

Model Public-Private Partnerships Toll Concessions Contract Guide

[Part 2]

Following receipt of public comments, this document - Part 2 of the Model Public-Private Partnerships Toll Concessions Contract Guide – will be combined with Part 1, which reviews the “core” provisions and which can be found at the following URL:

http://www.fhwa.dot.gov/ipd/pdfs/p3/model_p3_core_toll_concessions.pdf.

All cross-references herein are to relevant sections or chapters of the combined Guide. All capitalized terms herein are defined in the glossary (attached as Exhibit A) used for the combined Guide. Any consequential stylistic, format and editing amendments required due to the combination of the documents will be made upon final publication.

TABLE OF CONTENTS

INTRODUCTION.....	1
Description of Chapter Topics	1
9 CONSTRUCTION PERFORMANCE SECURITY	4
9.1 Introduction.....	4
9.2 The Role of Performance Security in Traditional Contracting	4
9.3 The Approach Taken in Mature P3 Markets Outside of the United States	5
9.4 The Approach Taken in the United States P3 Market to Date	6
9.5 Conclusion	6
10 INSURANCE.....	7
11 LENDER RIGHTS AND DIRECT AGREEMENT	8
11.1 Administrative Acknowledgements	8
11.2 Lenders' Right to Take Action.....	8
11.3 Subordination of Department's Rights.....	10
11.4 Impact of Bankruptcy.....	11
12 DEPARTMENT STEP-IN	12
12.1 Events Triggering the Department's Step-in Rights	12
12.2 Effect on the Obligations of the Developer.....	12
12.3 Effect on Rights of the Department	12
13 PERFORMANCE STANDARDS AND NON-COMPLIANCE POINTS	13
14 CONSUMER PROTECTIONS AND PUBLIC POLICY ISSUES	15
14.1 Overview	15
14.2 Excessively High Tolls and Fines	15
14.3 Windfall Profits.....	15
14.4 Emergencies	15
14.5 Competing Facilities	16
14.6 National Security.....	16
15 FEDERAL REQUIREMENTS.....	17
16 GOVERNMENTAL APPROVALS AND PERMITS	18
17 UTILITIES AND THIRD PARTY RIGHTS.....	19
17.1 Risk Allocation and Coordination with Utilities and Railroads.....	19
17.2 Other Third Parties' Rights	19
17.3 Buy America Requirements	20

18	FINANCIAL MODEL ADJUSTMENTS	21
19	DEPARTMENT AND DEVELOPER CHANGES	22
	19.1 Department Changes	22
	19.2 Developer Changes	22
20	ADDITIONAL CAPACITY CONSTRUCTION REQUIREMENTS	23
21	NATURE OF DEVELOPER'S PROPRIETARY INTEREST	25
22	CONTRACT TERM.....	26
23	DEVELOPER INDEMNITIES	27
	23.1 Scope of Indemnities.....	27
	23.2 Indemnification Procedures	27
24	DISPUTE RESOLUTION.....	28
25	INTELLECTUAL PROPERTY	29
	25.1 Ownership and Licensing of Intellectual Property.....	29
	25.2 Intellectual Property Rights on Expiry or Termination of the Concession Agreement	29
26	AMENDMENTS TO KEY DEVELOPER DOCUMENTS	30
27	ASSIGNMENT.....	31
	27.1 Assignment by the Developer	31
	27.2 Assignment by the Department.....	31
28	GENERAL PROVISIONS.....	32

Exhibit A Glossary of Terms

INTRODUCTION

Description of Chapter Topics

[Part 1 of this Guide, which reviews the “core” provisions and which can be found at the following URL: http://www.fhwa.dot.gov/ipd/pdfs/p3/model_p3_core_toll_concessions.pdf, contains Chapters 1 through 8 listed below. This Part 2 contains Chapters 9 through 28 listed below.]

Chapter 1: Introduction.

Topics include the background to the development of this Guide, an overview of its intended purpose and suggested approaches for utilizing its contents.

Chapter 2: Tolling Regulation

Topics discussed include toll collection, user classification, toll rate setting, toll collection system and administration, enforcement of collections, management of demand risk, and use of revenue funds.

Chapter 3: Benefit-Sharing

Topics discussed include the setting of revenue-sharing triggers, financial modeling and structuring of triggers within the P3 model, treatment of operating costs, capital costs, grants, the effects of refinancing on revenue-sharing, and other timing issues.

Chapter 4: Supervening Events

Topics include the role of insurance in mitigating supervening risks, a definition of supervening events, and the types of contractual relief generally granted in supervening events.

Chapter 5: Changes in Equity Interests

Topics include the definition of a change in ownership, example contractual provisions related to a change in ownership, permitted and prohibited changes, and participant concerns.

Chapter 6: Changes in Law

Topics include the concerns of parties, unforeseeable changes in law and relevant considerations, tax-related issues, and compensation due to changes in law.

Chapter 7: Defaults, Early Termination, and Compensation

Topics include events related to default by the Developer and the Department, cure periods, and termination rights of both parties in the event of a default, as well as all issues related to compensation for early termination.

Chapter 8: Handback

Topics include handback requirements, inspections, reserve accounts, letters of credit, and payments related to handback.

Chapter 9: Construction Performance Security

Topics include the role of performance security in traditional contracting, the approach taken in mature P3 markets outside of the United States and the approach taken in the United States P3 market to date.

Chapter 10: Insurance

Topics include the background and incorporation of insurance requirements applicable to the Developer in the Concession Agreement.

Chapter 11: Lender Rights and Direct Agreement

Topics include the Lenders' rights to cure defaults of the Developer under the Concession Agreement, step into the shoes of the Developer, substitute a different entity to continue the Concession Agreement, other rights to enforce security, and the use of a separate Direct Agreement to document such rights.

Chapter 12: Department Step-In

Topics include events triggering the Department's step-in right and its effect on the rights of the Developer.

Chapter 13: Performance Standards and Non-Compliance Points

Topics include factors relevant to setting performance requirements, monitoring the Developer's performance, and remedies of the Department in the case of non-compliance by the Developer.

Chapter 14: Consumer Protections and Public Policy Issues

Topics include user protections against monopolistic behavior by Developers (e.g., excessively high tolls and windfall profits), parameters surrounding the Department's ability to develop competing facilities, non-Developer access to the Project, and national security considerations.

Chapter 15: Federal Requirements

Topics include a brief discussion of the types of Federal requirements which may apply if a Project receives Federal funding assistance.

Chapter 16: Governmental Approvals and Permits

Topics include the Developer's obligation to secure approvals and permits, the Department's obligation to assist, and certain permits the Department may undertake to provide.

Chapter 17: Utilities and Third Party Rights

Topics include the allocation of risks relating to utilities, the railroads, and other third parties with an interest in the Project and procedures for identifying utilities and Federal provisions which may be applicable to the funding of utility relocations.

Chapter 18: Financial Model Adjustments

Topics include circumstances in which the financial model may be updated and limitations on the scope of updates.

Chapter 19: Department and Developer Changes

Topics include the right of the Department to require changes in the work, the procedures for compensating the Developer, and the right of the Developer to propose changes.

Chapter20: Additional Capacity Construction Requirements

Topics include triggers requiring the Developer to make capacity enhancements to the Project and considerations relevant to setting the triggers.

Chapter21: Nature of Developer's Proprietary Interest

Topics include the nature of the Developer's proprietary interest in the Project and considerations relevant to determining the type of interest to grant.

Chapter 22: Contract Term

Topics include the various considerations relevant to setting the Term.

Chapter23: Developer Indemnities

Topics include circumstances under which the Developer may be required to indemnify the Department, including the scope of indemnities and payments.

Chapter24: Dispute Resolution

Topics include procedures for the resolution of disputes between the Developer and the Department.

Chapter25: Intellectual Property

Topics include ownership and licensing of intellectual property necessary for the performance of the work under the Concession Agreement and transfers to the Department on expiry of the Term.

Chapter26: Amendments to Key Developer Documents

Topics include rights of the Department relating to changes in key contracts to which the Developer is a party other than the Concession Agreement.

Chapter27: Assignment

Topics include restrictions on the right of the Department and the Developer to assign their interests in the Concession Agreement.

Chapter28: General Provisions

Topics include the application of, and consideration to be given to general provisions that are typically standard and not heavily negotiated.

9 CONSTRUCTION PERFORMANCE SECURITY

9.1 Introduction

This Chapter considers the extent to which it is appropriate for the Department to require the Design-Build Contractor to provide defined levels and/or types of construction performance security in connection with the Project. Common forms of construction performance security include surety bonds, on-demand letters of credit and retention requirements. The FHWA recognizes that participants in the P3 market have differing views regarding the relative benefits offered by different forms of construction performance security and the role that each may play in providing support to a Project. The FHWA encourages a robust dialogue with respect to these and other issues, and as a result, this Chapter does not analyze the extent to which there is a role in P3 projects for any particular form of construction performance security, nor the relative strengths and weaknesses of different forms of such security as may be commercially available in the United States. Departments should consult with their legal, financial and technical advisers to determine the type and amount of construction performance security that may be required by law or otherwise advisable for any particular Project.

In the United States P3 market to date, the approach taken to this issue has varied significantly from State to State and from project to project. Some of the reasons for this are discussed in this Chapter. Some Concession Agreements have not required construction performance security to be provided by the Design-Build Contractor, whereas others have required performance and/or payment bonding in amounts up to 100% of the construction price for the Project.

By way of contrast, in P3 markets outside of the United States, it is unusual for a procuring authority to prescribe minimum levels of construction performance security for a Project in the Concession Agreement. Some of the reasons for the approach taken in other markets are also discussed in this Chapter.

9.2 The Role of Performance Security in Traditional Contracting

In Design-Bid-Build and Design-Build projects, Departments typically require the contractor to provide performance bonding and, in some circumstances, payment bonding. The typical bonding levels vary from State to State and from project to project, but can range between 10% and 100% of the contract price.

In some States, Departments are required to demand performance and/or payment bonding as a matter of law (e.g., “Little Miller Acts”). The relevant law in some States even prescribes the minimum level of performance and/or payment bonding required for each construction project the Department procures. This Chapter does not provide a comparative analysis of the relevant laws of each State on this issue.

In those States where there is no legal requirement for such bonding, the Department would nevertheless, as a matter of best practice, consider the extent to which it should require performance and/or payment bonding from the contractor. To the extent that the Department requires bonding to be provided, the level of bonding required is typically a function of the complexity of the construction project and the “maximum probable loss” in the event of a contractor default. The basis upon which “maximum probable loss” analyses are typically undertaken is not discussed in this Chapter.

9.3 The Approach Taken in Mature P3 Markets Outside of the United States

In the international P3 market, it is generally considered a matter of best practice for Concession Agreements not to require the Design-Build Contractor to provide a minimum level of construction performance security in respect of the Project, for the following reasons:

- Unlike a traditional construction contract, the Department in a typical P3 project would not suffer the “first loss” in the event of default by the Subcontractor (e.g., bankruptcy). Under a traditional Design-Bid-Build or Design-Build contract, the Department suffers the “first loss” in the event of a contractor default, and it is for this reason that construction performance security is typically required. In a P3 project, the “first loss” is suffered by the equity providers to the Project, and the “second loss” (which only arises if the losses are greater than the level of the equity committed to the Project) is suffered by the senior lenders to the Project. To the extent that there is a “third loss” (which would only arise if the cost to complete the Project was greater than the aggregate of the equity and debt committed to the Project), that loss would be suffered by the Department following the termination of the Concession Agreement, but only to the extent that the level of termination compensation payable by the Department to the Developer results in a loss to the Department. Accordingly, in other P3 markets (e.g., Canada, Australia, France and the United Kingdom), the level of construction performance security required to be provided by the Design-Build Contractor for the Project is typically prescribed by the Developer (in consultation with its equity and senior debt providers) on the basis that the Developer (and its equity and senior debt providers) suffer the first and second losses in the event of a default by the Design-Build Contractor.
- In the event of a termination of the Concession Agreement, the level of compensation payable by the Department to the Developer will typically take into account the amount it would cost the Department to complete the construction of the Project, meaning that (all other things being equal) the Department should not suffer a loss as a result of the termination of the Concession Agreement.
- Performance bonds “travel” with the underlying Design-Build Contract entered into between the Developer and its Design-Build Contractor, meaning that in the event of a termination of the Concession Agreement, the Department would only be able to take advantage of the performance bond if it agreed to take over the Developer’s obligations under the Design-Build Contract (and in respect of which the performance bond had been issued). Although the Concession Agreement can mandate this quite easily, as a practical matter the implementation of this requirement is a more complex undertaking, because the Design-Build Contract will typically be drafted to work in conjunction with the Concession Agreement rather than as a stand-alone document. In other words, the terms of the Design-Build Contract would need to undergo significant amendment to reflect the fact that the Concession Agreement had been terminated – this exercise would likely require the involvement of the performance bond provider, the Design-Build Contractor (and any of its guarantors) and the Developer (particularly if the Developer was pursuing claims against the Design-Build Contractor and/or any relevant guarantors).
- As the international P3 market has matured, projects have increasingly adopted construction performance security packages tailored to their specific requirements. The approach taken to each project is a function of the cost and commercial availability of the relevant performance security instruments and the financial strength of the Design-Build Contractor that the

Developer proposes to use. If the Concession Agreement prescribes the form and/or amount of performance security that the Design-Build Contractor must provide in support of the Project, this may cause an unfair advantage or disadvantage to one particular bidder team (e.g., a Design-Build Contractor with comparably high financial strength may be unfairly disadvantaged if it is required to provide the same level of performance security as a Design-Build Contractor with comparably low financial strength), while also adding costs to the proposals of other bidder teams which would not, in the absence of the requirement in the Concession Agreement, have been incurred.

9.4 The Approach Taken in the United States P3 Market to Date

Although some recent Concession Agreements in the United States have not required the Design-Build Contractor to provide defined levels of construction performance security, most P3 projects that have closed to date in the United States have had this requirement. Among the reasons for this:

- the majority of P3 projects that have closed to date in the United States have been procured in States where, as a matter of law, the Design-Build Contractor for the Project is required to provide a minimum level of construction performance security for the Project; and
- with respect to some of the early P3 projects to close in the United States, material levels of design and construction work were undertaken by the Developer between commercial and financial close and, at the time of commercial close, the senior debt financing solution was still being explored by the Department and the Developer. Accordingly, the Department took significant comfort from the Design-Build Contractor's activities on the Project being supported by committed construction performance security.

9.5 Conclusion

In the absence of a governing requirement for minimum levels of construction performance security to be provided in respect of P3 projects, the appropriate level of such security will typically be a function of:

- the credit strength of the proposed Design-Build Contractor;
- the complexity of the Project (in terms of both design, engineering & construction, and the length of the construction period); and
- the proposed payment arrangements under the Design-Build Contract.

If the Department's principal objective is to ensure best value through its procurement of a P3 project, it may wish to consider, to the extent permitted by applicable law, the merits of not prescribing minimum construction performance security requirements in the draft Concession Agreement and, alternatively, allowing bidders and their respective equity and debt providers to determine the most cost effective and creditworthy approach to construction performance security. In any case, Departments may wish to consider the relationship between this issue and the level of compensation it would owe the Developer due to early termination of the Concession Agreement for Developer Default prior to Substantial Completion (see Chapter 7, Defaults, Early Termination and Compensation).

10 INSURANCE

The Concession Agreement will typically specify certain minimum insurance requirements applicable to the Developer and its Subcontractors during both the construction period and the operating period for a Project. The scope and amounts of insurance carried by the Developer are often of interest to the Department because they represent a significant resource on which the Developer will rely when unexpected, and potentially expensive, events occur. Unlike the construction performance security, however, which is not intended to be called upon except in severe circumstances, the insurance coverage is a resource upon which the Developer and its Subcontractors are expected to rely. Without adequate insurance coverage, there is an increased risk that the Developer may become unable to perform its obligations and/or enter bankruptcy. In addition, many of the other provisions of the Concession Agreement, such as the scope of Compensation Events and Delay Events, are drafted on the presumption that the Developer has adequately insured itself against the risks it is required to bear. As a result, the Department will typically want to be sure that the terms of the Concession Agreement require minimum levels of insurance coverage to be carried by the Developer.

An exhibit will generally be attached to the Concession Agreement listing various insurance policies that the Developer will be required to obtain and maintain during the construction and operating phases of the Project, including the minimum amount of the required coverage, requirements to name entities (such as the Department and, in some cases, Lenders) as additional insured parties, and other terms and conditions specific to each type of insurance coverage.

In addition to minimum insurance requirements, the Concession Agreement will often:

- specify a minimum financial size category rating according to the relevant insurance rating system for all insurers providing the required coverage,
- require evidence, delivered to the Department annually, that the required insurance policies are in place, and
- set out a procedure for adjusting minimum coverage amounts, if appropriate, from time to time.

Many Concession Agreements will also state that if the Lenders require stricter insurance coverage than the Department, then fulfilling those requirements will be deemed to satisfy the Developer's obligation under the Concession Agreement.

The minimum requirements and other insurance terms will differ during the construction period and the operating period due to the different risks that the Project may encounter, and both sets of requirements should be developed in consultation with an insurance advisor experienced in P3 transactions that is under contract with the Department.

11 LENDER RIGHTS AND DIRECT AGREEMENT

The Lenders that fund a Project have a vested interest in ensuring the Project is completed and generates the projected cash flows by which the Lenders will be repaid. Given that the Lenders are not generally party to the Concession Agreement, another mechanism is needed through which the Lenders' interests in the Project are protected. The rights of the Lenders with respect to the Concession Agreement are therefore typically documented in a Direct Agreement entered into among the Developer, the Department and the Lenders (or the Collateral Agent acting on behalf of the Lenders). This agreement is critical to the financing of any Project because it provides a direct contractual relationship between the Lenders (or their representative) and the Department pursuant to which the Department will provide the Lenders with certain assurances regarding their rights and under which the Lenders can enforce those rights directly against the Department. The Direct Agreement's most important provisions fall into three categories: (a) certain administrative acknowledgments by the Department, (b) the Lenders' right to take action in the event of a default by the Developer, and (c) in the event of a Developer Default, the Department's agreement not to terminate the Concession Agreement for a period of time, so as to afford the Lenders an opportunity to remedy the relevant default.

11.1 Administrative Acknowledgements

A basic provision in a Direct Agreement is the acknowledgment and consent from the Department that the Developer has granted the Lenders a security interest in its rights under the Concession Agreement. Although many Concession Agreements expressly permit the Developer to grant a security interest to its Lenders, this acknowledgment is important because it avoids any ambiguity regarding the rights of the Lenders or the extent to which the Department was aware of their interest. This provision may also contain an acknowledgment from the Department that it has no knowledge of, and has not consented to, the grant of a security interest in favor of any other lenders to the Developer (although Developers are unlikely to have any other debt because they are typically special purpose vehicles formed specifically for the Project).

In addition, Direct Agreements generally contain an agreement from the Department to deposit any money owed to the Developer under the Concession Agreement into a particular bank account designated at the time of execution of the Direct Agreement. This provision is important for the Lenders because one of the key components of their security package is control over the bank accounts of the Developer and the funds held in them. They are concerned that money paid to the Developer (including funds payable by the Department as termination compensation) could be directed to an account outside of their control, and will therefore seek to protect against this risk.

11.2 Lenders' Right to Take Action

The Direct Agreement will generally provide that, upon the occurrence of a Developer Default under the Concession Agreement, the Department will provide a notice to the Lenders of the Developer Default (including an explanation of its nature and circumstances) and will agree not to terminate the Concession Agreement or initiate bankruptcy proceedings against the Developer for a specified period of time (the "Lender Cure Period"). The length of the Lender Cure Period will generally depend on the nature of the Developer Default. For example, the Lender Cure

Period for remedying payment defaults is generally shorter than the Lender Cure Period for remedying non-completion defaults.

This stay on termination and/or bankruptcy proceedings is particularly important to Lenders because they have financed the Project on the basis of projected cash flows under the Concession Agreement (e.g., Toll Revenues), so if the Concession Agreement is terminated, Lenders will be unlikely to recover the full amount of the Project Debt they have provided (even after taking into account the Termination Sum payable by the Department). Full repayment is generally possible only after the Project is completed and successfully operated for a significant period of time, so Lenders should be motivated to “revive” the Project. The Direct Agreement therefore permits the Lenders to take the actions described below during the Lender Cure Period.

11.2.1 *Cure Rights*

The simplest action that can be taken by the Lenders during the Lender Cure Period is to remedy a Developer Default on behalf of the Developer. The Direct Agreement will specify a portion of the Lender Cure Period during which the Lenders can do so without “stepping in” to the shoes of the Developer, thereby avoiding liability while pursuing such a remedy. As a result, although the Lender is taking action to remedy the Developer Default, all liabilities will continue to be borne by, and all obligations remain the responsibility of, the Developer. This mechanism works well for payment defaults because there is little risk to the Department that actions taken by Lenders to cure such a Developer Default could make matters worse. However, the absence of Lender liability may be of greater concern to the Department for non-completion defaults, where actions taken by Lenders to cure could very well put the Department in a worse position than it was in before. Given such concerns, the Department may seek to limit the Lenders’ right to cure without incurring liability to an initial period that is shorter than the total Lender Cure Period.

11.2.2 *Step-In Rights*

Where the remedy required to cure a Developer Default is more complex, the Collateral Agent (or a qualified substitute developer designated by the Lenders) may become a party to the Concession Agreement, with joint and several liability with the Developer for all of its rights and obligations under the Concession Agreement. These “step-in” rights are broader in scope than the cure rights discussed above, giving the Lenders the ability to take greater action where necessary to remedy more complex breaches of the Concession Agreement (including directing the Department to ignore instructions or requests delivered by the Developer). As a condition to exercising these rights, the Lenders are typically required to pay any outstanding obligations of the Developer to the Department as of the date of step-in. Once the Lenders have exercised their “step-in” rights, the Department will be prohibited from terminating the Concession Agreement until the expiration of the Lender Cure Period (or the date when the Lenders relinquish their step-in rights, if earlier). Though Lenders are generally motivated to “revive” the Project (as discussed above), they will typically step-in only if there is a reasonable chance of success. It is therefore not unusual for the Lenders, following an exercise of step-in rights, to agree with the Department on a plan for reviving the Project that may obligate the step-in entity to take certain specific actions – the breach of which would give the Department a new termination right – in exchange for more time (i.e., extended Lender Cure Periods). Notwithstanding this, Lenders will usually have the right to step-out and cease to have any further liability with respect to the Concession Agreement

at any time during the Lender Cure Period. Stepping out before the Developer Default is cured is a significant decision for Lenders though, as it will invariably lead to the termination of the Concession Agreement for Developer Default.

11.2.3 Substitution Rights

The most significant action the Lenders can take during the Lender Cure Period is to propose a substitute developer that is qualified (from a financial and technical standpoint) to assume the Developer's role, and cause the Developer to assign all of its rights and obligations under the Concession Agreement to the substitute developer, including all unperformed obligations arising prior to the substitution date. This action can be taken by the Lenders at any time during the Term because it not only represents a means of remedying Developer Defaults under the Concession Agreement, but also defaults by the Developer under the Finance Documents, which may separately provide the Lenders the right to foreclose on their security interest in the Developer's rights under the Concession Agreement. A substitution, if approved by the Department, will release the existing Developer (and any step-in entity then acting on behalf of the Lenders) from all of its obligations under the Concession Agreement as of the substitution date. The Lenders or the substitute developer will be required to pay to the Department any outstanding amounts owed by the Developer as a condition to the Department's approval, but once provided the Department will agree to waive its right of termination and any other rights the Department may have had which were suspended during the Lender Cure Period. Substitution effectively restores the Concession Agreement as if the Developer Default had not occurred, with the new developer permanently replacing the original Developer.

11.3 Subordination of Department's Rights

Both Lenders and the Department will generally enter into separate direct agreements with the Developer's Design-Build Contractor giving them rights to step into the shoes of the Developer under the Design-Build Contract in the event of a default by the Developer under the Finance Documents or the Concession Agreement, respectively. As a result, the Department and the Lenders will have competing step-in rights. Lenders will seek to address these competing step-in rights by including in the Direct Agreement an agreement from the Department not to exercise its step-in rights while the Lenders still have the right to exercise theirs. Departments typically agree to this arrangement in order to preserve the Lenders' incentive to monitor the Concession Agreement and take action to cure a Developer Default. However, the Department will generally not agree to subordinate its rights indefinitely and will often require that the Department be permitted to exercise its rights under its direct agreement with the Design-Build Contractor in certain circumstances, including at any point after:

- termination of the Concession Agreement,
- the expiration of the Lenders' rights under their own direct agreement with the Design-Build Contractor,
- receipt of confirmation that the Lenders do not intend to exercise their rights under their direct agreement or have no further claims thereunder, or

- the Lenders have stepped-out or otherwise relinquished control under their direct agreement.

11.4 Impact of Bankruptcy

In the event that the Developer is the subject of formal bankruptcy proceedings, there is a risk that the presiding judge will reject or terminate the Concession Agreement during the course of such proceedings. To provide comfort to the Lenders under these circumstances, Direct Agreements will typically allow the Collateral Agent (or any of its designees, including any substitute developer) to certify to the Department that it will perform all of the Developer's obligations under the rejected or terminated Concession Agreement and request that the Department deliver to the Collateral Agent a new concession agreement that includes the same terms as the rejected or terminated Concession Agreement (revised only to reflect the removal of obligations thereunder that have already been fulfilled). This feature functions as a backstop in the event that the Lenders' ordinary right to step in and cure a Concessionaire Default is made impractical by ongoing bankruptcy proceedings.

12 DEPARTMENT STEP-IN

12.1 Events Triggering the Department's Step-in Rights

Under the Concession Agreement, the Department is typically given the right to 'step-in' and perform the Developer's obligations following a Developer Default or in other circumstances where it may be in the public interest for the Department to temporarily take control of the Project.

The step-in rights of the Department are generally increased in certain default scenarios, such as closure of a part of the Project or failure to perform certain safety compliance obligations. In such circumstances, the Department will generally want the right to step-in, without waiting for any cure period of the Developer to lapse, in order to perform such actions as may be necessary to rectify the closure or danger to public safety.

12.2 Effect on the Obligations of the Developer

If the Department cures a Developer Default or otherwise steps-in to perform the Developer's obligations, the Developer will be obligated to indemnify the Department for the costs and expenses incurred by the Department in respect of such cure or performance.

12.3 Effect on Rights of the Department

Following a Developer Default, if the Department exercises its step-in rights, it does not affect the Department's other rights against the Developer arising from the Developer Default. In addition, the Department will generally not be liable for any act or omission of the Department during the course of remedying any Developer Default or stepping in to perform the obligations of the Developer under the Concession Agreement. Furthermore, even if the Department commences cure of the Developer Default or steps in to perform obligations of the Developer, generally the Department will not be required to continue to, or otherwise complete, the cure or performance.

13 PERFORMANCE STANDARDS AND NON-COMPLIANCE POINTS

Concession Agreements typically require the Developer to meet certain minimum performance standards relating to the design, construction, operation, and maintenance of the Project. Rather than dictate the use of particular methods and materials, however, many Concession Agreements include outcome-based performance standards focusing on measurable indicators of achievement. The goal of using outcome-based performance standards is to make service delivery more efficient by allowing the Developer to decide how best to achieve the intended results. In addition, outcome-based performance standards encourage the Developer to utilize resources efficiently over the life of the Project, because decisions made at one phase of the Project's life cycle, such as construction or major maintenance, will determine the techniques and costs that are necessary for the Developer to satisfy the minimum performance standards at another phase.

The use of outcome-based performance requirements will require the Department to consider carefully the types of outcomes it wishes to achieve. Traditionally, many Departments have prescribed the precise means and methods that contractors must apply to the design, construction, operation, and maintenance of a facility. An outcome-based performance requirement, by comparison, might specify minimum ride quality or durability benchmarks that must be met, but not the means and methods to be utilized to achieve those benchmarks. Traditional construction and operations specifications are unlikely to be appropriate for these purposes, although discrete portions (such as safety requirements, procedures for handling hazardous materials, environmental mitigation, and other critical functions) may be applicable without variation. Departments should consider carefully what outcomes they wish to achieve and prepare technical specifications for inclusion in the Concession Agreement that are appropriate for an outcome-based approach.

In setting performance standards, the Department may look to benchmarks set in other Concession Agreements or equivalent facilities. There is a natural tension, however, between flexibility and accountability in setting performance standards. If a standard is too flexible, the public sector risks receiving a lower level of performance from a concession. If a standard is inflexible, the Department might unwillingly reduce the opportunity for innovation.

The Department is responsible for monitoring the performance of the Developer. The Concession Agreement will typically establish procedures to facilitate monitoring of the Developer's performance, including self-reporting, independent audits, regular meetings and reports, and the use of automated data collection and reporting processes.

The Concession Agreement typically includes a representative, but not exhaustive, list of minimum performance requirements and classifies them in different categories (varying in terms of significance). Most Concession Agreements prescribe processes for penalizing noncompliance, although rewards for superior performance are rarely used. Usually, a performance points system is used by the Department to measure the Developer's performance levels. When this type of system is used, the failure to meet a minimum performance standard will be reflected in the accumulation of performance points. The Concession Agreement defines the procedures to report and record each failure, any cure periods that may apply before performance points are assessed and the maximum number of performance points the Department may assess for each breach or

failure. Departments should carefully analyze the types of outcomes they wish to achieve with any given Project and the relative severity of failing to achieve them when compiling the performance points system applicable to a Project.

The accumulation of performance points by the Developer may trigger certain remedies:

- the Department may be permitted to increase the level of monitoring of the Project, for which the Developer will be required to compensate the Department;
- the Department may require the Developer to prepare and submit a remedial plan for the Department's approval, setting forth a schedule and specific actions the Developer will undertake to improve its performance, such as improvements to quality management practices, plans, and procedures; changes in its organizational and management structures; increased monitoring and inspections; changes in key personnel; and the replacement of Subcontractors;
- the Department may assess liquidated damages for certain critical non-compliances, or when the accumulated number of performance points exceeds a certain level over a given period of time; and,
- in the event of systemic performance failure, termination of the Concession Agreement for Developer Default.

14 CONSUMER PROTECTIONS AND PUBLIC POLICY ISSUES

14.1 Overview

A properly structured Concession Agreement will protect the public interest by transferring risk to the Developer and heightening accountability to the public for the performance of the Project. In addition, the Concession Agreement will contain provisions that address a number of common consumer concerns about Developer behavior in P3 transactions. This chapter describes several common consumer concerns and the manner in which a typical Concession Agreement will address them.

14.2 Excessively High Tolls and Fines

One of the most common concerns of consumers is the possibility that the Developer will impose excessive tolls and fines on Project users. As noted in Chapter 2 (Tolling Regulation), the ability of the Developer to establish, escalate, collect, and enforce tolls is strictly limited by the contractual terms contained in the Concession Agreement and approved by the Department. In setting the limits on maximum toll rates that the Developer will be permitted to charge users, the Department, in consultation with its financial advisers, should consider the extent to which consumers may be willing to pay toll rates above levels seen historically in the region or in comparable facilities, and the possibility that the revenue maximizing toll rate may from time to time be below the highest rate which is permitted by the Concession Agreement. In addition, the amount of fines which may be assessed against users for non-payment of tolls, if any, is not set by the Developer, but rather by applicable law. In light of the public interest in managing the cost of using the toll roads, the Concession Agreement may require the Developer to operate a customer service center in order to field questions or concerns from the public regarding tolls and fines. Departments may mandate minimum response times following receipt of a customer complaint, and may prescribe the type of information to be provided by the customer service center.

14.3 Windfall Profits

The public may also be concerned that the Developer can capitalize on unexpected changes in market conditions to realize windfall profits for its own account. While there is an opportunity for the Developer to earn more profit when demand is unusually high, as noted in Chapter 3 (Benefit Sharing), the Concession Agreement may entitle the Department to participate in the economic “upside” of the Project by requiring the Developer to share with the Department a portion of (i) the Developer’s revenues from the Project above certain thresholds, or (ii) the Developer’s refinancing gains that were not contemplated in the original Base Case Financial Model for the Project. These protections allow the public to share in the benefit of uniquely positive market conditions.

14.4 Emergencies

A concern often expressed by the public is that the Developer could unduly restrict the ability of law enforcement and other first responders to protect the public welfare in the event of emergencies. As noted in Chapter 2 (Tolling Regulation), the government may suspend tolls on the Project in the event of emergencies, and at all times law enforcement agencies will have the right of entry and jurisdiction necessary to enforce laws and regulations of the State. Moreover,

the Department may expressly reserve its right to exercise all of its regulatory and police powers granted by law, including rights necessary to enable first responders to perform their duties, and as a legal matter such regulatory and police powers of government cannot be abridged by contract.

14.5 Competing Facilities

Of particular concern to the public is the possibility that the Developer might seek to prevent the government from developing other vital transportation facilities in order to protect its profitability. As noted in Chapter 4 (Supervening Events), the Concession Agreement will permit the Department to develop and procure any competing transportation facility it wishes to construct. The Department can typically do so without compensating the Developer (so long as the facility was contemplated by the long-term transportation plan of the relevant jurisdiction at the time of the successful bid or commercial close for the Project), although for the reasons described in Chapter 4 (Supervening Events), in some cases it will be necessary for the Department to provide compensation.

14.6 National Security

Members of the public may express concern about investors from foreign jurisdictions having access to information regarding public safety and critical infrastructure as a result of their ownership interests in the Developer. When reviewing the qualifications of bidders at the outset of the procurement process, the Department should receive assurances from bidders that none of its owners or controlling persons is named on the “Specially Designated Nationals and Blocked Persons” list maintained by the Office of Foreign Asset Control at the United States Department of the Treasury. The use of this list is a commonly accepted means of determining whether an individual may be a threat to national security, so Departments may refer to it in order to screen out bad actors and avoid their participation in a Project. The Department may additionally seek such assurances at the time of the bid by the Developer for the Project, and the Concession Agreement may include representations and warranties from the Developer to the same effect. In addition, the Concession Agreement will either bar transfers in ownership of the Developer to such persons or entitle the Department to disallow such transfers in its sole discretion.

15 FEDERAL REQUIREMENTS

In the event that the Project receives Federal assistance at any time pursuant to Title 23 of the United States Code (e.g., credit assistance in the form of a TIFIA loan or Federal grant assistance that may be used to purchase right of way for the Project), the Developer is required by law to comply with multiple Federal laws and regulations as if the Developer were the Department. Therefore, the Concession Agreement will require that the Developer comply (and require its Subcontractors to comply) with such Federal laws, including compliance with Federal law pertaining to the use of Federal-aid funds. For example, the Concession Agreement will require that the Developer and its Subcontractors procure the Project in compliance with (among others): (i) Title VI of the Civil Rights Act of 1964 (prohibiting discrimination on the basis of race, religion, color, or national origin); (ii) Buy America Requirements (requiring the use of domestically produced steel and iron; see Section 17.3 of this Guide for the applicability of such requirements in the context of utility relocations); (iii) the Davis-Bacon Act (requiring the payment of prevailing wages, as determined by the United States Department of Labor); (iv) Disadvantaged Business Enterprise regulations (requiring good faith efforts to hire minority, female-owned, veteran-owned, and other disadvantaged contractors); (v) Equal Employment Opportunity and affirmative action regulations (concerning employment of individuals who are members of protected categories); (vi) the applicable National Environmental Policy Act (NEPA) determinations; and (vii) the applicable Federal tolling and operational requirements and regulations. Additional requirements and restrictions under Federal law will apply based on a variety of factors unique to each Project, all of which the Developer will be required to comply with.

The FHWA has published a guide for how to apply Federal-aid requirements to P3 transactions. A copy of this Guide can be found at the following URL:

http://demo9.pbid.com/ipd/p3/toolkit/publications/p3_oversight/default.aspx

16 GOVERNMENTAL APPROVALS AND PERMITS

Prior to commencing a particular activity in relation to the Project, a “Government Approval” may need to be acquired, either as a matter of law or otherwise. Accordingly, the Concession Agreement will allocate responsibility between the parties with respect to the procurement of Government Approvals and the associated costs in obtaining them. For the purposes of the Concession Agreement, “Government Approvals” may include all local, regional, State, and Federal agreements, studies, findings, permits, approvals, authorizations, certifications, consents, decisions, exemptions, filings, leases, licenses, registrations, rulings, and other governmental authorizations required to be obtained or completed under law prior to undertaking any particular activity contemplated by the Concession Agreement.

As a general matter, the Department will often procure certain Governmental Approvals in advance of (or in parallel with) the procurement of the Project, the most notable examples being environmental related Governmental Approvals required as a matter of Federal law, which are typically fundamental to the feasibility of the Project.

The Concession Agreement will typically set out a discrete list of Governmental Approvals that the Department is responsible for procuring and the Department will be required to procure them by defined dates. These permits will typically be those which are considered either fundamental to the feasibility of the Project or materially beneficial to the construction schedule (if procured in advance). Responsibility for procuring all other Governmental Approvals typically sits with the Developer, at its sole cost and expense, albeit that the Department will typically agree to provide reasonable assistance and cooperation to the Developer, as requested by the Developer, in obtaining Governmental Approvals relating to the Project and any revisions, modifications, amendments, supplements, renewals, reevaluations, and extensions of Governmental Approvals. The Department may additionally agree under the Concession Agreement that it will not unreasonably withhold or delay any Governmental Approval for which the Department is the issuing Governmental Authority with respect to the design, construction, operation, or maintenance of the Project.

It should be noted that, as a practical matter, certain Governmental Approvals obtained by the Department in advance of (or in parallel with) the procurement of the Project may need to be obtained on the basis of assumed design. Accordingly, to the extent that the Developer proposes an alternative design to that assumed when procuring the relevant Governmental Approval, the Developer may need to amend the relevant Governmental Approval or obtain a re-evaluation of the alternative design by the relevant agency issuing the relevant Governmental Approval.

17 UTILITIES AND THIRD PARTY RIGHTS

17.1 Risk Allocation and Coordination with Utilities and Railroads

Most Projects will impact existing utility lines or other assets owned by third parties (such as railroads) that will need to be relocated, temporary disabled, or otherwise accommodated during the course of construction. The basic risks presented by these activities will be familiar to most Departments because they also arise in traditional construction arrangements. In a P3 transaction, the risk of cost and schedule impacts associated with unknown utilities or intransigent third parties is addressed largely in the same manner as the risk of differing site conditions. Developers are expected to budget and schedule for these impacts and limited relief may be provided in respect of risks that cannot be reliably quantified at the time the Concession Agreement is executed (often by reference to baseline information that the Department provides prior to submittal of the bids for the Project (see Chapter 4 (*Supervening Events*) for further information regarding the use of baselines)).

Many Departments enter into master utility relocation agreements with utility companies governing the standard terms of any utility relocation that will be performed in connection with the Department's construction projects. These agreements typically contemplate that a Project-specific utility relocation agreement will be executed in connection with each Project, incorporating the terms of the master agreement and specifying the particular terms applicable to the individual relocation, particularly the extent to which the Department or the utility will bear the cost of any relocation. Concession Agreements will often provide that the Developer must perform the Department's obligations under these agreements. As such, to the extent the Department is obliged to pay for relocation under the utility relocation agreement, the Developer will be required to make a payment on behalf of the Department.

The principal difference between the management of these risks and other differing site conditions is the presence of third parties whose cooperation is required in order for the Developer to successfully perform the work. When these third parties have been uncooperative with the Developer despite the Developer's best efforts, the Concession Agreement will often require the Department to use its own reasonable efforts to compel cooperation (typically excluding the use of eminent domain or the initiation of formal legal proceedings), and may entitle the Developer to claim a Compensation Event or Delay Event to the extent that it is prejudiced by the unreasonable failure of the third parties to cooperate.

17.2 Other Third Parties' Rights

In addition to railroads and utilities, a variety of other third parties' rights may be impacted in connection with any given Project (e.g., relevant local townships may have the right to review and comment on the design of portions of the Project or impose scheduling and other restrictions on the performance of any construction work within its jurisdictional area). These rights will typically be set out in existing contracts between the Department and the relevant third party. The terms of the Concession Agreement will often require that the Department assign, and the Developer accept, the Department's contractual rights and obligations under those contracts. The relevant third parties will need to be notified, and in some cases their consent, which may take considerable time to acquire, may be required in order to effect the assignment. Departments

should therefore begin the process of identifying these contracts and contacting the relevant third parties relatively early during the procurement, in order to resolve issues as quickly and efficiently as possible.

Some third parties' rights may not be set out in contracts. It is not uncommon that when a Department begins to acquire right-of-way, the owners from whom it is acquired will negotiate certain rights in connection with the sale of their land. These rights may take the form of permanent or long-term real property interests, such as easements to cross the right-of-way, which are not set out in a contract but rather are recorded in the relevant government records. When describing the rights of access that the Developer will have to the right-of-way for purposes of constructing and operating the Project, it is therefore important to specify that the Developer's rights of access are subject to these real property interests. This is often accomplished by reference to a title report, produced by a title company on behalf of the Department. If existing real property interests are not reflected in the report, the Developer may be entitled to claim a Compensation Event for the impact to its rights of access.

17.3 Buy America Requirements

"Buy America Requirements" are Federal laws which require that steel and iron products permanently incorporated into Projects and paid for, in whole or in part, with Federal highway funds must be manufactured in the United States. Historically, these requirements were applicable only to contracts where Federal funds were actually used for the construction. Section 1518 of MAP-21, however, expanded the requirements to include any contract eligible for Federal funds for a project within the scope of any applicable NEPA determination, regardless of the funding source of the contract, if at least one project contract is funded with amounts available under Title 23. As a practical result, to the extent that a utility relocation associated with a Project meets these criteria, the Buy America Requirements will apply even if the utility relocation itself is not paid with Federal funds.

18 FINANCIAL MODEL ADJUSTMENTS

The Concession Agreement will require the Developer to deliver and maintain a Base Case Financial Model containing all of the cash flow projections (including all costs and revenues) and calculations relating to the Project. This Base Case Financial Model is the successor to the financial model that the Developer submitted as part of its bid for the Project. On the Financial Close Date, the Base Case Financial Model may be placed in an escrow in order to avoid unauthorized tampering or modification. After the Financial Close Date, updates and adjustments to the Base Case Financial Model are allowed only under certain conditions, and are generally subject to approval under the Concession Agreement by both the Developer and the Department. Additionally, Lenders may separately require similar approval rights under the relevant Financing Documents.

Updates to the Base Case Financial Model consist of changes performed to reflect the financial consequences of certain events, including the incorporation of historical information. Typically, updates are performed in order to account for the impact of Compensation Events, Delay Events, refinancing events, annual updates of audited financial information, and other circumstances that are deemed appropriate by the Department and the Developer.

Adjustments to the Base Case Financial Model can include changes to assumptions, logic, mathematical formulas/calculations and forecasted information resulting from material changes to the Project, and generally require the agreement of both the Developer and the Department.

Because the Base Case Financial Model is crucial in determining the financial consequences of events throughout the lifetime of the Concession Agreement, both the Department and the Developer have an interest in fair and realistic procedures for updates and adjustments. The procedures typically include a review by an independent auditor (and the allocation between the Department and the Developer of responsibility for paying the fees and expenses of the auditor for such review) and a process for resolving disputes arising out of the Base Case Financial Model. The Concession Agreement aims to ensure easy access to the Base Case Financial Model for both the Department and the Developer, and therefore will often prohibit password-protected files or macros, as well as hidden rows, columns, cells or worksheets.

19 DEPARTMENT AND DEVELOPER CHANGES

19.1 Department Changes

In order to limit potential claims from Developers with respect to Compensation Events, Departments will want to ensure that the specifications governing the Project (including technical requirements, any applicable standards and general scope of work) set out in the Concession Agreement account for the Department's long-term (not just current) requirements, and that these specifications anticipate changes that are reasonably foreseeable (e.g., any advancements in technology that the Department expects to adopt in the near future). Departments, however, will also want a certain degree of flexibility to deal with future unknowns and evolving Department requirements. To achieve this flexibility, the Concession Agreement will usually specify the Department's right to authorize or require changes to the Work (a "Department Change") subject to limited conditions (e.g., the changes cannot contravene applicable laws), with the understanding that such changes constitute a Compensation Event and the Department will be required to compensate the Developer for the net impact of all increased costs (including the impact on future operations and maintenance costs) and decreased revenues associated with such changes.

Negotiations surrounding Department Changes, as with change orders in traditional construction contracts, can be contentious, so the Concession Agreement will generally specify the steps that each party must take once a Department Change is proposed in order to facilitate agreement on costs, likely impacts on the Developer and other relevant details. For example, the Concession Agreement may require consultation with an independent engineer. However, if the Department and the Developer cannot agree on the costs of a Department Change or whether the proposed changes qualify as a Department Change (i.e., whether the Department should bear the associated costs), the Concession Agreement will usually give the Department the right to issue a directive letter that requires the Developer to carry out the proposed changes specified therein regardless of any disagreements between the parties. In such cases, the associated costs, which are the responsibility of the Department, will typically be determined either through a pre-determined mechanism for reporting and calculating extra work costs (e.g., a force account mechanism) or the dispute resolution procedures.

19.2 Developer Changes

Developers, like Departments, will also seek flexibility to propose changes to the Project, especially in situations where such changes may decrease the Developer's costs without diminishing the quality of the Project. The Concession Agreement will give the Developer a right to propose changes, which are typically subject to the Department's consent and must be performed at the Developer's sole cost and expense.

20 **ADDITIONAL CAPACITY CONSTRUCTION REQUIREMENTS**

Some Concession Agreements may require the Developer to provide additional traffic capacity at its own cost and expense to meet minimum performance standards once certain pre-set triggers have been met. In order to establish the long-term necessity of the enhancements, triggers based on daily or monthly traffic levels usually must be exceeded over a meaningful period of time. The enhancements required may vary by project. They may include:

- improvements to certain intersections,
- the addition of new lanes, signs, equipment, or
- other capital changes that improve performance.

The required enhancements may be described in detail in the original Concession Agreement or may be left intentionally undefined.

These triggers may help to achieve acceptable performance over the entire life of the Project, in particular because they are intended to encourage the Developer to make the appropriate enhancements to do so. A balance must be struck when negotiating the precise triggers and corresponding capacity requirements. On the one hand, clearly defined triggers that ‘automatically’ lead to capacity enhancement measures can reduce uncertainty for both the Developer and the Department. On the other hand, if applied too rigidly, these mechanisms may lead to sub-optimal investment decisions and unintended effects.

Developers will typically be afforded a period of time after the occurrence of the trigger in order to complete the enhancements, particularly if it requires mobilizing major construction equipment, obtaining new permits, or acquiring land. In some cases, the Developer’s ability to complete the enhancement will depend on the Department’s participation, such as in the acquisition of land.

The capacity enhancements may occur years after the construction of the original Project, which can pose several challenges. For example, the Developer may not be able to obtain financing quickly or affordably, either because the financial markets are not interested in financing the enhancement or if the financial metrics for the original Project, such as coverage ratios, are not likely to be maintained if the enhancement is not undertaken. Alternatively, the enhancement stipulated in the Concession Agreement may no longer be the appropriate technical solution due to changes in technology or regulations.

Potential solutions to these challenges may include (a) ensuring that performance triggers are linked to financial triggers (such as revenue levels or debt service coverage ratios); (b) providing a reasonable amount of time for the Developer to complete the enhancements; or (c) allowing the Developer a degree of flexibility to achieve the enhancement, such as offering solutions that have comparable results or providing the Developer with the option to pay liquidated damages in lieu of implementing the enhancement. If the Department permits the Developer to pay liquidated damages in lieu of implementing the enhancement, the Developer will likely choose to pay if the cost of the enhancement exceeds the liquidated damages, so the Department, in consultation with

its financial advisor and technical experts, should establish liquidated damages amounts which reflect the true cost to the Department and the travelling public of foregoing the enhancement in order to better align the Developer's incentives with the needs of the public.

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21 NATURE OF DEVELOPER'S PROPRIETARY INTEREST

The Developer's "proprietary interest" refers to the extent to which the Developer has a tangible or intangible interest in the Project or the underlying real estate. This issue manifests itself when determining the legal means by which the Developer is granted the access rights needed to perform its obligations under the Concession Agreement. Broadly speaking, there are two principal means by which the Developer is afforded these rights: (i) a leasehold interest in the underlying real estate; and (ii) a contractual license/permit to use.

From a practical perspective, both approaches give the Developer substantially similar rights to access the Project and perform all of its obligations under the Concession Agreement. As a general rule, however, Departments are often reluctant to grant leasehold interests in their highways (the concern being that the grant of a leasehold interest implies that legal ownership of the highway has in some way been transferred to the private sector). Additional practical and legal considerations often influence the decision on which approach to take, as follows:

- Taxes – a leasehold interest may be subject to State or local real property tax, transfer tax, and recordation tax, whereas an intangible right (such as license or permit to use) may not be subject to such taxes (or may be subject to similar taxes in lower amounts);
- Legal Rights – in some jurisdictions, a lessee may have the benefit of legal rights and remedies that both undermine the traditional risk allocation in a Concession Agreement and cannot, as a matter of law, be waived; and
- Underlying Property Interest – the Department may not be capable of granting a leasehold interest to the Developer in respect of the entirety of the Project. Although significant sections of the right of way for the Project will typically be owned by the Department, it is not uncommon for the Department to be incapable of granting a lease in respect of material sections of the right of way, particularly in respect of those sections of the right of way that are secured via access rights granted by way of contract with third parties (e.g., right to establish a bridge crossing a third party's property).

22 CONTRACT TERM

In most toll concession P3s in the United States, the Department at the beginning of the Project procurement will specify the length of the Term of the Concession Agreement. In addition to restrictions in applicable law with respect to the maximum permitted Term, the fundamental principle that Departments should bear in mind is that for a Project to be financeable, the Term must be long enough to permit the Developer to spread out its debt service (and other expenses) over a sufficient number of years so that the expected Project cash flows cover these amounts as they fall due. Consequently, the magnitude of construction costs to be financed and the anticipated toll revenues play a key role in determining the Term of the Concession Agreement. Departments should also bear in mind that although Lenders typically require debt to be repaid a few years prior to the expiration of the Term (in order to accommodate a potential restructuring of the debt at some point), there are limits to the length of time Lenders will wait to be repaid.

Other considerations are relevant to the Department's determination of the Term, such as mitigating demand-risk for the Developer (e.g., in the event of lower-than-projected traffic volume or longer-than-expected ramp-up periods, a longer Term could mitigate against these risks by giving the Developer a longer period of time to "earn back" the lost revenue), the level of the toll rates (including any caps on the maximum toll rate the Developer is permitted to charge) and the Department's expectation of the Concession Fee (if any). Even if it is economically possible for the Developer to pay its debt service, operating and maintenance expenses and earn a reasonable return in a relatively short Term (such as 20 years), these other considerations may lead the Department to prefer a longer Term that is subject to additional constraints (e.g., the expected level of tolls necessary to repay the debt in a shorter period may be unacceptable from a policy perspective, even if traffic and revenue studies indicate consumers may be capable of paying such a higher amount). However, in setting a Term that extends over a period of decades, the Department should also take into consideration its loss of direct control over the Project. For example, the Developer could be underperforming, but not to such an extent that would trigger a Developer Default. Consumer backlash could lead the Department to voluntarily terminate the Concession Agreement for convenience, although a longer Term in such a scenario could increase the cost of termination.

Potential tax benefits may also play a role in determining the length of the Concession Agreement, although their significance will vary according to a number of considerations, including the tax structuring choices made by the Developer, the rights granted to the Developer with respect to any existing assets in the Project Right of Way, and others. Both the Department and the Developer should consult their financial and tax advisors for advice on the potential tax ramifications of the proposed Term of the Concession Agreement.

23 DEVELOPER INDEMNITIES

23.1 Scope of Indemnities

The indemnity provisions in a Concession Agreement protect the Department against the risk that the Developer's actions generate liabilities for the Department outside of the Concession Agreement. The Developer will often be required to indemnify the Department and a class of other indemnified parties (including the Department's employees and officers, the State itself, and any other State agency or body associated with the procurement or management of the Project) against:

- claims made by third parties that arise out of the Developer's performance or non-performance of the Concession Agreement;
- violations of securities laws by the Developer in connection with the financing of the Project;
- patent or trademark claims associated with the Developer's use of intellectual property on the Project;
- damage caused to property or loss of life as a result of the work performed by the Developer; or
- other matters relevant to the particular Project.

The Developer's indemnity obligation will usually not apply when the third party claim arises as a result of the gross negligence, willful misconduct or fraud of any of the Indemnified Parties, or where the third party claim arises due to the performance or non-performance by the Indemnified Party (including the Department) under the Concession Agreement. Departments and their legal advisors should balance the scope of indemnities with the risks the Developer is undertaking pursuant to the Concession Agreement.

23.2 Indemnification Procedures

Because the Developer will be required to pay the Department's losses associated with third party claims, the Concession Agreement will typically provide that the Department must give notice to the Developer upon receiving notice of such a claim and afford the Developer some level of control and/or management of the defense and settlement of the relevant claim. However, the extent to which such rights can be delegated to the Developer by the Department is often complicated by matters relating to sovereign immunity and legal restrictions in the relevant State. Additionally, some States will not permit the delegation of the defense of a claim to a third party without the prior approval of the relevant Attorney General's office.

24 DISPUTE RESOLUTION

The Concession Agreement will generally establish procedures for the resolution of disputes between the Developer and the Department. The subject matter of such procedures is often broad and may include any claim, dispute, disagreement or controversy between the Developer and the Department concerning their respective actions, rights and obligations under the Concession Agreement. Typically the Concession Agreement will provide that, in the event of a dispute, the Developer and Department will first attempt to resolve it through good faith negotiations between their designated representatives. If the dispute is not resolved within a period of time set forth in the Concession Agreement, either party will typically have the right to commence formal discussions between their executive-level representatives. If such discussions fail to resolve the dispute before a deadline prescribed by the Concession Agreement, then typically either the Developer or the Department may initiate non-binding mediation and, in the event that the dispute continues after the conclusion of mediation, each party will have the right to litigate the matter in accordance with the provisions of the Concession Agreement concerning venue and choice of law. Concession Agreements may contemplate the use of binding arbitration rather than litigation, although many Departments are bound by statutes requiring disputes to be heard in court, and some laws may specify special courts to address claims against State agencies. Typically the parties will be required to bear their own costs during the course of a dispute, and the Concession Agreement will require them to continue to perform their obligations while a resolution is pending.

Where mediation of a dispute has been unsuccessful and the dispute is technical in nature (such as the proper application of particular engineering specifications, or the interpretation of technical requirements), the Concession Agreement may entitle either party to initiate a hearing of the dispute by a panel of independent subject matter experts appointed by the parties before commencing litigation. The decision of such a panel may entitle a party to interim relief relating to the dispute, but will not typically prejudice the right of either party to litigate the matter. In many cases, the Department cannot be party to an agreement that provides for binding arbitration of claims.

25 INTELLECTUAL PROPERTY

25.1 Ownership and Licensing of Intellectual Property

In most Projects, the Developer will need to use a variety of intellectual property in order to perform its obligations under the Concession Agreement. The intellectual property may be owned by the Department, the Developer or a third party. The Concession Agreement will usually specify that intellectual property owned by the Department, the Developer or a third party will remain the exclusive property of such party at all times. However, the Department and the Developer will typically be required to grant a license to each other for the use of intellectual property that they own. Where the intellectual property is owned by a third party, the Developer often bears the responsibility for procuring a license in favor of the Department that is similar in scope to the license it provides with respect to its own intellectual property.

Such licenses can be broad (i.e., for use in connection with the Project and other facilities or programs) or narrow (i.e., for use solely in connection with the Project). Whether a broad or narrow license is granted varies from one Project to another and can depend on the type of intellectual property in question. The Department will typically grant a narrow license to the Developer for intellectual property that is pre-existing and of general applicability (“background IP”). The Developer will typically grant a broad license to the Department for intellectual property developed specifically for the Project (“foreground IP”) or at least provide the Department the right to purchase foreground IP for use in other facilities on commercially reasonable terms.

25.2 Intellectual Property Rights on Expiry or Termination of the Concession Agreement

Developers often seek to limit access to portions of their proprietary intellectual property which constitute patents or trade secrets, fearing that any public disclosure could deprive the Developer of the property’s commercial value. Consequently, a Developer may insist that the Department only be permitted to exercise its license to such proprietary intellectual property upon the expiration or early termination of the Concession Agreement or exercise of the Department’s step-in rights. Departments should be aware, however, that insolvency of the Developer could render a license ineffective, or that the Developer (or Subcontractor) may not cooperate in handing over the relevant intellectual property in a potentially contentious termination scenario. Each possibility presents a material risk that could jeopardize the Department’s ability to operate the Project when it has assumed the obligations of the Developer under the Concession Agreement. One common means of mitigating this risk for the Department in a way that is satisfactory to the Developer is to require the Developer to place this proprietary intellectual property (such as software source codes and related documentation) in an escrow with an independent third party, subject to the express condition that it can be accessed by the Department upon the occurrence of certain termination and insolvency scenarios (e.g., termination for Developer Default).

26 AMENDMENTS TO KEY DEVELOPER DOCUMENTS

The Concession Agreement will typically require the Developer to submit to the Department all of its primary contracts critical to design, construction, operations, maintenance, financing and any other similar activities related to the Project (the “Key Developer Documents”) for review prior to execution thereof. This review is intended to ensure that these Key Developer Documents do not adversely impact or interfere with the Department’s rights under the Concession Agreement. Once executed, however, the Developer will want to retain some measure of flexibility to amend these Key Developer Documents going forward, while the Department will not want the Developer to simply rewrite them after they have been reviewed and accepted. Of particular concern to the Department will be amendments to Key Developer Documents that increase the Department’s potential liabilities, both during the Term and on early termination of the Concession Agreement. The Department will typically want to ensure that its potential liabilities cannot be increased by way of an amendment, particularly in the case of the Developer’s financing documents (which can generate substantial termination compensation obligations). To protect against the risk that Key Developer Documents will be amended in a manner detrimental to the Department, the Concession Agreement will typically state that the amendments to Key Developer Documents cannot, in the absence of the Department’s prior written approval of the relevant amendments, have the effect of increasing the Department’s liabilities under the Concession Agreement.

27 ASSIGNMENT

27.1 Assignment by the Developer

For the reasons discussed in Chapter 5 (Changes in Equity Interests), there will generally be a restriction on the Developer from directly assigning or transferring its rights under the Concession Agreement without the consent of the Department. An exception will generally be included in relation to an assignment to, or at the direction of, the Collateral Agent in an enforcement scenario in accordance with the terms of the Direct Agreement (see also Chapter 11, Lender Rights and Direct Agreement).

27.2 Assignment by the Department

The Department is also generally restricted from assigning or transferring its rights under the Concession Agreement without the consent of the Developer. An exception is typically provided with respect to a transfer to a public agency permitted by law, which is sometimes restricted to those public agencies that succeed to the governmental powers and authority of the Department. The Department will generally have to give reasonable notice of this assignment (e.g., 90 days) and also provide assurances that the assignee is duly authorized and financially capable of performing the Department's obligations under the Concession Agreement.

28 GENERAL PROVISIONS

Each Concession Agreement will contain a number of general provisions that are relatively standard, not heavily negotiated, and accordingly have not been covered in this Guide. These provisions include conditions precedent, representations and warranties, record keeping, notice provisions, payments, interest on overdue amounts and governing law. The Department will still need to consider each of these provisions in the context of a particular Project.

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EXHIBIT A

Glossary of Terms

The glossary of terms provided below is designed to be used as an educational tool to assist in understanding the Model Public-Private Partnership Core Toll Concessions Contract Guide. The below terms are illustrative and should not be construed as legal advice, notwithstanding that a number of the terms contained below may also be used in example provisions provided in the Guide. The below terms contain both “terms of art” often seen as defined terms in Concession Agreements (which are capitalized) and more general jargon commonly used in the P3 industry (which are not capitalized).

Term	Description
Account Balances	Amounts held in or credited to certain bank accounts of the Developer which reduce the total amount of Termination Sum payable by the Department.
applicable law	Any local, State or Federal laws, rules or regulations that apply to the Developer or the Project.
appropriations risk	The risk that a State legislature will not appropriate or allocate to the Department sufficient funds to permit the Department to meet its payment obligations to the Developer under the Concession Agreement.
Base Case Financial Model	The financial model containing agreed projections and calculations regarding revenues, expenses, dividends and repayment of debt and equity relating to the Project as well as agreed economic assumptions. The Base Case Financial Model will be prepared in Excel format and may be used, among other things, to calculate the projected Equity IRR over the Term, as may be updated in accordance with the terms of the Concession Agreement.
benefit-sharing	The sharing of financial benefits between the Developer and the Department according to the terms of the Concession Agreement, as described in Section 3.1 of the Guide.
breakage costs	Any commercially reasonable costs, make-whole payments or other prepayment amounts (including premiums) that the Developer must pay under any Financing Document as a result of the early repayment of such debt prior to its scheduled maturity date.
caps and floors	Terms derived from instruments used in the financial markets, which establish a maximum (cap) and minimum (floor) price, such as an interest rate, for a financial instrument. Often used together (in which case, a collar), caps and floors are considered cost-effective ways to manage financial risks, such as changes in interest rates.

Change in Law	A new or changed Law that is applicable to the Project as compared to that in effect when the Project was procured, as described in Section 6.7 of the Guide.
Change in Ownership	A change in the direct or indirect ownership of the Developer, as described in Section 5.2 of the Guide.
Change Order	A written order from the Department to the Developer requesting a change in the Construction Work as compared to the Construction Work originally required to be performed by the Developer under the Project Documents.
Collateral Agent	In circumstances where there is more than one secured Lender involved in a Project, the Lenders will often appoint a Collateral Agent that holds the collateral provided as security for the Project, such as a real property mortgage or an all-asset pledge agreement from the Developer, on behalf of the secured parties.
Compensation Amount	The amount of any compensation payable by the Department to the Concessionaire with respect to any Compensation Event.
Compensation Event	The occurrence of one or more events which delay or increase the cost of the Developer's performance of its obligations under the Concession Agreement or which reduce the Developer's revenue, as described in Section 4.3.1 of the Guide.
Competing Facility	A transportation facility managed or built by the Department in the vicinity of the Project which may give rise to a Compensation Event if the Developer's traffic and revenue are reduced as a result, as described in Section 4.3.2 of the Guide.
Concession	The contractual right granted by the Department to the Developer to design, build, finance, operate and maintain a particular asset owned by the Department, which will be documented and governed by the terms of a Concession Agreement.
Concession Agreement	This term is defined or otherwise described in Section 1.2 of the Guide. This document is also sometimes known in the market as a "Comprehensive Agreement," a "Concession and Lease Agreement" or a "Public-Private Partnership Agreement."
Concession Fee	The amount of any fee payable with respect to benefit-sharing. This fee is also sometimes known in the market as a "permit fee" or "revenue-sharing payment."
Construction Period	The period starting upon the commencement of construction of the new asset being developed as part of the Project, and ending at the achievement of Substantial Completion.

Construction Work	All Work to build or construct, make, form, manufacture, furnish, install, supply, deliver, landscape or equip the Project.
Cost to Complete	The cost to the Department to complete the Project following a Developer Default prior to Substantial Completion, as described in Section 7.3.4 of the Guide.
Defects Liability Period	A proscribed period (generally two to five years) following Substantial Completion of the Project during which time the Design-Build Contractor must account to the Developer for defects in the construction of the Project.
Delay Event	The occurrence of one or more events which delay the Developer's performance of its obligations under the Concession Agreement, as described in Section 4.3.3 of the Guide.
demand and revenue risk	The risk that traffic demand for the relevant Project, and Toll Revenues received by the Developer, do not match the projections used to generate the Developer's expected rate of return.
Department	The public authority granting rights to the Developer to design, build, finance, operate and maintain the Project in accordance with the Concession Agreement.
Department Default	The occurrence of one or more specified failures of the Department to perform its obligations under the Concession Agreement, as described in Section 7.2.1 of the Guide.
Department Default Termination Sum	The amount payable by the Department to the Developer following a termination of the Concession Agreement for a Department Default, as described in Section 7.2.4 of the Guide.
Design-Build Contract	The contract between the Developer and the Design-Build Contractor pursuant to which the Design-Build Contractor agrees to carry out the design work and the Construction Work and related services on the Project.
Design-Build Contractor	The Subcontractor hired by the Developer to carry out the Construction Work and related services on the Project pursuant to the Design-Build Contract. The Design-Build Contractor may be an affiliate of the Developer.
Developer	The private entity that contracts with the Department to undertake some or all of the design, construction, financing, operations and maintenance relating to a Project that is to become subject to a Concession Agreement.

Developer Default	The occurrence of one or more specified failures of the Developer to perform its obligations under the Concession Agreement, as described in Section 7.3.1 of the Guide.
Developer Default Termination Sum	The amount payable by the Department to the Developer following a termination of the Concession Agreement for a Developer Default, as described in Section 7.3.4 of the Guide.
Direct Agreement	The agreement between the Developer, the Department and the Collateral Agent under which, among other things, the Department provides consent to provision of security over the Developer's rights in the Project and grants the Collateral Agent step-in rights and cure rights in the event of a Developer Default under the Concession Agreement.
Discriminatory Change in Law	This term is defined or otherwise described in Section 6.5 of the Guide.
Dispute Resolution Mechanism	The provisions contained within the Concession Agreement that outline how the parties will resolve disputes, which generally include an initial good faith effort to reach agreement, when disputes are to be reviewed by a technical advisor and/or disputes review board and the use of arbitration and traditional litigation.
early termination	Termination of a Concession Agreement for any reason prior to the original stated expiration of the Term, including by reason of a default by either party or a Force Majeure Event.
Early Termination Date	The effective date of early termination.
Electronic Toll Collection Agreement	An agreement pursuant to which the Department provides toll transaction account management services and other "back office" functions to the Developer.
Electronic Toll Collection System	An automatic electronic system used to collect tolls.
electronic tolling	The collection of tolls by a toll operator using an Electronic Toll Collection System.
Element	Each individual component, system, or subsystem of the Project.
Equity Investors	The entities which directly or indirectly own the Developer and invest equity into the Project, also known as "sponsors" or "shareholders".
Equity IRR	The internal rate of return that the Equity Investors have projected to be derived from the Project in accordance with the Base Case Financial Model, as may be updated in accordance with the terms of the Concession Agreement.

Escrow Agent	A third party hired to hold and control the Handback Reserve Account, as described in Section 8.4.2 of the Guide.
Exempt Vehicles	A class of vehicles (e.g. commuter buses) which is entitled to a discount from otherwise applicable tolls.
express toll lane	A traffic lane subject to tolls that vary with demand in order to maintain average speed at or above a stated level.
Financing Documents	All documentation relating to the financing of the Project (excluding Shareholder Loans), including loan documentation, security documentation, credit support documentation, hedging documentation and intercreditor documentation.
Financial Close Date	The date on which the conditions precedent to the provision of financing to fund the Project have been met. These conditions include execution of the Transaction Documents, delivery of the Base Case Financial Model, delivery of requisite legal opinions and confirmation that the requisite equity investment or Shareholder Loan/s have been made by the Equity Investors.
Force Majeure Event	One of a set of agreed events outside the control of either the Department or the Developer which may permit the Developer to seek relief under the Concession Agreement, as described in Section 4.3.5 of the Guide.
Force Majeure Termination Sum	The amount payable by the Department to the Developer following a termination of the Concession Agreement for a Force Majeure Event, as described in Section 7.4.2 of the Guide.
Governmental Approval	All approvals, permits, permissions, consents, licenses, certificates and authorizations required from time to time in connection with the Project whether issued by the Department or any Governmental Authority.
Governmental Authority	Any court, Federal, State, or local government, department, commission, board, bureau, agency or other regulatory or governmental authority, other than the Department.
greenfield project	In a P3 context, a greenfield project is a Project that requires the construction of a new asset. The Concession Agreement in respect of the greenfield project will include the design and construction of the new asset, as well as the operation and maintenance of the asset.
Gross Revenues	All amounts received by the Developer in relation to the Project, including Toll Revenues, insurance proceeds (to the extent received to compensate for the loss of tolls and user fees) and interest income.
Handback	The return of the Project to the Department at the end of the Term, as described in Section 8.1 of the Guide.

Handback Inspections	Regular inspections conducted by the Developer during the Handback Period, as described in Section 8.3 of the Guide.
Handback Performance Security	Any performance security the amount of which is credited to the Handback Reserve Account.
Handback Period	The final years of the Term, during which the Developer is required to prepare for and manage the handback of the Project to the Department, as described in Section 8.2.1 of the Guide.
Handback Requirements	The performance standards for the Project's major assets required to be achieved by the Developer prior to handback of the Project to the Department, as described in Section 8.2.1 of the Guide.
Handback Reserve Account	The account in which the Handback Reserve Amount is held, as described in Section 8.4.1 of the Guide.
Handback Reserve Amount	An amount required to be held by the Developer to pay the cost of complying with the Handback Requirements, as described in Section 8.4.1 of the Guide.
Hazardous Substances	Any substance which is considered a contaminant, pollutant, dangerous substance, toxic substance, solid waste, or hazardous material which is deemed hazardous or toxic under, or otherwise regulated by, environmental laws.
High-Occupancy Vehicle (HOV)	A vehicle which contains multiple passengers, generally two or more.
high-occupancy toll (HOT) lane	A high-occupancy vehicle traffic lane that includes a road pricing scheme allowing motorists in non-HOVs access to such high-occupancy vehicle lanes if they pay a toll.
high-occupancy vehicle lane	A restricted traffic lane reserved for motorists in HOVs, generally during peak travel times.
highway project	The design, construction, finance, operation and maintenance of an asset comprising a highway.
Insurance Proceeds	Any insurance proceeds available to the Department for the purposes of achieving Substantial Completion.
Key Assets	The assets and contractual rights necessary to enable the Department to continue a Project following a termination of the Concession Agreement, as described in Section 7.6.4 of the Guide.

Key Contractor	The relevant Subcontractor under designated “key contracts” relating to the Project, which will generally include the Design-Build Contract, the Operations and Maintenance Contract and any significant services contract with a value over a designated amount.
Law	All laws, rules and regulations applicable to the Developer or the Project, as described in Section 6.7 of the Guide.
Lenders	Each bank or financial institution, including the United States Department of Transportation, acting through the Federal Highway Administrator (as lender of a TIFIA loan), or any other entity that provides Project Debt (excluding Shareholder Loans or any other financing provided by Equity Investors).
life-cycle	In relation to an asset, the course of the Useful Life of that asset.
life-cycle maintenance / investments / costs	In relation to an asset, money or materials invested to maintain the asset during the life-cycle of that asset.
Life-Cycle Maintenance Plan	The Developer’s plan to manage its major maintenance and handback obligations during the life of the Project, as described in Section 8.2.3 of the Guide.
Long Stop Date	The date, being a designated period of days following the date Substantial Completion is scheduled to occur, following which time, if Substantial Completion has not occurred, a Developer Default will occur under the Concession Agreement.
Losses	Any losses, liabilities, judgments, damages, fees, penalties, fines, sanctions, charges or out-of-pocket and documented costs or expenses actually suffered or incurred.
Maintenance Work	Work required to be undertaken by the Developer in relation to the maintenance of the Project, including routine maintenance and Renewal Work.
Major Maintenance Reserve Account	An account established by the Developer which must contain sufficient funds to pay for projected Renewal Work required over a given period in respect of the Project.
managed lane facility	A toll road concession such as a high-occupancy toll lane, an express toll lane or an exclusive/special-use lane with tolls for certain users that vary with demand.
MAP-21	Moving Ahead for Progress in the 21st Century Act.
Net Cost Impact	The increase in the Developer’s costs due to a Compensation Event, as described in Section 4.4.3.1 of the Guide.

Net Cost Savings	The decrease in the Developer's costs due to a Compensation Event, as described in Section 4.4.2.1 of the Guide.
Net Project Debt	The amount of the Developer's Project Debt less its Account Balances, as described in Section 7.3.4 of the Guide.
Net Revenue Impact	The net increase or decrease in the Developer's revenue due to a Compensation Event, as described in Section 4.4.2.1 of the Guide.
Nondiscriminatory Change in Law	A Change in Law that is not a Discriminatory Change in Law, as described in Section 6.7 of the Guide.
Operations and Maintenance Contract	The contract between the Developer and the Operations and Maintenance Contractor pursuant to which the Operations and Maintenance Contractor agrees to carry out operations and maintenance services for the Project.
Operations and Maintenance Contractor	The Subcontractor hired by the Developer to carry out the operations and maintenance services on the Project pursuant to the Operations and Maintenance Contract. The Operations and Maintenance Contractor may be an affiliate of the Developer or the Developer may perform the Operations and Maintenance services itself.
Permitted Vehicle	In the context of a managed lane facility, those vehicles that are allowed to use the managed lane for public policy reasons, and generally include motorbikes, buses, transit vehicles, maintenance vehicles of the Department and emergency vehicles.
private activity bonds (PABs)	A bond issued for the purpose of financing a project. PABs are often issued via a conduit issuer (generally a finance vehicle of the Department), which then on-lends the money to the Developer. The Developer (rather than the Department) is liable for the payment of interest and redemption of the PABs. If issued for a designated purpose and provided other Federal and State requirements are complied with, PABs can be tax-exempt..
Prohibited Person	In the context of Change in Ownership provisions, and depending on the Department's requirements with respect to changes in ownership to particular entities of concern, those entities that give rise to concerns associated with national security, debarment from State or Federal procurement processes or egregious reputation who may not become Equity Investors.
Project	The asset to be designed, constructed, financed, operated and maintained by the Developer pursuant to the terms of the Concession Agreement.

Project Debt	The bona fide indebtedness related to the Project, including bank debt, PABs, TIFIA loans, guarantees and credit support facilities. Project Debt includes not just principal and interest but also fees, expenses and any breakage costs. Project Debt does not include Shareholder Loans or any other financing provided by Equity Investors.
Project Documents	All documentation relating to the design, construction, operation and maintenance of the Project, including the Concession Agreement, the Design-Build Contract and the Operations and Maintenance Contract.
Project Right of Way	The real property which is necessary for the performance of the Work and operation of the Project.
Project Schedule	The construction schedule for the Project as agreed between the Department and Developer.
Project Value	The fair market value of the Developer's interest in the Project. This fair market value is generally determined by an independent appraiser and based on the projected cash flows and projected costs of the Project as of the date of determination until the end of the original Term.
Proposal Due Date	The due date for potential Developers (or their Equity Investors) to submit their proposals in response to a "Request For Proposals" issued by the Department in relation to an upcoming Project.
Public-Private Partnership / P3 / P3 transaction	A contractual arrangement between a Department and a Developer as described in Section 1.1 of the Guide.
Qualified Investor	A list of Equity Investors in the Project that the Department has vetted as part of the procurement process and is comfortable with and has an interest in keeping as investors in the Project.
ramp-up period	The initial period of operations for a Project before traffic reaches its expected steady state, as described in Section 7.2.4.2 of the Guide.
Refinancing Gain	The net financial gain the Developer may receive as a result of refinancing some or all of the Project Debt by, for example, securing lower interest rates as part of the refinancing or paying Equity Investors a dividend with the proceeds.
Related Entity	In the context of Change in Ownership provisions, this would generally include each entity in the ultimate ownership structure between the Developer and the Equity Investors, as well as all affiliated legal entities under common ownership and control.
Renewal Work	The renewal, repair or replacement of worn-out, obsolete, damaged or under-performing components so that the Project does not prematurely deteriorate and remains fully functional.

Required Residual Life	The required Useful Life an Element must have following handback from the Developer to the Department.
Residual Life	The approximate Useful Life of an asset less its age if the asset has performed in service in the manner and with the levels of traffic and wear and tear originally expected by the Developer and if the Developer has properly maintained the asset in accordance with its obligations under the Project Documents.
Residual Life Methodology	The methodology for calculating the Residual Life of an asset at the end of the Term of a Concession Agreement, as described in Section 8.2.2 of the Guide.
Restricted Change in Ownership	A change in the ownership of the Developer that is restricted by the Concession Agreement, as described in Section 5.5 of the Guide.
return trigger	Equity IRR levels which trigger revenue sharing provisions in the Concession Agreement, as described in Section 3.2.1.2 of the Guide.
revenue sharing	The Developer's sharing of revenues generated by a Project with the Department in accordance with the terms of the Concession Agreement, as described in Section 3.1 of the Guide.
revenue trigger	Levels of revenue which trigger revenue sharing provisions in the Concession Agreement, as described in Section 3.2.1.1 of the Guide.
Service Commencement Date	The date the Project opens for normal and continuous operations and use by the traveling public. This often, but not always, occurs at the same time as Substantial Completion.
set-off	The right of one party to deduct, from the amount owed to another party, any amount owed from such other person to the first person.
Shareholder Loans	Equity investments in the Developer which take the legal form of loans from the Equity Investor to the Developer.
Site	The development location of the Project.
State Highway	Any highway designated as a "State Highway" by the relevant State regulations.
Subcontract	An agreement between the Developer and a Subcontractor under which the Subcontractor will perform certain services contracted to be performed by the Developer under the Concession Agreement.
Subcontractor	The subcontractor under a Subcontract, including the Design-Build Contractor and the Operations and Maintenance Contractor.

Subcontractor Breakage Costs	Liabilities incurred in respect of demobilization of Subcontractors and the cancellation of orders for materials and goods which arise as a result of the early termination of the Concession Agreement, as described in Section 7.2.4.4 of the Guide.
Substantial Completion	When the Developer has completed all the Construction Work required by it under the Concession Agreement and the Project is substantially ready for normal and safe use and operation.
Substantial Completion Date	The date Substantial Completion is achieved, usually evidenced by a certificate issued by the Department.
supervening events	A set of defined events or circumstances giving rise to a claim for relief under the Concession Agreement, as described in Section 4.1 of the Guide.
Term	The duration of the grant of the concession to the Developer under the Concession Agreement, usually from the date of the Concession Agreement for a fixed period of years, unless terminated early.
Termination for Convenience Termination Sum	The amount payable by the Department to the Developer following a termination of the Concession Agreement for convenience by the Department, as described in Section 7.5.2 of the Guide.
Termination Sum	The amount of compensation payable to the Developer from the Department in the event the Concession Agreement is terminated early, including, depending on the reason for the early termination, the Termination for Convenience Termination Sum, the Department Default Termination Sum, the Developer Default Termination Sum and the Force Majeure Termination Sum.
TIFIA	The program administering loans under the Transportation Infrastructure Finance and Innovation Act, which provides Federal credit assistance in the form of direct loans, loan guarantees, and standby lines of credit to finance eligible surface transportation projects.
Time Impact Analysis	A method used to determine the extent of a delay in the critical path of a construction project, as described in Section 4.4.1 of the Guide.
Title 23 of the United States Code	The United States Code is a codification of the general Federal laws of the United States. Title 23 outlines the role of highways, including Federal-aid and other highways, highway safety and research and technology relating to highways.
Toll Enforcement and Violation Processing Services Agreement	An agreement pursuant to which the Developer secures toll enforcement and violations processing services, usually through existing agreements the Department has with law enforcement and State agencies.

Toll Revenues	The fees, tolls, rates and other charges generated from vehicles using the Project and other amounts received by the Developer in connection with such revenues, including proceeds of insurance, amounts payable by the Department under the Concession Agreement and amounts awarded as damages or from enforcement action or settlement.
tolling rights	The right to establish, assess, collect, enforce (subject to applicable law), and retain tolls paid by users of the Project.
toll road concession	A concession granted to a Developer in relation to a toll road facility.
Transaction Documents	All documentation relating to the Project, including Financing Documents and Project Documents.
transportation facilities	Facilities relating to transportation, including bridges, railways, freight ways, highways and toll roads.
Unknown Endangered Species	Endangered or threatened species found on the Site or other Project Right of Way that were not contained in the site conditions report prepared for the Project or otherwise known (or should have been known) to the Developer.
Unknown Geotechnical Condition	Subsurface or latent geological conditions found on the Site or other Project Right of Way that were not contained in the site conditions report prepared for the Project or otherwise known (or should have been known) to the Developer.
Unknown Pre-Existing Hazardous Substances	Hazardous Substances found on the Site or other Project Right of Way that were not contained in the site conditions report prepared for the Project or otherwise known (or should have been known) to the Developer.
Unknown Utility	Public or private utility systems found on the Site or other Project Right of Way that were not contained in the site conditions report prepared for the Project or otherwise known (or should have been known) to the Developer.
Useful Life	The period a new, renewed, or replaced asset is expected to remain in service under ordinary maintenance until it next requires reconstruction, rehabilitation, restoration, renewal, or replacement.
video-based tolling	The collection of tolls using video technology to capture license plate data.
Work	All services required to be undertaken by the Developer in relation to the Project under the Concession Agreement, including design work, Construction Work and Maintenance Work.

Work Value	The value of completed work for a construction project, calculated as described in Section 7.3.4 of the Guide.
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