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Public-Private Partnerships Promoted in Bipartisan Infrastructure Package: Nossaman

Yesterday, the Senate released legislative text for its highly anticipated bipartisan infrastructure package, titled the Infrastructure Investment and Jobs Act. Negotiations have been ongoing for months, and while several political and policy hurdles remain before this proposal can arrive on the President's desk for his signature, agreement on this bipartisan package is a hugely positive development. Project sponsors and practitioners have closely tracked the development of this package not only with respect to overall funding levels and policies but also with an eye towards specific provisions relevant to public-private partnerships ("P3s") and other alternative delivery methods. The bipartisan package includes three provisions, in particular, that will provide tremendous benefit to P3s if enacted.

First, Section 80403 would raise the cap on private activity bonds (commonly known as "PABs") for highway and surface freight transfer facilities from $15 billion to $30 billion. PABs allow private entities to benefit from tax-exempt bond treatment to finance certain public works improvements. However, the federal $15 billion allocation of highway and surface freight transfer facility PABs has been exhausted, eliminating the ability of private entities to access tax-exempt bonds for these projects. Increasing the cap from $15 billion to $30 billion would address current demand and lower the cost of private financing on future P3 projects.

Second, Section 71001 would provide $100 million in grants to project sponsors for technical assistance with P3 procurements. While this may seem a bit esoteric, it is incredibly challenging for a public agency with needs that outweigh resources to consider P3 delivery without technical support, especially if the project sponsor has never used this delivery method before. These grants would provide particular benefit to agencies with significant infrastructure needs but without the internal capacity or resources to engage experts to assist in P3 delivery.

Third, Section 70701 would require a value-for-money ("VfM") analysis for any project seeking credit assistance under the TIFIA or Railroad Rehabilitation & Improvement Financing ("RRIF") programs with estimated capital costs of $750 million or more. A VfM analysis evaluates the benefits of P3 delivery for a certain project against conventional delivery, looking across the spectrum of project costs during the lifecycle of the asset. While P3 delivery will not be the most efficient option for every project, this VfM requirement will ensure that projects receiving TIFIA and RRIF credit assistance evaluate whether P3 delivery would provide public benefit over conventional delivery.

While the future of this legislation is not yet clear, inclusion of these three provisions marks a positive step for federal P3 policy and would provide tremendous benefit to the industry if enacted.

By Shant Boyajian on 08.02.2021

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