

2008 Innovative Financing Workshop for Ohio Transportation

Impediments to Implementing Innovative Financing in Ohio

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I. Constitutional Limitations

- A. Article VIII, Sections 4 and 6 – These provisions of the Ohio Constitution prohibit the state and its political subdivisions from lending credit to private companies and from entering into joint ventures with private companies.
- B. Exception – Article VIII, Section 13
 - 1. Section 13 allows a political subdivision to raise money for or loan its credit to private enterprises, provided that such financial involvement is (among other permitted purposes) to create or preserve jobs and employment opportunities in relation to industry, commerce, distribution and research.
 - 2. Section 13 also provides that moneys raised by taxation cannot be pledged for the payment of debt service on bonds or other obligations issued pursuant to the Section 13 exception. This essentially means that general obligation bonds cannot be issued in support of a public-private partnership.
- C. These constitutional provisions limit the manner in which a private enterprise can partner with a public entity on transportation projects.
 - 1. Specifically, the parties involved in such an arrangement would need to demonstrate that the transportation project would create or preserve jobs in support of industry, commerce, distribution or research.
 - 2. Any bonds or notes that are issued in support of such a transportation project would need to be non-tax revenue bonds or notes (i.e., supported by one or more specific revenue streams rather than by the full faith and credit of the issuer).

II. General Statutory Limitations

- A. Prevailing Wage Requirements – R.C. Chapter 4115

1. Prevailing wage requirements generally must be followed for the construction of public improvements on behalf of a public authority.
 2. Statewide prevailing wage requirements generally do not apply to municipal corporations exercising their home rule authority, but statewide requirements may prevail in certain circumstances.
 3. For multi-jurisdictional projects, general state laws are likely to apply, though municipal charter and municipal code requirements may have to be considered.
- B. Competitive Bidding Requirements – R.C. Sections 153.12(A), 723.52, 731.14 and 735.05
1. In general, advertisement and competitive bidding are requirement for all public improvement contracts.
 2. Municipal corporations exercising their home rule authority generally can require that contractors follow the municipality’s own competitive bidding requirements rather than general state laws regarding competitive bidding.
 3. For multi-jurisdictional projects, general state laws are likely to apply, though municipal charter and municipal code requirements may have to be considered.

III. Specific Statutory Authority for Transportation Projects

A. Transportation Improvements Districts (“TIDs”) – R.C. Chapter 5540

1. Overview
 - a. A TID is a body corporate and politic that is created by the board of county commissioners of a county and is governed by a board of trustees.
 - b. TIDs can purchase, construct, maintain, repair, sell, exchange, police, operate or lease projects, and can issue bonds pursuant to Article VIII, Section 13 of the Ohio Constitution or TID revenue bonds.
 - c. The board of trustees of a TID may provide for the construction, reconstruction, improvement, alteration or repair of any road, highway, public place, building or other infrastructure, and levy special assessments that benefit the property within the TID.

- d. A TID could be used to provide financing for transportation projects using bonds, with special assessments used to pay debt service for the bonds.
 - 2. Restrictions/Limitations
 - a. Special assessments levied by a TID must provide a special benefit to the property being assessed.
 - b. Bonds issued by a TID are subject to the Article VIII, Section 13 limitations.
 - c. Prevailing wage and competitive bidding requirements likely apply.
 - d. The TID statutes contain no authority for the collection of tolls.
- B. Tax Increment Financing (“TIF”) – R.C. Chapters 725 and 1728, R.C. Sections 5709.40 through 5709.43, 5709.73 through 5709.75, 5709.77 through 5709.80
 - 1. Overview
 - a. TIF is a tool that can be used by Ohio political subdivisions (municipal corporations, counties and townships) and private companies to fund infrastructure and site improvements.
 - b. The definition of “public infrastructure improvements” in R.C. Section 5709.40(A)(7) includes public roads and highways, meaning that TIF funds can be used to construct transportation projects.
 - c. Political subdivisions can partner with private companies to maximize TIF revenues for transportation projects by either issuing TIF-backed debt or by using TIF service payments to reimburse private companies that make road improvements.
 - 2. Restrictions/Limitations
 - a. In general, school district approval is needed to establish a TIF for more than 10 years or for more than 75%. This often requires the execution of a school district compensation agreement.
 - b. Cities that levy an income tax may be required to share a portion of the income tax revenue from new employees with the school district.

- c. Prevailing wage and competitive bidding requirements likely apply.
- d. Certain levies may be carved out for incentive district TIFs.
- e. Sharing with the affected county or township may be required for incentive district TIFs.
- f. There could be logistical issues involved with multi-jurisdictional projects that could make the use of TIF difficult (e.g., multiple approvals, multiple ordinances/resolutions, multiple TIF funds, scores of TIF exemption application filings).
- g. For public-private partnerships (“PPP”), bonds backed by TIF service payments are subject to the Article VIII, Section 13 limitations.

C. State Infrastructure Bank (“SIB”) Assistance – R.C. Section 5531.09

1. Overview

- a. The SIB consists of federal grants and awards and other monies received from the Ohio Department of Transportation (“ODOT”), and can be used to provide financing for “qualified projects.”
- b. “Qualified project” is defined as any public or private transportation project, including, without limitation, planning, engineering, construction, reconstruction and resurfacing of public or private highways.
- c. Assistance from the SIB can be in the form of grants, loans, loan guarantees, letters of credit, leases, lease-purchase agreements, interest rate subsidies, debt service reserves and any other forms that the Director of ODOT deems to be appropriate.

2. Restrictions/Limitations

- a. For PPP, SIB financing is subject to the Article VIII, Section 13 limitations.
- b. Projects constructed with SIB funds are likely subject to prevailing wage and competitive bidding requirements.

IV. Special Case – Public Private Partnership (“PPP”) Transportation Projects

A. Overview

1. At least 20 other states have enacted legislation to allow for the use of PPP in the construction of roads.
2. In states that have adopted such legislation, roads are often constructed pursuant to a concession agreement, which provides the means by which the private company constructing the road can raise funds for the project.
3. The concession agreement also generally works to reallocate risks from the governmental unit to the private partner. These risks can include the following:
 - a. Risk of construction cost overruns.
 - b. Risk of delays in project completion.
 - c. Risk of inadequate traffic and revenue.
4. Potential ways to structure a PPP transaction:¹
 - a. Perpetual Franchise – Ownership, financing and operation of the facility are the permanent responsibility of the private company. Government generally regulates safety and some aspects of design standards, and may regulate tolls or profits.
 - b. Build-Operate-Transfer – Private company receives a long-term franchise, at the end of which it must turn the project over to the government (generally, at no charge and free of debt). Private company retains title for the life of the franchise.
 - c. Build-Transfer-Operate – Title transfers at the time construction is complete. The intent is to insulate the private company from potential liability claims.
 - d. Lease-Purchase – Private company finances and builds the facility, then leases it to the government on an installment plan. Once all payments are made, title passes to the government. Generally used for projects where traffic levels would not support toll financing.
 - e. “Shadow Tolls” – Governmental entity finances the project and pays a “shadow toll” amount to the private entity based on the total number of cars that use the road. The private entity then operates and maintains the road.

¹ The first four of these structures are taken from “*How to Enable Private Toll Road Development*,” Robert W. Poole, Jr., May 1993. The last two are taken from http://www.fhwa.dot.gov/ppp/case_studies.htm.

- f. Long-Term Lease Model – Governmental entity leases the road to a private entity, which collects tolls on the road and operates and maintains the road. Examples:
 - i. Chicago Skyway – Lease agreement between the City of Chicago and a private concession company.
 - ii. Indiana Toll Road – Indiana Department of Transportation leases the road to a private concession company.
 - iii. Pocahontas Parkway – Virginia Department of Transportation leases the road to an Australian company.

B. Restrictions/Limitations

- 1. Ohio does not currently have any legislation that would specifically allow for the construction, financing and operation of a PPP transportation project that is structured as a private toll road.
 - a. Arguably, SIB financing could be used to construct a road and to make other improvements to the road, but there is no direct authority in Ohio allowing for the construction, financing and operation of such a toll road.
 - b. Although municipalities arguably have the authority to allow for the collection of tolls, the scope of such potential authority is not clear, and no such authority exists for counties and townships.
 - i. Municipalities have general Home Rule powers pursuant to Article XVIII, Section 3 of the Ohio Constitution.
 - ii. These powers, however, are not unlimited. The General Assembly can regulate a municipality's power of self-government by passing general laws that limit municipal authority. See, e.g., Article XVIII, Section 13 of the Ohio Constitution (allowing the General Assembly to pass laws limiting a municipality's power to impose an income tax, which allowed for the passage of R.C. Chapter 718).
 - iii. While the General Assembly has authority to restrict local fees, the General Assembly has not specifically prohibited the collection of tolls as a type of impact fee. In general, a fee used to fund a roadway project is constitutional so long as it is not unduly burdensome in its application. See Home Builders Ass'n of Dayton and the Miami Village v. Beavercreek, 89 Ohio St.3d 121 (2000). This requires a

municipality to demonstrate that a nexus exists (i) between the interest in constructing the roadway and the increased traffic to be generated, and (ii) between the fee imposed on users and the benefits to be enjoyed by those users. Id.

- iv. There do not appear to be any cases discussing the use of an impact fee to construct a private road.
 - v. Multi-jurisdictional projects could be difficult unless all of the parties are municipalities. Townships and counties do not have constitutional Home Rule authority, and have not been granted the authority by statute to impose impact fees.
2. Depending on the source of construction financing, prevailing wage and competitive bidding requirements would likely apply.
 3. If proper legislation is passed in Ohio, how would the toll revenue be used?
 - a. In other states, earmarking revenue for use for transportation needs has been successful.
 - b. Using funds for purely private purposes, however, could prove to be more problematic.
 4. Labor unions might oppose such a PPP, which opposition could drive up start-up costs and construction costs.
 5. Other policy issues.
 - a. Who is responsible for maintenance? In practice, this is generally addressed in a concession agreement or lease.
 - b. Who is responsible for policing the toad? Who pays for the policing?
- V. Case Study – The Virginia Public/Private Transportation Act of 1995 (the “Virginia Act”)
- A. The Virginia Act allows private entities to enter into agreements to construct, improve, maintain and operate certain transportation facilities. Most importantly, the Virginia Act allows for tolls to be imposed to finance the operation of roads.
 - B. Qualified transportation facilities must be one or a combination of the following: roads, bridges, tunnels, overpasses, ferries, airports, mass transit facilities, vehicle

parking facilities and port facilities, together with any buildings, structures, parking areas, appurtenances and other property needed to operate the facility.

- C. The stated goal of the Virginia Act is to specify a PPP process that is consistent, transparent, stable and that encourages and supports a climate for private sector innovation and investment to address specific transportation needs of Virginia.
- D. Structure of Deals Made Pursuant to the Virginia Act
 - 1. Proposals are submitted by private entities to either local officials or the Virginia Department of Transportation, which proposals are either unsolicited or submitted pursuant to a request for submissions. These proposals must generally include the following:
 - a. A listing of the qualifications of the private entity, including the legal structure of the entity that will construct and operate the road and the experience of the private entity or entities.
 - b. A description of the project to be constructed, including a description of the assumptions used in developing the project and a description of the permits that will be necessary to construct the project.
 - c. A description of the financing of each phase of the project. This must include an anticipated schedule showing the flow of funds and proposed sources and uses. In addition, the private entity must specify whether it is seeking the issuance of public bonds or notes to finance all or a portion of the project.
 - d. A description of the economic benefits of the proposed project to the community, the region and/or the State, including the estimated tax revenue to be generated by the project, the total estimated jobs that will be created by the project and the payroll associated with those jobs and any known governmental support or objections to the project.
 - e. Information regarding the project's compatibility with State and/or local transportation policies or goals and compatibility with local land use plans.
 - 2. Once submitted, proposals undergo a six-part review and approval process (approximate timeline is listed in parentheses):
 - a. Quality Control (5 to 6 months)
 - b. Independent Review Panel (5 to 8 months)

- c. Oversight Board Recommendation (2 months)
 - d. Submission and Selection of Detailed Proposal (8 to 14 months)
 - e. Negotiations (2 to 6 months)
 - f. Comprehensive Agreement (1 month)
3. The comprehensive agreement would be executed among the private entity or entities and the governmental entity or entities, and would provide for all aspects of the construction and operation of the road.

E. Limitations/Legal Requirements

- 1. Proposals are subject to the Virginia Freedom of Information Act, and may be subject to disclosure upon a public records request.
- 2. Procurement Requirements
 - a. The Virginia Act provides for either “competitive sealed bidding” or “competitive negotiation.” To use the latter, the governmental entity must provide a written determination to the Virginia Secretary of Transportation that such procedures are advantageous to the public based on:
 - i. The probable scope, complexity or urgency of the project;
 - ii. Risk sharing, including guaranteed cost or completion guarantees, added value or debt or equity investments proposed by the private entity; or
 - iii. An increase in funding, dedicated revenue source or other economic benefit from the project that would not otherwise be available.
 - b. Written approval of the procurement process is required by the Secretary of Transportation before a written agreement is executed.
- 3. Police officers have the same powers on private roads that they have on public roads located within their jurisdiction. This authority does not extend to the private offices, buildings, garages and other improvements of the private entity to any greater degree than the police power extends to any other private buildings and improvements.

- F. The Virginia Act has been used as a model by several other states in structuring PPP transportation projects. Enabling legislation in Ohio would need to address many of the same issues addressed in the Virginia Act.