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U.S. Department of Transporta
Office of Innovative Program D
1200 New Jersey Ave., S.E.
Washington, D.C. 20590

RE: FHWA-2014-0006; Draft Av ilability Paym t Concess ons Public Priva e Partnership Model Contr act Guide

The Associated General Contra tors of Americ (AGC) is p eased to have a opportunity to comment the Federal Highway Administra tion's (FHWA' Draft Ava lability Payment Concessions Public Private Partnership Model Contract Gu de and on the abor Best Practices recom endations that are proposon for inclusion in this document a d in the previ us model guide for toll cor ession P3s. With the limited amount of tim provided to r view the Draft document i s difficult to make a complete side by side analysis c the differenc s between the original toll oncession guide and the n availability payment guide. It se ems that mucl of the language in both do uments is the same except the payment sections and item . Given these that are inclu ed in the AP guide that we later added to the toll concession guide as an appendi AGC provides minimal changes AGC wishe to reemphasize the issues for raised in our original comments rt of both gui eparate comments on the abor Best Practices sectio which is proposed to become p s. ng a real oppo tunity to discuss a significa t cost factor in P3 projects

AGC believes that FHWA is miss and risk alloca on between the developer nd the design builder. The not addressing the relationship g these guide as well as the wealth of in ormation on FHWA's by purported purpose for develop ite, is to pron te a broader understandir of P3 transactions. Risk Innovative Project Delivery web ne P3 market r transportation projects b cause unbalanced risk will allocation significantly impacts tors from part ipating on these projects t ereby limiting competitior discourage construction contra esign-builders r P3s vary significantly fro one concessionaire to the Developer arrangements with c siness model r these arrangements imp cts cost is important. next. Understanding how the b concessionair need to understand that t ere are contingency costs can be reduc d if the risk is better mana ed. Also there is the belief

Public agencies and developers, re are many c nsistent risk factors associa ed with each project that associated with project risks tha ed approach. enegotiating all of these is ues on each P3 creates that while each P3 is unique, th g, costly and nnecessary. Owners need understand this. can be addressed in a more uni uncertainty and is time consum omments, the uide does a good job of id ntifying typical constructio gesting proper llocation of those risks bet veen the

As pointed out in our previous c e public agen . Where the guide is lackir , however, is that it only n risks and financing risks and sug veloper/conc sionaire's point of view. Ir most P3s, the developer/concessionaire and t in the shoes the owner (typically the s te DOT or local transit addresses these issues from a d at there are c tain risks that are beyond ne ability of the developer developer/concessionaire stand erefore should e retained by the public b dy and the agency). The Guide recognizes t concessionaire to control and th

de veloper/co sionaire should l e provided compensati on shou ld they occu . To o o th ise would m ke these p ts too costly to ove forward.

H wever, the le fails to sugg s how this compensatio for ur anticipated ircumst anc uring co nstruction d flow down t he design-builder. Man of the "Compens ion E ents" d "Delay Ev nts" direc pact the desig builder's costs. By not fa irly all cating thes risks th e de veloper/co sionaire is likel be increasing overall project costs. AGC l elieve s t hat Guide w uld enhan value by discus g appropriate risk allo cation etween the develop er/ essionaire an the desig lder much in the same way it discusses t hese ri ks betwee the de veloper/co sionaire and the wner and suggesting a propri ate risk allo ation in his ationship as well. The G includes a disc s ion of unanticipated ci cumst nces durin cons ructio hese are m ny of the r ve are concerne with. FHWA should exp and o this sectio of th e g uid discuss ris allocatio veen develope s and design-builders.

O e risk factc t is not addres se in the Guide is the sig ificant costs to the desig n-b uil n putting to ether a pr al. Proposal co t are a factor on all desig n-build projects bu are r uc h r e sig ificant on rojects becaus the many different pa ties th at are involv ed on the c ssion te ms. In add the history of P3 projects is that they go throug h various st os and s art they m ke their wa rough the polit c l and public review pro ess. O ten various procure en tions are at empted be the P3 arrange m ent is agreed on. This ca n be ve ry time con umin g a nd ly for de ign builde they put toget he r proposals at each stag e of the process. A C sugge ts the Guide di uss the iss f the develope / oncessionaire receiving a stipe nd to cover roject d esig osts and th t the Guid uss the flow d wn of the stipend to the design- build firm.

Th experienc the industry is th at the various legal and transa tion docum nts that are fted for po ential P3s nique for each p oject. This can be very costly f r the devel per/don ces aire and th design-bu who must each have a team of legal, fina ncial a nd insuranc experts rev , co ment on, and negotiate ea ch of these documents. These osts will be eflec ec in overall co of the pr While it is un der stood that each projec is uni ue and the fore will re e many dif erent cont erms, it is also r asonable to expect that many contract ter s and c ond ns need no change fr e project to a nother. The value the Guide brin s to the tab e is th at it n lead to a m e consiste d unified appr a ch to P3s. To make the Guide f real value t mu st be u . Th refore, AG gests that whe TIFIA assistance is being used as a part of he fin an cing a P3 pr ject that us this Guide (and the future guides being drafted should be ncour ag ed b he Office of nnovative ct Delivery.

La or Best Pra es

Th US DOT ha luded in this N ice for Comment, a list of "Lab r Best Prac ces" with th gated intent of inc uding thes part of the P3 M del Contract Guides for both a vailability pa yment c onc ons and toll co cessions. A elieves that it s mportant to make concessiona ires and sta e DO s awa hat in any P3 pr ject deliver angement that r eceives any Federal assi tance ursuant to itle 2 3 U S C developer[s], co tractors, su ntractors, and c ncessionaires – are required to comply wit all ap plicab ederal labor an employme ws. However, A C believes it is inappro riate t include in hese P3 gui "best pra tices" that not federally re ired, are burdensome o impl ement, have been co ntro sial and in

fact have not been tested or approved. It is confusing to states and concessionaires and implies that they are expected to take steps that go far beyond Title 23 requirements. The P3 model is still in its infancy in the United States but there is a great deal of hope that these arrangements will play an important part in meeting some of the Nation's overwhelming infrastructure needs now and in the future. There are many impediments that can keep P3 arrangements from moving forward and being successful. AGC believes that encouraging the use of the "labor best practices" as presented in this document only adds new impediments to the success of P3s and therefore AGC strongly recommends that labor practices highlighted in these Guides be limited to those that are actually required. The onslaught of new regulations over the past few years has contractors overwhelmed financially and with regard to staff time. Therefore, the inclusion of additional regulatory-like contractual requirements will only act to decrease contractor interest in performing work on P3 projects. This will cause contractors with a history of quality performance to exit the competition and focus exclusively on private work, leaving a smaller pool of contractors competing for the work – ultimately increasing cost and potentially decreasing quality.

AGC believes it is a misnomer to categorize the practices listed in this notice as "best practices." There is no evidence to support that these suggested labor practices are indeed "best practices." Since many of the "best practices" cited have not been implemented on federally assisted construction contracts, using them in the P3 arena will require the development of a whole new body of regulatory-type requirements. If the concessionaire requires by contract that the design-build contractor implement these requirements, it will be the responsibility of the concessionaire to determine whether or not the design-build contractor – and the likely many tiers of subcontractors –is in compliance with the contractual requirements. Concessionaires typically do not have experience with the labor requirements listed. Neither concessionaires nor developers have experience with regard to issuing regulatory guidance, conducting investigations or enforcing any of the labor requirements listed. Many of the purported "best practices" have been controversial and not generally accepted by the contracting community and that is why they have not been adopted. For example, the recommended Injury and Illness Prevention Program (I2P2) is an incomplete regulatory concept. The Occupational Safety and Health Administration (OSHA) has been engaged in an effort to promulgate an I2P2 standard since the summer of 2010. At that time stakeholder meetings were held and eventually OSHA announced plans to initiate the Small Business Regulatory Enforcement Fairness Act (SBREFA) process to better understand the economic impact of such a rule on small employers as well as solicit recommendations from employers on its proposal. However, the process has since stalled with the current rule placed in a long-term actions category of the rulemaking process. In the absence of a Federal rule it is astonishing that DOT is recommending the Injury and Illness Prevention Program as a "best practice." In addition this concept is not necessary because current OSHA standards under Subpart C already require construction employers to initiate and maintain worker safety programs and to provide for frequent and regular inspections of job sites, materials, and equipment by a competent person.

Another questionable best practice is the requirement for a Project Labor Agreement (PLA). PLAs are areas where the contractor is in a much better position to evaluate their appropriate use than the federal government, a state government, or a concessionaire. AGC neither supports nor opposes contractors' voluntary use of PLAs on P3 projects or elsewhere, but strongly opposes any government mandate (at any level) for contractors' use of PLAs. AGC is committed to free and open competition for publicly funded work, and believes that the lawful labor relations policies and practices of private construction

contractors should not be a factor in a governmental agency's selection process. AGC believes that neither a public project owner nor its representative should compel any firm to change its lawful labor policies or practices to compete for or perform public work, as PLAs effectively do. Government mandates for PLAs can restrain competition, drive up costs, cause delays, lead to jobsite disputes, and disrupt local collective bargaining. There are no widely published studies establishing that the use of PLAs has consistently lowered the cost, shortened the completion time, or improved the quality of construction of public projects. If a PLA would benefit the construction of a particular project, the contractors otherwise qualified to perform the work would be the first to recognize that fact, and they would be the most qualified to negotiate such an agreement. We firmly believe that a government entity, including a concessionaire acting in a similar capacity, mandating or incentivizing the use of a Project Labor Agreements is not a "best practice."

Other examples of inappropriate "best practices" in this guide are policies on paid sick and family leave, wage and classification transparency. These topics are the subject of ongoing regulatory consideration. It is very difficult to describe concepts that are the subject of active or inactive rulemaking activities as "best practices." Other areas covered here are complex and will likely increase confusion and limit competition. They will likely increase costs for concessionaires, contractors, subcontractors and the traveling public. There are numerous protections in law and regulation that require compliance and vigilance. AGC believes a "best practice" should be adopted to ensure full compliance with federal, state and local laws. AGC believes state and local governments that are working on P3s should look for consistency in contracts from jurisdiction to jurisdiction. That consistency will encourage competition from contractors and build a reliability of outcome that will help promote the use of P3s nationwide.

FHWA would provide more assistance to concessionaires by instead focusing on guidance for implementation of labor law requirements such as the Davis Bacon Act. Before FHWA moves forward with implementation guidance, it is necessary for the agency to work with the U.S. Department of Labor in order to provide clarification as to where and when the Davis-Bacon Act will or will not apply and to which activities it applies. Furthermore, the Davis-Bacon Act is one of the most complex labor laws in existence today. Applying this law by concessionaires who have no basic understanding of its complexities can leave developers with tough questions about site of work, fringe benefit credits, overtime calculations and so forth. For classifications that are not listed on prevailing wage determinations, who will be tasked with determining the prevailing wage rate? Clarify how these issues apply in the P3 context would be of more use to the P3 community than the expansion of labor requirements by calling them "best practices."

Sincerely,

Brian Deery

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