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Public-private partnerships key to financing FDOT projects

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Florida transportation officials and the private sector have fine-tuned a financing structure that allows the state to use private-sector financing to advance projects to build roads and bridges and fulfill other essential infrastructure needs.

The timing is right. The infrastructure of Florida, like the rest of America, is in critical need of maintenance and overhaul. Facilitating financing for projects by the Florida Department of Transportation is a wise move that will encourage important funding sources.

According to the American Society of Civil Engineers, about 18 percent of Florida's bridges are structurally deficient or functionally obsolete, 13 percent of the state's major roads are in poor or mediocre condition and 47 percent of its major urban highways are congested.

The society calculates more than 16 million residents, 75 million visitors and 850,000 tons of freight travel on Florida's highways, roads and streets every year. Drivers in Miami, Orlando and Jacksonville combined waste more than 200 million hours and nearly 150 million gallons of fuel sitting in traffic — at a cost of more than $3.8 billion to the state's economy.

Only a portion of the funding needed to fix these problems is available. According to a 2012 report from the FDOT, the "total estimated unfunded ... capacity needs for all modes through 2040 is approximately $131.2 billion in 2010 dollars." Roughly $83 billion of that sum is for highway needs.

To address these challenges, Florida has increasingly looked to public-private partnerships, so-called P3 or PPP projects. These projects, involving contractual agreements between government agencies and private-sector entities, allow for greater private-sector participation in the delivery of public infrastructure projects by shifting some construction and maintenance risk to the private sector. Also, they provide the public sector with access to private-sector financing and capital.

Gap Financing

Florida has been among the states most active in seeking P3 projects for transportation infrastructure. The Legislature enacted its P3 statute (Fla. Stat. 334.30) in 1991, giving the FDOT the authority to "enter into agreements with private entities ... for the building, operation, ownership or financing of transportation facilities."

In recent years, the department has used its statutory authority to enter into high-profile concession agreements for improvements to I-595 and the Port of Miami tunnel.

In addition to authorizing concession-style projects, Florida's P3 statute lets the FDOT advance projects in its adopted five-year work time frame, also known as gap-finance projects. This structure allows the FDOT to use funds it will have in future budgets to advance transportation projects procured under its traditional design-build model.

Unlike standard design-build projects in which the FDOT pays on a monthly basis for work completed and certified in a progress estimate, in a gap-finance project there may be a much greater period between the time the FDOT approves and certifies a progress estimate and the FDOT's contractual deadline to pay for the work. Many contractors do not have the ability or desire to self-finance this gap because either they need the cash flow to complete the project or any such self-financing will limit their ability to take on other projects.

To cover this gap, the FDOT and the state have created the necessary legal framework that permits the private sector to facilitate such financing.

One of the first projects procured by the department through the design-build finance delivery model was the I-95 managed lanes venture. Its financing used a structure that contemplated financing the gaps in the schedule of payments through a nonrecourse sale of the contractor's right-to-payment progress estimates that had been FDOT-certified.

The arrangement is similar to factoring. The contractor entered into an agreement to sell the face amount of certified-progress estimates generated during the course of the project (and any rights to related proceeds) to banks, acting in the role of purchasers, in exchange for a purchase price.

Eliminating Risk

By using this type of structure, the contractor benefited from a nonrecourse financing structure, while purchasers limited the risk profile of the financing to FDOT credit risk.

Although the structure used in the I-95 project contained an risk allocation that should have appealed to the construction industry, elements of the state procurement documents made the construction industry uneasy about the delivery model.

These included whether the FDOT would waive its right of offset against certified-progress estimates and the effect of FDOT restrictions on the assignment of rights to payments under design-build finance contracts.

In response to industry feedback, the FDOT addressed these issues in procurement documents for design-build finance projects that are part of the department's Transportation Vision Plan. These second-generation documents include an express waiver of the FDOT's right to offset against certified progress estimates regardless of future claims, defects or subsequent work on the project, thereby expressly eliminating construction risk for potential lenders.

The FDOT also has allowed contractors (with the consent of their surety and lender) to establish a project-specific escrow account, or PSEA. The FDOT will deposit all payments the FDOT will eventually make for the project into the PSEA. While the FDOT will not formally acknowledge an assignment of a right to payment, it will allow the lender, contractor and surety to enter into any type of agreement with respect to the PSEA.

In effect, through acknowledgment of the PSEA and the relinquishment of certain rights, the FDOT has established a mechanism to facilitate the allocation of the right to payment under design-build finance agreements. This ensures that all stakeholders — contractor, surety and lender — are involved in the process.

Against the backdrop of a weak economy, shrinking budgets and expanding infrastructure needs, gap financing provides another way for government authorities to leverage scarce resources and maximize the involvement of the private sector.