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5 Projects Reshaping The P3 Landscape

By **Linda Chiem**

Law360, New York (March 23, 2016, 6:47 PM ET) -- State and local governments contending with overburdened highways, pothole-ridden roadways and crumbling bridges are increasingly turning to private industry to help get some of their crucial transportation infrastructure projects financed, built and delivered.

As their transportation infrastructure needs continue to outpace their ability to finance critical repairs or much-needed upgrades, local governments have more readily embraced the public-private partnership model to help pay for projects and move them through the construction pipeline more quickly.

Here, Law360 highlights the top five transportation and infrastructure projects using the P3 model that attorneys say show promise and have the potential to set precedent for others.

Maryland's Purple Line

Attorneys are keeping an eye on the Maryland Department of Transportation and Maryland Transit Administration's approximately $2.5 billion Purple Line project, a proposed 16.2-mile light rail line that will run east to west inside the Capital Beltway from Bethesda in Montgomery County to New Carrollton in Prince George's County.

After the state passed its P3 law in 2013, Maryland officials planned to deliver the Purple Line through a P3 and solicited bids from private partners, ultimately **selecting Purple Line Transit Partners**, a consortium composed of majority equity holder Meridiam, Fluor Enterprises Inc. and Star America to to finance, develop, design, construct, equip and supply light rail vehicles for the line.

"While the Purple Line would not be Maryland's first P3 project, it would be the state's first multibillion-dollar P3 project, its first in the light rail sector, and its first since the passage of its P3 law in 2013," said Paul Epstein, a partner with Shearman & Sterling LLP.

The selection of the preferred partner in March puts to rest some of the uncertainty that had been swirling over the project since last year. Maryland Gov. Larry Hogan, a Republican who took office in January 2015 and hasn't been the biggest fan of the project, slashed down to less than $200 million how much the state would kick in for the project, calling for the federal and local county governments to carry more of the cost burden.

The project is estimated to cost nearly $2.5 billion and would be paid for with a combination of federal, state and local funds. Maryland officials have said they're expecting the private sector to invest between $500 million and $900 million. In turn, the state will pay the private partner annual service payments, known in the industry as "availability payments," throughout an approximately 30-year operating period. Deductions will be made from these payments if the contractor does not meet predetermined performance targets.

It will boast 21 stations and direct connections to Metrorail's Orange and Green Line trains, two branches of the Red Line and MARC's Brunswick, Camden and Penn Lines. Construction is scheduled to begin in 2016. The Purple Line is expected to open for service in 2021.

The Office of the Attorneys General provides advice and legal assistance to the Purple Line.

Nossaman LLP has provided advice and assistance with the preparation of contract documents for the Purple Line P3 agreement.

Pennsylvania Rapid Bridge Replacement Project

The Pennsylvania Department of Transportation came up with a novel approach to use the P3 model to replace 558 aging or structurally deficient bridges across the state — a first-of-its-kind bundling of the work for multiple bridges into one massive project under a single procurement.

According to the National Council for Public-Private Partnerships, this project set many precedents: It is Pennsylvania's first transportation P3, the nation's first multiasset availability payment concession, and the first project in which the developer won approval through the Federal Highway Administration's Special Experimental Project program to conduct the environmental process.

The state completed financing for the $1.1 billion project in the spring, and experts say that the successful start to the P3 will enable future infrastructure revitalization projects in the Keystone State and could serve as a model for other states to follow.

Pennsylvania's "innovative use of P3 structure for multiple bridges has potential value as precedent in other areas," said John Schmidt, a partner and leading P3 attorney with Mayer Brown LLP.

PennDOT in October 2014 picked Plenary Walsh Keystone Partners — a consortium made up of infrastructure investor Plenary Group, Walsh Group, Granite Construction and HDR Engineering — as the preferred bidder for the project. PWKP is responsible for the design, construction or replacement, financing and maintenance of the bridges over a 28-year term. PWKP will receive availability payments from PennDOT, expected to average $65 million annually. PWKP has three years to finish construction with a targeted completion date at the end of 2017.

The 558 bridges are primarily crossings on smaller state highways, many in rural areas, but PennDOT ultimately wants to tackle replacing more than 4,000 bridges deemed to be structurally deficient. With the P3 approach, PennDOT says it can replace hundreds of these bridges more quickly, save money, and minimize the impact on the traveling public.

PennDOT was represented by in-house counsel from the Office of Chief Counsel, as well as Allen & Overy LLP and Ballard Spahr LLP.

Colorado's I-70 East Project

Colorado officials are looking to ease the strain on I-70 East between I-25 and Tower Road, which is one of the most heavily traveled and congested highway corridors in the Denver region and the state. And they've come up with an approximately $1.8 billion plan to do so, which is catching attention because it's expected to be one of the largest construction projects in the Colorado Department of Transportation's history.

In February 2015, state officials decided to pursue a "design, build, finance, operate, maintain," or DBFOM, P3 delivery model for the I-70 East Project. The project's final environmental impact statement was put out for public review in January and that concluded earlier this month. Last summer, officials shortlisted four teams — 5280 Connectors, Front Range Mobility Group, I-70 Mile High Partners and Kiewit / Meridiam Partners — to bid on the request for proposals that was issued last September and just updated last month. Technical proposals are due this December, while financial proposals are due in February 2017.

"This project would build on the success of the U.S. 36 project which the Colorado Department of Transportation closed with a consortium led by the Plenary Group in 2014," Epstein said.

The U.S. 36 project involved widening a portion of the existing highway, constructing tolled "managed" lanes from Denver to Boulder, and co-managing the completed highway with existing express lanes in Denver along Interstate 25.

I-70 is a key corridor that, among other things, connects downtown Denver with Denver International Airport. The I-70 East project would, like the U.S. 36 project, include road widening and the addition of tolled express lanes, in this case on the stretch of I-70 between I-25 and I-225, Epstein explained. It also would feature an innovative repurposing of an aging viaduct, which would be replaced with a 4-acre landscaped green space, with the highway being lowered to run beneath it.

More recently, the project has come under fire from environmentalists who **lobbed a D.C. Circuit petition** in March claiming recent U.S. Environmental Protection Agency guidance improperly cleared the project under the Clean Air Act.

The Sierra Club and others claimed that the Colorado Department of Transportation would not have been able to get a "conformity determination" with the CAA's particulate emissions standards if it were not for the November 2015 change to the EPA's hot-spot guidance covering transportation projects involving large amounts of diesel emissions, according to the petition.

All Aboard Florida Rail Link

All Aboard Florida, a consortium owned by Fortress Investment Group subsidiary Florida East Coast Industries, has been deep into construction on the $2.5 billion privately funded passenger rail line, dubbed Brightline, connecting Orlando and Miami with stops in Fort Lauderdale and West Palm Beach.

Since last year, construction has been underway on all three of the line's South Florida stations, including a 9-acre transportation hub in downtown Miami called MiamiCentral that will be part of a mixed-use development with residential, office and commercial space, and a retail concourse. AAF has also been steadily working on the Fort Lauderdale and West Palm Beach stations. In addition, track work, including the double tracking of the railway and the installation of new grade crossing equipment, is beginning to ramp up, according to AAF.

The first segment of the 235-mile express rail service, between Miami and West Palm Beach, is scheduled to start operations in mid-2017, with full-service from Orlando to Miami following later that year.

“This is the first privately funded and operated passenger railroad being built in the U.S. in nearly a century,” said Mitchell Bierman, a partner with Weiss Serota Helfman Cole & Bierman. “While it is primarily a private development, it is highly coordinated with government.”

AAF applied for $1.6 billion in federal funds through the Railroad Rehabilitation and Improvement Financing program that’s administered by the Federal Railroad Administration. As a result, the FRA must conduct an analysis of the potential environmental impacts of the project. The FRA released its draft EIS with respect to the project on Sept. 19, 2014, which found that the overall environmental impact of the project will be minimal.

All Aboard Florida and Florida East Coast Industries are represented by Weiss Serota Helfman Cole & Bierman and others.

Florida's I-4 Ultimate Project

Another P3 in Florida that's attracted plenty of attention is the $2.3 billion I-4 Ultimate Project, which involves the reconstruction of more than 100 bridges, as well as the addition of express lanes in both directions, along a 21-mile corridor that goes from the area that houses the likes of Universal Studios and Walt Disney World through downtown Orlando and to the suburbs.

The Florida Department of Transportation, or FDOT, was able to get the deal funded using an innovative availability payment structure, which involves the private sector financing the design and construction of the work and getting paid back upon completion of the project.

The I-4 Mobility Partners consortium, owned by Skanska Infrastructure Development and John Laing Investments, was selected by FDOT as the preferred bidder for the 40-year DBFOM project in April 2014. It will receive payments from the FDOT during construction and annual performance-based availability payments thereafter.

According to Chris Roux of Alston & Bird LLP, another notable aspect of the project is that the financing included two TIFIA loans — which are loans under the U.S. DOT's Transportation Infrastructure Finance and Innovation Act program — and construction loans with Societe Generale as the syndication agent, CIBC as the documentation agent, and BTMU as the administrative agent. The TIFIA loans, at approximately $950 million, were the largest ever TIFIA loans to a P3 project, Roux said.

Nossaman LLP advised the Florida DOT on the I-4 Ultimate Project.

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