SQUIRE PATTON BOGGS

Fixing America's Surface Transportation (FAST) Act: Opportunities for Private Sector Investment and P3s

The Fixing America's Surface Transportation (FAST) Act, Pub. L. No. 114-94, reauthorizes surface transportation programs for five years, providing $305 billion over fiscal years 2016 to 2020. The FAST Act includes $225.2 billion for highways and $48.7 billion for transit programs. It continues nearly all of the highway and transit formula programs of MAP-21, and focuses much of the increase in highway funding on two new freight programs, one formula-based and one discretionary. The Act reestablishes the bus and bus facilities discretionary grant program, converts the Surface Transportation Program into a block grant, and builds on the environmental streamlining and project acceleration provisions of previous authorization bills. The text of the law can be found here.

The FAST Act includes several provisions and programs that provide opportunities for private sector investment and public-private partnerships (P3s):

- The first long-term transportation bill in 10 years, this five-year reauthorization will allow states to pursue larger infrastructure projects.
- Creates a new Nationally Significant Freight and Highway Projects (NSFHP) discretionary grant program for large freight highway projects.
- Repeals restrictions on using tax-exempt bonds to fund Water Infrastructure Finance and Innovation Act (WIFIA) projects, making WIFIA more workable and opening up opportunities for large drinking water, wastewater, stormwater, and water reuse projects.
- Establishes a National Surface Transportation and Innovative Finance Bureau that will develop and promote best practices for P3s and administer the Transportation Infrastructure Finance and Innovation Act (TIFIA), the Railroad Rehabilitation and Improvement Financing (RRIF) program, the new NSFHP discretionary grant program, and private activity bonds (PABs).
- Incentivizes private investment in public transportation projects by establishing an expedited pilot program for certain P3 fixed guideway projects under the Capital Investment Grant program.

Infrastructure Project Opportunities

- **Nationally Significant Freight and Highway Projects** (NSFHP) (Section 1105): Establishes a competitive discretionary grant program for large projects on the National Highway Freight Network, highway or bridge projects on the National Highway System, intermodal projects on the National Multimodal Freight Network, and rail-highway grade crossing and separation projects. NSFHP funding can be used to pay for TIFIA subsidy and administrative costs. Provides $800 million in FY 2016, increasing $50 million each year to $1 billion in FY 2020.
- **Water Infrastructure Finance and Innovation Act** (WIFIA) (Section 1445): Amends WIFIA to strike the provision prohibiting communities from funding water infrastructure projects with a combination of WIFIA assistance and tax-exempt debt.
  - Under the terms of the WIFIA program, project sponsors can secure a low-interest loan for up to 49 percent of project costs; the remaining 51 percent must come from other sources. Tax-exempt bonds will generally be the most cost-effective source for the required non-WIFIA share of project costs. Permitting project sponsors to use tax-exempt debt with WIFIA assistance will ensure the WIFIA program works as intended to reduce project costs and accelerate investment in much-needed major infrastructure improvements.
  - Funding has been appropriated for the administrative costs of standing up the EPA's WIFIA office. Appropriations necessary to support WIFIA loans to project sponsors are expected in FY 2017.
- **Fixed Guideway Capital Investment Grants** (Section 3005): Reauthorizes the Capital Investment Grants program with only minor changes in project eligibility criteria and establishes an expedited pilot program for public transportation projects with private funding to incentivize non-federal investment.
  - Expedited Project Delivery Pilot Program: The Act establishes a pilot program for as many as eight Full Funding Grant Agreements (FFGAs) to expedite the delivery of new fixed guideway, Small Starts, or Core Capacity public transportation projects undertaken via P3 arrangements. The federal share of project costs under this pilot is limited to 25 percent.
  - To be eligible, the applicant must have the legal, financial, and technical capacity to carry out the project, continuing control over the equipment and facilities, and advisors providing guidance to the applicant that are independent from investors in the project. The project must be: (1) part of an approved transportation plan; (2) supported through a P3; (3) justified by findings including mobility improvements, environmental benefits, congestion relief, economic development effects, and estimated ridership projections; (4) supported by a local financial commitment; and (5) operated and maintained by employees of an existing public transportation provider in the service area of the project

National Finance Bureau

- **National Surface Transportation and Innovative Finance Bureau** (Section 9001): Establishes a Finance Bureau that will administer TIFIA, RRIF, and the new NSFHP discretionary grant program. The Finance Bureau was a House Transportation and Infrastructure Committee P3 Panel recommendation, and is intended to integrate the TIFIA and RRIF programs and create a more seamless innovative financing process. The Bureau will also make highway and surface freight transfer facility private activity bond allocations, but the Act does not increase the $15 billion cap on such bonds. The Bureau is directed to:
  - Work with US DOT's modal administrations, eligible entities, and other public and private interests to develop and promote best practices for innovative financing and P3s, including: (1) best practices with respect to standardized state P3 authorities and practices, including those related to accurate and reliable assumptions for analyzing P3 procurements, procedures for the handling of unsolicited bids, policies with respect to noncompete clauses, and other significant terms; (2) standard contracts for the most common types of P3s for transportation facilities; and (3) analytical tools and other techniques to aid eligible entities in determining the appropriate project delivery model, including a value for money analysis.
  - Ensure transparency of P3 projects receiving credit assistance under the programs it administers by: (1) requiring the sponsor to undergo a value for money analysis or comparable analysis prior to deciding to advance the project as a P3; (2) requiring the value for money analysis and other key terms of the P3 agreement to be made publicly available by the project sponsor at an appropriate time; (3) requiring the sponsor to conduct a review regarding whether the private partner is meeting the terms of the P3 agreement within three years of completion of the project; and (4) providing a publicly available summary of the total level of federal assistance in such project.
  - Develop procurement benchmarks, including: (1) establishing maximum thresholds for acceptable project cost increases and delays in project delivery; (2) establishing uniform methods for states to measure cost and delivery changes over the life cycle of a project; and (3) tailor benchmarks, as necessary, to various types of project procurements, including design-bid-build, design-build, and P3s.
  - Within one year, submit a report: (1) evaluating the application processes for the programs the Bureau administers; (2) identifying administrative and legislative actions that would improve the efficiency of the application processes without diminishing federal oversight; and (3) describing how the Executive Director will implement the administrative actions identified that do not require legislation.

State and Regional P3 Offices

- **Surface Transportation Block Grant Program** (STBGP) (Section 1109): Changes the Surface Transportation Program into a block grant program; it is not completely clear how changing the program into a block grant to states will affect how the program is administered, as it will likely be different in each state. The Act adds the following as eligible uses for STBGP funds:
  - A state's creation and operation of a P3 office to assist in the design, implementation, and oversight of P3s eligible to receive federal funding under title 23 and chapter 53 of title 49.
  - The payment of a stipend to unsuccessful private bidders to offset their proposal development costs, if necessary to encourage robust competition in P3 procurements. While stipends to unsuccessful bidders are currently eligible under US DOT guidance, the Act clarifies that eligibility in statute.
- **Regional Infrastructure Accelerator Demonstration Program** (Section 1441): Creates a new Regional Infrastructure Accelerator program, modeled on the West Coast Infrastructure Exchange, to establish one or more regional entities to develop financing strategies and otherwise promote and accelerate the development of projects eligible for TIFIA assistance. Authorizes $12 million in General Funds, subject to appropriations.
  - Each regional entity would serve a defined geographical area and advance the following purposes: (1) evaluate and promote innovative financing methods for local projects; (2) build capacity of state, local, and tribal governments to evaluate and structure projects involving private capital; (3) provide technical assistance and information on best practices to potential project sponsors; (4) increase transparency of infrastructure project analysis and using innovative financing for public infrastructure projects; (5) foster a pipeline of projects available for investment; (6) bundle small and rural projects to make them more marketable to investors; and (7) reduce transaction costs for public project sponsors.

Other Innovative Finance Programs

- **Transportation Infrastructure Finance and Innovation Act** (TIFIA) (Section 2001): Reauthorizes the TIFIA credit assistance program at levels significantly below MAP-21: $275 million for each of FY 2016 and FY 2017, $285 million for FY 2018, and $300 million for each of FY 2019 and FY 2020. The Act simplifies the TIFIA process to ensure it is a more accessible innovative finance tool. To ensure sufficient funding for the pipeline of anticipated projects under these new authorization levels, the Act also repeals the redistribution of unused funds to other programs. Additionally, states may use their NHPP and STP apportionments to pay the subsidy and administrative costs for projects receiving TIFIA assistance.
  - Adopts the loans-to-lenders program in which State Infrastructure Banks (SIBs) can apply for TIFIA assistance to capitalize a rural projects fund and re-lend the loan proceeds to downstream rural infrastructure projects. The Act also restores states' authority to capitalize their SIBs with federal-aid highway apportionments for FY 2016 through FY 2020. SIBs have fewer barriers to entry and may provide a more accessible innovative financing tool than TIFIA for some infrastructure projects.

- Establishes a streamlined and expedited application process for project sponsors seeking loans of no more than $100 million for projects secured by pledged revenues not affected by project performance (such as tax revenues).
- Adds eligibility for local projects with minimum project costs of $10 million. A local project is a project (1) where the applicant is a local government, public authority, or instrumentality of local government; (2) located on a facility owned by a local government; or (3) for which the Secretary determines that a local government is substantially involved.
- Adds eligibility for projects "to improve or construct public infrastructure" that is located within walking distance of, and accessible to public transportation, an intermodal facility, or a public utility.
- Changes the definition of rural projects, from an area other than a city with a population of more than 250,000 individuals to one with a population greater than 150,000 individuals.

- **Railroad Infrastructure Financing Improvement Act** (RIFIA) (Sections 11601-11611): Makes changes to increase access to RRIF.
  - Expands eligibility to include a joint venture with any RRIF-eligible applicant, such as a state, local government, or railroad. Expands eligible uses of RRIF funding to include planning and design costs, economic development, and commercial and residential development that incorporates private investment. Requires a 25 percent non-federal match for commercial and residential development and related infrastructure and activities.
  - Allows states, localities, and special-purpose entities to pay credit risk premiums for RRIF loans, though the appropriations bill continues the perennial prohibition on using federal funds to pay credit risk premiums. Allows applicants to use the net present value of a future stream of state or local subsidy income or other dedicated revenues to secure a loan or loan guarantee.
  - Updates application procedures to require the Secretary: to notify applicants within 30 days whether their application is complete; to approve or disapprove an application within 60 days of notifying an applicant that their application is complete; and to require the Office of Management and Budget to take any actions within that 60-day limit.
  - Changes the repayment term from within 35 years to the lesser of 35 years or the estimated useful life of the infrastructure, allows US DOT to sell direct RRIF loans in the capital markets, and provides that RRIF loans shall not be subordinated in bankruptcy except for limited preexisting indentures (the same subordination condition that TIFIA and WIFIA loans include).

Other Finance Provisions

- **Tolling, HOV Eligibility, Interstate Reconstruction and Rehabilitation** (Section 1411):
  - Requires equal access to HOV facilities for all public transportation vehicles and public or private over-the-road buses.
  - Extends, with some modifications, the provisions authorizing public authorities to permit various types of energy efficient and low-emission vehicles to use HOV lanes as follows:
    - May permit alternative fuel vehicles and qualified plug-in electric drive vehicles to use HOV facilities until the end of FY 2025; and
    - May permit certified low emission and energy-efficient vehicles to use HOV facilities until the end of FY 2019.
  - Provides greater flexibility in the HOV facility maintenance-of-operating-performance provisions, and permits US DOT to waive sanctions for degraded HOV operations upon a finding that such waiver is in the public interest and the authority has made a good faith effort to improve facility performance.
  - Amends the Interstate System Reconstruction and Rehabilitation Pilot Program to (1) require applicants to have approved state enabling legislation necessary for their proposed toll project to proceed; and (2) establish requirements for project completion, including that provisionally approved applications shall expire three years after initial approval, and that previous provisionally approved applications must meet the requirements within one year of enactment of the Act.
- **Availability Payment Concession Model** (Section 2002): Clarifies that availability payments made under P3 concession models are an eligible use of federal funds.

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