Private involvement in US roads

In this article we look at those states in the United States that have adopted special legislation to facilitate the involvement of the private sector in road development and discuss the results that these states have had in developing new road projects pursuant to such legislation. By Douglas M. Fried, a partner, and Jonathan Finklestone and Jacob S Falk, associates, in the project finance group at Chadbourne & Parke LLP in New York.

Federal and state governments in the United States have had to turn in certain instances to the private sector to help build needed road projects. Various governments in the United States are in need of funds. Tax rates are at levels that leave too little money to pay for needed infrastructure. New road construction in many parts of the country has not kept pace with population growth. Thus, public-private partnerships involving toll road development are becoming more common in the United States. Billions of dollars of private funds have already been poured into United States road projects.

The deterioration of the public transportation infrastructure in the United States was recently recognized by Emil Frankel, an assistant transportation secretary in the United States, when he told a Congressional subcommittee in May of 2004 that: "As robust as our national transportation networks are, they are aging and increasingly being operated at or above capacity. Domestic and international trade growth is even faster than overall economic growth and certainly faster than capacity is being added to our transportation systems. Congestion is worsening on our highways, at our airports, in our skies, and at our seaports. This congestion represents a significant and growing risk to our economy."

The Federal Highway Administration in its Innovative Finance Primer (a resource guide published in April 2002 to explain the use of innovative finance techniques for highway projects financed with Federal funds) notes that "[t]raditional government funding sources are insufficient to meet the increasingly complex and diverse needs of America's transportation system". The July 6, 2004 Wall Street Journal attributes the shortfall in available public-sector funding to the fact that "fuel taxes traditionally used to pay for highways aren't bringing in enough money to fix existing roads – much less to build new ones". States that have not been able to spend money on transportation projects because of budgetary shortfalls may increasingly be looking for alternative financing, including the utilization of private sector resources, for their transportation needs.

The passage of federal legislation encouraging innovative financing programs has been helpful in attracting private sector participation in road projects. The Transportation Infrastructure Finance and Innovation Act of 1998 – called TIFIA, provides private and public sponsors of major ground transportation projects (as distinct from airlines or marine projects) with supplemental subordinated credit, loan guarantees or loans of up to 33% of a project's total cost. TIFIA loans can be subordinated to private financing (except upon the bankruptcy, insolvency or liquidation of the project obligor). The repayment of TIFIA loans can be backloaded and repaid over a period of up to 35 years after project completion, thereby enabling early project revenues to be utilized to repay senior commercial debt that is typically for a shorter term. A recent TIFIA success story is the US$640m SR-125 South Toll Road project in San Diego, California that reached financial close in May 2003 and is currently under construction. SR-125 was financed with a combination of private and public funding, including a US$153m subordinated loan from the United States Department of Transportation that was authorized under TIFIA. United States Transportation Secretary, Norman Y Mineta, observed that this project demonstrates "how innovative federal financing tools can attract private investment to transportation projects".

As of March 2003, the United States Department of Transportation, or USDOT, had made over US$3.5bn of loans and credit support to various transportation projects under TIFIA. As recently as July 14, 2004, the USDOT established a credit council to oversee the management of USDOT loans. Secretary Mineta declared that "[a]s we continue to build a transportation infrastructure and transportation assets that keep our economy moving, it is critical that we act on proven principles of financial management to assure both taxpayers and users of the Department's direct loan and loan guarantee programs that we are protecting the integrity and management of these programs".Since the late 1980's, various states in the United States have moved to involve the private sector in state road projects by adopting special legislation.The experience of these states provides useful insight into how to correctly structure private sector involvement in road development projects.

STATE INITIATIVES FOR PRIVATE PROJECTS

Several states have encouraged private sector involvement in road projects by enacting legislation known as 'enabling legislation'. Enabling legislation authorizes the development of road projects with private sector involvement and provides guidelines to developers as to the number and type of projects for which the state is interested in attracting private sector involvement. Fourteen states adopted enabling legislation to date, although the legislation in both California and North Carolina has expired.Table A, at the end of this article, lists those states that have enacted enabling legislation.

Enabling legislation varies widely in the number and type of projects authorized and in the manner in which private sector involvement is contemplated. Some legislation, such as the legislation in Texas, allows concession type arrangements with private sector developers pursuant to which the private sector developer is entitled to charge, collect and retain tolls in order to repay project loans and earn a return on equity, similar to a public-private partnership program. Such programs generally aim to appropriately allocate risks and obligations between the public and private sectors. In other cases, such as in Washington, the enabling legislation may limit the role of the private sector participant to that of a turnkey design-build construction contractor or to that of a toll road operator. Other enabling legislation, such as that passed in North Carolina, limits authorization of private road projects to a pre-determined number of projects, which the state expects private entities to develop and finance without state assistance.Texas,Virginia, Georgia, Oregon, Colorado and Florida have enabling legislation that allows for the submission of unsolicited proposals for private road projects.The regulations of those states that invite unsolicited proposals are not uniform. For purposes of this article, legislation such as in Massachusetts and Ohio that authorizes only one predetermined project is not considered enabling legislation.

The enabling legislation dating back to the late 1980's and early 1990's is markedly different in many cases from much of the enabling legislation passed later.The correlation between a statute's age and the allocation of control that such statute contemplates is more obvious in the later enabling legislation, which was often adopted following a careful review of the successes and failures of the earlier enabling legislation.The later enabling legislation often follows more of a traditional public-private partnership model.Table B, at the end of this article, is an indicative list of projects that have been developed with the involvement of the private sector. As states evaluate the success or failure of the various state initiatives adopted over the years aimed at encouraging private sector involvement in road development and as states continue to face the realities of deteriorating infrastructure and budgetary shortfalls, the number of states introducing enabling legislation may well increase.

NARROW ENABLING LEGISLATION

The legislation enacted in California,Washington, Florida,Arizona, North Carolina and Minnesota limits the number of projects that may be developed or requires specific legislative or other approvals on a project by project basis. None of the aforementioned states have supplemented or replaced its legislation with a public-private partnership style program. In the case of California and North Carolina the legislation lapsed in 2003. Florida,Arizona and North Carolina have not seen the development of any private road projects. California and Washington may not see the development of any more private road projects without substantially amending or restating their enabling legislation.

In 1989, California became one of the first states to adopt enabling legislation. California's enabling legislation authorized the development of four pilot projects. One such project was the SR-91 Express Lanes project, which won ten major industry and government awards for its innovation in financing and excellence (although in 2002 the project was bought out by the Orange County Transportation Authority, a public body, after a non-compete provision in the concession agreement limiting further development along the route led to public criticism of the project). In addition, as noted above, SR-125 in San Diego has also been recognized as a project that has successfully attracted innovative financing. California's enabling legislation lapsed in January 2003.A bill introduced to authorize four additional projects lost support in a California Assembly committee on February 2, 2004 and further efforts to introduce substitute enabling legislation may lack political support. However, the director of transportation studies at the Reason Public Policy Institute, Robert Poole, maintains that "the need to enact a second-generation public-private partnership law for transportation in California" is apparent. He argues that California should adopt second-generation enabling legislation that follows Texas' new paradigm (discussed below), which embraces public-private partnerships.

Washington passed enabling legislation in 1993 to provide for the development of up to six public-private projects, but to date, the Tacoma Narrows Bridge project, on which construction began in 2002, is the only project that has been approved. Moreover, the scope of private involvement in the Tacoma Narrows bridge project has been significantly curtailed since the project was initially approved in the mid 1990's. A state legislative study completed in January 2004 observed that subsequent changes to the legislation following its initial passage (based in part on controversy generated by the idea of imposing tolls) limited the private sector's role in approved projects and made it difficult to procure public authorization for additional projects. The study recommended that new public-private partnership legislation be considered to help Washington finance future projects. A minority report submitted with the study concluded that "by utilizing the inherent efficiency of the private sector, we can provide the citizens of Washington with much greater bang for their transportation buck".

In Florida, private road projects may be authorized pursuant to enabling legislation, but each project requires separate legislative approval and to date no projects have been authorized. A bill introduced in 2003, which failed to win approval in Florida's Senate, would have amended Florida's enabling legislation to make it look more like the broader enabling legislation discussed below. The bill would have amended Florida's enabling legislation expressly to authorize public-private partnerships and to remove the restrictive requirement that separate legislative approval be acquired prior to the development of each private road project.

Arizona, Minnesota and North Carolina enacted enabling legislation giving private entities authority to develop private road projects but have not seen any projects developed. Arizona passed enabling legislation in 1991 which allowed for the authorization of two pilot projects, but to date no projects have been authorized. Similarly, North Carolina passed enabling legislation authorizing the North Carolina Department of Transportation to license two pilot projects, but again no projects were licensed and the authority to issue licenses expired on July 1, 2003. Minnesota has enabling legislation allowing private entities to enter into development agreements with road authorities and develop, finance, design, construct, improve, rehabilitate, own, and operate toll projects. To date, no projects have been authorized under the enabling legislation of Minnesota. One of the impediments to development of projects under Minnesota's enabling legislation is a provision allowing affected communities to reject a project. None of Arizona, Minnesota or North Carolina has adopted enabling legislation to supplement or replace its original enabling legislation.

Many of the states with narrow enabling legislation have had more limited success in developing road projects with private sector participation than states with broader statutes.

BROAD PPP STYLE ENABLING LEGISLATION

Some states that passed enabling legislation in the late 1980's and early 1990's have passed additional legislation to amend or supplement the earlier legislation. Often, this more recent enabling legislation incorporates an allocation of responsibilities for the project based on a more typical public-private partnership model, which allows public authorities to expend funds for, enter agreements with, and/or grant benefits or support to private entities who undertake the development of an eligible project.

Texas is at the forefront in this area. The enabling legislation passed in Texas in 2003 encourages private entities to enter into agreements with the Texas Turnpike Authority, or TTA, a division of the Texas Department of Transportation, to independently finance, construct, maintain, repair, and operate turnpike projects or, alternatively, to enter into public-private partnerships (concession type agreements called comprehensive development agreements) with the TTA. Comprehensive development agreements can also be reached with the regional transport authorities known as 'Regional Mobility Authorities' that are established by statute. Texas expects comprehensive development agreements to play an important role in the development of the Trans-Texas Corridor, an ambitious 4,000 mile network of passenger vehicle and truck lanes connecting all of Texas. The TTA is currently reviewing competing proposals from private entities for the development and financing of a mix of facilities that will make up the 600 mile I-35 portion of the Trans-Texas Corridor from Denison (near the Oklahoma border) to the Texas-Mexico border, a portion the TTA has identified as being of high priority. Texas will consider unsolicited proposals both generally and for segments of the Trans-Texas Corridor and, according to local papers, the counties linking Corpus Christi and Laredo are looking for private developers to build an estimated US$600 to US$700m toll road linking the two cities.

Virginia, which was one of the first states to enact enabling legislation in the late 1980's, grants private entities broad authority to develop private transportation projects. In 1995, Virginia supplemented its legislation with a public-private partnership program for the development of road projects. Two toll roads have been completed in Virginia (the Dulles Greenway was completed in September 1995 under the earlier legislation and the Pocahontas Parkway was completed in September 2002 under the later legislation) and there are currently five public-private partnership projects under development (Route 28, Route 288, Coalfields Expressway, Jamestown 2007, and Route 58). Five unsolicited proposals for public-private partnerships are currently being considered (Third Hampton Roads Crossing, I-95 HOT Lanes, Capital Beltway (I-495)

HOT Lanes, Powhite Parkway Western Extension, and I-81 Widening), including an unsolicited proposal for the Third Hampton Roads Crossing that was submitted in the summer of 2004 and for which the RFP period for competing proposals is scheduled to close in September 2004. Virginia has a well-developed website where it posts RFPs for its public-private partnership program and as noted in an article in Project Finance International for March 2004, public-private partnership activity in Virginia is 'heating up'.

The same article noted that public-private partnership activity was heating up in Georgia. Georgia's earlier enabling legislation declared that any person may be licensed by local government entities to finance, construct, maintain, improve, own, or operate private toll roads and bridges. This enabling legislation was supplemented in 2003 with a program allowing private entities to submit unsolicited proposals for public-private partnership road projects financed by private commercial lenders. The first unsolicited proposal being reviewed under the new program, for the creation of a toll road on Ga 316 between Lawrenceville and Athens called the University Parkway, was posted on the Georgia Department of Transportation website on January 23, 2004 and no competing proposals were submitted prior to the deadline of May 19, 2004. The scope of the proposed project includes the development, design, construction, financing and operation of toll facilities on the University Parkway.

Oregon passed legislation in 2003 that encourages private entities to conceive, develop, construct and operate transportation projects in partnership with the Oregon Department of Transportation, or ODOT. The Innovative Partnership Unit of ODOT is currently developing rules and regulations for the identification of eligible transportation projects, developing protocols for risk management and integrating itself within the ODOT. The unit expects to post its first RFPs later this year on the ODOT website. Oregon enacted earlier enabling legislation as well, which allows for substantial private control of projects, but no projects have been developed under this earlier legislation.

Colorado's Department of Transportation, or CDOT, is authorized to assist private developers in obtaining finance for the construction of road projects under enabling legislation passed in 1995. Supplemental legislation was passed in 2002 under which the CDOT established the Colorado Tolling Enterprise. The purpose of the Colorado Tolling Enterprise is to organize the financing, construction, operation, regulation, and maintenance of a network of tolling highways through public-private partnerships. The Colorado Tolling Enterprise and the Colorado State Transportation Commission are authorized to issue state bonds for this purpose. While no new public-private partnership projects have been developed yet, the Enterprise has reached pre-development agreements (as a result of unsolicited proposals received by CDOT) with private sector companies for express toll lanes on I-70 and on C-470 and is considering a toll road extension to

Table A - State enabling statutes

State	Year of legislation	Comments
Alabama	2000	Licenses may be issued to develop or operate and maintain roads
Arizona	1991	State entitled to grant authorization for two projects
California	1989	Legislation expired in 2003. SR 91 and SR 125 both gained recognition for being innovative projects
Colorado	1995, 2002	Later legislation supplemented early legislation with the creation of a Statewide Tolling Enterprise which can enter into public-private partnerships and issue state bonds
Florida	1991	Legislation requires separate legislative approval for each project. A recent bill expressly authorizing public-private partnerships and removing requirement for separate legislative approval failed to win support in Florida's Senate
Georgia	1998, 2003	Later legislation supplemented early legislation by allowing private entities to submit unsolicited proposals for public-private partnership projects
Louisiana	1997, 2003	Later legislation supplemented early legislation with the creation of the Lafayette Metropolitan Expressway Commission for the completion of toll roads in Lafayette Parish
Minnesota	1993	Legislation authorizes development agreements to be entered into with private sector
North Carolina	2000	Legislation expired in 2003 before any projects were authorized
Oregon	1995, 2003	Later legislation supplemented early legislation with the creation of an Innovative Partnership Unit, which expects to issue its first RFPs in 2004
South Carolina	1995	Private participation is an important part of the state's transportation plan for the completion of 27 years of planned future work in 7 years
Texas	1995, 2003	Private entities may proceed independently or through public-private partnerships with either the Texas Turnpike Authority or Regional Mobility Authorities
Virginia	1988, 1995	Later legislation supplemented early legislation with public-private partnership program
Washington	1993	Legislation authorized six projects. A legislative study of Washington's early legislation was recently completed

provide a link between I-70 and US36, the Northwest Corridor. Two other roads, the E-470 and Northwest Parkway toll roads, both of which were completed in 2003, were developed by state highway authorities and financed by bond offerings.

Louisiana enabling legislation passed in 1997 allows private entities to enter into cooperative endeavor agreements with any parish (similar to counties) or municipality for the construction of privately-owned tollways. To date, no private tollways have been developed. In 2003, Louisiana passed legislation allowing private entities to reach agreement with the Lafayette Metropolitan Expressway Commission to develop Lafayette Parish toll roads, but no private toll roads have been developed yet. According to local papers, government officials are seeking private entities to develop a loop toll road to ease congestion in Baton Rouge. Alabama has enabling legislation allowing any legal entity to be licensed to establish or operate private transportation projects however, to date, no project has been developed under the legislation.

In South Carolina, public-private partnerships are an important part of the state's coordinated effort to compress 27 years of planned future road work into 7 years with its '27 in 7 peak performance program'. As part of the program, the South Carolina Department of Transportation divided the State into two public-private partnership regions and in July 1999 reached agreements for the construction and maintenance of roads and bridges with construction and resource management firms. Fluor Daniel is the construction and resource manager, or CRM, for the western region of the state and Parsons Brinckerhoff/LPA Group is the CRM for the eastern region of the state. Each CRM is responsible for managing over US$760m of road and bridge construction contracts being performed by private contractors. In addition, South Carolina's enabling legislation allows private entities to enter into contracts with transportation authorities to provide for the development of facilities and provision of services.

Elizabeth S Mabry, the Executive Director of the South Carolina Department of Transport described their program as follows: "We're taking 27 years of planned work and compressing it into 7 years to take advantage of low interest rates, to avoid paying the inflation cost of construction and, simply to get a lot of needed work done faster. I really believe that we are doing a tremendous service to the citizens…."

Table B - Examples of roads involving the private sector

Project Name	Location	Operation Date	Cost
Foothill/Eastern Transportation Corridor	Orange County, California	1993/1998	US$1.5bn
91 Express Lanes	Orange County, California	1995	US$130m
San Joaquin Hills Transportation Corridor	Orange County, California	1996	US$1.4bn
SR-125-South San Miguel Mountain Parkway	San Diego County, California	2006*	US$426m
E-470 Public Highway Authority	Denver, Colorado	2003	US$1.2bn
Northwest Parkway	Denver Area, Colorado	2003	US$180m
Mass Route 3	Boston, Massachusetts	Under construction	US$385m
Butler Regional Highway	Butler County, Ohio	2000	US$150m
Cross Island Parkway	Hilton Head, South Carolina	1998	US$83m
Southern Connector	Greenville, South Carolina	2001	US$191m
Conway Bypass	Myrtle Beach Area, South Carolina	2002	US$386m
Carolina Bays Parkway	Grand Stand Area, South Carolina	2002	US$226m
Camino Columbia Truck Bypass	Laredo, Texas	2000	US$85m
Central Texas Turnpike	Austin-San Antonio, Texas	2007*	US$3.2bn
George Bush Turnpike	Dallas Area, Texas	2008*	US$531m
Dulles Greenway	Northern Virginia	1996	US$350m
Pocahontas Parkway/I-895 Connector	Richmond, Virginia	2002	US$324m
Route 288	Richmond Area, Virginia	2003/2004	US$319m
Jamestown 2007	Jamestown, Virginia	2005*	US$31m
Route 28	Fairfax, Virginia	2006*	US$200m
Tacoma Narrows Bridge	Tacoma, Washington	2008*	US$800m

* Under construction, year indicates anticipated date of operation