

Illinois PPPs for Transportation Act: A new infra tool for the US state

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The Illinois General Assembly recently passed Public Act 97-0502, the Public-Private Partnerships for Transportation Act (the “Act”), to authorise the Illinois Department of Transportation (IDOT) and the Illinois State Toll Highway Authority (the “Tollway Authority”) to develop, finance, and operate infrastructure projects using public-private partnerships (PPPs). The Act was signed into law on August 23, 2011 by Governor Pat Quinn.

The Act was sponsored by Rep. Elaine Nekritz and Sen. Heather Steans and supported by a broad coalition of business and civic leaders, engineering trade associations and labour organisations. The Metropolitan Planning Council, a not-for-profit organisation based in Chicago that promotes regional planning efforts in the metropolitan Chicago area, was particularly instrumental in assembling support for the Act.

The Council’s Business Leaders for Transportation actively supported PPP legislation since 2005 and worked with legislators to introduction public-private legislation in each session of the General Assembly since 2006.

The Act shares common origins and provisions with Illinois Public Act 96-913, legislation adopted by the Illinois General Assembly and signed into law by Governor Quinn last year that authorised the use of a PPP, including tolling, for the development, financing and operation of the Illiana Expressway, a new highway connecting Interstate 55 in Illinois to Interstate 65 in Indiana.

The enactment of Public Act 96-913 demonstrated support project-specific PPP legislation in Illinois and helped generate momentum for the more general legislation adopted this year, as did support from IDOT, the Tollway Authority and the Quinn administration more generally.

HB 1091 authorises the development of new PPP projects by IDOT and the Tollway Authority. The Tollway Authority is prohibited from entering into PPP agreements with

respect to existing toll roads, including leases of existing toll roads or PPP agreements related to reconstruction or expansion of existing toll roads. The Act also prohibits the Tollway Authority from using tolls on existing toll roads to subsidise PPP projects.

The Act, however, authorises both IDOT and the Tollway Authority to pursue PPP agreements for new projects, including roads, bridges, intermodal facilities, intercity or high-speed passenger rail or other transportation facilities, excluding airports, under their jurisdiction, and authorises IDOT to enter into PPP agreements for reconstruction or expansion of such facilities.

A high-visibility project that may be undertaken pursuant to the Act is the development of “western access” to Chicago O’Hare International Airport. Currently, the airport can be accessed only by Interstate 190 via Chicago from the east. Local planners have frequently championed the construction of a new highway to connect the airport to the western suburbs via Interstate 90 or the Elgin-O’Hare Expressway, but those plans have gone unfunded to date. Under HB 1091, however, the western access highway could be developed and financed through a PPP transaction.

HB 1091 requires that IDOT and the Tollway Authority identify potential projects each year to the General Assembly. The General Assembly must then authorise a project by joint resolution of the Illinois House and Senate before the project may proceed. But thereafter, no further legislative action is required.

Projects must also be consistent with regional transportation plans developed by Chicago Metropolitan Agency for Planning (CMAP) the local metropolitan planning organization (MPO). Although the Metropolitan Planning Council plays an important role as an advocate for regional planning in the Chicagoland area, CMAP is the designated metropolitan planning organisation for the Chicago region.

Once a project is authorised, the sponsoring agency, whether IDOT or the Tollway Authority, may undertake a competitive procurement process to select one or more proposals. The agency may choose between a bid process, proposal process, or design-build process, depending on the needs and circumstances of the project.

The Act permits (but does not require) public agencies, including IDOT and the Tollway Authority, to submit competing proposals in PPP procurements and requires the sponsoring agency to give such proposals equal consideration. This raises the possibility of “SH 121” risk similar to that of the North Texas Tollway Authority’s competing proposal in 2007 related to the development of SH 121 in Texas.

The practical risk is the possibility of the Tollway Authority submitting a competing proposal to the extent IDOT undertakes a toll PPP project pursuant to the Act; however, the Act’s prohibition on the Tollway Authority using tolls from existing toll roads to subsidise a PPP project should significantly mitigate this risk.

After proposals are submitted on a project, the sponsoring agency must review them and determine, which, if any, best serves the public purpose of the Act and satisfies the criteria set forth in the request for proposals.

If a proposal is selected by the sponsoring agency, it will be reviewed by the State's Commission on Government Forecasting and Accountability (a bi-cameral and bi-partisan legislative commission that reviews and analyzes Illinois government financial and operational matters) and presented at one or more public hearings.

After this review and hearing process, the sponsoring agency is required to make a recommendation to the Governor as to whether the proposal should be approved. The Governor then makes the final decision as to whether the contract should be awarded to the selected proposer, taking into account the recommendation of the sponsoring agency, the review of the Commission, the public hearing process and the best interests of the State.

The sponsoring agencies have broad contracting authority. The maximum term of any agreement, including all extensions, is 99 years, although it is presumed agreements entered into under the Act will be far shorter. The agency may enter into design-build-finance-operate-maintain agreements or agreements with only certain of those components.

Agreements only for design-build services are subject to additional procurement requirements under the Act similar to statutory design-build authorisation for other State governmental agencies and local governments in Illinois.

Some of these requirements (in particular a provision that the guaranteed maximum project cost criteria weighing factor not exceed 30 per cent) are not well suited for large-scale design-build agreements and may have impact on the extent to which the design-build authorisation may be utilised by IDOT and the Tollway Authority.

The compensation terms may vary widely, including lump-sum fees, progress payments, availability payments, revenue concessions and other payment structures that the agency finds appropriate. For transaction structures requiring payment by the State, such as availability payments, IDOT and the Governor are directed to include the payments in annual budget requests, although there is still risk that the General Assembly might fail to appropriate the necessary funds.

This appropriation risk is particularly relevant for availability payment projects that IDOT may pursue, since IDOT funding is subject to annual legislative appropriation. The Tollway Authority is not subject to the same legislative appropriation issues with respect to its own toll revenues and therefore may pledge toll revenues from a PPP project to make availability payments on that project without the same appropriation concerns that apply to IDOT.

Both IDOT and the Tollway Authority are authorised to set user fees in the agreement, including the imposition of tolls. Likewise, the private contractor operating the transportation

facility is authorised to impose those user fees consistent with the terms of the agreement. User fees may be capped, indexed, or calculated using other methodologies.

The contractor would be required to enter into a "project labor agreement" to the extent utilised by IDOT for any transportation facility developed under the Act. The contractor must also comply with certain other Illinois statutory requirements, including the Illinois Prevailing Wage Act and the Business Enterprise for Minorities, Females, and Persons with Disabilities Act. Notably, the Act was supported by numerous labour organisations that viewed it as a vehicle to create jobs in Illinois by permitting projects to move forward as PPPs that may not otherwise have sufficient funding.

The Act also includes an exemption from state and local sales taxes on building materials incorporated into a PPP project and an exemption from property taxes to the extent a leasehold interest is granted as part of the PPP transaction.

The Act does not affect local governments in Illinois that have authority to enter into PPPs through "home rule" powers or through specific statutory authorisation. The City of Chicago, for example, has utilized its broad "home rule" powers under the Illinois Constitution to pursue long-term concessions for the Chicago Skyway, the Chicago Underground Public Parking System and Chicago Midway International Airport.

Other local governments that are not "home rule" units, such as the Chicago Transit Authority, the Chicago Park District and the Public Building Commission of Chicago have specific statutory authorisation to enter into design-build agreements and can also pursue PPPs through certain legal arrangements with the City of Chicago, such as the Chicago Park District intergovernmental agreement with the City of Chicago related to the concession of certain of the Park District's underground garages by the City.

The Tollway Authority recently announced its intention to pursue a toll increase to fund an ambitious agenda of reconstruction of existing tollways and potential construction of new tollways in Illinois, possibly including the O'Hare western access project described above. The Tollway Authority's new tollway projects could be undertaken as PPPs pursuant to the Act.

In addition, IDOT has plans for various road and bridge construction and rehabilitation projects as well as plans for new high-speed rail and intermodal facilities, any of which could also be undertaken as PPP projects through the Act. With these ambitious plans, the adoption of Public Act 97-0502 is expected to result in enhanced use of PPPs for surface transportation infrastructure projects in Illinois.

Indeed, whilst governments have an impressive record of maintaining existing infrastructure throughout the difficult years before and after the demise of the Soviet Union, they typically have not been too good in dealing with modern challenges. Not surprisingly, however, comparatively few projects have been realised, and past experience confirms that it is technically even more difficult to devise a PPP as compared to direct investment.

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