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October 29, 2019

U.S. Department of Transportation
Office of Innovative Program Development
1200 New Jersey Ave., S.E.
Washington, D.C. 20590

RE: FHWA-2014-0006; Draft Availability Payment Guide

The Associated General Contractors of America (AGC) is pleased to have a real opportunity to discuss a significant issue between the developer and the design builder. The guide does a good job of identifying typical construction risks and financing risks and suggests how to allocate them. However, it only addresses these issues from a developer/concessionaire standpoint (agency). The Guide recognizes the concessionaire's role in controlling and

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Public agencies and developers are many of the same. It is important to understand how the business model can be reduced. Also, there is the belief that negotiating all of these issues on each P3 creates uncertainty and is time consuming.

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Availability Payment Concessions Public Private Partnership Model Contract

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tion's (FHWA) Draft Availability Payment Concessions Public Private Partnership Model Contract Guide and on the labor Best Practices recommendations that are proposed for inclusion in this document. The difference between the original toll concession guide and the new one is the same except for the items that are included in the AP guide that were later added to the toll concession guide as an appendix. AGC provides separate comments on the items raised in our original comments which is proposed to become part of both guides.

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developer/concessionaire should be provided compensation should they occur. To do otherwise would make these projects too costly to move forward.

However, the Guide fails to suggest how this compensation for unanticipated circumstances should flow down to the design-builder. Many of the "Compensation Events" directly impact the design-builder's costs. By not fairly allocating these risks, the developer/concessionaire is likely to be increasing overall project costs. AGC believes that it would enhance the value by discussing appropriate risk allocation between the design-builder much in the same way it discusses these risks between the developer/concessionaire and the owner and suggesting appropriate risk allocation in this relationship as well. The Guide includes a discussion of unanticipated circumstances during construction; these are many of the risks we are concerned with. FHWA should expand on this section of the guide to discuss risk allocation between developers and design-builders.

One risk factor that is not addressed in the Guide is the significant costs to the design-builder in putting together a proposal. Proposal costs are a factor on all design-build projects but are much more significant on projects because of the many different parties that are involved on the construction. In addition, the history of P3 projects is that they go through various stages and start-ups they make their way through the political and public review process. Often various procurement options are attempted before the P3 arrangement is agreed on. This can be very time consuming and costly for the design-builder. They put together proposals at each stage of the process. AGC suggests that the Guide discuss the issue of the developer/concessionaire receiving a stipend to cover project design costs and that the Guide discuss the flow down of the stipend to the design-build firm.

The experience in the industry is that the various legal and transaction documents that are drafted for potential P3s can be very costly for the developer/concessionaire and the design-builder who must each have a team of legal, financial and insurance experts review and negotiate each of these documents. These costs will be reflected in the overall cost of the project. While it is understood that each project is unique and the terms will therefore vary, it is also reasonable to expect that many contract terms and conditions need to be consistent from one project to another. The value the Guide brings to the table is that it needs to lead to a more consistent and unified approach to P3s. To make the Guide of real value, it must be used. Therefore, AGC suggests that when TIFIA assistance is being used as a part of the financing for a P3 project that use of this Guide (and the future guides being crafted) should be encouraged by the Office of Innovative Contract Delivery.

Labor Best Practices

The US DOT has included in this Notice for Comment, a list of "Labor Best Practices" with the stated intent of including these practices as part of the P3 Model Contract Guides for both availability payment concessions and toll concessions. AGC believes that it is important to make concessionaires and state DOT's aware of what in any P3 project delivery arrangement that receives any Federal assistance pursuant to title 23 U.S.C. developer[s], contractors, subcontractors, and concessionaires – are required to comply with all applicable federal labor laws. However, AGC believes it is inappropriate to include in these P3 guides "best practices" that are not federally required, are burdensome to implement, have not been controlled by the Office of Innovative Contract Delivery.

fact have not been tested or approved. It is confusing to states and concessionaires and implies that they are expected to take steps that go far beyond Title 23 requirements. The P3 model is still in its infancy in the United States but there is a great deal of hope that these arrangements will play an important part in meeting some of the Nation's overwhelming infrastructure needs now and in the future. There are many impediments that can keep P3 arrangements from moving forward and being successful. AGC believes that encouraging the use of the "labor best practices" as presented in this document only adds new impediments to the success of P3s and therefore AGC strongly recommends that labor practices highlighted in these Guides be limited to those that are actually required. The onslaught of new regulations over the past few years has contractors overwhelmed financially and with regard to staff time. Therefore, the inclusion of additional regulatory-like contractual requirements will only act to decrease contractor interest in performing work on P3 projects. This will cause contractors with a history of quality performance to exit the competition and focus exclusively on private work, leaving a smaller pool of contractors competing for the work – ultimately increasing cost and potentially decreasing quality.

AGC believes it is a misnomer to categorize the practices listed in this notice as "best practices." There is no evidence to support that these suggested labor practices are indeed "best practices." Since many of the "best practices" cited have not been implemented on federally assisted construction contracts, using them in the P3 arena will require the development of a whole new body of regulatory-type requirements. If the concessionaire requires by contract that the design-build contractor implement these requirements, it will be the responsibility of the concessionaire to determine whether or not the design-build contractor – and the likely many tiers of subcontractors – is in compliance with the contractual requirements. Concessionaires typically do not have experience with the labor requirements listed. Neither concessionaires nor developers have experience with regard to issuing regulatory guidance, conducting investigations or enforcing any of the labor requirements listed. Many of the purported "best practices" have been controversial and not generally accepted by the contracting community and that is why they have not been adopted. For example, the recommended Injury and Illness Prevention Program (I2P2) is an incomplete regulatory concept. The Occupational Safety and Health Administration (OSHA) has been engaged in an effort to promulgate an I2P2 standard since the summer of 2010. At that time stakeholder meetings were held and eventually OSHA announced plans to initiate the Small Business Regulatory Enforcement Fairness Act (SBREFA) process to better understand the economic impact of such a rule on small employers as well as solicit recommendations from employers on its proposal. However, the process has since stalled with the current rule placed in a long-term actions category of the rulemaking process. In the absence of a Federal rule, it is astonishing that DOT is recommending the Injury and Illness Prevention Program as a "best practice." In addition, this concept is not necessary because current OSHA standards under Subpart C already require construction employers to initiate and maintain worker safety programs and to provide for frequent and regular inspections of job sites, materials, and equipment by a competent person.

Another questionable best practice is the requirement for a Project Labor Agreement (PLA). PLAs are areas where the contractor is in a much better position to evaluate their appropriate use than the federal government, a state government, or a concessionaire. AGC neither supports nor opposes contractors' voluntary use of PLAs on P3 projects or elsewhere, but strongly opposes any government mandate (at any level) for contractors' use of PLAs. AGC is committed to free and open competition for publicly funded work, and believes that the lawful labor relations policies and practices of private construction

contractors should not be a factor in a government agency's selection process. AGC believes that neither a public project owner nor its representative should compel any firm to change its lawful labor policies or practices to compete for or perform public work, as PLAs effectively do. Government mandates for PLAs can restrain competition, drive up costs, cause delays, lead to job site disputes, and disrupt local collective bargaining. There are no widely published studies establishing that the use of PLAs has consistently lowered the cost, shortened the completion time, or improved the quality of construction of public projects. If a PLA would benefit the construction of a particular project, the contractors otherwise qualified to perform the work would be the first to recognize that fact, and they would be the most qualified to negotiate such an agreement. We firmly believe that a government entity, including a concessionaire acting in a similar capacity, mandating or incentivizing the use of a Project Labor Agreement is not a "best practice."

Other examples of inappropriate "best practices" in this guide are policies on paid sick and family leave, wage and classification transparency. These topics are the subject of ongoing regulatory consideration. It is very difficult to describe concepts that are the subject of active or inactive rulemaking activities as "best practices." Other areas covered here are complex and will likely increase confusion and limit competition. They will likely increase costs for concessionaires, contractors, subcontractors and the traveling public. There are numerous protections in law and regulation that require compliance and vigilance. AGC believes a "best practice" should be adopted to ensure full compliance with federal, state and local laws. AGC believes state and local governments that are working on P3s should look for consistency in contracts from jurisdiction to jurisdiction. That consistency will encourage competition from contractors and build a reliability of outcome that will help promote the use of P3s nationwide.

FHWA would provide more assistance to concessionaires by instead focusing on guidance for implementation of labor law requirements such as the Davis Bacon Act. Before FHWA moves forward with implementation guidance, it is necessary for the agency to work with the U.S. Department of Labor in order to provide clarification as to where and when the Davis-Bacon Act will or will not apply and to which activities it applies. Furthermore, the Davis-Bacon Act is one of the most complex labor laws in existence today. Applying this law by concessionaires who have no basic understanding of its complexities can leave developers with tough questions about site of work, fringe benefit credits, overtime calculations and so forth. For classifications that are not listed on prevailing wage determinations, who will be tasked with determining the prevailing wage rate? Clarity how these issues apply in the P3 context would be of more use to the P3 community than the expansion of labor requirements by calling them "best practices."

Sincerely,



Brian Deery
Senior Director
Highway and Transportation Division