PPPs)

- Market Interest
 - Is there a favorable investment environment?
 - Is there competitive interest?
 - Should PABs and TIFIA be arranged?
 - Does further T&R analysis support business case?

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