2010 Transportation Infrastructure Year in Review

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The condition of transportation infrastructure in the United States remained a key concern in 2010. As with 2009, the economic conditions in 2010 continued to highlight the need for states and localities to rely on financial assistance from the federal government and to seek ways to leverage private investments to fund improvements for transportation projects. In particular, federal-aid programs and public-private partnerships were tools used by the public sector to try to address the financial gap in transportation infrastructure funding. With the soft economy, states were also able to take advantage of the competitive market conditions in the construction industry. As a result, several mega-projects were procured or reached significant milestones in the past year. This e-alert highlights some key developments in the past year with respect to transportation infrastructure in the United States.

Importance of Federal-Aid Programs in 2010

States and localities aggressively competed for federal aid offered by the Transportation Infrastructure Finance and Innovation Act ("TIFIA") credit assistance program and the TIGER II discretionary grant program. Due to limited resources, these programs were able to fund some (but not all) critical projects in the past year.

- TIFIA

Since its inception in 1998, the TIFIA credit assistance program has been an important tool for financing infrastructure projects throughout the United States. The program's fundamental goal is to "leverage Federal funds by attracting substantial private and other non-Federal co-investment in critical improvements to the nation's surface transportation system." The TIFIA program achieves this goal by offering low-cost, long-term secured loans, loan guarantees, and stand-by lines of credit for large transportation projects which might otherwise be unable to assemble adequate financing. TIFIA loans are attractive because they provide loan amounts of up to one third of project costs at low (U.S. Treasury) interest rates and are subordinated to other notes,[1] with payment deferrals of up to five years after project completion. Projects eligible for TIFIA include highway, transit, railroad, intermodal freight, and port access projects, with eligible costs exceeding $50 million.

Conditions in the credit markets have made TIFIA increasingly popular, and since 2008 the demand for assistance has exceeded the program's budget. In FY 2010, the following four projects were approved or funded by TIFIA:

Project Name

Project Type

Costs
(thousands)

Type of Instrument

Amount
(thousands)

Repayment /
Security

Port of Miami Tunnel Highway/Tunnel 1,073 Direct Loan 341,000

Availability/

Payments Approved 2010 Transbay Transit Center Transit Intermodal 1,189 Direct Loan 171,000 Real Estate Tax Increment (98%) & passenger facility charges (2%) Approved FY 2010 IH 635 Managed Lanes Highway/Managed Lanes 2,615 Direct Loan 850,000[2] Project Revenues/User Changes TIFIA Credit Agreement executed 6/21/10 Denver Union State Project Intermodal 519 Direct Loan 145,600 Sales Tax/ Real Estate Tax Increment Approved FY 2010

In 2010, TIFIA loans continued to be in high demand, with FHWA receiving an unprecedented 39 letters of interest seeking more than $13 billion in credit assistance, nearly twice the amount the TIFIA program has been able to support to date. For the first time since 2002, USDOT imposed a fixed date competitive process to determine which projects should receive the loans, rather than the "first-come, first-served" system based on the applicant's optimal schedule.[3]

Of the 39 letters of interest received, USDOT invited only four projects to apply for fiscal year 2010 TIFIA loans:

Project Name

Applicant

City and/or State

Estimated Project Cost *(millons)*

TIFIA Request *(millions)*

Type of Instrument Eagle Commuter Rail Regional Transportation District (RTD) Denver, CO 2,729 400 Direct Loan Goethals Bridge Port Authority of New York; New Jersey New Jersey & New York 1,500 500 Direct Loan Southeast Waterfront Transportation Improvements City & County of San Francisco/ San Francisco Redevelopment Agency San Francisco, CA 588 121 Direct Loan Presidio Parkway[4] CA DOT/ San Francisco County Transportation Authority San Francisco, CA 629 309 Direct Loan

The TIFIA applications will be evaluated based on the following eight selection criteria in order of relative weight:

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    - the national or regional significance of the project, in terms of generating economic benefits, supporting international commerce, or otherwise enhancing the national transportation system. This includes consideration of ***livability*** (providing transportation options that are linked with housing and commercial development to improve the economic opportunities and quality of life for people in communities across the U.S.); economic competitiveness (contributing to the ***economic competitiveness*** of the U.S. by improving the long-term efficiency and reliability in the movement of people and goods); and ***safety*** (improving the safety of U.S. transportation facilities and systems and the communities and populations they impact);
    - private participation;
    - environmental impact, including ***sustainability*** and the state of good repair for existing transportation facilities and systems;[5]
    - creditworthiness;
    - project acceleration;
    - use of new technology to enhance efficiency;
    - consumption of budget authority; and
    - reduced federal grant assistance.[6]

The new competitive process and evaluation criteria include more emphasis on livability, economic competitiveness, safety, environmental sustainability, and the state of good repair. The inclusion of these elements appears reflective of the shift at USDOT to offer project sponsors incentives to adopt progressive programs in return for TIFIA credit assistance.[7]

- TIGER II

After the success of TIGER I (authorized under the American Recovery and Reinvestment Act of 2009), Congress authorized $600 million in funds for TIGER II Discretionary Grants for fiscal year 2010. While the appropriation for TIGER II was similar to the appropriation for TIGER I, it had a number of significant differences, including the fact that it was not constrained by ARRA's focus on "shovel ready" projects and immediate job creation, but instead focused on long-term outcomes. TIGER II funding was available to governmental units, transit agencies, port authorities, MPOs, and multi-jurisdictional entities for capital investments in highway or bridge projects; public transportation projects; passenger and freight rail transportation projects; port infrastructure investments; and intermodal facilities.

TIGER II authorized awards for projects in non-rural areas of $10-200 million with up to 80 percent of project costs eligible for federal funding. TIGER II specifically reserved $140 million for projects in rural areas, where 100 percent of project costs were eligible for funding and project awards could be as low as $1 million. No single state was allowed to receive more than 25 percent of program funds and up to $150M was available for projects financed under TIFIA.

The USDOT received nearly 1,000 construction grant applications for more than $19 billion from all 50 states, U.S. territories and the District of Columbia. TIGER II's evaluation criteria emphasized lowering the average cost of transportation, as well as environmental and economic sustainability. The program also gave special priority to multi-modal projects that incorporate new technologies or innovative approaches to finance, contracting, project delivery, congestion management, safety, asset management, or long-term operations and maintenance.

On October 20, 2010, the USDOT announced the recipients of the TIGER II grants for major infrastructure projects. It awarded nearly $600 million to 42 capital construction and 33 planning projects in 40 states. According to a USDOT press release, approximately 29 percent of the money will go to road projects, 26 percent to transit, 20 percent to rail, 16 percent to ports, 5 percent to planning, and 4 percent to bicycle and pedestrian pathways. Using the merit-based evaluation criteria allowed the USDOT to address some of the nation's most critical challenges, such as sustainability and economic competitiveness. According to the USDOT, the "projects chosen demonstrate their ability to contribute to the long-term economic competitiveness of the nation, improve the condition of existing transportation facilities and systems, increase energy efficiency and reducing greenhouse gas emissions, improve the safety of U.S. transportation facilities and/or enhance the quality of living and working environments of communities through increased transportation choices and connections. The USDOT also gave priority to projects that are expected to create and preserve jobs quickly and stimulate rapid increases in economic activity."

The largest single grant provided nearly $48 million for a new 2.7-mile streetcar line in Atlanta, with anticipated daily ridership of 2,600 passengers, to help residents and visitors circulate in the downtown area. According to USDOT, this award demonstrates the USDOT's commitment to improving quality of life in major metropolitan areas.

The most significant project (in dollar terms) to receive funding is the Los Angeles County Metropolitan Transportation Authority's ("LA Metro") $1.7B Crenshaw/LAX Light Rail Line Project. USDOT awarded LA Metro $20 million in TIGER II funds to support a TIFIA credit facility, which is anticipated to support a $546 million TIFIA loan, covering nearly a third of project costs. This groundbreaking project is a key piece of Mayor Antonio Villaraigosa's 30/10 initiative, an effort to accelerate 12 major transit projects in just 10 years, rather than 30 years, using innovative financing backed by the voter-approved Measure R sales tax. The new 8.5-mile light rail line will provide a critical north-south link in Los Angeles, with six to eight stops connecting the South Bay Region and LAX Airport with major employment centers located in the Westside Region and the downtown area. LA Metro expects to complete the environmental process in the spring of 2011, and construction could begin in late 2011. The project is expected to be complete and open for business between 2016 and 2018.[8]

Implementation of Public-Private Partnership ("PPP") Programs in 2010

The public sector continued to pursue public-private partnerships as a method to leverage public and private financial resources. Private sector interest remained strong, but investors took a cautious approach given the budgetary constraints that faced the states and the uncertainty with respect to the pending reauthorization of the federal surface transportation program. Nevertheless, 2010 was marked by significant developments in several public-private partnership projects and programs.

In February 2009, California enacted its first workable public-private partnership transportation statute in 20 years, Streets and Highways Code Section 143. Less than 24 months later, the California Department of Transportation reached commercial close with the first project under the new statute. On January 3, 2011, the California Department of Transportation, in cooperation with the San Francisco County Transportation Authority, awarded the contract for the Presidio Parkway Project to Golden Link Concessionaire, LLC, a consortium led by Hochtief PPP Solutions North America and Meridiam Infrastructure North America. Golden Link Concessionaire, LLC proposed a maximum availability payment of $28,549,189 for the 30-year contract to design, build, finance, operate, and maintain the Presidio Parkway Project. The Presidio Parkway Project is a reconstruction of 1.6 miles of existing route 101 with a new six-lane facility south of the Golden Gate Bridge in San Francisco.

In Denver, the Regional Transportation District reached several significant milestones with its FasTracks Eagle PPP Project. The project, which consists of electrified commuter rail over 36 miles and 15 stations, is the first design, build, finance, operate, and maintain project for commuter rail in the United States. The project reached commercial close on July 9, 2010, and financial close on August 12, 2010. NTP 1 was issued at the same time as financial close. The concessionaire, Denver Transit Partners, is a consortium of Fluor Enterprises, Uberior Investments and Laing Investments.

The IH-635 Project, also known as the LBJ Express Project, reached financial close in June 2010, a very difficult time for the capital markets. The $2.8 billion, 17 mile project is the largest greenfield transportation PPP project in U.S. history. The project involves the construction of six new managed lanes, eight reconstructed non-tolled mainlanes, and frontage roads in the Dallas-Fort Worth Metroplex in Texas. The project is being built under a public-private partnership between the Texas Department of Transportation and LBJ Infrastructure Group LLC, a consortium including Cintra U.S., Meridiam Infrastructure Finance and the Dallas Police and Fire Pension System (the latter provides retirement benefits for approximately 9,000 police officers, fire fighters, and pensioners in Dallas). Financing includes $489 million in public funds, $664 million in equity, federal credit assistance in the form of a conditional $850 million TIFIA loan (the second largest in U.S. history) commitment and reservation of funding, as well as $615 million in Private Activity Bonds (the largest allocation for a U.S. toll road). Under the terms of the agreement, over the 52-year term, the LBJ Infrastructure Group will design, construct, repair and maintain the project (including the non-tolled lanes), and will collect tolls from the managed lanes. After the first 180 days, tolls will be based on a dynamic pricing system that allows the tolls to be adjusted as frequently as every five minutes based on traffic congestion and other factors intended to maintain a steady flow of traffic at 50 miles per hour.

In addition to the commercial and financial close of several PPP projects in 2010, states also took significant measures in advancing their PPP programs. For example, as part of its new PPP program, LA Metro undertook a comprehensive project screening process. This process resulted in the selection of six projects to undergo preliminary financial assessments and an evaluation regarding the feasibility of being developed through PPPs.

Further, the Virginia Department of Transportation implemented significant changes to its Public-Private Transportation Act ("PPTA") program. The changes were the result of an outside audit by KPMG in an effort to strengthen Virginia's transportation program development and management activities. Changes included the following:

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    - Establishing a separate, multi-modal PPTA program office
    - Developing standard processes and methodologies for project screening
    - Prioritization and focus on solicited PPTA projects
    - Creating a programmatic approach to procurement and delivery of PPTA projects
    - Revising existing PPTA implementation guidelines
    - Establishing a dedicated funding source for the PPTA program office

VDOT's revitalization of its PPTA program demonstrated its continued commitment to utilizing public-private partnerships as a means of delivering vital transportation projects.

Procurement of and Milestones for Mega Design-Build Projects in 2010

In 2010, the public sector also took advantage of favorable market conditions due to lower labor and material prices. As a result, there was robust interest and competition for public work projects, including large-scale design build projects. Below are three examples of major transportation projects that were awarded, in procurement, or reached significant milestones in 2010.

- Alaskan Way Viaduct

The Washington Department of Transportation awarded a $1.35 billion design-build contract to Seattle Tunnel Partners for the Alaskan Way Viaduct Replacement project, which will replace the viaduct with the SR-99 Bored Tunnel. The project provides for a 32 foot wide roadway with an 8 foot shoulder in each direction. The approximately 55 foot diameter tunnel will run underneath Seattle and be the largest diameter bored tunnel in the world. Seattle Tunnel Partners is a joint venture of Dragados USA and Tutor Perini Corp. HNTB Corp. is the joint venture's engineer.

- UDOT I-15 CORE

The Utah Department of Transportation is proceeding apace with the Utah County I-15-Corridor Expansion ("I-15 CORE"), a $1.1 billion design-build project, with construction starting in April 2010. The design-builder on the project, Provo River Constructors, is comprised of Fluor Enterprises, Inc., Ames Construction, Inc., Ralph L. Wadsworth Construction Company, Inc. and Wadsworth Brothers Construction Company, Inc. The project will expand the I-15 freeway by two lanes in both directions from Lehi Main Street to Spanish Fork Main, extend the express lane from University Parkway in Orem to Spanish Fork, rebuild and reconfigure 10 freeway interchanges, replace and restore 55 bridges, and provide additional improvements without decreasing the number of lanes during the majority of construction.

UDOT used an innovative procurement methodology, selecting the proposer who offered to deliver the improvements that provided the best value to UDOT for a fixed price set by UDOT. Best value was determined with reference to the ability of specified proposal elements to meet or exceed the project's goals, values, and requirements, as set forth in the procurement documents.

- Gerald Desmond Bridge Replacement Project

The Port of Long Beach and the California Department of Transportation are pursuing the $950 million Gerald Desmond Bridge Replacement Project as one of the 10 state projects authorized under California's Design-Build Demonstration Program. The Port of Long Beach and Caltrans released the request for qualifications for the project's design-build contract on November 5, 2010. The project centers on the complex construction of the first cable-stayed highway bridge in California and will replace the current Gerald Desmond Bridge, the key access and egress to one of the busiest ports in the world.

Conclusion

Despite the economic conditions of 2010, states were able to make appreciable progress in advancing their transportation programs with the assistance of federal-aid and credit programs, public-private partnerships, and healthy competition within the construction market. The coming year is also likely to produce significant developments for transportation infrastructure due to federal re-authorization of the surface transportation program and continued emphasis on leveraging private financing through the use of public-private partnerships.

- Federal Re-Authorization

Congress is currently deliberating the next surface transportation reauthorization, and will likely be considering various funding and financing sources to support transportation investments in the coming decade. Some of the options that Congress may consider include: the replacement of motor fuel taxes with a system of road use charges based on vehicle-miles of travel, more efficient use of federal-aid highway apportionments to leverage federal dollars, private funding through public-private partnerships, use of the tax code to accelerate financing of transportation investments, and expansion of existing programs such as TIFIA.

In addition, President Obama in his fiscal 2011 budget proposed a $4 billion infrastructure bank to fund or finance major transportation projects. The budget proposes $2 billion of infrastructure grants and $417 million to subsidize $2.1 billion of direct loans. About $270 million would fund administration, cost-benefit analyses, planning, and other areas, with $1.313 billion left over for fiscal 2012. A number of transportation advocates — including former Pennsylvania Gov. Ed Rendell (D), the Center for National Policy and the American Association of State Highway and Transportation Officials — have pushed lawmakers to launch the infrastructure fund. And on February 8, Vice President Biden announced a six-year, $53 billion plan to build a national high-speed rail network. The first step in the plan includes investing $8 billion in the coming fiscal year to expand Americans' access to high-speed passenger rail service. It remains to be seen how these issues will play out over the coming year.

- Emphasis on PPPs

Both the Obama administration and numerous members of Congress have indicated their desire to marshal the power of the private sector in developing and maintaining the nation's infrastructure. Given the current budget crunch at both the national and state levels and the new fiscal conservatism in Congress, private investment should continue to be relevant in bridging the gap between desired infrastructure and available funding sources.

[1] Note, however, that TIFIA loans are subject to the so-called "springing lien" which, in the event of a borrower's insolvency, brings the government's interest to parity with other lenders. 23 U.S.C. § 603(b)(6) (2009).

[2] The second largest TIFIA loan amount in TIFIA's history.

[3[Notice of Funding Availability for Applications for Credit Assistance Under the Transportation Infrastructure Finance and Innovation Act ("TIFIA') Program; Clarification of TIFIA Selection Criteria; and Request for Comments on Potential Implementation of Pilot Program To Accept Upfront Payments for the Entire Subsidy Cost of TIFIA Credit Assistance, 74 Fed. Reg. 63,497 (Dec. 3, 2009) available online at http://edocket.access.gpo.gov/2009/pdf/E9-28860.pdf

[4] Further information about the Presidio Parkway Project is set forth below.

[5] Note that in the FY2010 NOFA, USDOT added "livability" and "sustainability" to the selection criteria used to award TIFIA credit assistance set forth in Federal law at 23 U.S.C. §602(b):

[6] Notice of Funding Availability for Applications for Credit Assistance Under the Transportation Infrastructure Finance and Innovation Act (TIFIA) Program; Clarification of TIFIA Selection Criteria; and Request for Comments on Potential Implementation of Pilot Program To Accept Upfront Payments for the Entire Subsidy Cost of TIFIA Credit Assistance, 74 Fed. Reg. 63,497 (Dec. 3, 2009) available online at http://edocket.access.gpo.gov/2009/pdf/E9-28860.pdf.

[7] USDOT first tested similar incentives under the Transportation Investment Generating Economic Recovery (TIGER) Discretionary Grant Program in 2009. Note, however, that on January 25, USDOT issued a revised NOFA that included revised selection criteria, allowing applicants to demonstrate that their projects help preserve and protect the environment through "the use of tolling or pricing structures to reduce or manage high levels of congestion on highway facilities and encourage the use of alternative transportation options." See http://edocket.access.gpo.gov/2011/pdf/2011-1460.pdf.

[8] A complete list of capital grant recipients can be viewed at: http://www.dot.gov/docs/tiger2grantinfo.pdf A complete list of planning grant recipients can be viewed at: http://www.dot.gov/docs/tiger2planninggrantinfo.pdf