

A NATIONAL INFRA BANK AT WORK

AS THE US PUBLIC-PRIVATE PARTNERSHIP MARKET FOR INFRASTRUCTURE DEVELOPMENT HAS GROWN AND EVOLVED RAPIDLY IN THE LAST 15 YEARS, THE TOOLS FOR FINANCING THESE P3S HAVE SIMILARLY GROWN AND EVOLVED. BY **STEPHANIE WAGNER**, ASSOCIATE, **MAYER BROWN**.

Given the decline in traditional funding sources for infrastructure development and overall increased pressure for governments to spend less while facing ever-increasing infrastructure needs, the P3 model will continue to offer an innovative way to offset risks and invite private investment into these projects.

Innovative financing structures have played a key role in the evolution and success of the US P3 market and the continued success of the P3 model in the US will depend on continued support for such structures. Various proposals have been made to introduce a national infrastructure bank in the US. In reality, a series of innovative financing programmes have been established in the US that have played a key role in the evolution and success of the P3 market and have the opportunity to promote the continued development of this market. These programmes effectively function as the US's national infrastructure bank.

TIFIA and PABs, evolving and succeeding

The US Department of Transportation's TIFIA (Transportation Infrastructure Finance & Innovation Act) credit programme and private activity bonds (PABs) allocation for transportation infrastructure development have become steadfast components of virtually all US P3 transportation infrastructure deals.

TIFIA, initially enacted in 1998, provides low-cost federal direct loans, loan guarantees and credit support for various types of transportation projects, including highways and bridges, freight transfer facilities, passenger rail vehicles and facilities, and port projects. TIFIA was substantially expanded with the adoption of federal legislation in July 2012 known as MAP-21 (Moving Ahead for Progress in the 21st Century).

MAP-21 authorised TIFIA funding in the amount of US\$1.75bn, which increased TIFIA's loan-making capacity from approximately US\$1bn per year to approximately US\$7.5bn in 2013 and US\$10bn in 2014. TIFIA support is most commonly provided through fixed-rate direct loans for a percentage of the projects costs, typically 33% (although statutorily available up to 49%) of eligible project costs, with interest rates equivalent to Treasury rates.

As of May 2014, TIFIA had approved 45 projects with total TIFIA assistance of US\$17.1bn (inclusive of retired credit agreements), including major

recent P3 transactions such as the Goethals Bridge Replacement Project in New Jersey and New York (US\$473.7m), US 36 Managed Lanes/BRT: Phase 2 in Colorado (US\$60m), Port of Miami Tunnel in Florida (US\$341m) and North Tarrant Express (Segments 3A and 3B) in Texas (US\$531m).

In 2005, the US Congress enacted the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA – LU), which added highway and freight transfer facilities to the types of privately developed and operated projects for which PABs may be issued. In general, PABs are debt instruments issued by state or local governments where the proceeds are lent to private developers and used to construct qualifying projects with significant private involvement, hence the name private activity bonds. Through this conduit structure, the private entity is the borrower under the PABs.

The interest earned by holders of these bonds is exempt from US federal income taxes; therefore, these holders are willing to receive a lower interest payment resulting in a lower-cost borrowing option for private investors in qualifying projects. These types of bonds historically have been available for various types of infrastructure projects deemed to have a public benefit, such as ports (including publicly owned airports) and water and sewer projects, but were not available for transportation infrastructure projects until SAFETEA-LU.

To be eligible to receive a DOT PABs allocation, state and local projects must also receive assistance under Title 23 or Title 49 of the United States Code. Further, although these PABs are not subject to traditional state volume caps for private activity bonds, they are subject to an aggregate limit of US\$15bn allocated by the US Secretary of Transportation.

As of April 18 2014, more than US\$4.6bn in DOT PABs had been issued for 11 projects, and allocations approved by DOT totalled over US\$5.2bn for seven additional projects, representing in total more than half of the total US\$15bn available. All but two of these projects are P3 schemes, including the recent Ohio River Bridges East End Crossing (US\$676.8m, the largest issuance to-date) and Goethals Bridge (US\$460.9m) projects, and the only US mass transit P3 project to achieve financial close to-date, the Denver FasTracks Eagle Project (US\$397.8m).

As is often the case with new financing incentives and federal programmes, it took some time for the P3 market to analyse and evaluate how best to incorporate both TIFIA and PABs. Starting in the mid-2000s, P3 projects financed by TIFIA and then TIFIA and PABs began coming to market. Initially, TIFIA and PABs were funding more traditional toll concession P3 projects, where the private developer took toll revenue risk and toll revenues were pledged to secure financing for the project, including TIFIA and PABs.

These early projects included SH 130 (Segments 5 and 6), which closed financing in March 2008 with senior bank debt and a subordinate TIFIA loan, and the Capital Beltway/I-495 high-occupancy toll (HOT) lanes project, which closed TIFIA financing in December 2007 and PABs financing in June 2008, and was the first P3 project to combine TIFIA and PABs financing. Similar toll concession projects financed by TIFIA and PABs followed shortly thereafter, with North Tarrant Express (Segments 1 and 2A) and IH-635 Managed Lanes in Texas achieving financial close for both TIFIA and PABs in 2009 and 2010, respectively.

As the US P3 market moved from the toll concession model to the availability payment model and from roadways to mass transit, bridges, and other transportation projects, it became clear that TIFIA and PABs were flexible enough to accommodate this changing market.

In March 2009, financial close was achieved on a TIFIA loan to finance in part the first US availability payment P3 transportation roadway project (Florida I-595 Express Lanes). Shortly thereafter, in August 2010, the first DOT PABs secured by availability payments reached financial close for the Denver RTD Eagle Project, which was also the first US P3 rail project.

Subsequently, TIFIA and PABs have been used successfully to fund or are being contemplated for an increasing variety of transportation infrastructure projects beyond roadways to complex bridges (East End Crossing and Goethals Bridge) and tunnels (Port of Miami Tunnel, East End Crossing and Midtown Tunnel) as well as consideration for new mass transit projects such as the Maryland Purple line light rail project and the Chicago Transit Authority's Red & Purple Modernization project.

Continued evolution needed

The success of the DOT PABs and TIFIA programmes has been recognised by the Obama administration, as evidenced by the US\$302bn surface transportation bill recently sent by President Obama to Congress that would increase the aggregate DOT PABs allocation by US\$4bn and increase funding for TIFIA administrative personnel and expenses to manage its rapidly growing portfolio.

While MAP-21 is scheduled to expire in September 2014, the passage of a new surface transportation bill is unclear, leading to uncertainty regarding the TIFIA and PABs programmes. Without additional appropriations

Despite the success of TIFIA and PABs, the US P3 market has yet to take full advantage of another federal financing incentive, RRIF

for TIFIA and authorisation for PABs, the P3 market could be negatively impacted by a backlog of TIFIA applications or loss of financing capacity altogether. Additionally, the TIFIA JPO recently published new template forms for the TIFIA term sheet and loan agreement, introducing a revised set of baseline terms from those that had become familiar to the P3 market. It will be important for industry, state and local governments and TIFIA to continue their history of collaboration to ensure that these new concepts can be commercially and efficiently incorporated into the US P3 market.

Further, despite the success of TIFIA and PABs, the US P3 market has yet to take full advantage of another federal financing incentive, the Railroad Rehabilitation and Improvement Financing (RRIF) programme. Under the RRIF programme, the Federal Railroad Administration (FRA) is authorised to provide direct loans and loan guarantees to eligible borrowers to finance the development of railroad infrastructure, including acquisition, improvement, development or rehabilitation of intermodal or rail equipment/facilities (tracks, bridges, yards, buildings and shops).

Such intermodal facilities include mass transit and passenger rail stations. RRIF loans can fund up to 100% of project costs at interest rates equal to long-term Treasury rates and can be combined with TIFIA for projects that meet eligibility requirements under both programmes. SAFETEA-LU authorised up to US\$35bn in RRIF credit support, but only approximately US\$2bn has been utilised to date.

In particular, RRIF could be used to finance major elements of train station upgrades using the Denver Union Station project as a template. The Denver Union Station Project Authority reached financial close on a US\$155m RRIF loan in 2010 to redevelop the site as an intermodal transit district surrounded by transit-oriented development (a mix of residential, retail and office space). The Denver Union Station Project also benefited from a companion TIFIA loan. Penn Station in New York and Union Station in Chicago are two passenger station redevelopment projects that may benefit from RRIF financing.

An impediment to using the RRIF programme has been the statutory limitation on the method of financing the credit risk premium that is assessed as a percentage of the total loan amount. Current statutory constraints prevent this premium from being financed from FRA appropriations, requiring the borrower to

finance these costs out-of-pocket. President Obama's transportation bill would allow this premium to be financed with funds appropriated to FRA, similar to the treatment of credit risk currently authorised for the TIFIA programme. If Congress approves such an appropriation, it will be much easier for project sponsors to include RRIF loans in structuring rail improvement and redevelopment projects.

Beyond transportation infrastructure

Although much of the US P3 market has centred on roadways and other transportation infrastructure, the market for social infrastructure projects is beginning to grow. With the successful closing in 2010 of the Long Beach Courthouse P3 project involving a 38-year availability payment project to build, finance, operate and maintain the court complex, the US P3 market continues to expand beyond transportation and into similar social infrastructure development projects. As evidence of this, two new courthouse design, build, finance, operate and maintain projects are in procurement at this time – the Houston Justice Complex P3 and the Indianapolis Courthouse – each of which recently shortlisted three proposers for the projects.

Despite the increasing expansion into social infrastructure projects, no federal financing programmes comparable to the DOT TIFIA and PABs programmes are available for social infrastructure projects. Instead, solely private bank loans and the private taxable capital markets, including private placements, are used to finance these projects.

To facilitate the continued expansion of the US P3 market into social infrastructure, it would make sense to build on the success in the transportation sector and establish federal innovative financing opportunities for social infrastructure projects using TIFIA and PABs as a model. PABs and a social infrastructure loan programme similar to TIFIA are important to create a level playing field between the P3 market and the tax-exempt bond market that is otherwise used by state and local governments to complete social infrastructure projects developed using a traditional design-bid-build model.

Efforts are already under way to support this evolution. To provide federal financing support for public building projects under the P3 model, the Performance-Based Building Coalition has proposed creating both a new subordinate debt financing vehicle, coined BIFIA (the Building Infrastructure Financing & Innovation Act), modelled after TIFIA, and a new category of public building PABs with a US\$10bn allocation cap. These programmes would be used to support P3 projects for schools, hospitals, courthouses and other public buildings.

While Congress has not yet taken action to implement these types of financing programmes for public buildings projects, it recently adopted the Water Resources Reform and Development Act (WRRDA), providing additional financing opportunities for waterway and port projects. Modelled after the success of the TIFIA program, WRRDA authorised the Water Infrastructure Finance

and Innovation Act (WIFIA) credit programme to finance the construction and repair of waterway and port projects across the US. WRRDA passed the US House on May 21 and the US Senate on May 22, and was signed into law by the President on June 10.

WIFIA already faces certain limitations and hurdles, however. A project funded with WIFIA may not be combined with funding from traditional state tax-exempt private activity bond allocations available for water infrastructure projects, limiting expanded funding options for very large infrastructure projects. In addition, the WIFIA programme will be administered by the US Army Corps of Engineers and the Environmental Protection Agency (EPA), neither of which are familiar with the processes and administration of an infrastructure loan programme.

Further, WIFIA authorises appropriations to each of the Secretary of the Army and the Administrator of the EPA of only US\$20m for fiscal year 2015, increasing to US\$50m in the fifth year. If "scored" for federal budget purposes similar to the scoring for the TIFIA programme, this would provide for an aggregate of approximately US\$400m in financing capacity in the first year, increasing to approximately US\$1bn in the fifth year, much less than is currently available under the TIFIA programme.

Despite these limitations, WIFIA represents an important next step in expanding the federal innovative financing solutions beyond transportation infrastructure projects and the USACE and EPA have the opportunity to consult with DOT for best practices over a proven track record.

The US P3 market will prove to be most vibrant if these financing tools continue to evolve to provide enhanced opportunities. The combination of private equity and debt financing with TIFIA, PABs, and RRIF already presents significant financing opportunities for transportation infrastructure projects in the US P3 market.

Indeed, although not generally recognised as such, TIFIA, PABs, RRIF and WIFIA when combined with the TIGER programme (a more limited federal grant programme for surface transportation projects) and the Title 11 DOT Maritime Administration ship financing incentives (providing low-cost financing for eligible vessel and shipyard projects) essentially represent the current state of the US national infrastructure bank. The continued support for these existing financing programmes and the expansion of similar financing opportunities for social infrastructure are essential for providing continued confidence and opportunities in the US P3 market. ■

TIFIA, PABs, RRIF, and WIFIA when combined with the TIGER programme represent the current state of the US national infrastructure bank