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A Forum on P3s: What Are the Lessons Learned?

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LEGAL AND REGULATORY CONSIDERATIONS

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FEDERAL LAW AND REGULATIONS: OVERVIEW

• Importance of FAA Grant Assurance 25 re revenue diversion: airport-generated funds from any source to be reinvested in airport operations and development, and not used for other unrelated purposes

• Airport P3s without violating the FAA revenue diversion rule:

• Full private operation of an airport is possible under Airport Investment Partnership Program (“AIPP”) with P3 party becoming airport operator for FAA Part 139

• Selected airport facilities, such as terminals, ground transportation, parking, energy facilities, cargo, etc. developed and operated as a P3 outside of the AIPP, so long as any transaction proceeds are used for airport purposes and public owner remains Part 139 airport operator
FEDERAL LAW AND REGULATIONS: AIPP OVERVIEW

• Formerly known until 2018 as Airport Privatization Pilot Program
• Currently no limit on number of participating airports or limit on hub airports
• Airport sponsors seek to improve airport operations and management or enhance capital expenditures at the airport that could not otherwise be funded by a public sponsor.
• P3 lease proceeds (or for GA airport, sale) can be used for non-airport purposes if approved by 65% of scheduled air carriers
FEDERAL LAW AND REGULATIONS:
AIPP STATUTORY REQUIREMENTS

- P3 operator’s ability to assume the public operator’s grant obligations
- Ensure continued access to the airport on reasonable terms
- P3 operator must ensure the airport is operated safely, maintain and improve the airport, charge reasonable fees, provide security, mitigate noise and environmental impacts
- Existing collective bargaining agreements covering airport employees may not be repealed
- P3 lease agreement must provide a plan for continued operation of the airport in case of bankruptcy of the private operator
- Private operator access to PFCs/AIP grants
FEDERAL LAW AND REGULATIONS: P3s AND GRANT ASSURANCES

• Applicable for all P3s—under AIPP or otherwise and with or without airline approval
• Access to aeronautical users on reasonable terms without unjust discrimination.
• Users who are similarly situated must be treated in the same manner
• Air carriers making similar use of similar facilities must be subject to comparable rules, regulations, conditions and rate
• Sponsor may make reasonable classifications such as signatory/nonsignatory or tenant/non-tenant and treat the classes differently.
STATE AND LOCAL LAWS: OVERVIEW

• Applicable to airport and other infrastructure P3s
• State/local laws govern available project delivery methods and processes for implementing a project under the available methods
• Glory and challenge of US federal system
• Scope of capital projects eligible for P3 project delivery varies widely across jurisdictions
• Legal landscape for P3 procurement is rapidly changing--numerous states have adopted P3 authorization legislation—but still inconsistent
STATE AND LOCAL LAWS: LOCAL P3 AUTHORIZATION

- Subdivisions of the state, such as municipalities and counties, may have separate P3 authority via home rule powers or state statutes.
- Cities and counties may have P3 authority even where a state or state-level agency does not—e.g., City of Chicago vs. State of Illinois.
- Even with home rule P3 authorization, state authorization may be needed for certain aspects of the transaction--property or excise tax exemptions, etc.
STATE AND LOCAL LAWS: LOCAL GOVERNANCE STRUCTURE

• Governance structure and corresponding procurement authorization are important determining factor for the regulatory authority to execute airport P3s

  – Port Authority of New York and New Jersey:
    • Interstate compact with jurisdiction over certain regional transportation projects and not restricted by State law.
    • Delivering LGA Central Terminal, new Terminals at JFK and Capital Projects at EWR;

  – Los Angeles World Airports:
    • Implementing CONRAC and Automated People Mover Projects under City Charter/Muni Code Airport P3 provisions – in the absence of any state enabling statute for P3
STATE AND LOCAL LAWS: GENERALLY APPLICABLE TERMS

• Highlighted considerations:
  – procurement methods including transparency
  – selection criteria and scoring methodology
  – degree of risk transfer
  – financing options
  – funding sources
STATE AND LOCAL LAWS: GENERALLY APPLICABLE TERMS

- Highlighted considerations:
  - term length
  - performance security
  - right of way responsibility
  - data protection
  - actions or authority that must remain with the government agency
STATE AND LOCAL LAWS: PUBLIC POLICY CONSIDERATIONS

- Open records laws
- Competitive bidding
- Non-compete requirements and restrictions
- State and Local taxes to which the P3 counter party may be subject
- Dispute resolution
- Adverse Actions by government sponsor and/or other governments
STATE AND LOCAL LAWS:
WORKFORCE POLICY CONSIDERATIONS

• Prevailing wage/living wage
• MWBE/ACDBE/DBE compliance
• Local hiring
• Project labor agreements and labor protections
• Requirements intended to protect jobs or levels of wages and benefits for current employees
• Limitations on employee non-compete agreements
• Generally limited impact on P3 project implementation
COMPLIANCE WITH OUTSTANDING AIRPORT AGREEMENTS

• Potential limitations imposed by bond covenants
• Potential limitations imposed by airline use agreements