

LAW AND POLITICS IN PUBLIC PRIVATE PARTNERSHIPS:
TRANSPARENCY, CONFLICT OF INTEREST,
AND RENEGOTIATION IN CONCESSION
ARRANGEMENTS

by

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ABSTRACT

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Many states and local governments have begun to use the Public-Private Partnership (PPP) vehicle as a policy tool in the area of highway transportation infrastructure development. A particular type of PPP, sometimes referred to as a “concession,” can involve a state or local government’s grant of concession rights, which typically includes the right to collect toll revenues on a roadway, to a private entity in exchange for the private entity’s development and management of the roadway.

As highway concession practice in the U.S. is a recent phenomenon, policymakers and other interested observers can benefit from a greater understanding of these arrangements. One important area of concession arrangements involves the legal framework of the state in which the concession project occurs. Indeed, state laws can exert tremendous influence upon transportation infrastructure concession arrangements and may serve as one of the most important factors concerning whether a concession deal comes to fruition. Many private entities may not

consider a particular state as a potential locale for their projects because of what they perceive as unfavorable state laws, while a state which does serve as the locus of a PPP might lack a sufficient legislative scheme in order to adequately account for public interest concerns. The dissertation includes six case studies of PPP projects in the U.S. in order to provide further insight into these arrangements and examines three important areas - confidentiality and transparency, conflict of interest, and contract renegotiation - where the legal framework of a state can significantly impact a transportation infrastructure concession arrangement. The paper compares and contrasts the legal framework of Texas with another state and model legislation and then offers suggested revisions to Texas law in order to improve its PPP concession policy.

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CHAPTER 1

INTRODUCTION

The primary purpose of this dissertation is to provide an exploratory study of U.S. highway transportation Public-Private Partnerships (PPPs) that include long-term concession arrangements to extract lessons learnt and policy implications for future PPPs. A secondary purpose of the dissertation is to offer a discussion and analysis of Texas state law with other state laws and model legislation. There are two main forms of PPPs that this paper will address. First, the dissertation will examine the situation where the public sector leases an existing road to a private company for a concession fee. Second, the paper will analyze the event where a private company finances new road construction in exchange for the right to control the operation of that roadway for a period of time and to receive certain monetary benefits that accrue to its operation. Additionally, the paper will discuss and analyze how Texas state law addresses the matters of confidentiality, conflict of interest, and concession renegotiation issues involved in transportation Public-Private Partnerships. The paper will compare portions of the Texas legislation for transportation Public-Private Partnerships with relevant portions of the FHWA model legislation and other proposed or existing Public-Private Partnership laws and assess the relative merits of the Texas law concerning the specific issue (e.g., confidentiality) compared with other state legislation or model legislation. Moreover, the paper will provide suggestions on how transportation Public-Private Partnership law in Texas may be improved with regard to the matters of confidentiality, conflict of interest, and concession renegotiation.

The issues of confidentiality, conflict of interest, and renegotiation of agreements, arguably, provide three of the most important aspects of PPP concessions that require further study. First, balancing the interests of a private entity's concern for protection of its intellectual property rights with the public's right to public participation through a transparent process has been noted as a complex and important matter involved in PPP arrangements (Siemiatycki 2007; Sagalyn 2007). Private entities spend multiple billions of dollars each year on research and development of various technologies that they hope will provide them with a competitive market position. Private entities involved in PPP arrangements are often comprised of companies which have developed market-leading technology in the area of transportation. For instance, state of the art technology that deals with tolling may provide a competitive advantage to a private entity which seeks to obtain selection by a state department of transportation on a PPP project worth hundreds of millions of dollars. Should proprietary intellectual property lose its protected status at some point in the proposal or other stage of a PPP arrangement, the private entity could suffer a tremendous loss. Thus, several states, including Texas, have enacted specific legislation that addresses how a private entity's intellectual property will be treated and what steps a private entity must take in order to maintain protection of its property during the PPP process (Texas 2007, sec. 223.204)).

Second, many PPP arrangements are "megaprojects" due to the scale of the construction, the huge sums of money, and the amount of publicity involved (Flyvbjerg 2003). Indeed, as many of the PPP arrangements involve large up-front, lump sum, cash payments, sometimes in the hundreds of millions of dollars – and even multiple billions of dollars – arguably, the risk of conflict of interest matters adversely affecting PPP practice should not be overlooked. Several

states have enacted specific statutes that address conflict of interest matters in Public-Private Partnership arrangements in their state. However, some states have not enacted laws that directly pertain to PPP processes, yet have, by virtue of their department of transportation or some other state agency, promulgated administrative policies that target conflict of interest matters in PPP situations. The question of whether legal protections can ever be sufficiently comprehensive or detailed to alleviate unethical practices in the area of PPP conflict of interest matters will be discussed.

Third, one could argue that there are legitimate reasons why PPP agreements may need to be renegotiated. However, arguably, contract renegotiation in PPP arrangements may serve to disadvantage the public sector to a greater degree, and more oftentimes, than the private sector party. Some states have, if only indirectly, enacted legislation that may reduce the occurrence of renegotiation of PPP arrangements. The dissertation will discuss the risks involved in the renegotiation of PPPs and how legislative policy can reduce those risks.

1.1 Background

The state of U.S. highway, road, and bridge infrastructure requires significant investment and repair (Pew 2009; Buxbaum and Ortiz 2009; USDOT 2007). With an estimated \$1.6 trillion required on infrastructure projects in the U.S. for the years 2008-2013 U.S., Federal and state and local governments have transportation infrastructure needs that surpass available financial resources (USDOT 2007). According to one estimate, the U.S. currently faces an annual \$47 billion gap between the needed investment for new transportation networks and available funding (Pew 2009, i). In recent years state and local public sector agencies, as well as the Federal government, have sought new types of solutions to close the funding gap. Some scholars

and policymakers contend that Public-Private Partnerships (PPPs) offer the potential to meet at least part of the required investment need (Buxbaum and Ortiz 2009). Furthermore, some proponents of PPPs assert that PPPs can deliver “cost savings and efficiencies on project delivery and operations” (Buxbaum and Ortiz 2009, 1). Arguably, as private funds remain available, one can be confident that the U.S. will continue to witness additional PPP projects. Indeed, according to some observers, a combination of factors will continue to exert upward pressure on the use of PPPs in the U.S. (Brown 2007; Zhang 2008).

Some recent U.S. transportation PPPs include the Indiana Toll Road (75 year lease/\$3.85 billion contract amount); the Chicago Skyway (99 year lease/\$1.83 billion contract amount), and the North Tarrant Express Managed Lanes (52 year concession/\$2.00 billion contract amount). Perhaps the main argument in favor of PPPs as a policy option of preference concerns the perceived superiority of increased private sector involvement in transportation infrastructure policy implementation within the U.S. One scholar noted that, “[S]avings in capital cost [and] . . . access to private sector expertise . . . [are] the top two reasons cited by local government officials in the U.S.” for utilizing PPPs for infrastructure development (Smith 2003, 285). Additionally, others have argued that, “[F]lexibility with use of proceeds . . . greater upfront proceeds . . . [and] strict operating and maintenance standards” make PPPs a favored policy tool for infrastructure finance (Brown 2007, 322).

An often cited study published in 2007 and commissioned by Infrastructure Partnership Australia (IPA) “evaluated the efficiency of PPPs relative to traditional procurement” (Buxbaum and Ortiz 2009, 1). In the IPA study, the researchers concluded that “such partnerships were more cost-efficient and more often completed within schedule” (Buxbaum and Ortiz 2009, 1).

Even some scholars and other observers who tend to view PPPs favorably argue that one should not necessarily conclude that PPPs provide a universal solution to transportation policy needs. For example, Garvin (2008), writing on behalf of a team of scholars which conducted an international study of countries with a substantial history of PPP policy implementation, made the following contention:

At this stage, one cannot conclude whether a particular policy or practice is better than another. In fact, such conclusions may be impossible to reach given the complex socio-political environment in which highway infrastructure resides. Yet, differing approaches should give both policy and decision-makers the opportunity to appraise their advantages and disadvantages and determine if implementation resolves a need and is in the public's interest (Garvin 2008, 4).

While noting the importance of contextual and other issues regarding PPP implementation, Garvin concluded that, "PPPs are an effective strategy for delivering highway projects" (Garvin 2008, 4).

Arguably, legitimate concerns have been raised over the use of PPPs for transportation infrastructure development and operation on several grounds. First, questions exist regarding whether PPPs are in "the public interest and what type of information is available to decision makers as they decide whether to pursue a PPP" (Buxbaum and Ortiz 2009, 1). Second, some argue a need exists for a uniform approach to PPPs in transportation infrastructure policy in the U.S. Third, scholars and other observers have voiced concern over insufficient expertise by public officials and personnel with concession arrangements - arrangements that are complex with long lease terms and that often involve large sums ranging into the multiple billions of dollars. Fourth, some decry the loss of control of an important public infrastructure asset (Buxbaum and Ortiz 2009, 3).

Although some scholars have performed studies into the nature of PPPs in transportation infrastructure in the U.S., arguably, the complexity of the phenomenon and the significant risks to the public good necessitates additional research. For example, an author recently cited “the rate and magnitude of toll increases, safety and environmental concerns,” “the status of public employees in the new management structure,” and the “appropriate term of the concession agreement to maximize benefits to both parties” as several of the important questions that the public sector should address before proceeding with a PPP project (Brown 2007, 323). Thus, a strong need exists for research and analysis that addresses key areas of PPP projects and that proposes to answer some of the important questions raised over the appropriate use and form of PPP projects as a policy tool for transportation infrastructure development and operation in the U.S.

The use of Public-Private Partnerships (PPPs) as a policy tool of choice for highway and other transportation infrastructure projects has increased dramatically throughout the world in recent years. One author noted the following with respect to PPPs:

A 2005 study by AECOM consultants found that since 1985 over 1,100 projects worth \$450 billion worldwide have been delivered and financed through public/private partnerships. In the United States, a relative latecomer to this model of project delivery, 364 projects worth over \$100 billion have been delivered or are planned for development (Siemiatycki 2007, 388).

Buxbaum and Ortiz (2009) noted the following several important factors that have contributed to the significant emergence of PPPs in U.S. transportation development and operation:

1. Automobile travel demand is high and is expected to continue growing;
2. Inflation has outpaced the rate of motor fuel tax increases, thus decreasing available revenue for transportation investment, and significant existing state municipal debts have limited public agencies’ abilities to obtain more money from the tax-exempt bond market;

3. Transportation infrastructure costs are rising as a result of construction cost inflation and the aging of existing infrastructure; and
4. Pension funds and insurance companies, both domestic and international, have enormous amounts of cash to invest in steady, predictable, long-term cash flows (Buxbaum and Ortiz 2009, 5).

Buxbaum and Ortiz (2009) noted that a PPP “allows a much larger role for the private sector, from bundling design and construction in one contract (design-build)” to much greater involvement, such as “long-term operations and maintenance of existing or new facilities (concessions)” (Buxbaum and Ortiz 2009, 2). Furthermore, as the authors noted, some PPPs “include equity contributions from the private partner” and, moreover, “may also transfer toll collection and rate setting responsibilities to the private sector” (Buxbaum and Ortiz 2009, 2).

1.1.1 Privatization of Transportation Infrastructure in the U.S.

Bortolotii and Siniscalco (2004) define privatization as “the transfer of ownership rights from the public to the private sector (Bortolotii and Siniscalco 2004, 1). The present study uses the following definition for a Public-Private Partnership:

A Public-Private Partnership is defined as a contract between the public and private sectors for the delivery of a project or service in which the private partner has responsibility for acquiring the majority of the necessary financing (Brown, et al. 2009, 1).

Additionally, the dissertation uses the terms “concession arrangement,” “concession,” and “Public-Private Partnership” interchangeably. While some scholars contest the notion that concession arrangements are examples of privatization due to the public entity’s retention of ownership rights in the asset (Buxbaum and Ortiz 2009, 4), some observers argue that concession arrangements are tantamount to a transfer of ownership to a private entity (Baxandall 2009, 7).

The increased use of concession arrangements, arguably, has its roots in the overall shift toward privatization in the U.S. Arguably, the increased use of Public-Private Partnerships in U.S. transportation policy evidences a continued movement toward privatization. One writer asserted that, “The shift toward market forces began in the U.S. with rail, power and telecom deregulation during the 1970s (Altamirano 2010, 349). However, while privatization in the U.S. may have begun several decades ago in certain areas, some observers have asserted that private involvement in transportation has lagged behind other sectors of the U.S. economy. Consider the following assessment of private involvement in U.S. transportation infrastructure:

Private risk-taking in the development of new roads and rail projects has evolved slowly in the U.S. Design-build contracts without traffic, operating or maintenance risk transfer are the preferred means of alternative delivery by U.S. contractors and public agencies. There are only a handful of U.S. projects where private investors have taken equity risks on Greenfield projects – 13 since 1990 worth about \$7.2 billion. Four brownfield projects involving existing U.S. toll roads have been financially closed since 2005 for a total of \$7 billion in upfront fees (Reinhardt 2009, 3).

Although some scholars view an increased role for the private sector in U.S. policy favorably (Savas 2000; Grimsey and Lewis 2004), other observers are more skeptical of the phenomenon (Kettl 2002; Goodsell 2004). Haque (2001) notes some concerns over the expansive role of the private sector for policy implementation in the following manner:

In the United States . . . the increasing number of government contracts with the private sector has generated public concern regarding the problems inherent in government-contractor relations [notably, with the respect to the] frequent use of illegal tactics, and increased opportunities for kickbacks. Thus, although one may find it efficient to expand public-private alliance, the concern remains whether such extensive dealings with business firms would influence public service through vested business interests, and thus, jeopardize its public accountability (Haque 2001, 71).

Kettl (2002) argues that, while Americans may have never liked government very much, the history of relations reveals that the “reality has never matched the rhetoric” (Kettle 2002, 63).

Kettl disagrees with the notion that “government should steer rather than row,” where non-governmental entities, such as Public-Private Partnerships, for example, should implement policy (Kettle 2002, 96). Similarly, Martin (1993) cautions against a too hasty and comprehensive shift from public to private control of important infrastructure. Goodsell (2004) finds that the public sector in the U.S., in general, operates in a “competent and effective” manner (Goodsell 2004, 3).

However, Savas (2000) argues that the private sector often provides more efficient delivery of services than public provision of the same services. Similarly, Grimsey and Lewis (2004) assert that, at least in some instances, privatization may offer advantages over public sector service delivery. While they acknowledge some of the criticisms of PPPs, Grimsey and Lewis (2004) disagree with the assertion that PPPs are merely “privatization through the back door” (Grimsey and Lewis 2004, 248). Indeed, while they conclude that PPPs “are not, and probably never will be, the dominant method of infrastructure acquisition,” the authors maintain their position that PPPs serve as an important aspect of infrastructure policy (Grimsey and Lewis 2004, 248). Interestingly, some scholars contend that PPPs that involve concession contracts stand as the “one truly tried and tested” PPP model (Grimsey and Lewis 2004, 226).

1.1.2 Privatization of Transportation Infrastructure in Other Countries

While the U.S. has arguably only recently begun to use PPPs as a major policy tool in transportation infrastructure projects, some countries have used PPPs for considerably longer. Countries in both Europe and Asia have utilized PPPs to a large extent over the past three decades. The US Government Accountability Office states that, “[O]ver the period 1985 to 2004, the highest investment in PPP roads, bridges and tunnels was in Europe (US\$58.1bn), followed by Asia (US\$44.5bn)” (USGAO 2008A, 17-18). For example, in Europe, countries

such as Spain and France have used private concession companies for the development of toll roads. The United Kingdom, however, emerged as the leading advocate in Europe. As one writer observed, the UK set itself apart in “the use of transport partnerships, starting with a new Thames river crossing east of London to relieve the M25, a congested orbital highway” (Startin et. al. 2008, 331). The following summary reveals the UK’s commitment to private sector involvement in infrastructure projects:

The U.K. requires government agencies to consider using PPPs to procure infrastructure before using conventional methods. Under the U.K.’s Private Finance Initiative (PFI) model, private contractors are engaged to design, build, finance, and operate public projects based on output specifications developed by the project sponsors. According to data from the U.K. government, over 88 percent of PFI projects have been delivered on time, and none of the cost overruns in those projects have been borne by the public sector (Fishman 2009, 20).

One scholar who commented on the British use of PFIs asserted that, “[Governments should] make transparency of the process, competitiveness of the bids, appropriate allocation of risk, developer returns commensurate with risks, government guarantees and credit enhancements” focal issues of concern when engaged in PPP projects (Akintoye 2003, xix).

1.1.3 Suitability of International Experience as Model for U.S.

Certainly, European countries serve as important sources of data for U.S. transportation policy with respect to PPP vehicles (Garvin 2008). The UK’s extensive experience with Private Finance Initiatives (PFIs) provides an example of a policy that seeks to leverage private capital to address transportation and other infrastructure needs (Garvin 2008). However, while lessons may be learned from European and other international experience with PPPs, the comparisons of those contexts with U.S. situations does pose some challenges. For example, the different legal framework of the U.S. with that of the U.K. and other nations requires caution when making

comparisons. Additionally, lending standards and rates vary depending on the context in which the PPP occurs. According to one author, in France, the PPPs benefit from special lending rates and debt protections that are not available in the U.S. (Startin et. al. 2008).

1.2 Methodology

The dissertation provides an empirical analysis through use of existing related cases as well as the case study method. As noted above, the dissertation incorporates data from closed PPP projects in the U.S and includes additional data from existing case studies. Specifically, the dissertation includes analysis and discussion of multiple forms of documentation, including letters, written reports, proposals, leases and other agreements, and newspaper and other mass media articles.

The study will use a cross-case synthesis approach in order to address important issues associated with PPP projects in the U.S. The study examines the following six PPP projects: the North Tarrant Express Managed Lanes, located in Texas; the Northwest Parkway Lease, located in Colorado; the Pocahontas Parkway Lease, located in Virginia; the Port of Miami Tunnel, located in Florida; the Indiana Toll Road; and the Chicago Skyway.

1.2.1 Case Studies

The present study examines six different cases from six different states in the U.S. Data used in the study includes information obtained from concession contracts between the public and private sectors, inter-governmental agreements, newspaper articles, internet articles and other information from the internet, as well as other sources.

According to Robert Yin, the exploratory case study method “has been considered a prelude to much other social research not just other case studies” (Yin 2003, 6).

Arguably, the exploratory case study method is particularly well-suited for the present study due to the recent advent of long-term transportation concession PPPs in the U.S. As these types of PPPs in the U.S. are in the initial years of decades-long terms, researchers lack sufficient, meaningful data from PPPs. Arguably, as the use of PPPs in U.S. transportation policy matures, future researchers can benefit from exploratory and descriptive studies performed during the early stages of long-term concession projects.

Indeed, due to the current embryonic state of PPP practice in the U.S., arguably, one cannot engage in other types of analyses other than exploratory or descriptive due to the present lack of available data. For example, at the present time, one cannot deem a particular long-term concession arrangement, such as the Indiana Toll Road or the Chicago Skyway, “successful” due to the many years remaining in the concession term. Arguably, one cannot predict which project will be successful due to the unknown factors that could positively or negatively influence these projects many years in the future. Therefore, the present study uses the qualitative research method of case study analysis to provide an exploratory study of transportation PPPs in the U.S.

Additionally, the dissertation includes discussion and analysis of relevant statutes, cases, and other forms of law. The study will compare Texas law with other state laws and the Federal Highway Administration (FHWA) model legislation. Finally, the paper will propose revisions to Texas law that will strengthen the practice of PPP concession projects through an improved legal framework.

1.3 Organization of Study

This dissertation includes eight chapters. Chapter one provides an introduction to the topic and consists of background information to the topic and the methodology employed in the

study. Chapter two contains a literature review of the issues of confidentiality, conflict of interest, and renegotiation of contracts in Public-Private Partnerships. Chapter three includes six case studies of transportation Public-Private Partnerships each of which have been deemed “innovative” by the U.S. Federal Highway Administration (FHWA). Chapter four discusses and analyzes the observations obtained from the six different case studies. Chapter five evaluates how laws from the six states represented in the case studies, as well as the FHWA model legislation, address the areas of confidentiality, conflict of interest, and renegotiation of contracts in transportation Public-Private Partnerships. Chapter six discusses and analyzes the strengths and weaknesses of Texas law compared to another state’s law and the FHWA model legislation in these three areas. Chapter seven incorporates the analyses of the six case studies with the analyses of the PPP legal frameworks and, based on the findings, includes a PPP policy proposal for Texas. Chapter eight includes a summary of the findings and offers suggestions for further research.

CHAPTER 2

LITERATURE REVIEW

2.1 Confidentiality

Arguably, one of the most controversial aspects of PPP projects concerns the need to maintain an acceptable balance between the public's desire for participation in the PPP process and a private entity's interest in the protection of its intellectual property rights. Because PPP projects involve tremendous commitments on the side of the public, usually in terms of the value of public assets, arguably, the public has an extremely high interest in exercising its right to participate in the PPP project process. Therefore, when a private entity contends that certain information pertaining to a PPP project should not be disclosed to the public, arguably, public officials must not agree to withhold information from the public unless safeguards that promote fairness in the PPP process are in place.

According to some observers, important information, such as private sector proposals and terms of the contractual agreement between the public sector and the private entity, remain unavailable to the public and, in some cases, key decision-makers such as legislators (Buxbaum and Ortiz 2009). In their study of PPP projects that involve long-term concession arrangements in the U.S., Buxbaum and Ortiz (2009) noted the following concerning the type of information available to the public and the public's access to information concerning the project during the PPP process:

For the projects reviewed, most of the information available to the public about potential long-term concessions was very general, including ranges of expected value of the facility and the names of potential concessionaires. Proposals remain confidential throughout the

selection process. Some details (e.g., length of concession, toll policy) of the winning proposal are provided during the negotiation process, with full details provided after a contract is signed. In general, the public sector has three opportunities to make decisions:

1. When deciding to solicit proposals (or be open to unsolicited proposals);
2. When deciding that a particular proposal meets their needs and initiating negotiations;
- and
3. When fully executing the agreement (Buxbaum Ortiz 2009, 13).

In his study of confidentiality in PPP projects that included a case study of the \$2 billion project known as the Canada Line, Siemiatycki (2007) asserted that confidentiality concerns must be addressed when the public sector partners with the private sector. The author contended that officials who oversee public infrastructure projects should consider three main strategies to improve transparency and provide for confidentiality (Siemiatycki 2007).

First, Siemiatycki argued that an appointment of an “independent information commissioner” should be made. According to Siemiatycki, the private sector proposer, together with the project planners, must show why certain information requires non-disclosure (Siemiatycki 2007, 400). Second, when the commissioner deems specific information confidential and therefore not subject to public disclosure Siemiatycki claimed that all elected officials “directly responsible for deciding whether to approve or reject a project” must have full access to such information (Siemiatycki 2007, 400). Third, Siemiatycki asserted the need for increased oversight responsibilities for auditors general and comptrollers (Siemiatycki 2007, 400). Siemiatycki made the following argument concerning the need for an expanded role for a “state . . . or federal auditor general”:

[The auditor general] should certify that each summary report released throughout the project planning process clearly and accurately represents the full range of issues contained within the full length confidential document. The auditor general or comptroller should also be tasked with examining the contents of all confidential documents, with a mandate to report on whether any assumptions or parts of the proposals could incur harm to all or part of the community in which the project is being delivered. Categories to be

examined should be broadly defined to include financial harms, environmental harms, harmful impacts on private property, and harms related to system design and construction (Siemiatycki 2007, 400-401).

While Siemiatycki contended that the use of an auditor general could serve to impede a project that otherwise could go forward, he asserted that the auditor general should have oversight power throughout the entire planning process. Therefore, Siemiatycki, asserted, the auditor general's decisions concerning disclosure of information at an early stage in the process can allow a private entity and other parties to avoid incurring significant costs only to have the auditor general refuse to protect information from public disclosure at a post-approval review stage (Siemiatycki 2007, 401). Furthermore, by including the auditor general from the inception of the process, the public will have access to information at the early stages of the planning process and can decide whether to oppose or support the project (Siemiatycki 2007, 401).

In a subsequent study, Siemiatycki (2010) noted the importance of citizen involvement in the PPP process and its relationship to the private sector's efforts to restrict information from public access in the following way:

Research has identified meaningful community consultation and involvement in infrastructure investment decisions as critical to making public planning accountable, raising citizen support for a project, and improving the policy outcomes of specific initiatives. . . During project planning, confidentiality of commercially sensitive information has often been invoked to withhold key details about project design, toll levels, funding arrangements, and noncompetition clauses. And, once operational, contractual terms of the partnership arrangement can limit how much stakeholder feedback directs ongoing facility management (Siemiatycki 2010, 47).

In his article on success factors for delivery of PPP projects, Aziz (2007) discussed policies of Partnership BC (PBC), a corporation owned by British Columbia, including PBC's policy concerning transparency and disclosure (Aziz 2007, 926). While the purpose of PBC is "to

promote, enable, and help implement PPPs,” according to Aziz, PBC maintains a policy that requires it to disclose “as much information as possible without jeopardizing the competitive process” (Aziz 2007, 926). Aziz noted that PBC’s policy concerning disclosure includes the following provisions:

1. Tender documents: recommends full disclosure of tender documents that include requests for expressions of interest RFEI, RFQ, and RFP;
2. Responses to tender documents: recommends disclosing the number of respondents for RFEI, RFQ, and RFP; recommends disclosing names of those short-listed for RFP; conditional disclosure or project-by-project basis for respondents’ names for RFEI and RFQ; does not recommend disclosing submission, e.g., proposals; and
3. Concession agreements: does not recommend disclosure of draft concession agreement; recommends disclosing final agreement after removing personal, proprietary, or commercially confidential information (Aziz 2007, 926).

Additionally, Aziz stated that PBC uses “fairness auditors” to ensure that the selection of private entities and the evaluation of proposals are conducted in a fair manner (Aziz 2007).

Furthermore, Aziz discussed how PBC requires disclosure of a “project value-for-money report” (Aziz 2007, 926). Thus, PBC policy requires disclosure of all financial statements, budget reports, and other financial documents that led to the decision to use a PPP arrangement for the project, as well as the decision regarding which entity or entities to partner with, and how officials determined the value for money measurement (Aziz 2007).

Sagalyn (2007) noted that some PPP projects proceed with little concern for public participation as evidenced by the public sector foregoing comparisons between the private sector and the public sector competing for the project and economic or financial evaluations before commencing with the project (Sagalyn 2007, 17). She observed that some public officials have favored “rapid implementation . . . over due process, with little apparent concern for consumer protection” (Sagalyn 2007, 17).

According to Sagalyn (2007) PPP projects receive most scrutiny at the time the public becomes aware of the project, usually when either an official announcement is made, an approval is required, or when the implementation of the project occurs. During these particular moments in the process, local officials and community groups often attempt to defend their position through the media (Sagalyn, 2007). However, some observers claim that important “financial deal making” may remain hidden from public scrutiny despite the efforts of public interest groups and an interested media (Sagalyn, 2007, 13). Indeed, some question whether the politics of the PPP project “often elude analysis” (Sagalyn 2007, 13).

In an article published by the National Transportation Research Board (NTRB), the author contends that many states have addressed the competing concerns of the private sector’s interest in maintaining the confidentiality of proprietary information and the public sector’s interest in access to information and participation in the process through the enactment of state legislation (Fishman 2009). While the public interest maintains a significant interest in a fair PPP process, Fishman (2009) made the following observation with respect to a private entity’s confidentiality concerns in PPP project processes:

In the current U.S. market, there are only a handful of private companies that are bidding on the large-scale PPP opportunities in the highway sector. Therefore, there is intense concern among those bidders about the public disclosure of negotiating strategies, financial information, or other cost and technical proposals. The confidentiality issues during the bidding and negotiation phase are complicated by the involvement of various participants in large-scale PPP transactions. In addition to the private-sector bidders and the sponsoring state or local agency, the participants may include federal agencies such as FHWA, financial underwriters, bond rating agencies, and all of the various financial and legal advisors to the participants. Therefore, it is imperative that all participants understand and appreciate the applicable federal and state open record and sunshine laws, the confidentiality expectations of the various participants, and the dynamics of commercial negotiation and public decision making (Fishman 2009, 30).

Additionally, while Fishman (2009) does not deny the potential for unfair lack of public participation in the PPP process, arguably, the author finds current legislative safeguards satisfactory. For example, Fishman asserts the following:

From a fairness and transparency perspective, *it is unlikely* that a jurisdiction would accept an unsolicited proposal without allowing other entities to propose alternative approaches or submit competing bids. Therefore, *most jurisdictions that accept unsolicited proposals have a detailed process* in place that specifies how the unsolicited proposal is reviewed, when competing proposals will be accepted and reviewed, and how a final determination will be made. . . The negotiation of a contract initiated by the submission of an unsolicited proposal will generate additional concerns about the appearance of impropriety. Thus, there will be strong pressure on the public-sector negotiators to make information about the negotiations available to the public. On the other hand, the private sector has a legitimate interest in the confidentiality of its proprietary information during ongoing negotiations. (Fishman 2009, 29, 31 (Emphasis mine)).

Fishman (2009) asserts that public officials may experience “strong pressure” to disclose information, yet his discussion of confidentiality issues in the PPP process seems to lack a strong concern for the public’s right to participate in a fair process. For instance, as noted above, because a small number of companies bid on concession projects in the U.S., the writer contends that those bidders are greatly concerned about the public disclosure of various items, such as, “negotiating strategies,” “financial information,” or other “cost and technical proposals” (Fishman 2009, 30). Moreover, the author notes how the FHWA treats the “thorny” issue of public disclosure mandated by the federal Freedom of Information Act (FOIA):

The involvement of a federal agency such as FHWA in a PPP project raises some unique issues relating to confidentiality. As a general matter, any document submitted to a federal government agency becomes a “government record” subject to public disclosure under the Freedom of Information Act (FOIA) unless a specific exemption under FOIA applies. . . Thus, FHWA has established a procedure whereby it reviews documents relating to a proposed PPP project offsite and determines which of those documents it believes will qualify for confidentiality protection under FOIA. When the formal PPP proposal is submitted to FHWA, only those records identified as qualifying for confidentiality protection will be submitted and the other sensitive records will not become “government records” subject to disclosure under FOIA (Fishman 2009, 31).

Thus, rather than question the legitimacy of the FHWA's policy of conducting an "offsite" review of documents that, arguably, serves the sole purpose of avoiding compliance with Federal law, Fishman declines to challenge the practice.

However, other scholars who have examined planning practice in the area of transportation infrastructure have shown a greater willingness to critique aspects of the process and, in doing so, have noted the importance of public participation to ensure a fair process. Flyvbjerg et. al. (2005) studied the phenomenon of inaccurate demand forecasts in public works projects that involve transportation. The authors made the following assertion concerning travel demand forecasts used as evidence to justify major transportation infrastructure projects:

Forecasting, too, has its dark side. . . Planners on the dark side are busy not with getting forecasts right and following the AICP Code of Ethics but with getting projects funded and built. And accurate forecasts are often not an effective means for achieving this objective. Indeed, accurate forecasts may be counterproductive, whereas biased forecasts may be effective in competing for funds and securing the go-ahead for construction (Flyvbjerg et. al. 2005, 140).

While the authors asserted that "political manipulation" in road traffic forecasts appears to happen "less often and less systematically" in road projects than in rail projects, they concluded that, in general, "it is highly risky to rely on travel demand forecasts to plan and implement large transportation infrastructure investments" (Flyvbjerg et. al. 2005, 140). Moreover, Flyvbjerg et. al. (2005) argued for greater public participation in the planning process as a means to strengthen the use of forecasts in transportation public works projects. Specifically, the authors argued that planners should make the following part of any transportation infrastructure project planning process:

Public hearings, citizen juries, and the like should be organized to allow stakeholders and civil society to voice criticism and support of forecasts. Knowledge generated in this way should be integrated in planning and decision making (Flyvbjerg et. al. 2005, 143).

Moreover, a public advocacy organization recently published an extensive and highly critical assessment of the PPP model as a policy choice for states to use in their transportation infrastructure development (Baxandall 2009). The critique included the following argument concerning private sector interests in the maintenance of confidential information:

Given the profound implications of road privatization, no deal should be approved if the public has not had the opportunity to review, question and comment upon it. Unfortunately though, many states lack legislation requiring transparency in private road projects, such as making proposals available to affected communities. This refusal to provide information is justified on the basis that private road builders and operators regard their own analysis and proposals as “proprietary” business secrets. But such rules prevent full public review of the process and undermine both transparency and the opportunity for full public participation (Baxandall 2009, 30).

Thus, while some of the literature concerning confidentiality of information in PPPs provides a survey of state and federal law that pertain to transportation infrastructure PPP projects that seems to cater to private sector interests without questioning the desirability of current state law and how the legislative framework affects PPP practice, other scholars not only recognizes inequities in transportation planning processes, but propose remedies that include greater participation by the public as a means to promote a more fair planning process (Fishman 2009; Flyvbjerg et. al. 2005; Baxandall 2009).

2.2 Conflicts of Interest

There are three main ways that PPPs may involve conflict of interest concerns. First, states recognize that public employees and their agents who submit proposals to the state on behalf of a private entity have a conflict of interest. Therefore, as noted below, some states have

enacted laws that prevent state officials and representatives who have helped to prepare a RFP from submitting a proposal for that particular project. One author noted the following:

[A] Public-Private Partnership creates doubt regarding the transparency of public-private transactions, raises the question whether it is acceptable to utilize public resources to benefit certain business enterprises, and diminishes the degree of government control over private contractors needed for accountability (Haque 2001, 71).

Second, some states have enacted laws or have promulgated policies that forbid state employees who represent the state in some aspect on PPP projects from accepting gifts from individuals or organizations affiliated with a private entity that submitted a proposal for a PPP project with the state. Obviously, these states recognize the potential for employees of the state who accept gifts to be influenced in favor of a particular private entity who gave the employee the gift.

Third, arguably, the nature of the partnership model and the competing interests of the state with its private partner serve as the most predominant cause for conflicts of interest in PPP projects. According to some observers, the state's interest for the public good differs from the private entity's interest in the good of its stockholders. Therefore, PPPs contain inherent an inherent conflict of interest due to the competing interests of the "partners" (Reijniers 1994; Rosenau1999).

Rosenau (1999) argued that, while PPPs operate "more smoothly" when the public and private actors share objectives, he asserts that conflicts of interest may still arise (Rosenau 1999, 22). Moreover, he contended that conflicts of interest can generate a great cost to society in PPP arrangements (Rosenau 1999, 22). Specifically, Rosenau (1999) made the following assertion:

Conflicts of interest are sources of problems for public-private policy partnerships. They threaten to undermine performance. Stockholders' interests must come first when the

private partner is a for-profit organization. This makes for a divided loyalty, and it conflicts with public policy obligations to society (Rosenau 2000, 234).

Additionally, Reijniers (1994) argues that “differences in interest” exist between the public and private sectors which can result in “a tension that can be considered the basis of the problems that arise during the preparation and implementation of PPP projects” (Reijniers 1994, 139).

Linder (1999) contends that much of the discussion concerning PPPs suffers from a lack of clarity of the term, “Public-Private Partnership.” Linder finds six distinctive uses of the term Public-Private Partnership and that each of the views relate to “neoliberal or neoconservative ideologies” (Linder 1999, 42).

Linder asserts the PPP as “management reform,” “problem conversion,” “moral regeneration,” “risk shifting,” “restructuring public service,” and as “power sharing,” constitute the six uses of the PPP label (Linder 1999, 42-47). First, the management reform understanding, according to Linder, resembles a mentoring relationship where the private partner, due to its superior knowledge and abilities, mentors the weaker public partner. Under the management reform model, the private partner purposes to revamp the public partner into an image of itself.

Next, a variation of the management reform type, the problem conversion paradigm does not seek to transform the public partner into the private actor’s replica. Rather, the problem conversion model involves the private partner educating the public agency regarding a “reframing” of the problem (Linder 1999, 43). By “commercializing the problem,” the private entity shows the public partner how to “bait the marketplace” and thereby entice private entities to provide private capital (Linder 1999, 43).

Third, under the moral regeneration view, PPPs advantage both the persons who are served by the project as well as those persons who participate in the process. Therefore, the moral

regeneration understanding recognizes a certain “salutary effect” that market forces produce both on people who benefit from the finished product of the PPP process and people who carry out the provisions involved in the PPP arrangement (Linder 1999, 45).

Fourth, partnership as risk shifting calls government to “do more with less” (Linder 1999, 45). The private entity provides support and public officials typically support projects with private partners due to an asserted desire to leverage public capital for the development of needed infrastructure (Linder 1999, 45). Fifth, partnerships understood as a means to restructure public service emphasizes the large number of public employees as a detriment. Therefore, the restructuring public service view of PPPs seeks to move people from public payrolls to private ones. Finally, partnership as power sharing argues for a “horizontal” relationship between the public and private sectors, rather than the traditional “vertical,” or top down arrangement. While some private sector proponents may favor the notion of public agencies ceding some of their power to private companies, Linder implies that, in practice, such instances may be extremely infrequent (Linder 1999, 48).

Due to the billions of dollars involved in the PPP market in the U.S. alone, arguably, one may find it difficult to assess the objectivity of those who favor increased use of the PPP model for transportation infrastructure. For example, although labeled as “commentary,” a member of one of a major financial investment firm published an article in a scholarly journal that included the following honorific assessment of PPP arrangements in U.S. transportation policy:

Public–private partnerships can be truly mutually beneficial—municipalities are able to monetize assets for upfront cash payments to fund future projects or inject additional capital in others while private owners, operators, and investors are able to access the steady stream of cash flows produced by infrastructure assets. The marriage of private operating efficiencies and incentives with essential public assets can only enhance our nation’s transportation infrastructure (Brown 2007, 324).

Rather than adopting a cautious stance toward the public and private sectors joining hands in partnership, however, some states have moved aggressively to promote PPP projects in their state (Iseki et. al. 2009). For example, the Texas Department of Transportation issued a publication in 2006 entitled, “TxDOT: Open for Business,” in which it argued the following:

Partnerships between the agency, local officials, and the private sector . . . is a way to broaden the options available for solving the traffic congestion, safety and mobility issues that impact the quality of life for communities throughout the state (TXDOT 2006, 2).

2.3 Renegotiation of PPP Concession Agreements

When one or both of the parties to a PPP arrangement becomes dissatisfied with the terms of the agreement they may seek to renegotiate the contractual arrangement. One author defined “renegotiation” in a PPP contract in the following manner:

Renegotiation. . .[is] an event in which a concession contract undergoes a significant amendment in any of the following areas: tariffs, investment plans and levels, exclusivity rights, guarantees, lump-sum payments or annual fees, coverage targets, service standards and concession periods (Guasch 2004, 12).

Some scholars have noted the prevalence of contract renegotiations between parties to PPPs (Estache and Serebrisky 2004; Guasch 2004; Guasch, et. al. 2008; Buxbaum and Oritz 2007; Gómez-Ibáñez et. al. 2004). Arguably, due to the significantly long terms of many concession agreements between the public and private sectors, one should expect parties to seek renegotiation of concession arrangements. Indeed, Gómez-Ibáñez (2004), argued the following:

The main risk with concession contracts is that an unforeseen event will make the contract unworkable for one or both parties. In such cases, the parties face a difficult choice of whether to renegotiate the contract or try to live with its unsatisfactory terms until the concession expires. In practice, infrastructure concession contracts have proven very vulnerable to unforeseen events . . . (Gómez-Ibáñez 2004, 9).

Following Gómez-Ibáñez, Baxandall (2009) made the following contention regarding the contextual issues that affect the usefulness of long-term concession arrangements between the public and private sectors:

Metropolitan areas have doubled their populations in the course of a few decades, creating huge changes in transportation needs. Massive, unforeseeable changes will likely take place for transportation technology, networks, demographics, and the distribution of population over time frames like those in the Chicago and Indiana deals. In the face of such uncertainties, governments cannot predict their transportation needs, nor the revenue potential of their toll roads, well enough to negotiate a deal that fairly allocates risks, dictates policy, or sets a fair price (Baxandall 2009, 29).

Moreover, when the private party seeks renegotiation of the PPP concession contract, arguably, the public partner may view renegotiation as the only viable choice. For example, Buxbaum and Ortiz (2007) made the following assessment regarding the public party's stance toward certain renegotiation decisions and noted a specific instance where renegotiation occurred:

If the private investor defaults on its loans, defaults on its agreement with the public sector, or goes bankrupt, there is typically no legal requirement for the public sector to step in and rescue the project. However, the highway in question may be an important facility to the community, and the public sector may still choose to bear some of the costs in these circumstances. This happened in the case of the Camino Colombia Toll Road near Laredo Texas, where the private toll road developer defaulted and TxDOT ended up buying the road, albeit at a deep discount from the original development cost (Buxbaum and Ortiz 2007, 11).

Therefore, because unforeseen occurrences may lead the private concessionaire to seek renegotiation of the concession agreement and may “hold up” the government by its insistence on renegotiation, some observers have called for concession contracts to be limited in duration. For example, a report published by the FHWA concerning PPP arrangements in Europe stated that, “Although each contract is unique to the PPP project, it is recommended that contracts for PPPs with concessions be limited to 30 to 35 years” (Jeffers et. al. 2006, 24). Indeed, one

researcher found that concession terms beyond 35 years are “sub-optimal” for taxpayers (Stambrook 2005, 26). Apparently due to their recognition that long-term concession arrangements create inherent difficulties that often lead to undesirable renegotiation events, some European countries have contemplated legislation that will require concession contracts to include provisions that mandate a prescribed renegotiation every 7.5 years throughout the life of the concession contract (Jeffers et. al. 2006).

Finally, at least one scholar contends that, aside from the long-term concession contract’s susceptibility to unforeseen events, and therefore, arguably, a private concessionaire’s push for renegotiation, one should likewise recognize the issue of fairness to future voters (Baxandall 2009). Baxandall (2009) made the following assertion:

Private investors in toll roads specifically seek out essential thoroughfares that lack attractive alternative routes. These highways are vital infrastructure, integral to the daily lives of residents. So long as the state, directly or through a turnpike authority, retains control over its toll roads, voters have the ability to hold decision-makers accountable. Turning over control of the roads to private investors eliminates that accountability and binds future voters to present-day decisions. Doing so for several generations of voters is simply anti-democratic ” (Baxandall 2009, 30)

CHAPTER 3

PPP CONCESSION CASE STUDIES

In order to gain greater understanding into the concession model for highway PPP projects in the U.S. the chapter includes case studies of six different concession arrangements. Possessing at least one attribute deemed “innovative” by the Federal Highway Administration (FHWA 2008), the following six projects will be examined: the North Tarrant Express (Texas), the Northwest Parkway (Colorado), the Pocahontas Parkway (Virginia), Port of Miami Tunnel (Florida), the Indiana Toll Road (Indiana), and the Chicago Skyway (Illinois).

While some factors may have more prominence in one case study as compared with another case study, some minimum information is included in each of the case studies. For example, each case study includes a description of the project undertaken, in terms of its geographic location and its significance as a transportation route; the important terms of the concession arrangement between the parties, including, but not limited to, the concession fee paid by the concessionaire and the length of the concession term granted by the public entity; and a discussion of the innovative feature(s) of the project. Moreover, when relevant, some of the case studies discuss citizen participation and the role of certain key political actors in the PPP process. Through the use of the exploratory case study method, the six case studies may reveal important information that can shed light on the nature of these concession arrangements and perhaps serve as a source of data for theory construction by researchers in the future.

3.1 North Tarrant Express

In June of 2009 the Texas Department of Transportation (TXDOT) entered into an agreement with a consortium of entities which acted under the name NTE Mobility Partners (NTE Mobility) for the project known as the North Tarrant Express (NTE). The private concessionaire, NTE Mobility, and TXDOT formally entered into the project under two separate Comprehensive Development Agreements (CDAs). The first CDA, known as the “Concession CDA,” envisions a Phase 1 portion of the project. Phase 1 entails the “design, development, construction, finance, maintenance and operation of 13 miles” of interstate and state highways (FHWA OIPD 2010). Specifically, the phase 1 portion of the project will include a portion of Interstate Highway (IH) 820 and State Highway (SH) 121/SH 183 from IH 35W to SH 121. The stretch of highways involved in the project stretch from north of Fort Worth to just southwest of Dallas-Fort Worth International Airport (FHWA OIPD 2010).



Figure 3.1 North Tarrant Express Project
(Image taken from Toll Road News 2009)

Additionally, TXDOT and NTE Mobility agreed to a second CDA that envisions three additional segments for the project. The second CDA contemplates the development of master plans for corridors that will range “from SH 121 to SH 161, IH 820 east from SH 121/SH 183

south to Randol Mill Road” (FHWA OIPD 2010). Furthermore, the corridors along IH 35W and IH 30 to SH 170 are included in the project. Finally, the CDA calls for the creation of other facilities for “connectivity, safety, and financing” (FHWA OIPD 2010). Based on traffic data, the highways included in the project are considered the most congested in the Dallas-Forth Worth metro area (FHWA OIPD 2010). Under the agreement, NTE will operate and maintain the entire section, including both toll and no toll lanes, with the rights to the tolls collected during the 52-year concession. The North Texas Toll Authority (NTTA) will serve as the toll collection sub-contractor for NTE.

While the improvements under the project maintain the current number of six lanes (2 x 3) on SH183 and four lanes (2 x 2) on IH820, four toll lanes (2 x 2), termed “managed lanes,” will be implemented. Although construction will be extensive, the plans call for the work to allow for traffic to operate continuously through the construction phase (FHWA OIPD 2010). Furthermore, the project boasts a “state-of-the-art electronic toll collection system” (FHWA OIPD 2010). The project design of the toll collection areas entails open architecture which aims toward a smoother operation of the managed lanes (FHWA OIPD 2010).

Notably, the project involves the first time a U.S. pension fund has served as an equity member in a toll road project (Sharn, 2009, 18). Indeed, the FHWA Office of Innovative Program Delivery emphasized the public pension fund aspect of the project as one of the projects “innovative” features (FHWA OIPD 2010).

Overall, the financing for the project includes a \$650 million dollar federal loan, \$570 million in public money from the state of Texas, private activity bonds of \$400 million, and \$427 million in private equity (Sharn, 2009, 18; FHWA OIPD 2010). Cintra claims a 56.7% interest,

Meridiam holds a 33.3% interest, and the Dallas Police and Fire Pension System possesses a 10% stake in NTE Mobility Partners (Sharn, 2009, 18).

The NTE project contemplates the \$1.6 billion of debt incurred to be repaid through toll revenues which will come from the tolled managed lanes (TXDOT 2009). While the lease period runs for a considerable term of 52 years – the longest duration allowed under Texas law – the CDA designates TXDOT as the owner of the project throughout the lease term (TXDOT 2009).

The Regional Transportation Council (RTC) devised a managed policy for setting toll rates for all managed lanes within the region (TXDOT 2009). The managed lane policy sets forth a fixed schedule pricing for the initial six months followed by “dynamic pricing” for the subsequent period (TXDOT 2009). The CDA authorizes the concessionaire to set toll amounts for the initial 180-day period as long as the tolls are no greater than a maximum toll rate provided. User demand determines the toll rates after the initial six month period.

According to the RTC managed lane policy, after the first 180 days, dynamic pricing begins. The toll rate seeks to maintain a minimum average speed of 50 mph in the managed lanes (TXDOT 2009). A lower rate will be charged if demand is low, most likely during “off-peak hours” (TXDOT 2009). Conversely, during “peak commute times,” when demand is great, the toll rate will be higher. According to the CDA, based upon average traffic flows or average speeds, toll rates will adjust in five minute intervals or sooner. While the CDA appears to limit the maximum toll rate during dynamic pricing to a maximum toll rate of \$0.75/mile (in January 1, 2010 dollars) adjusted annually according to the Consumer Price Index, the CDA allows tolls

to exceed the maximum toll rate “if certain traffic performance measures set forth in the CDA cannot be met” (TXDOT 2009, 3).

Notably, TXDOT may build other facilities throughout the concession period regardless if such facilities are located near the NTE project. Additionally, TXDOT is not obligated to compensate the concessionaire should TXDOT build any facilities outside the right of way of the project nor must TXDOT compensate the concessionaire should TXDOT develop other transportation modes - such as rail - within the right of way of the project (TXDOT 2009). Moreover, if TXDOT “builds additional limited access main lanes within the right of way” of the project, then the concessionaire must compensate TXDOT for any increase in revenues (TXDOT 2009, 3). Indeed, the only instance where TXDOT must compensate the concessionaire under the agreement involves the situation where TXDOT builds additional limited access main lanes within the right of way of the project that decrease NTE Mobility’s revenues. However, according to TXDOT, there are no plans for development of additional main lanes. In accordance with Texas law, Transportation Code, Chapter 371, TXDOT published financial information concerning the project and provided notice of a public hearing that was held regarding the financial information disclosed (TXDOT 2009).

3.2 Northwest Parkway

The Northwest Parkway (NWP), 9 miles of road in the Denver, Colorado, area, runs from the E-470 toll road to the city of Broomfield and was developed by a public authority known as the Northwest Parkway Authority (NWP Authority) (USDOT 2008). The city and counties that comprise the NWP authority are the city of Broomfield, Broomfield County, the city of

Lafayette, and Weld County. Additionally, several other governmental entities serve as ex-officio members of the NWP Authority.

In June 2001, under a design-build contract in which the Colorado Highway Authority selected the private companies to perform the work for the project, construction of the NWP commenced (Northwest Parkway Authority 2007). The NWP Authority used toll revenue bonds that were to be repaid with toll revenues as the means of financing for the project.

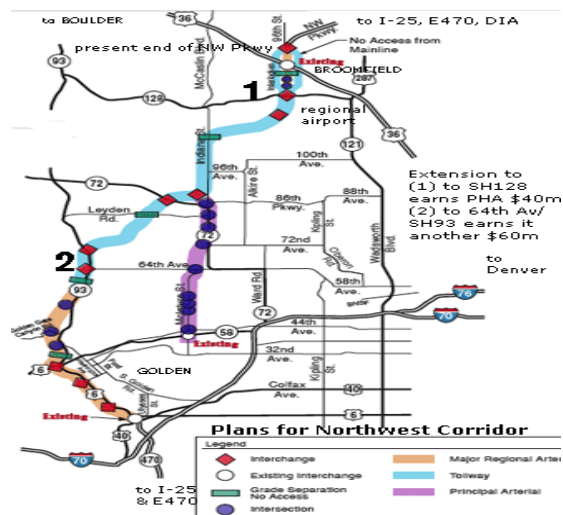


Figure 3.2 Northwest Parkway Project
(Image taken from Toll Road News 2007B)

In 2003, the NWP opened and toll collection began. However, the revenues generated from tolls fell short of the originally projected amount and would not have provided sufficient monies to repay the bonds (Toll Road News 2007C). Rather than continue toward a path that seemed to lead to inevitable default, the NWP Authority began a process of transforming the project into a PPP. The NWP Authority eventually entered into an agreement with a private consortium that consisted of Brisa Auto-Estradas de Portugal, S.A. (“Brisa”), and Compania de

Concessoes Rodoviaras (“CCR”). Brisa, a toll road operator based in Portugal, and CCR, a toll road operator based in Brazil, entered into the agreement with the NWP Authority on August 29, 2007, as the concessionaire in the PPP arrangement.

The concessionaire paid a total of \$543 million and received the exclusive rights to “use, possess, operate, manage, maintain, and rehabilitate and toll the Parkway for a term of 99 years” (Northwest Parkway Authority 2007B). The concessionaire’s payment included \$200 million toward operating expenses over the term of the lease; \$50 million in rent; \$40 million placed in escrow to be paid if the parkway is extended within certain time frames contemplated in the agreement; and the remainder designated as payment for the right to collect tolls during the lease period and to pay off outstanding bond debt. Furthermore, should the parkway be extended within a certain time period, the agreement calls for the concessionaire to pay an additional \$60 million (Northwest Parkway Authority 2007B).

The amount paid by the concessionaire stood as the “the largest price ever paid for a lease of a U.S. toll road as a multiple of revenues or earnings” in the U.S. (Northwest Parkway Authority 2007B, 1). One author described the price of the concession as “staggering” due to the amount paid compared with the amount collected in tolls which reached only \$6.7 million in 2006 (Toll Road News 2007B). Arguably, the concessionaire entered into the agreement based on the belief that taxpayer funds will assist in the development of a connection between Interstate 70 and Colorado State Highway 470 (Toll Road News 2007B). In the case of such a connection, the NWP will comprise a portion of a continuous belt route in the Denver area and, arguably, would have a significant impact on traffic levels and, thus, toll revenues for the Parkway (Toll Road News 2007B).

The concessionaire agreed to certain limits on the amount of toll charges (NWP Authority 2007A). Under the agreement, toll charges for the entire length of the parkway are limited to an amount up to \$3.00 for the first two axles and an additional \$3.00 for each additional axle for vehicles with more than two axles, from the date of closing until December 31, 2009 (NWP Authority 2007A). The concessionaire must maintain toll amounts that fall within the maximum toll level on an average basis annually. Thus, the concessionaire may use congestion tolling, time of day variable rate tolling, or any other method to assess toll charges (NWP Authority 2007A). The agreement requires the concessionaire to share some of the “excess revenue” from the operation in the event the concessionaire attains a certain profit level (Northwest Parkway Authority 2007B). The concessionaire must pay the NWP Authority \$263,200 each year for the cost and expense associated with monitoring the concessionaire’s operations (NWP Authority 2007A). Additionally, the concessionaire agreed to interview employees of the NWP Authority and offer those individuals employment terms that met or exceeded the respective employee’s current salary and benefits, or to pay the employee an amount equal to the employee’s salary, health insurance, and retirement contribution (NWP Authority 2007A).

Despite the NWP Authority’s assertion to the contrary, the NWP, arguably, includes a “non-compete” provision (NWP Authority 2007B). Indeed, although the agreement does not purport to limit the right of the NWP Authority or any governmental authority to build highways or other transportation facilities that may seem to compete with the project, the agreement requires that the concessionaire receive compensation if certain conditions occur (Northwest Parkway 2007B). First, the concessionaire must show that the competing facility diminished the

concessionaire's toll revenues from the Parkway project. Second, the concessionaire must prove certain facts about the alleged competing facility or facilities. In order to qualify as competing facilities, and thereby require that the concessionaire receive compensation should toll revenues on the Parkway decrease, the alleged competing facility type must be one of the specific transportation facilities types specified in the agreement (Northwest Parkway 2007A). Thus, rather than serve as a renunciation of a non-compete arrangement and therefore act in favor of development by the NWP Authority and other public entities of transportation projects near the Parkway, the agreement essentially protects the concessionaire and hinders governmental authorities' transportation infrastructure development near the Parkway. One author made the following assessment of the provision that addresses development by public authorities:

Brisa also received a noncompete clause in its lease. For the next 99 years, nobody can build a roadway or transportation that adversely affects Brisa's toll-road traffic. If they do, Brisa can demand compensation or back out of the lease. . . Anyone who wants to build a road, railway or bus line in Broomfield had better brush up on their Portuguese (Lewis 2007).

In the event of default by the NWP Authority, the concessionaire may terminate the agreement. If the concessionaire elects to terminate the agreement, the rights to the Parkway revert to the Authority and the Authority must pay termination damages to the concessionaire (Northwest Parkway 2007A). Should the concessionaire violate the terms of the agreement, the Authority must provide the concessionaire the right to cure the violation before terminating the agreement. If the concessionaire fails to remedy the situation, the NWP Authority has the right to terminate and take back possession and all other rights previously transferred to the concessionaire under the lease agreement. The agreement does not require the NWP Authority to pay a termination fee to the concessionaire in such an instance (Northwest Parkway 2007A).

3.3 Pocahontas Parkway



Figure 3.3. Pocahontas Parkway Project
(Image taken from <http://www.pocahontas895.com/home.html>)

The Pocahontas Parkway (Parkway) consists of an 8.8 mile tolled highway in the Richmond, Virginia, area. The Parkway, also known as Route 895, connects Interstate 95 with Interstate 295 seven miles south of Richmond near the Richmond International Airport. Although construction on the Parkway commenced in 1998, traffic opened in May of 2002 in stages until the complete opening in September of 2002. The Parkway has four lanes and includes a high-level bridge that traverses the James River (FHWA 2010).

The Parkway served as only the second project financed through a 63-20 corporation in the U.S. (FHWA 2010). The Department of Transportation defined a 63-20 corporation in the following manner:

These corporations are named for the requirements of IRS Rev. Rul. 6320 and Rev. Proc. 8226. In the context of transportation finance, a 6320 not-for-profit corporation is a nonstock corporation formed to issue tax-exempt debt on behalf of a public authority, the

proceeds of which are used to pay for a private developer to design, construct and/or operate a transportation facility. The governing structure typically includes representatives from both the public sector and the private sector and members of the 6320 are generally insulated from financial risk. The corporation may not be formed for pecuniary profit and may not provide dividends or distributions to its members so the financing structure does not include any equity investments by the private sector (USDOT 2008, 15).

Although 63-20 corporations cannot produce a profit or provide for equity investment, private developers, arguably, generate significant profit from 63-20s through consulting fees (Toll Road News, 2008). Moreover, while 63-20 corporations have served as vehicles to finance several transportation projects since the Pocahontas Parkway, and the USDOT contends that the 63-20 structure made construction of the Parkway possible without a “15 year delay,” some observers question the desirability of continued use of these not-for-profit entities (USDOT 2008; Toll Road News 2008).

Arguably, the structure of a 63-20 corporation negatively impacts a project’s probability of success (USDOT 2008; Toll Road News 2008). For example, a major industry publication made the following assessment regarding the use of 63-20 corporations:

In order to gain IRS acceptance of the tax exempt status of its debt, the local government must approve the charter of the 63-20 corporation and the issue of its debt and have title to its assets after its bonds are paid off. But then it can effectively disown the outfit and usually proceeds to do so lest it be held responsible for any bad debts it generates. This need to put the 63-20 at arms length means that the local government cannot have the power to appoint or remove board members or get involved in operations, even though the project may have been sponsored by local government (Toll Road News 2008).

Therefore, as some observers, including the U.S.DOT, have noted, the use of 63-20 corporations in transportation projects could lead to the failure of projects as “neither the public nor the private sector has financial liability if the facility cannot repay its debt” (USDOT Innovation wave 2008, 15). Indeed, the USDOT, while not outright criticizing nor disassociating itself from

63-20 corporations, admitted that transportation projects that have utilized 63-20 corporations have “struggled” (USDOT 2008, 15).

The Pocahontas Parkway Association (PPA) issued bonds in order to finance the construction of the Parkway. Under Virginia’s Public Private Transportation Act of 1995, the PPA issued \$354 million of tax-exempt revenue bonds. Additionally, funding in the amount of \$18 million loan from a State Infrastructure Bank (SIB) together with \$9 million from Federal funding provided the necessary funds to develop the project (USDOT 2008).

Although Virginia planned to repay the bond indebtedness through tolls collected on the Parkway, observers argue that by 2004, only two years after the Parkway’s opening, officials realized that the prospect of default loomed (Toll Road News 2008). Clearly, traffic levels and revenue from tolls would not increase enough in the foreseeable future to meet the obligations incurred from the bond issue (Toll Road News 2008). Officials predicted that the Parkway would generate 840,000 transactions each month for the year 2003, which would result in \$1.4 million in revenue (USDOT 2007, 23). However, actual transactions reached only 400,000 per month and produced only \$630,000 in revenue (USDOT 2007, 23).

Therefore, while reserve funds allowed the Parkway to remain open, the Virginia Department of Transportation (VDOT) and the PPA began the process in 2005 to wind-up the PPA and search for an alternative to the not-for-profit model (Toll Road News 2008).

In May of 2006, VDOT announced that Transurban, a private toll road operator based in Melbourne, Australia, agreed to take over the project in a windup agreement (Toll Road News 2008). Transurban then entered into an Asset Purchase Agreement with the PPA and an Amended and Restated Comprehensive Agreement with VDOT in June of 2006.

The total cost of the Parkway stands at \$597.4 million, which includes “refinancing, construction of the airport connector road, and the installation of an electronic tolling system” (USDOT 2007). Transurban agreed to pay off all of the debt and expenses incurred by VDOT and assumed responsibility for agreed upon operations and maintenance duties (Toll Road News 2008). Additionally, Transurban agreed to build a 1.58 mile road that would connect the Parkway to the Airport (Toll Road News 2008). The concessionaire committed to share revenue with VDOT should the project surpass a certain profit level (Toll Road News 2008; USDOT 2008).

In June 2006, under an amended and restated development agreement, Transurban formally assumed responsibility for the road for a period of 99 years. While the private concessionaire is now responsible for all debt on the Pocahontas Parkway and assumes the risk that revenues on the highway might not be high enough to support all costs, arguably, the arrangement may benefit the concessionaire through its implementation of progressively higher tolls in future years (USDOT 2008, 3).

In return for Transurban’s commitments under the agreements, the Australian toll road company received the exclusive rights for a period of 99 years to “enhance, manage, operate, maintain, and collect tolls on the Parkway” (USDOT 2008). Additionally, due to the company’s assertion that the arrangement would not be economically viable otherwise, Transurban obtained a \$150 million TIFIA loan as an incentive to construct the airport connector roadway (USDOT 2008).

3.4 Port of Miami Tunnel

The Port of Miami Tunnel (POMT), described as a technically challenging transport construction project, arguably, may never have occurred without a PPP arrangement (Parker 2009). Hailed as a landmark project, the POMT will involve two 3,900 foot-long tubes with a diameter of 41 feet (Sigo 2009). Officials hope that the tunnel, which will consist of four lanes when completed, will alleviate the problems associated with large cargo trucks and cruise passenger buses that travel from the mainland of Miami to the port (Sigo 2009.). Once the tunnel opens for traffic those vehicles, whose course of travel currently takes them through downtown Miami, will then have a “by-pass” route that avoids Miami’s urban core (Sigo 2009).



Figure 3.4 Port of Miami Tunnel Project
(Image taken from <http://www.portofmiamitunnel.com/images.html>)

Based on the state of Florida’s assessment of the cost required to bring the tunnel to completion and, perhaps more specifically, the conclusion that the expected benefits from the

project fell short of the significant expenditure the tunnel mandated, Florida chose not to risk the significant capital required to complete the tunnel (Parker 2009). However, in February of 2006, Florida decided to move forward with the project under a PPP scenario and issued Requests for Qualifications (RFQ) from private entities (FDOT 2010). Almost four years later in October of 2009, the Florida Department of Transportation (FDOT) and a private consortium, Miami Access Tunnel (MAT), reached a financial close on the POMT project (FDOT 2010). An integral aspect of the project involves a Public-Public Partnership (PuP) that includes FDOT, Miami-Dade County, the City of Miami, and the U.S. Department of Transportation (FDOT 2010). Indeed, observers argue that the multi-jurisdictional element of the POMT contributed to the difficulty in reaching an agreement with a private concessionaire on a timelier basis (Parker 2009). One author noted the following regarding the PuP portion of the project:

The path to financial close was certainly complicated by these intergovernmental agreements, as headlines during this period will attest, resulting in important “lessons learned” on all sides. However, any large, multi-jurisdictional public works project in the U.S. faces similar political risks, which cannot be managed neatly and which affect conventional as well as PPP project implementation (Parker 2009, 16).

Touted as a “\$1 billion tunnel” (Chardy 2009), the total cost of the POMT project stands at \$900 million (Parker 2009, 18). A substantial piece of the funding for the POMT exists in the form of a \$341 million loan made possible by the Transportation Infrastructure Finance and Innovation Act (TIFIA). The TIFIA program offers “credit assistance for qualified projects of regional and national significance” (USDOT 2008). A Luxembourg based investment fund, Meridiam Infrastructure Finance (Meridiam), and Bouygues Travaux Publics SA (Bouygues), a French contractor, serve as the private equity providers for the concessionaire, MAT (Parker 2009, 19). Meridiam provided 90% and Bouygues the remaining 10% of the \$80 million equity

portion of the project financing (Parker 2009). Furthermore, the project includes \$322 million from private bank loans. Notably, FDOT estimated the construction cost to exceed \$1.2 billion (Parker 2009).

POMT's availability payment feature and the advanced technology that allows for the POMT to provide wide tunnel access while keeping construction costs low, arguably, serve as key innovative features of the project (USDOT 2008; Parker 2009). First, the POMT project, described as "technically challenging," requires a machine that will bore through rock in order to create a round tunnel tube (Parker 2009). As the machine moves forward and forms a tube, panels of pre-cast reinforced concrete are to be assembled in the rear to shape the tunnel walls (Chardy 2009). The project may, as one writer asserted, "introduce new boring technology to the U.S."; the cost of the machine amounts to \$40 million (Chardy 2009).

Second, the POMT project involves a mechanism known as "availability payments" and will not charge tolls (Parker 2009, 18). The concessionaire will receive funds from FDOT based upon substantial completion of the project and the continued maintenance of the traffic lanes (Parker 2009, 18). Under the terms of the 35 year concession contract, FDOT agreed to pay the concessionaire \$350 million upon final acceptance and availability payments annually for 30 years (Parker 2009, 18; USDOT 2008). FDOT and the concessionaire agree to the amount of \$32.48 million annually as the maximum availability payment (Parker 2009, 17; USDOT 2008). Payments are based on the availability of the road and are subject to reduction should the POMT experience unplanned lane closures or should the concessionaire fail to provide proper maintenance and safety (USDOT 2008). According to one observer, due to the policy choice of

a PPP arrangement, the 50% reduction in construction costs are now expected to make the POMT an example of “value-for-money” that a non PPP vehicle cannot offer (Parker 2009, 16).

3.5 Indiana Toll Road

The Indiana Toll Road (ITR) stretches for 157 miles and serves as one of the nation’s most significant truck routes as it connects the Midwest to the East Coast (Johnson et. al. 2007, 4). The origins of the ITR, often referred to as the “Main Street of the Midwest,” due to its acting as a connection between the City of Chicago and commercial areas in Indiana, reaches back to 1951 when the Indiana General Assembly created the ITR Commission (Johnson et. al. 2007, 18). The ITR opened for traffic in 1956, having been financed by the sale of \$280 million in bonds (Johnson et. al. 2007, 18). The ITR connects with Interstate 65 and Interstate 69 and thereby leads to significant cities and ports in the South, including the Gulf Coast (USDOT 2008).

Perhaps the most significant feature of the ITR simultaneously acts as its most controversial characteristic. When the Indiana Finance Authority (IFA) entered into a concession agreement with the Indiana toll Road Concession Company (ITRCC) on April 12, 2006, for a 75-year lease of the ITR, the ITR became “the first long term lease by a state of an existing public toll road in the United States” (USDOT 2008). The concessionaire paid \$3.8 billion in cash up front in exchange for the concession rights it received under the agreement (USDOT 2008).

The private concessionaire, ITRCC, includes the private entities, Cintra Concesiones de Infraestructuras de Transporte, S.A., and Macquarie Infrastructure Group/Macquarie

Infrastructure Partners (USDOT 2008). Each possess a 50% interest in the equity portion of the concession (USDOT 2008).

According to the agreement, the concessionaire will operate and maintain the road for the duration of the lease term and holds the rights to collect and retain all toll revenue during that period (USDOT 2008). The State of Indiana plans to use the \$3.8 billion to fund a 10 year transportation plan (USDOT 2008). Furthermore, the State agreed to issue one time payments between \$40 million and \$120 million to each county in which the ITR traverses so that those counties can fund local transportation projects (USDOT 2008).

While the substantial cash payment to Indiana obviously allowed for funds to develop significant additional transportation projects in the state, the lease of an existing transportation asset to a private entity also created concerns over the necessity and propriety of the transaction (Johnson et. al. 2007; USDOT 2008). Indeed, according to at least some observers, the history of the ITR reveals that political concerns, rather than disinterested decision-making on the part of political figures, led to the decision to enter into the long-term lease of the ITR (Johnson et. al. 2007). For example, while toll transactions from 1957 to 2004 followed a general pattern of increase, and while toll revenue increased from \$38 million in 1984 to almost \$85 million in 2004, Indiana chose not to retain the ITR and institute toll increases in order to fund additional projects within the state. At least one study contends that toll rate increases on the ITR have not affected the traffic volume growth in a significant manner (Johnson et. al. 2007).

Notably, the State of Indiana hired a private consulting and accounting firm to provide a “net present value” of the ITR (USDOT 2007, 33). The firm deemed the value of the ITR to the State of Indiana at slightly less than \$2 billion (USDOT 2007, 33). However, the private

consulting firm based its assessment on future toll increases that would follow the pattern of toll increases in the past (USDOT 2007, 33). Yet, opponents of the concession arrangement argued that, based on an alternative valuation of the ITR lease provided by an economics professor, the net present value of the ITR to the State amounted to \$11 billion (USDOT 2007, 33). Thus, while the analysis put forth by the opponents of the concession deal used assumptions that involved annual toll increases of 4.4 percent rather than the 2.8 percent used by the State's consultant, arguably, the history of traffic volume on the ITR discussed above indicates that the larger toll increases would not negatively impact toll revenues on the ITR (USDOT 2007; Johnson et al. 2007).

According to some observers, the ITR concession arrangement generated "intense debate and controversy" (Buxbaum and Ortiz 2009, 26). Some argued that the public was not sufficiently informed about imported facts concerning the concession deal (Buxbaum and Ortiz 2009). Supporters of the transaction countered that the legislative hearings held between January and March 2006 provided a forum open to the public (Buxbaum and Ortiz 2009). Moreover, according to Indiana State officials, the State conducted additional hearings subsequent to the enactment of the ITR PPP enabling legislation (Buxbaum and Ortiz 2009).

Arguably, Indiana Governor Mitch Daniels stood to gain significant political ground through the ITR project (Johnson et al. 2007, 23). Indeed, he asserted that his transportation capital improvement plan, "Major Moves," would create 130,000 new jobs or more through the projects funded from the concession payment (Johnson et al. 2007, 23).

However, while disparate accounts exist as to the transparency of the process which culminated in the IFA's agreement with the concessionaire, and disagreement continues as to the

ITR's value to the State of Indiana at the time the concession arrangement took place, arguably, the evidence shows the deal may not prove as beneficial to the State of Indiana as Governor Daniels claimed it would (Baxandall 2009). Daniels promoted the ITR concession based on the reasoning that the interest earned from the cash payment from the concessionaire would fund transportation programs well into the future (Baxandall 2009, 21). However, after two years the actual interest earned from the State's investment fell \$138.6 million short of its projection (Baxandall 2009).

3.6 Chicago Skyway

The Chicago Skyway, a 7.8 mile toll road that includes a 3.5 mile elevated structure that crosses the Calumet River, connects Interstate 94 (I-94) in Chicago to Interstate 90 (I-90) at the Indiana border (Pew 2009; USDOT 2010). Thus, the Skyway acts as a link between the City of Chicago and the Indiana Toll Road (I-90) (Pew 2009).

The City of Chicago Department of Streets and Sanitation operated and maintained the Skyway since its inception in 1958 (Pew 2009). The 47 year period in which the City operated the Skyway witnessed few toll rate increases (Pew 2009). Indeed, toll rates decreased significantly in real terms between 1989 and 2004, even though, historically, the Skyway had operated at a loss and was in debt (Pew 2009; USDOT 2007).

Facing a severe budget deficit in 2004, the city of Chicago began a search for ways to generate additional revenue from its assets (USDOT 2010). Rather than initiate toll rate increases on the Skyway, the City determined to accept bids for the lease of the toll road from private bidders (USDOT 2010). In October of 2004, Chicago accepted the bid submitted by the

Macquarie/Cintra Consortium and Macquarie/Cintra, under the name the Skyway Concession Company (SCC). SCC took control of the toll road in January of 2005 (USDOT 2010).

The terms of the arrangement between Chicago and the concessionaire include the concessionaire's upfront lump-sum payment of \$1.83 billion to the City in exchange for the rights to operate and maintain the Skyway for a 99-year lease term (USDOT 2010). The concession agreement allows for annual toll increases after the year 2017 (Pew 2009). Indeed, under the concession agreement, CSCC may increase toll rates frequently (USDOT 2007). The agreement provides that toll increases are limited to the highest of a 2 percent annual increase, an increase in the Consumer Price Index, or the per capita GDP increase (Pew 2009). Based on at least one estimate, the tolls will be permitted to increase almost 97 percent from 2007 through 2047 (USDOT 2007). The potential increase, from \$2.50 to \$4.91 in 2007 dollars, is based on a projection that reflects the maximum allowable toll rate allowed for under the concession agreement (USDOT 2007).

Furthermore, the parties to the concession agreement did not bind themselves to a non-compete clause nor did they agree to revenue sharing under the arrangement (Pew 2009). However, the concession agreement includes protections for the concessionaire in the form of financial compensation should the Illinois legislature take action that adversely affects the value of the concession for SCC (Pew 2009). City officials assert that the arrangement did not call for a non-compete provision due to geographic limitations (USDOT 2007). According to Chicago officials, the Skyway's proximity to Lake Michigan and a highly developed urban area make construction of transportation facilities that would compete with the Skyway highly improbable (USDOT 2007).

By leasing the Skyway to a private entity, the City of Chicago not only found a means to pay down outstanding debt attributable to the toll road, it also used the cash payment to fund non-transportation type programs (Pew 2009). Additionally, Chicago used a portion of the concession fee to fund social programs (Buxbaum and Oritz 2007). Furthermore, the City of Chicago placed \$500 million of the upfront payment into a “rainy day” fund which was earning \$25 million annually as of 2007 (Buxbaum and Oritz 2007). While most PPP projects in the U.S. require state enabling legislation, Chicago has “home-rule” authority to lease its assets and, therefore, did not seek state legislation to authorize its lease of the Chicago Skyway (Pew 2009).

CHAPTER 4

SUMMARY ANALYSIS OF CASE STUDIES

Similar to other highway transportation concession PPPs, even if one could satisfactorily describe a “successful” PPP, due to the recent implementation of the projects contained in each of the six case studies and the substantial number of years that remain before any of the projects concession term ends, arguably, one cannot determine whether, and which one(s), of the projects will prove successful. Additionally, the unique contextual features for each PPP concession arrangement make it difficult to identify potential causal mechanisms and construct theories applicable to a large population of PPP concessions. However, the six case studies reveal that PPP concessions can be extremely complex arrangements that, due to the substantial amounts of money involved and the long-term nature of the projects, possess the potential to impact, not only highway users, but citizens throughout the state for many years. Therefore, in order to better understand these important arrangements, after a brief summary of each of the six cases, the following section of the dissertation will discuss and analyze of some of the commonalities, differences, and other notable features among the six case studies.

4.1 North Tarrant Express

The NTE project adds additional lanes to portions of roadways in what may be the most traffic congested area of the Dallas-Fort Worth Metroplex. The additional lanes, described as “managed lanes,” will charge toll rates to users based on various factors, such as time of day. The toll rate will attempt to maintain minimum average speeds in the managed lanes (Sharn

2009, 18). When demand is low the rate will be lower; during peak time rates will adjust higher (Sharn 2009).

While some of the other case studies included in the dissertation involve larger up-front, lump sum, cash payments, NTE's two billion dollars and up-front payment for concession rights, in terms of amount paid up front by a concessionaire, ranks it as one of the largest PPP projects ever in the U.S. Moreover, the involvement of the Dallas Police and Fire Pension Fund marks the NTE as the first PPP where a public pension fund participated as an equity member. Finally, the asserted ability to keep open all of the existing lanes throughout the construction period, arguably, serves as another outstanding feature of the project.

4.2 Northwest Parkway

Not unlike some other PPP transportation concession projects, the NWP project involved a private concessionaire's payment of a large lump sum cash payment for concession rights on an existing tolled roadway. In the case of the NWP project, the concessionaire paid what was at the time the highest price for the lease of a U.S. toll road in terms of a multiple of revenues (Northwest Parkway 2007B, 1). While, arguably, taxpayer-based incentives for the concessionaire included in the deal made the transaction more favorable toward the concessionaire than what one might initially assume based on the prior revenue collection, the over half-billion dollar concession fee paid by the concessionaire for a struggling toll project alone made the NWP project a noteworthy PPP.

While the concession payment justifiably caught the attention of many observers of the NWP project, arguably, another important feature of the agreement between the parties garnered too little notice. In fact, one could argue that, in light of the written statement by the NWP

Authority concerning the absence of a non-compete provision between the parties to the agreement, the public may have been misled about the nature of the concession arrangement. Indeed, the NWP Authority's contention that the concession agreement does not limit the ability of it or any other governmental authority to build highways or other transportation facilities that could be construed as "competing" with the NWP, the concession agreement does provide for the concessionaire to receive compensation should the concessionaire offer evidence concerning a competing facility.

Thus, despite the NWP Authority's seeming assertion to the contrary, the NWP, arguably, does limit the right of the NWP Authority or any governmental authority to build highways or other transportation facilities that may seem to compete with the project (Northwest Parkway 2007A; Northwest Parkway 2007B). Indeed, the agreement requires that the concessionaire receive compensation if certain conditions occur (Northwest Parkway 2007A). While the NWP Authority does note the items the concessionaire must show in order to receive compensation in the event of an alleged competing facility, arguably, the NWP Authority's statement that the concession agreement does not place limitations upon governmental agencies ability to develop competing facilities seems misleading (Northwest Parkway 2007A). One could argue that, in the case of highly complex and vitally important PPP arrangements, the government should exercise greater caution when providing information to the public about particular PPP arrangements. However, if the NWP Authority's statements offer an indication of how the public partner will disseminate information to the public about its contractual arrangements with the private entity, one could argue that the public's ability to participate in the PPP process will suffer.

4.3 Pocahontas Parkway

The Pocahontas Parkway project initiated as a PPP by virtue of the Pocahontas Parkway Association's issuance of bonds under Virginia's Public Private Transportation Act of 1995. The Parkway served as only the second instance of the use of a 63-20 not-for-profit corporation by a local government. Arguably, the inability of the Parkway Association to maintain viability of the project further strengthens the position of the 63-20 corporation detractors, some of whom claim that the local government who creates the entity can essentially disown the endeavor. Indeed, only two years after the Parkway's opening, the project faced impending failure (Toll Road News 2008).

Although reserve funds enabled the project to carry on for a short period, the Parkway received a welcome announcement in May of 2006 when VDOT communicated to the public that Transurban planned to take over the project through an asset purchase agreement with the PPA. In exchange for a 99 year concession, the Australian based toll road operator Transurban not only assumed all of the outstanding indebtedness of the project but furthermore agreed to build a connector road from the Parkway to the Airport which will be funded in part through a \$150 million TIFIA loan (USDOT 2010).

4.4 Port of Miami Tunnel

The Port of Miami Tunnel project contains three notable characteristics. First, some observers claim that, without the PPP model, the project would never have come to fruition. The high cost risk involved due to the state of the art technology needed for the underwater tunnel made public officials unenthusiastic toward the project.

Based on the state of Florida's assessment of the cost required to bring the tunnel to completion, Florida officials opposed the use of public dollars to finance the development and construction of the project (Parker 2009). However, in October of 2009, the Florida Department of Transportation (FDOT) and a private consortium, Miami Access Tunnel (MAT), reached a financial close on the POMT project (Parker 2009).

Second, the project involves a Public-Public Partnership (PuP) that includes FDOT, Miami-Dade County, the City of Miami, and the U.S. Department of Transportation (Parker 2009.). Although the multi-jurisdictional element of the POMT may have strongly contributed to the difficulty in reaching an agreement with a private concessionaire on a timelier basis, the parties did reach an agreement on the project (Parker 2009). Thus, future projects that involve multiple governmental entities that reach across geographical boundaries and involve federal and local levels of government may benefit from the experiences encountered in the POMT project.

Third, POMT's availability payment feature means that the concessionaire will receive annual payments from FDOT based upon maintenance of the traffic lanes (Parker 2009, 18). The POMT serves as only the second project in the U.S. to utilize availability payments.

4.5 Indiana Toll Road

The most striking feature of the ITR project, arguably, involves the immense up front, lump sum payment of \$3.8 billion by the concessionaire for the concession rights to an existing toll road. While the cash payment may allow state politicians to fund their proposed transportation programs for a decade into the future, according to some observers, the 75 year lease of the ITR to the private concessionaire may prove to be a "bad deal" for the state of Indiana before the lease term expires.

According to some observers, the history of the ITR and projected traffic volume reveals that the state of Indiana may have benefited from retaining control of the ITR rather than leasing it to private interests. For instance, at least one study of the ITR placed its value at \$11 billion compared with the State of Indiana's valuation of \$2 billion (USDOT 2007, 33). Arguably, significant traffic increase coupled with aggressive toll increases could have generated more revenue to the state than the money gained through the concession arrangement. Furthermore, the \$3.8 billion dollar cash payment attracted substantial media attention and Gov. Mitch Daniels, arguably, gained considerable political traction by virtue of his unveiling of a ten year transportation plan funded by the cash payment. However, a recent study suggested that, despite Gov. Daniels' assertion, the interest earned from the concession fee will not supply sufficient funds for the transportation program (Baxandall 2009, 21).

4.6 Chicago Skyway

Facing a severe budget deficit in 2004, the city of Chicago entered an agreement with a private concessionaire that included the concessionaire's upfront lump-sum payment of \$1.83 billion to the City in exchange for the rights to operate and maintain the Skyway for a 99-year lease term (USDOT 2010). Similar to the ITR, the Chicago Skyway project involved the lease of an existing road to a private entity. However, while public officials in Indiana plan to use the concession fee to pay for transportation related programs, city officials in Chicago used the cash payment to fund non-transportation related services (Pew 2009). Thus, arguably, while the Chicago Skyway project possesses important similarities with the ITR project, one could argue that Chicago's use of the concession fee to fund social service programs, for instance, differentiates the Skyway project from the ITR and the other case studies included in the

dissertation. Arguably, based on efficiency and other concerns, one might question the desirability of utilizing monies gained from the long-term lease of a transportation infrastructure asset to pay for government programs unrelated to transportation.

4.7 Important Characteristics Observed

First, importantly, each project included in the study possesses, according to the FHWA, at least one attribute that qualifies it as an “innovative” PPP project (FHWA 2010). Second, all six of the projects involve significant concession periods of at least thirty years. Thus, as none of the PPPs contained in the case studies began earlier than 2005, none of the six will reach the end of their respective concession period for decades into the future. Third, as noted above, while one cannot determine the degree of “success” of the individual concession deals at the present stage of the respective projects, one could argue that the case studies reveal several vital attributes of PPP projects that merit close attention.

4.7.1 “Non-Compete” Provisions

In the case of the Northwest Parkway, although the NWP Authority’ claim that, their agreement does “not limit the right . . . to build a transportation facility that may compete with . . . the Parkway,” may be technically correct, arguably, one must read further to understand the essence of the concession arrangement (Summary CLA 2007, 4). In fact, according to the agreement, should any governmental entity build a competing facility, although one that qualifies under the concession arrangement, then the NWP Authority must compensate the private concessionaire for lost revenue (Summary CLA 2007). Thus, one might question why the NWP Authority would assert that the agreement does not “limit the right” of a governmental entity from building a competing facility, when taxpayers, in essence, would be penalized by virtue of

the NWP Authority's mandated penalty payment to the concessionaire in the event a governmental entity did build a competing facility that adversely affected the concessionaire's revenue (Summary CLA 2007). Furthermore, due to the public sector's dubious claim that the concession arrangement does not "limit the right" of the development of competing facilities, one could contend that public participation, at least in the case of the NWP, did not rise to a level sufficient enough to prevent the public sector from making such a dubious assertion. Although a local media organization did note the inclusion of, what it plainly termed "a noncompete clause" in the agreement, arguably, a greater level of public participation could have brought the non-compete issue under greater scrutiny (Lewis 2007). Similarly, the Chicago Skyway agreement does not include a non-compete provision *per se*, yet the public sector must compensate the private entity in the event the Illinois legislature takes action that adversely affects the value of the concession for the concessionaire (Pew 2009).

4.7.2 Different Types of Repayment Mechanisms

Each of the six cases involved large sums of money. However, the cases differed in terms of their "repayment mechanisms." For example, while the NTE, ITR, CS, NWP, and PP projects allow for the concessionaire to collect tolls for a specified period, the POMT provides for "shadow payments" to the concessionaire based upon traffic volume and lane availability (FHWA 2010; Parker 2009). Additionally, not all six of the projects included a lump sum payment by the concessionaire. The POMT project requires the State of Florida to make payments to the concessionaire based on certain results achieved by the concessionaire.

Furthermore, while each of the cases required significant investment by the private partner, either in terms of cash to the public partner, new construction, or a combination of the

two, different sources of funding existed among the projects. For example, some of the projects used a combination of private equity from entities that comprised the concessionaire, loans from third parties, and PABs (FHWA 2010). However, at least one of the projects, the NTE, involved a 10% equity investment by the Dallas Police and Fire Pension System, making it the first PPP in the U.S. where a public pension fund participated as an equity partner in a toll road project (Sharn 2009, 18).

4.7.3 “Brownfield” vs. “Greenfield” Projects and Asset Valuation

The individual case studies may be classified as either a “greenfield” project or as a “brownfield” project (GAO 2008, 14, 15). The designation, “greenfield,” given to a project that involves new construction, has been defined in the following manner:

In construction of new infrastructure, commonly called “greenfield projects,” the private sector may provide financing for construction of the facility and then has responsibility for all operations and maintenance of the highway for a specified amount of time. The private operator generally makes its money through the collection of tolls (GAO 2008, 14-15).

The term, “brownfield,” has been used to designate a project that involves the transfer of rights to existing infrastructure (GAO 2008, 14, 15). The following definition has been given for a “brownfield” project:

Private investments have also been made in existing infrastructure through the long-term leases of currently existing toll roads. These transactions, often called “brownfield” projects, usually involve a private operator assuming control of the asset—including responsibilities for maintenance and operation and collection of toll revenues—for a fixed period of time in exchange for a concession fee provided to the public sector. The concession fee could be in the form of an up-front payment at the start of the concession, or could be provided over time through a revenue sharing arrangement, or both (GAO 2008, 15).

The lack of available funds for the development of greatly needed, yet extremely costly, transportation infrastructure projects, arguably, serves as the single most important advantage of

PPPs. However, the logic used to justify a PPP as a policy choice for a greenfield project does not, arguably, apply in the case of a brownfield project.

In the present study, the POMT clearly qualifies as a greenfield project because the underwater tunnel consists of entirely new construction. The NTE project would most likely be deemed a greenfield project because it involves new construction in the form of additional lanes, yet the project enhances existing roadways, as well. Both the Northwest Parkway and Pocahontas Parkway involve the lease of existing infrastructure to private entities and would therefore qualify them as brownfield projects. However, while one could argue that these provisions are clearly ancillary to the primary focus of the concession arrangements, both of the projects contemplate new construction as part of their respective concession agreements. Both the ITR and the Chicago Skyway involve long-term leases of currently existing toll roads.

4.7.4 Public or Political Interests?

The ITR and the Chicago Skyway projects not only exemplify brownfield projects, but also reveal some of the concerns expressed over the lease of existing infrastructure to private entities. One study made the following observation:

It was the high-profile asset monetization deals of existing facilities (referred to as brownfields) on the Chicago Skyway—\$1.83 billion in up-front payments, and the Indiana Toll Road—\$3.8 billion in up-front payments, that really caught the attention of elected officials. Some saw such deals, referred to now generically as public–private partnerships, as a way to tap value from existing infrastructure. Others saw these contracts as relinquishing control over decision making on public assets to the profit-motivated private sector without adequate public oversight (Buxbaum and Ortiz 2009, 5).

Not only has the relinquishment of control of an important infrastructure asset by the public sector to a private entity been identified by some observers as a serious flaw in long-term concession agreements of existing infrastructure, but critics of brownfield projects have noted

other concerns. Although public officials laud the significant up-front concession fee paid by the private concessionaire to the public sector, some observers have noted that the public interest may have been compromised, rather than improved, as a result of the concession deal. Indeed, some researchers suggest that public officials may favor the lease of public assets to private entities because of political expediency, rather than concern for the public interest (Pew 2009, 5; PIRG 2009, 12; Buxbaum and Ortiz 2009, 21). Politicians, arguably, favor PPPs because they can distance themselves from decisions to raise toll fees while foregoing at least some additional tax increases in order to fund infrastructure needs. A recent study noted the following:

Most government entities in the United States are struggling with the ability to keep the cost of developing, operating, and maintaining highway infrastructure under control, and also find it difficult to raise either general purpose taxes or motor fuel taxes (Buxbaum and Ortiz 2009, 29).

Some scholars imply that, public officials, in their eagerness to obtain large up-front concession fees, may have agreed to terms in concession arrangements that failed to account for the true value of the asset (Pew 2009; Baxandall 2009; Buxbaum and Ortiz 2009). However, some of the proponents of leasing existing infrastructure have promoted the assets' "trapped valued" as the following observation notes:

Indeed, the concept of "unlocking the trapped asset value" of transportation assets has been used as a key argument in favor of PPPs . . . By moving to PPPs, elected officials are removed from the mix on individual toll rate setting decisions in legally binding contracts (although they do approve the overall structure allowing for future increases). This added value can then be used for a variety of public projects, in addition to providing a profit for the private concessionaire (Buxbaum and Ortiz 2009, 29).

Yet while some elected officials contend that the transportation infrastructure asset possesses value to the public that becomes available only through the lease of the asset, a recent study

implies that, according to some public officials, concession deals may unduly favor the private entity. Buxbaum and Ortiz (2009) noted the following:

Data analysis by Infrastructure Management Group shows that the long-term return on equity on recent concession deals involving “brownfield” toll roads was expected to be around 12% . . . Buxbaum and Ortiz (2007) identified windfall revenues as one of the main public concerns related to long-term concessions. This concern was further validated by the public agencies surveyed in this synthesis, where all but one respondent indicated that excessive rates of return to private investors are an important concern (Buxbaum and Ortiz 2009, 18).

Furthermore, whether the concession arrangements prove to benefit the public interest or not, some researchers have argued that current U.S. transportation concession practice lags European practice of rigorous public interest tests. According to one recent study, the failure to include adequate public interest assessments may have the following result:

The failure to use formal public interest tests may result in certain aspects of the public interest being overlooked, such as the value of foregone toll revenue. When states have decided mid-course to conduct thorough analysis, it has often changed their decisions. In Texas, for example, Harris County conducted a study in 2006 to examine the value of a long-term concession compared to retaining public control. The county determined that it would gain little through the concession, and that by implementing more aggressive tolling, it could realize similar or greater financial gains. Thus, Harris County opted to retain control of the toll roads (Buxbaum and Ortiz 2009, 108).

Finally, the case of the ITR exemplified the potential for disputes between private consultants over the value of publicly owned assets (USDOT 2007). In the case of the ITR, the public sector’s financial evaluation of the Indiana Toll Road differed significantly from a public interest group’s valuation of the asset (USDOT 2007). Thus, one could argue that, under current PPP practice in the U.S., the decision as to which private consultant’s opinion concerning the valuation of the publicly owned asset should be deferred to cannot be easily answered.

4.7.5 Competing Interests

Finally, one of the case study projects, the NTE, involves the first time a public pension fund has acted as a partner in a PPP project in the U.S. The Dallas Police and Fire Pension Fund serves as an equity partner in the private consortium that comprises the private partner of the NTE and therefore, arguably, raises a conflict of interest issue. As noted above, some scholars and other observers have questioned the legitimacy of the public sector and the private sector acting as “partners” through a PPP due to their competing interests (Linder 1999; Rosenau 1999). Thus, one could assert that, due to the public sector’s interest in the furtherance of the public good through the maintenance of low toll fees on the NTE managed lanes, and the private entity’s interest in the maintenance of the highest toll fees possible in order to maximize the private entity’s profit, the “partners” that comprise the NTE project possess significant, competing interests that make their “partnership” untenable. Moreover, as the NTE project includes a public pension fund as an equity member of the private entity partner, essentially, the public sector partner, TXDOT, may be in a position where its interest of promoting the public interest through the maintenance of low toll fees conflicts with the interest of an important segment of the public sector population, the police and fire personnel whom have monies invested in the Dallas Police and Fire Pension Fund.

4.8 What Do the Case Studies Reveal About the Future of Long-Term Concession PPPs?

Based on the observations obtained from the case studies, the U.S. will continue to witness an increased use of PPPs as a policy tool for highway transportation. Most likely, elected officials, many of whom favor concession arrangements due to the seemingly low political-risk/high political-reward they offer, will continue to cite the ability to fund transportation and

other programs that up-front concession fees make possible, while citizen and other groups which oppose long-term concession arrangements will continue to question the actual benefits received from these agreements. However, elected officials whom choose to promote PPPs seem to possess a significant advantage over public interest groups who oppose PPPs.

Indeed, a recent study of concession arrangements noted the inherent difficulties involved in educating the public as to the desirability of a long-term concession deal:

Long-term infrastructure leases are complex deals with serious implications for drivers, businesses, communities and a state's economic future. *But the money usually grabs the headlines*—billion dollar headlines in the cases of the Indiana and Chicago leases (Pew 2009, 25 (emphasis mine)).

A variety of factors, such as the availability of private equity to fund PPPs, will certainly affect the prevalence and the nature of PPP projects in the U.S. in coming years. However, one might expect that the “billion dollar headlines” will continue to encourage public officials to promote PPPs and for the public to support the public and private sectors working as “partners” in order to facilitate highway transportation projects (Pew 2009; Linder 1999).

CHAPTER 5

STATE LAW AND MODEL LEGISLATION

5.1 Texas Law for Highway Transportation PPPs

Texas passed legislation that requires the use of a Comprehensive Development Agreement (CDA) for a Public-Private Partnership. The Texas legislature defines a CDA in the following manner:

A comprehensive development agreement is an agreement with a private entity that, at a minimum, provides for the design and construction of a transportation project and may also provide for the financing, acquisition, maintenance, or operation of a transportation project (Texas Transportation Code, Title 6, Section 370.305, subsection (b)).

5.1.1 Confidentiality

TEX TN. CODE ANN. § 223.204, TX TN. CODE ANN. § 366.403, and TEX TN. CODE ANN. § 370.307 address the issue of confidentiality of information involved in highway PPP projects in Texas. § 223.204 governs PPP projects that involve a CDA. If a transportation project involves a Regional Transportation Authority (RTA), then § 366.403 applies, whereas if the project includes a Regional Mobility Authority (RMA) then § 370.307 governs (FHWA 2010). The language of both § 366.403 and § 370.307 mirror the language of § 223.204.

Texas law allows for, and even encourages, unsolicited bids from private entities for highway transportation projects. Texas law contains the following provision in of the Texas statutory sections cited above:

To encourage private entities to submit proposals under this subchapter, the following information is confidential, is not subject to disclosure, inspection, or copying under Chapter 552, Government Code, and is not subject to disclosure, discovery, subpoena, or

other means of legal compulsion for its release until a final contract for a proposed project is entered into (TEX TN. CODE ANN. § 223.204(a) (emphasis mine)).¹

Thus, the language of § 223.204(a) and other statutory subsections clearly expresses, not only an allowance for unsolicited bids, but a desire to promote a policy of encouraging unsolicited bids from private entities who wish to engage in the construction, operation, or maintenance of a highway transportation project in Texas.

Specifically, in order to further the policy of private entities submitting unsolicited bids, Texas law provides legal protection to certain types of information obtained from a private entity (TEX TN. CODE ANN. § 223.204(a)). Texas law protects the following:

All or part of a proposal that is submitted by a private entity for a comprehensive development agreement, except information provided under Sections 223.203(b)(1) and (2)², unless the private entity consents to the disclosure of the information (TEX TN. CODE ANN. § 223.204(a)(1)).

Therefore, if a private entity submits a proposal to TXDOT for a CDA, unless the private entity consents to disclosure, no information may be disclosed to the public other than information concerning the “location, scope and limits” of the project and information related to the private

¹ Texas Government Code, Chapter 552, known as the “Public Information Act,” gives persons the right to obtain access to government records. Under Texas law a presumption exists that the public may access all government information unless certain exceptions to the disclosure of information apply (TEX GOV. CODE CH. 552).

² Sections 223.203(b)(1) and (2) state the following:

(b) The department shall establish rules and procedures for accepting unsolicited proposals that require the private entity to include in the proposal:

(1) information regarding the proposed project location, scope, and limits;

(2) information regarding the private entity's qualifications, experience, technical competence, and capability to develop the project.

entity's “qualifications, experience, technical competence, and capability” (TEX TN. CODE ANN. § 223.203(b)(1) and (2)).

5.1.2 Conflict of Interest

Texas law addresses the concern for conflicts of interest in projects that involve CDAs.

Rule §27.8 of Chapter 27 of Texas Administrative Code Title 43 states the following:

[Rule §27.8] prescribes ethical standards of conduct applicable to private entities, including consultants and subconsultants, participating in the department's comprehensive development agreement program (TEX ADM CODE Title 43, Ch. 27, Rule §27.8).

Rule §27.8 addresses the general topic of conflict of interest in CDAs under three main categories. First, subparagraph (b) of the rule governs situations that involve “gifts and benefits” in projects that involve a CDA (TEX ADM CODE Title 43, Ch. 27, Rule §27.8(b)). In general, the rule forbids private entities or individuals participating in a project that involves a CDA from providing gifts or benefits to any TXDOT or Texas Transportation Commission employee (TEX ADM CODE Title 43, Ch. 27, Rule §27.8(b)). Exceptions include payment for an “ordinary business lunch” or a generally distributed “token item” that does not exceed \$25 in estimated value (TEX ADM CODE Title 43, Ch. 27, Rule §27.8(b)).

Second, Rule §27.8(c) entitled, “Conflicts of Interest,” essentially prohibits a private entity that provides consulting services to TXDOT on a project that involves a CDA to represent an entity that submits a proposal for the same project (TEX ADM CODE Title 43, Ch. 27, Rule §27.8(c)(2)). Notably, however, a private entity that provides consulting to TXDOT on a project that involves a CDA may represent an entity that submits a proposal for a different project that involves a CDA (TEX ADM CODE Title 43, Ch. 27, Rule §27.8(c)(12)). The applicable subsection states the following:

A consultant participating with respect to a comprehensive development agreement project as a proposer or developer . . . is eligible to provide consultant services (other than procurement services) to the department for another comprehensive development agreement project, provided that, once the consultant is retained to perform consultant services for the department, the restrictions in this subsection shall apply (TEX ADM CODE Title 43, Ch. 27, Rule §27.8(c)(12)).

Additionally, Rule §27.8(c) prescribes time restrictions for private entities and individuals that performed work for TXDOT or TTC. For example, if services performed by a consultant raised a conflict of interest, restrictions and prohibitions under the Rule apply until “one year after the date of performance of service ends” (TEX ADM CODE Title 43, Ch. 27, Rule §27.8(c)(3)(A)). However, if an individual was “materially involved in providing services to the department,” then the prohibitions and restrictions under the Rule apply for five years once the individual’s service end (TEX ADM CODE Title 43, Ch. 27, Rule §27.8(c)(3)(B)(1)). Only a one year time period applies if the individual was “not materially involved in providing services to the department” (TEX ADM CODE Title 43, Ch. 27, Rule §27.8(c)(3)(B)(2)). Neither §27.2 entitled “Definitions” or Rule §27.8 under Chapter 27 define “material involvement.”

Third, Rule §27.8(d) deals with “rules of contact” for projects that involve a CDA. First, the Rule prohibits a proposer or any of its team members of a project that involves a CDA from communicating with other proposers or team members about the project, the Request for Qualifications (RFQ), or the Request for Proposal (RFP) (TEX ADM CODE Title 43, Ch. 27, Rule §27.8(d)(1)). Second, the Rule forbids *ex parte* communications by any proposer or potential proposer with members of TXDOT or the Texas Transportation Commission (TTC), including their staff, contractors, advisors, and consultants, regarding the project, the RFQ, or the RFP (TEX ADM CODE Title 43, Ch. 27, Rule §27.8(d)(3)). Third, in each RFQ and RFP, TXDOT designates an ombudsmen to remove information identifying the proposer who should

then pass on questions, complaints, or other communications to personnel authorized to receive communications from the proposer (TEX ADM CODE Title 43, Ch. 27, Rule §27.8(d)(5))

5.1.3 Renegotiation of Contracts

Although Texas law does not directly address the issue of renegotiation of CDAs in highway transportation projects, arguably, it does so indirectly (TEX TN. CODE ANN. § 223.208 (h)). Scholars and other observers of long-term concession arrangements have contended that the significant duration of the lease term under many concession arrangements serves as one of the primary factors that contribute to the prevalence of renegotiated concession agreements between the government and the private sector (Gausch 2004). Thus, as Texas law limits the term of a CDA that involved the collection of tolls by the private party to the agreement to 52 years, arguably, Texas indirectly addresses the issue of renegotiation of concession agreements (TEX TN. CODE ANN. § 223.208 (h)).

5.1.4 Senate Bill 792

Finally, during the state legislative session in the spring of 2007, several lawmakers in Texas proposed “freezes” on PPP concessions within the state (Toll Road News 2007A). Under Senate Bill 1267, for example, all but a select few types of PPPs would be disallowed for a period of 30 months (Toll Road News 2007A). Furthermore, the bill called for the creation of a “legislative study committee” that would study the policy implications of PPPs and report its findings to the legislative and executive branches of Texas (Toll Road News 2007A).

On June 11, 2007, Texas Gov. Rick Perry signed into law Senate Bill 792. Lauded as a “compromise bill,” S.B. 792 did not possess as severe restrictions on transportation PPP activity as S.B. 1267 and some other proposals, such as H.B. 1892 – which Gov. Perry had previously

vetoed (TCEC 2007, 1.). Two of the key provisions of the new transportation law included a two-year moratorium on some CDAs and the placement of the right of primacy or “right of first refusal” for toll projects with local toll road authorities (TCEC 2007, 3).

5.2 Florida Law for Highway Transportation PPPs

5.2.1 Confidentiality

Florida Statutes, Title XXVI, Chapter 334 governs PPP projects in the State of Florida. While §30 under Chapter 334 allows for unsolicited bids, Florida law does not contain an express provision that seeks to maintain the confidentiality of information submitted by a private entity on a PPP project (FL. STAT. 334.30; USDOT 2010).

5.2.2 Conflict of Interest

Furthermore, unlike Texas, Florida law does not provide a specific legislative rule that addresses conflict of interest matters in PPP arrangements (FL. STAT. 334.30). However, FDOT, citing its policy making authority under FL. STAT. §20.23(3)(a) and §334.048(3), recently issued a written policy effective June 17, 2010, entitled, “Public Private Partnership Conflicts of Interest” (FDOT 2010). FDOT asserted that it formulated the policy based on its intent “to maximize competition on Public Private Partnership (“PPP”) Projects” (FDOT 2010). Additionally, FDOT contended that the policy aimed to ensure “that the procurement of each project is open and fair” (FDOT 2010). Essentially, FDOT’s conflict of interest policy prohibits firms, including their employees, consultants, and subconsultants, which act as a consultant on any PPP project to FDOT to serve as a proposer or part of a proposer team for any other PPP project with FDOT (FDOT 2010).

5.2.3 Renegotiation of Contracts

While Florida law does not directly address the issue of renegotiation of PPP contracts, Florida does limit the duration of a lease term under a PPP arrangement (FL.STAT. §334.30(12)). Florida Statutes §334.30(12) provides that PPP agreements “shall be limited to a term not exceeding 50 years” (FL.STAT. §334.30(12)). However, the law allows the Secretary of FDOT to authorize a term of up to 75 years (FL.STAT. §334.30(12)). The Florida Legislature must specifically approve any duration beyond 75 years (FL.STAT. §334.30(12)).

5.3 Colorado Law for Highway Transportation PPPs

5.3.1 Confidentiality

Colorado law does not contain an express provision that addresses the matter of confidentiality of information under highway transportation PPP arrangements (USDOT 2010).

5.3.2 Conflict of Interest

Colorado law does not address conflict of interest matters in PPP arrangements in great detail (COLO. REV. STAT. §§ 43-4-505(2)). However, Colorado law does include a provision directed at conflict of interest concerns in PPP projects.

Colorado created a “statewide tolling enterprise to finance, build, operate and maintain toll highways” (USDOT 2010). Housed within the Colorado Department of Transportation (CDOT), the High Performance Transportation Enterprise (HPTE) replaced the Colorado Tolling Enterprise in 2010 and operates as a government owned business (USDOT 2010). The Colorado Legislature, under §§ 43-4-505(2), addresses conflict of interest issues that related to members of HPTE’s Board of Directors. §§ 43-4-505(2) states the following:

Any member of the board shall disqualify himself from voting on any issue with respect to which he has a conflict of interest, unless such member has disclosed such conflict of interest in compliance with section 18-8-308, C.R.S.³ (Colorado Statutes §§ 43-4-505(2)).

Therefore, while Colorado law prohibits board members of the HPTE from participation in a vote related to an issue to which that member has a conflict of interest, the statute does not provide detailed guidance as to what constitutes a conflict of interest. Furthermore, Colorado law does not provide prohibitions concerning conflict of interest matters that explicitly relate to a private party's involvement in PPP projects.

5.3.3 Renegotiation of Contracts

Colorado provides for the longest concession term available under law. §43-1-1202(1)(d)(II) allows for a lease term of up to 99 years.

5.4 Illinois Law for Highway Transportation PPPs

Although at least one significant PPP project occurred within the State of Illinois in the form of the Chicago Skyway, Illinois law does not provide state enabling legislation PPP

³ 18-8-308, C.R.S states in part the following:

(1) A public servant commits failing to disclose a conflict of interest if he exercises any substantial discretionary function in connection with a government contract, purchase, payment, or other pecuniary transaction without having given seventy-two hours' actual advance written notice to the secretary of state and to the governing body of the government which employs the public servant of the existence of a known potential conflicting interest of the public servant in the transaction with reference to which he is about to act in his official capacity.

(2) A "potential conflicting interest" exists when the public servant is a director, president, general manager, or similar executive officer or owns or controls directly or indirectly a substantial interest in any nongovernmental entity participating in the transaction.

projects. Indeed, Illinois did not act as a party to the Chicago Skyway agreement nor did state law require it to become involved due to the home-rule provision under Illinois law (CONST. ILL. ART. VII). Therefore, Illinois does not directly address confidentiality, conflict of interest, or renegotiation matters in PPP projects. Notably, however, while no enabling legislation currently exists in Illinois that allows for transportation PPPs, the Illinois General Assembly recently commissioned a study to assess the monetary value of the Illinois' State Toll Highway Authority system, as a whole and in segments, under different types of PPP arrangements (Buxbaum and Ortiz 2007, 14).

5.5 Indiana Law for Highway Transportation PPPs

5.5.1 Confidentiality

Indiana law does address the concern for confidentiality of information in PPP arrangements, although, arguably, not in an extensive manner (IND. STAT. §8-15.5-4-6). Under Indiana Statutes §8-15.5-4-6, the Indiana Finance Authority (IFA) may do the following with respect to information related to PPP projects:

The authority may, treat as confidential all records relating to discussions or negotiations between the authority and eligible offerors if those records are created while discussions or negotiations are in progress. §8-15.7-4-6. The department may not disclose the contents of proposals during discussions or negotiations with potential offerors (IND. STAT. §8-15.5-4-6).

Thus, while the Indiana legislature provides the IFA great discretion concerning whether to disclose information related to “discussions or negotiations” between private entities and IFA, it protects “the contents of proposals” with other entities who qualify as “potential offerors” from disclosure (IND. STAT. §8-15.5-4-6).

5.5.2 Conflicts of Interest

No express provision that addresses conflicts of interest matters in PPP projects exists in Indiana law. The Indiana Department of Transportation (INDOT) drafted a proposed policy that sets forth guidelines for conflicts of interest concerns in PPP contexts yet it has not adopted an official policy (INDOT 2010).

5.5.3 Renegotiation of Contracts

The State of Indiana's legislature, under §8-15.5-5-2, allows the IFA to enter into a PPP agreement for toll roads for up to 75 years (IN. STAT. under §8-15.5-5-2). Thus, while Indiana law limits the lease from the maximum lease term allowed under real property law, 99 years, arguably, it still provides for a very significant lease term. Similar to other states, Indiana does not directly address concerns involved in the renegotiation of PPP agreements.

5.6 Virginia Law for Highway Transportation PPPs

5.6.1 Confidentiality

Virginia law provides for the protection of information submitted by a private entity in connection with a PPP proposal and related negotiations (FHWA; VA. STAT. §56-560). The relevant statute states the following:

The responsible public entity shall take appropriate action, as more specifically set forth in its guidelines, to protect confidential and proprietary information provided by the private entity pursuant to an agreement under subdivision 11 of § 2.2-3705.6 (VA. STAT. §56-560).

Thus, while, arguably, Virginia law does not provide great guidance on matters pertaining to confidentiality concerns, it does incorporate by reference, at least potentially, more detailed treatment of confidentiality concerns as it directs the State's entity to "take appropriate action" as provided for in that particular entity's "guidelines" (VA. STAT. §56-560).

5.6.2 Conflict of Interest

Virginia law covers conflict of interest matters in PPP arrangements (VA.CODE. § 2.2-4373). In 2007, The Virginia Department of Transportation (VDOT) issued a memorandum that notes Virginia's legislative provision that governs PPP conflict of interest concerns. The law that addresses conflict of interest matters, entitled "Participation in bid preparation; limitation on submitting bid for same procurement," reads in the following manner:

No person who, for compensation, prepares an invitation to bid or request for proposal for or on behalf of a public body shall (i) submit a bid or proposal for that procurement or any portion thereof or (ii) disclose to any bidder or offeror information concerning the procurement that is not available to the public. However, a public body may permit such person to submit a bid or proposal for that procurement or any portion thereof if the public body determines that the exclusion of the person would limit the number of potential qualified bidders or offerors in a manner contrary to the best interests of the public body (VA.CODE. § 2.2-4373).

Therefore, while Virginia law purports to preclude a person who, on behalf of the State of Virginia, prepares an invitation to bid on a PPP project from submitting a bid or proposal that pertains to the bid that person worked on, the law provides a clear exception (VA.CODE. § 2.2-4373). Indeed, the rule allows a person who prepared an invitation to bid on a PPP project to submit a bid or proposal for the procurement of that same project if the Virginia public entity determines that exclusion would adversely affect "the best interests" of the public entity (VA.CODE. § 2.2-4373). Remarkably, under Virginia law, the same individual who prepared an invitation to bid on a PPP project can then submit a bid for the same project.

5.6.3 Renegotiation of Contracts

Virginia law does not address renegotiation of contracts in PPP arrangements. Moreover, Virginia does not limit the duration of a lease term in PPP arrangements.

5.7 Federal Highway Administration (FHWA) Model Legislation

5.7.1 Confidentiality

The FHWA offers suggested legislation for states concerning highway transportation PPP projects (USDOT 2010). A recent study of state legislation noted that, while twelve states have legislation that addresses proposal confidentiality, only two states protect confidentiality (Iseki et al. 2009, ix).

The FHWA offers two different “versions” of suggested legislation that pertains to a proposal submission and confidentiality matters. Under the first version, the model legislation provides a private entity the opportunity to request a review by the state’s Department of Transportation (DOT) of information “that the private entity has identified as confidential or proprietary” (FHWA Model Leg (g) (1)). The review allows for the DOT to “determine whether such information would be subject to disclosure” under the state’s open records, or similar type, act (FHWA Model Leg (g) (1)). Additionally, the private entity may “identify confidential or proprietary information submitted as part of a solicited proposal” (FHWA Model Leg (g) (2)). The state DOT determines whether the information qualifies as exempt under the state’s open records law (FHWA Model Leg (g) (3)). If the state DOT finds that the information does not qualify as exempt, the DOT must notify the private entity of its determination and provide the private entity an opportunity to object or to withdraw its proposal (FHWA Model Leg (g) (4) and (5)). The information that the DOT finds “not to be confidential or proprietary may be subject to disclosure” under the state’s open records act (FHWA Model Leg (g) (7)).

Version two of the FHWA model legislation, similar to version one, allows for a private entity, prior to submission of a solicited proposal of information, to request a review by the state

DOT of material “that the private entity has identified as confidential or proprietary” (FHWA Model Leg. (g) (1)). Under version two, identical to version one, the DOT determines whether the information qualifies as confidential or proprietary based on the state’s open records act (FHWA Model Leg. (g) (1)).

Unlike version one, however, version two does not provide a private entity an opportunity to object to the DOT’s determination prior to submission of a proposal. Moreover, version two does not allow for the private entity to withdraw its proposal should the private entity disagree with the DOT’s findings (FHWA Model Leg. (g) (2)). While the FHWA model legislation distinguishes between “solicited” and “unsolicited” proposals, the provisions that address confidential and proprietary information under unsolicited proposals mirrors the solicited proposals suggested provisions (FHWA Model Leg. (g) and (c)).

5.7.2 Conflict of Interest

The FHWA Model Legislation does not contain a provision entitled “conflict of interest” nor does it include the phrase as part of its suggested statutory language. Moreover, as noted by the American Bar Association (ABA) in its letter to the U.S. Secretary of Transportation, the FHWA model legislation may invite conflict of interest occurrences rather than serve to limit them (ABA 2007).

There are three main concerns related to conflict of interest matters noted by the ABA concerning the FHWA model legislation. First, the ABA finds the language of §1-103(a) of the FHWA Model Legislation entitled, “Unsolicited Proposals,” vague. For example, the model statute allows the state to receive an unsolicited proposal for a PPP project if the proposal “is independently originated and developed by the proposer” (FHWA Model Leg. §1-103(b)(1)(a)).

The ABA contends that model legislation does not define the phrase, “independently originated and developed,” and thus the provision offers little guidance (ABA 2007, 15). Second, the ABA finds subsection (b)(1)(D) of the Model Legislation, which allows the state to receive an unsolicited proposal if the proposal “includes sufficient detail and information for the Department to evaluate the proposal in an objective and timely manner,” susceptible to conflict of interest concerns (ABA 2007, 15). According to the ABA, the foregoing provision appears to do the following:

[The provision appears] to authorize the [state] to evaluate such proposals on whatever objective basis it may decide to apply after receipt of the unsolicited proposal (ABA 2007, 15).

Third, and perhaps most significantly, according to the ABA, §1-103(a) improperly exempts unsolicited proposals for PPP projects from the state’s procurement act entirely. Some states have enacted legislation, sometimes referred to as “procurement acts,” which mandates, among other items, that the state must provide specific, objective criteria for each project prior to the state receiving proposals from private entities for such project. According to the ABA, as PPP projects are exempted from the state’s procurement act under the FHWA Model Legislation, conflicts of interest events may ensue. The acting Director of the ABA made the following comment with respect to the FHWA’s exemption of the model rule from states’ procurement acts:

Under the proposed model legislation, information obtained by one competitor from prior engagements with the “Department” might never be disclosed, and any kind of participation by the “Department” in such engagement appears to be permitted as long as it is not characterized as “supervision” (ABA 2007, 15).

According to the ABA, the American Bar Association’s *2000 Model Procurement Code* addresses the three issues discussed above in an effective manner by “establishing a level playing

field among competitors” prior to the commencement by a state of the PPP project process, including the receipt of proposals (ABA 2007, 15). Thus, according to the ABA, while the FHWA does not directly address conflict of interest matters in its model legislation, based on its provision for receipt of unsolicited proposals, the FHWA model legislation, arguably, furthers the probability that conflicts of interest will take place in the context of highway transportation PPP projects between a state and a private entity.

5.7.3 Renegotiation of Contracts

The FHWA Model Legislation does not address the issue of renegotiation in PPP projects. The FHWA does not provide specific provisions that deal with renegotiation specifically, nor does it offer an indirect approach to the subject, such as a proposal to limit the lease term duration to a certain number of years.

CHAPTER 6

ANALYSIS AND DISCUSSION

6.1 Comparison of Texas Law with Other State Law and Model Legislation

According to at least one study, based on its enabling legislation, the state of Texas may be characterized as “aggressive” toward PPPs (Iseki et al. 2009, iii). However, arguably, whether Texas law provides a desirable legislative framework in terms of confidentiality and public participation, conflicts of interest, and renegotiation of contracts in PPPs presents a different question (Iseki et al. 2009, iii). By comparing Texas law with Florida law and with the FHWA Model Legislation, arguably, one could determine whether, and how, Texas may improve its laws in order to improve PPP practice in its jurisdiction.

As noted above, Texas law protects “all or part of a proposal that is submitted by a private entity for a comprehensive development agreement” (TEX TN. CODE ANN. § 223.204(a)(1)). In contrast, Florida law does not have legislation that maintains the confidentiality of information submitted by a private entity on a PPP project (USDOT 2010). The FHWA offers two different “versions” of suggested legislation that pertains to a proposal submission and conflict of interest matters. While both versions provide the private entity the opportunity to request a review by the DOT of information “that the private entity has identified as confidential or proprietary,” version two of the FHWA model legislation does not provide a private entity an opportunity to object to the DOT’s determination prior to submission of a proposal. Furthermore, version two does not provide a mechanism for the private entity to

withdraw its proposal should the private entity disagree with the DOT's findings (FHWA Model Leg (g) (2)).

Texas law provides guidance regarding conflict of interest matters in PPPs in three different areas (TEX ADM CODE Title 43, Rule §27.8). First, Texas law addresses "gifts and benefits" to public officials or employees (TEX ADM CODE Title 43, Rule §27.8). Second, Texas statutes includes a provision that governs a situation where an individual or private entity provides consulting services to TXDOT on a project that involves a CDA and acts as a proposer for the same project (TEX ADM CODE Title 43, Rule §27.8). Third, Texas law offers guidance for the situation where a proposer of a project that involves a CDA communicates with other proposers or team members about the project (TEX ADM CODE Title 43, Rule §27.8).

As noted above, Florida law does not provide a specific legislative rule that addresses conflict of interest matters in PPP arrangements, yet FDOT has issued a written policy that purports to address conflict of interest matters (FDOT 2010). FDOT cites Florida law as the basis for its policy-making authority. The FHWA Model Legislation does not address conflict of interest matters. Moreover, as noted above, the ABA has criticized the FHWA Model Legislation based on the ABA's position that certain aspects of the model law invite conflict of interest events (ABA 2007).

While Texas does not contain statutory provisions that specifically address renegotiation of concession agreements, arguably, Texas Transportation Code § 223.208 (h) indirectly concerns renegotiation events. § 223.208 (h) limits concession agreement to 52 years, a restriction that, one could argue, still allows for concession arrangements that are too long in duration and therefore susceptible to renegotiation (TEX TN. CODE ANN. § 223.208 (h)).

Similar to Texas, Florida does not specifically address renegotiation concerns while it provides for limitations upon the duration of PPPs. Florida Statutes §334 provides that, “Public-Private Partnership agreements under this section shall be limited to a term not exceeding 50 years,” yet the statute provides that the Secretary of FDOT may authorize a term of up to 75 years (FL.STAT. §334.30(12)).

The FHWA Model Legislation is silent on the issue of renegotiation. Unlike Texas, the FHWA code does not purport to limit the duration of PPPs to a particular number of years.

6.2 Analysis of Texas Law Compared to Florida Law and the FHWA Model Legislation

Arguably, Texas possesses a more comprehensive and desirable legislative scheme than both Florida and the FHWA Model Legislation offer in the area of conflict of interest and renegotiation of contracts. The FHWA Model Legislation, however, arguably offers a superior approach compared to both Florida and Texas in the area of confidentiality of information.

6.2.1 Confidentiality

Texas law allows for, and even encourages, unsolicited bids from private entities for highway transportation projects. As part of its policy of encouraging the submission of unsolicited bids, § 223.204(a) provides comprehensive protection of information provided by a private entity proposer (TEX TN. CODE ANN. § 223.204(a)(1)).

Florida law does not contain an express provision that seeks to maintain the confidentiality of information submitted by a private entity on a PPP project while the FHWA, under its PPP Model Legislation, provides for non-disclosure of certain information provided by a private entity proposer (FHWA 2010; FHWA Model Legislation). However, certain

differences exist between Texas law and the FHWA Model Legislation that governs information obtained from private entities during the PPP process.

Under the model statutory provisions of the FHWA approach, a private entity proposer that desires to avoid disclosure of certain proprietary information must request a review by the state's DOT (FHWA Model Leg (g) (1)). The review entails the DOT making a determination concerning whether the private entity's request for non-disclosure of information should be honored, or whether the information should be disclosed (FHWA Model Leg (g) (1)). While the FHWA offers two different versions of its model legislation that addresses confidential information, both versions require that the private entity request a review and both versions give the state DOT full discretion regarding whether the information shall be subject to disclosure ((FHWA Model Leg (g) (1)).

While the ABA criticizes the FHWA Model Legislation's exemption of PPP proposals from the state's open records act, the FHWA suggested provisions, arguably, provide greater opportunity for public participation in the PPP process than does Texas' legislative framework. Essentially, Texas provides "blanket" protection from disclosure of information included by a private entity in a PPP project proposal (TEX TN. CODE ANN. § 223.204(a)(1)). Although the FHWA Model Legislation could be greatly improved in terms of transparency, arguably, the FHWA Model Legislation's requirement that the private entity affirmatively request a hearing coupled with its provision that the state DOT serves as the final arbiter of whether information shall be subject to disclosure, offers a stronger statutory approach than the existing legal framework in Texas in terms of confidentiality of information and transparency concerns in PPPs.

6.2.1.1 Suggestions for Improvement to Texas Law – Confidentiality

While some proponents of PPPs may applaud Texas’ “aggressive” legislative approach (Iseki et. al. 2009, iii), arguably, current law in Texas sacrifices transparency in the PPP process for the sake of private sector interests. Thus, Texas should modify its current law in order to create a better balance between the competing interest of the private sector’s desire for protection of proprietary information and the public sector’s interest in meaningful participation in the PPP process. While the ABA’s suggestion that PPP projects should not be exempt from a state’s open records act addresses the public sector’s concern for transparency, the ABA approach fails to sufficiently account for the private sector concern for non-disclosure of proprietary information. Furthermore, although the FHWA Model Legislation’s tactic of giving the state DOTs the authority over disclosure decisions may naively assume that the state agency will act in an uninterested manner, the FHWA Model provides the least undesirable policy among the differing legal frameworks. Thus, Texas should revise its current law to reflect the FHWA Model Legislation that governs confidentiality of information in PPP projects. While either version one or version two of the FHWA Model law would improve Texas’ current policy, version one, which provides the private entity the option to withdraw its proposal if faced with an unfavorable decision by the state DOT, offers a more defensible approach than does version two’s provisions.

6.2.2 *Conflict of Interest*

First, Texas law provides guidance in three important areas where conflicts of interest can occur in PPPs (TEX ADM CODE Title 43, Rule §27.8). The acceptance of “gifts” by public officials and employees of Texas agencies who are in some way responsible for PPP projects

from interested parties in one or more of those PPP projects can create a conflict of interest that could lead to serious malfeasance. Additionally, Texas statutes disallow Texas state officials and employees responsible for a certain PPP project from engaging in the preparation or submission of a proposal for the same PPP project. Finally, in an effort to prevent unfair bidding, Texas addresses the situation of communication between parties who both submit, or plan to submit, proposals for the award of a PPP project.

In contrast, neither Florida law nor the FHWA Model Legislation contains specific provisions that address conflicts of interest concerns in PPPs. One could argue that other laws that forbid public officials and employees from engaging in unethical conduct, such as accepting improper “gifts” that may serve as “bribes” might pertain to PPP situations and would therefore make additional legislation unnecessary. However, one could argue that PPP arrangements, due to their uniqueness and complexity, call for legislation specifically targeted to the PPP process. Thus, Texas, by virtue of its specific inclusion of statutory provisions that address conflict of interest matters in concession agreements as part of the PPP process, offers a more desirable approach than both Florida and the FHWA Model Legislation.

6.2.2.1 Suggestions for Improvement to Texas Law – Conflict of Interest

However, one could argue that Texas does not go far enough in its legislative framework to adequately deal with conflict of interest problems in PPP projects in its state. As discussed above, while Texas law prohibits employees and agents of the TXDOT and the TTC from submitting a proposal on a PPP project in which they have prepared the RFP or RFQ, Texas law does not forbid employees and agents who prepare RFPs and RFQs for a particular PPP project from submitting a proposal for a PPP project in which they did not participate in the RFP or

RFQ. Thus, while the employee or agent of the public agency may not have firsthand knowledge of the particular facets of a particular project itself, the employee or agent may have the benefit of an existing or past relationship with influential persons in the decision-making process (ABA 2007). Coupled with Texas' allowance for unsolicited bids, one could argue that, by allowing persons who have worked on a previous PPP project, or who are currently working on an existing PPP project, to submit a proposal for a PPP deal, Texas law invites opportunities for conflicts of interest to arise (ABA 2007). By virtue of one's past or present dealings with Texas PPP projects, arguably, one gains an unfair advantage over other parties who do not have the benefit of those inside relationships, and therefore, inside knowledge.

Texas has addressed the matter of consultants who participate with respect to a comprehensive development agreement project as a proposer or developer by forbidding such persons to provide procurement services on other comprehensive development agreements, while allowing other types of consultant services (TEX ADM CODE Title 43, Ch. 27, Rule §27.8(c) (12) (emphasis mine). However, arguably, Texas could improve its statutory approach in the area of PPP conflicts of interest in at least one important way.

Texas could follow the ABA's position and disallow unsolicited bids (ABA 2007). By enacting legislation that limits bids to solicited ones, and that sets forth clear guidelines as to project requirements, arguably, Texas could avoid - or at least significantly alleviate - conflict of interest concerns that unsolicited bids create.

6.2.3 Renegotiation of Contracts

As noted above, Texas limits the term of a CDA to a total of 52 years but otherwise does not address the issue of renegotiation of PPP concession agreements (TEX TN. CODE ANN. §

223.208 (h)). In comparison, Florida limits PPP agreements to a term of 50 years (FL.STAT. §334.30(12)). However, Florida contains further statutory provisions that allow PPPs to exceed a term of 50 years in certain contexts (FL.STAT. §334.30(12)). The Secretary of the FDOT may authorize a PPP to a term of 75 years, with the Florida Legislature reserving the authority to grant any greater duration (FL.STAT. §334.30(12)).

Thus, while Florida’s statutory framework may seem comparable to Texas’ statutory approach, Florida allows for 23 years more for a concession arrangement than Texas’ law permits (FL.STAT. §334.30(12); TEX TN. CODE ANN. § 223.208 (h)). Thus, as Texas limits the potential for occurrence of renegotiation events to a greater extent than Florida does, Texas law offers a more desirable approach than Florida law provides in the area of renegotiation of concession agreements. The FHWA Model Legislation does not offer suggested provisions that deal directly or indirectly with renegotiation of concession arrangements.

6.2.3.1 Suggestions for Improvement to Texas Law – Renegotiation of Contracts

While Texas may offer a superior legal framework compared to Florida and the FHWA Model Legislation in the area of renegotiation of concession agreements, arguably, Texas can improve its PPP practice through revision of its current law that governs the duration of PPP contracts (TEX TN. CODE ANN. § 223.208 (h)). Scholars argue that unforeseen events often make concession contracts unworkable and that, in practice, “infrastructure concession contracts have proven very vulnerable to unforeseen events” (Gómez-Ibañe 2004, 9; Baxandall 2009). As noted above, researchers have concluded that PPPs should not possess lease terms beyond 35 years (Stambrook 2005; Jeffers et al. 2006). Therefore, in order to improve its legislative

framework in the area of renegotiation of concession agreements, Texas should revise § 223.208 (h) of its Transportation Code so that CDAs cannot exceed 35 years in duration.

CHAPTER 7

A LEGAL-POLITICAL POLICY PROPOSAL

The discussion and analysis of the six case studies showed that long-term concession arrangements in highway transportation infrastructure PPPs involve complex issues with serious ramifications that have the potential to impact citizens for several generations. One could argue that, based on the observations gleaned from the case studies, ensuring that elected and other officials responsible for PPPs inform the public about particular PPPs in a sufficient manner and provide a process that avoids conflict of interest matters and undue renegotiation of contracts serve as vital concerns for the law. Additionally, the discussion and analysis of the statutory frameworks for each of the six states in which the PPPs in the six case studies are located showed that, while all but one state has enacted enabling legislation that allows for PPPs within their state, in terms of confidentiality, conflict of interest, and renegotiation of contract concerns, not all legal frameworks are equal. As noted above, Texas, among the six states discussed in the dissertation, currently possesses the most comprehensive, and in some ways, arguably, the most advantageous legal framework as it pertains to PPP practice. However, while the dissertation revealed, arguably, that the legal framework of a state plays an important role in PPP practice, the two year moratorium on PPPs enacted by the Texas state legislature in 2007 reveals that, not only are legal considerations important, but political concerns can significantly impact PPP practice in a state. Thus, in order to strengthen PPP policy within its borders, Texas should not only enact the suggested revisions to its laws, set forth above, but it should also consider the creation of an independent auditor to oversee PPPs within its state.

As noted above, through the enactment of additional laws, and through revision of existing law, Texas can improve its current statutory framework for PPPs. Yet, despite what may be, arguably, a superior statutory scheme compared to other states and even model legislation, by virtue of the 2007 transportation law and its moratorium and primacy provisions, Texas recently experienced the most severe set-back to PPP practice among the six states analyzed. Some observers argue that the moratorium provision and the “primacy” provision – the grant of right of first refusal on toll projects to local toll road authorities - contained in the Texas transportation law signed by Gov. Rick Perry in 2007 significantly impacted PPP concession activity in the state of Texas. For example, at the time S.B. 792 was initially passed, the Texas Council of Engineering Companies, made the following contention:

While some projects under development will go forward as concessions, it is almost certain that, in the absence of a moratorium, the DOT would have solicited proposals for additional concessions or would have received unsolicited proposals for new projects. Most observers saw the demands TxDOT made of HCTRA [Harris County Transportation Regional Authority] in 2006 as a prelude to a CDA solicitation in Harris County. The S.B. 792 moratorium stops this possibility, as well as other potential solicitations in other parts of the state. Also, some of the potential projects that are technically exempted from the moratorium almost certainly have no chance of proceeding as a CDA even though they are exempt – for example, the proposed TTC-69 south of Corpus Christi. In Bexar County, the moratorium derails a pending CDA on US 281 and Loop 1604. And finally, the legislation takes two projects that would have been developed as concessions under previous law – SH 121 and SH 161 in the DFW area – and grants the North Texas Tollway Authority a right of first refusal on the projects. ***In sum, it cannot be reasonably argued that the CDA moratorium in S.B. 792 is without effect*** (TCEC 2007, 3).

Arguably, political interests that opposed the use of CDAs in Texas transportation policy arrayed themselves against Gov. Rick Perry and other proponents of the CDA model (TCEC 2007, 2). Several political factors may have led to the enactment of the moratorium and primacy provisions in 2007. First, coalitions of grass-roots political groups which are “anti-concession” received significant media attention, even if most of those groups lacked significant financial

resources (TCEC 2007, 2). Second, some key state legislators questioned several aspects of the concession model and PPP concession practice in Texas (TCEC 2007, 2). Third, some influential business leaders in major metropolitan areas of Texas publicly criticized the terms of the concession arrangements and argued that, from the perspective of the public, the deals appeared to resemble “rent-to-own” transactions (TCEC 2007, 2). Finally, the public toll authorities, many of which enjoyed strong support from important local business interests, sought control over toll projects in their respective areas (TCEC 2007, 2). Thus, arguably, the combination of grass-roots organizations, certain key state legislators, local business leaders, and local toll authorities posed a formidable force that led to a quick and decisive blow against PPP concession practice in Texas.

Therefore, while Texas law may offer a superior framework compared to other states, such as Florida, and compared to some model legislation, such as that offered by the FHWA, with respect to conflict of interest matters, for example, Texas’ current statutory scheme does not offer an effective approach to PPP concession practice. Through the creation of an independent auditor, Texas can address some of the concerns raised by PPP detractors and, hopefully, avoid further suspensions of PPP practice within its borders. Indeed, the enactment of a transportation law with a moratorium provision and a primacy provision reveals that political interests cannot be ignored.

Siemiatycki (2007) offers several reasons, all related to the concern to balance the private partner’s interest in confidentiality with the public’s interest in meaningful participation, to support his proposal for an independent auditor, and modeled in part on the Australian Auditor General (Siemiatycki 2007, 400). Indeed, according to Siemiatycki, a national, independent

auditor may provide one possible solution to the controversy over valuation of publicly owned assets (Siemiatycki 2007). Additionally, the establishment of an independent auditor would not only enhance PPP practice in the area of confidentiality, but it would most likely offer improvement in the areas of conflict of interest and renegotiation of contracts. Moreover, on the state level, through placement of oversight responsibility of PPPs in the authority of an independent auditor, Texas can provide some much needed uniformity and stability to PPP policy throughout its state. Finally, while the creation of an independent auditor will not remove PPP policy and practice from the political sphere, it could operate in a manner that avoids some of the local bias and inter-departmental disputes that currently serve to hinder PPP policy and continually threaten its existence, much less, its development and refinement.

7.1 Suggested Procedure for Implementation

The appointment of an independent auditor should follow a process that involves both the executive and legislative branches in Texas. First, the Independent Auditor should consist of a Board of Auditors comprised of five persons. Each of the individual board members should be appointed by the Governor. Additionally, each proposed member should be confirmed by both houses of the state legislature with two-thirds approval required for confirmation. Each board member should serve an initial six-year term with eligibility for re-appointment for one additional three-year term.

Conceivably, board members may have backgrounds in industry, government, or academia. Preferably, members would be chosen based on their expertise related to PPPs, transportation, or a combination of the two. For instance, a particular Board of Auditors might

consist of two persons with high-level state government experience, two persons from academia with expertise in the area of transportation, and one former construction industry officer.

The Independent Auditor should be responsible for the oversight of all PPP practice within the state. The responsibilities of the Auditor should be broad, and at a minimum, should include several important items. First, the Auditor should determine whether a proposed PPP project should go forward as a concession arrangement under a CDA or whether a different arrangement, such as a “public-public” partnership, would be preferable (Khankarli 2009). Second, should the Auditor approve of the project as a PPP concession, the Auditor should make decisions regarding bid solicitations from private entities. For instance, the Auditor would review suggested criteria from TXDOT or another public toll road authority and either approve of the request for proposal or provide suggested revisions regarding the specificity of the criteria set forth in the RFP. Third, in the event that a private entity requests non-disclosure of information contained in its bid, the Auditor should conduct reviews of the information based upon the private entity’s request and then provide a ruling. Finally, and most significantly, the Independent Auditor, rather than TXDOT or some other public agency, based on the RFP and the proposals submitted from private entities, should determine which private entity will serve as the private partner for the PPP concession arrangement.

Indeed, while one could argue that the presence of an independent auditor to oversee PPPs in Texas will not remove PPP concession practice and policy from the political arena, based on recent political events in Texas - specifically the passage of a two year moratorium on PPP concessions and the right of first refusal provided to local toll road authorities - one could argue that there are good reasons to create the office of an Independent Auditor. Through the use of an

Independent Auditor, Texas can provide an independent, governmental body to oversee transportation PPPs. Although not apolitical in nature, the presence of a five member board appointed by the Governor and confirmed by the State Legislature should serve to lessen the likelihood that, due to unfounded fears and misrepresentations about the dangers of concessions, Texas will experience moratoriums, or an outright termination, of PPP concessions in its future.

Arguably, the NTE project serves as a model PPP concession project due to several reasons. Indeed, one could argue that, the innovative use of technology for the operation of managed lanes and dynamic pricing, the reduction or elimination of traffic congestion on one of the most heavily congested roadways in Texas, construction carried out without interruption of roadways, and a multi-billion dollar up-front payment by the concessionaire serve to make the NTE project the type of PPP that most states would greatly welcome. Yet, one could also argue that, within an extremely short time span, misguided politics in Texas threatened to prevent more projects like NTE from being planned and coming to fruition within the state. Furthermore, although Texas, compared with other states and with the FHWA model legislation, possessed a more comprehensive and balanced approach with its PPP legal framework, political interests opposed to the PPP concession model were able to institute the extreme measure of a long-term moratorium on PPP concession activity.

However, instead of allowing concerns over the PPP concession model and its implementation in Texas, some of which may have been well-founded, lead to a ban on concessions, arguably, less draconian measures could have addressed the phenomenon in a much stronger fashion. The creation of an Independent Auditor to oversee PPP concession practice and regulate CDA activity within Texas offers a viable policy option. While an Independent

Auditor will not remove PPP projects from the influence of politics, conceivably, the Independent Auditor should lessen the likelihood that political pressures will lead to a hasty, extreme, and unnecessary suspension or complete termination of PPP concession practice in Texas. Moreover, the Independent Auditor involves board members who will offer industry expertise while being accountable to elected officials.

CHAPTER 8

SUMMARY AND CONCLUSION

The dissertation provided an exploratory study of large-scale concession PPPs in highway transportation infrastructure in the U.S. The study used the case-study method as well as existing case studies in order to gain understanding into various aspects of concession practice in the U.S. The six case studies included in the dissertation exemplified how, in an increasing manner, states and local governments in the U.S. are turning to PPPs for their transportation infrastructure policy needs. Additionally, the case studies revealed that, arguably, the most obvious advantage that long-term concession PPPs offer to local governments facing budget shortfalls and program funding needs that greatly exceed revenues is a large infusion of cash, or as in the case of the POMT, the willingness to risk large sums of money on the PPP project. Finally, while each of the six cases contained multiple context-dependent attributes that make comparisons between the cases difficult and defy easy generalization about long-term concession arrangements, the case studies did reveal the significant influence that the media and politics can have upon PPP concession deals in the U.S.

Additionally, the dissertation included a discussion and analysis of legislation that governs PPPs from each of the six states in which the case study projects took place as well as model legislation proposed by the FHWA. The dissertation included a discussion of how different state legislation as well as the model legislation address the three areas of confidentiality of information, conflict of interest, and renegotiation of contracts in the PPP

process. Furthermore, the study provided an analysis of the strengths and weaknesses of Texas law compared to another state's law and compared to model law. The dissertation suggested certain revisions to PPP law in Texas, yet also noted that, even the most desirable legal framework may not satisfy the political challenges that multi-billion dollar PPP projects entail. Indeed, similar to the observations gained from the case studies concerning the powerful effect that the media and politics can have upon concession arrangements, the legal moratorium placed upon concession deals in Texas likewise evidenced the tremendous impact that politics and the media can have upon the legal framework of a state's enabling legislation for PPPs. Therefore, as a means of avoiding future moratoriums and other hindrances to PPP practice, the dissertation proposed the creation of an Independent Auditor to oversee PPP concession practice in Texas.

Based on their respective agreements, all six PPPs represented in the six cases included in the dissertation will carry on for 35 years or longer and none of the projects commenced more than five years ago. Thus, one could argue that, due to the early stages of PPP practice in the U.S., as well as the lack of significant data concerning these projects, additional exploratory and descriptive studies of PPPs are needed.

As the projects mature, however, future research could analyze the relationship between state laws that govern PPPs and different aspects of PPPs. For instance, researchers may want to inquire into the relationship between laws that seek to maintain the confidentiality of information while ensuring the public's access to meaningful participation in the PPP process and citizen attitudes toward the effectiveness of a particular PPP project in their state. For example, based on the findings of the present study, future research concerning transportation PPPs could include an analysis of how state laws that govern PPPs may influence citizen attitudes toward

PPP projects. Finally, future research may want to focus upon a case, or cases, where document requests from the public related to a PPP were denied and inquire as to what criteria was utilized in the decision to protect the requested information from disclosure.

APPENDIX

DIFFERENT APPROACHES TO HIGHWAY INFRASTRUCTURE DELIVERY⁴

⁴ Buxbaum and Ortiz (2009).

Definitions

Traditional Approach (non-PPP)

Design-Bid-Build (DBB)

The traditional method of project delivery in which the design and construction are awarded separately and sequentially to private firms.

PPP Approaches

Design-Build (DB)

Combines the design and construction phases into a single fixed-fee contract, thus potentially saving time and cost, improving quality, and sharing risk more equitably than the DBB method.

Private Contract Fee Services/ Maintenance Contract

Contracts to private companies for services typically performed in-house (planning and environmental studies, program and financial management, operations and maintenance, etc.)

Construction Manager @ Risk (CM@R)

A contracted construction manager (CM) provides constructability, pricing, and sequencing analysis during the design phase. The design team is contracted separately. The CM stays on through the build phase and can negotiate with construction firms to implement the design.

Design-Build with a Warranty

A DB project for which the design builder guarantees to meet material workmanship and/or performance measures for a specified period after the project has been delivered.

Design-Build-Operate-Maintain (DBOM), Build-Operate-Transfer (BOT), or Build-Transfer-Operate (BTO)

The selected contractor designs, constructs, operates, and maintains the facility for a specified period of time meeting specified performance requirements. These delivery approaches increase incentives for high quality projects because the contractor is responsible for operation of the facility after construction. The public sector retains financial risk. Compensation can be...availability payments.

Design-Build-Finance (DBF), Design-Build-Finance-Operate (DBFO), or Design-Build-Finance-Operate-Maintain (DBFOM)

DBF, DBFO, and DBFOM are variations of the DB or DBOM methods for which the private partner provides some or all of the project financing. The project sponsor retains ownership of the facility. Private sector compensation can be in the form of tolls (both traffic and revenue risk transfer) or through shadow tolls (traffic risk transfer only).

Long-Term Lease Agreements/Concessions (brownfield)

Publicly financed existing facilities are leased to private sector concessionaires for specified time periods. The concessionaire may pay an upfront fee to the public agency in return for revenue generated by the facility. The concessionaire must operate and maintain the facility and may be required to make capital improvements.

Full Privatization Approaches

Build-Own-Operate (BOO)

Design, construction, operation, and maintenance of the facility are the responsibility of the contractor. The contractor owns the facility and retains all operating revenue risk and surplus revenues for the life of the facility. The Build-Own-Operate-Transfer (BOOT) method is similar, but the infrastructure is transferred to the public agency after a specified time period.

Asset Sale

Public entity fully transfers ownership of publicly financed facilities to the private sector indefinitely.

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