



*A bold voice for transportation workers*

October 29, 2015

Mr. Gregory G. Nadeau  
Administrator  
Federal Highway Administration  
1200 New Jersey Avenue SE,  
Washington, DC 20590

**RE: Draft Availability Payment Concessions Public-Private Partnership Model  
Contract Guide  
Docket # FHWA-2014-0006  
Federal Highway Administration**

Dear Administrator Nadeau,

On behalf of the Transportation Trades Department, AFL-CIO (TTD), I am pleased to comment on the Federal Highway Administration's (FHWA) Draft Availability Payment Concessions Public-Private Partnership Model Contract Guide as well as on the Labor Best Practices chapter. By way of background, TTD consists of 32 affiliated unions in the transportation sector, including those who may be affected by a Public Private Partnerships (PPP or P3) concession agreement.<sup>1</sup>

We continue to appreciate the agency's request for public input on the contents of its model PPP contracts, and believe consideration and incorporation of Labor Best Practices chapter is an important step in the right direction. Given the overwhelming needs facing the nation's infrastructure assets, it is clear that alternative options like P3s are being given more consideration in the finance and delivery of certain transportation projects. Ensuring that these agreements consider public interest concerns and appropriate protections for those who help design, build, operate and maintain them is of considerable importance.

TTD believes that PPPs can have a valuable place in project delivery for certain transportation projects. However, we have some concern that P3s may be used to weaken labor standards and collective bargaining rights, reduce public sector jobs, or ignore the public interest. To help address these concerns, it must be ensured that strong labor standards are included within these agreements. TTD reiterated this point in comments to the FHWA in 2013 when it solicited input on model P3 contracts (Docket No. FHWA-2012-0126) We are very pleased that the FHWA has begun to pursue this goal through the publication of the Labor Best Standards chapter and look forward to continuing to work on these issues.

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<sup>1</sup> Attached is a list of affiliates.

**Transportation Trades Department, AFL-CIO**

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Edward Wytkind, President / Larry J. Willis, Secretary-Treasurer



Availability payments are an increasingly common type of concession agreement in which the private concessionaire receives compensation for the delivery of a transportation project irrespective of demand. The general trend across all transportation P3s has been to move away from the user-fee structure for remuneration (e.g. long-term highway agreements with tolls) to availability payments. In large part, this decision is based on the private partners' interest in limiting its exposure to demand driven revenue instability. This inherently shifts the risk burden from the private partner to the public who, through taxes and general revenues, traditionally finances the availability payments provided to the concessionaire. In addition, this risk shift is compounded by increasing the replacement of funding obtained through private means with federal investment, including tax exempt bonds and TIFIA loans. Given this trend toward increasing the risk borne by the public, including through availability payments, we believe it is imperative that the FHWA guidance require robust value for money (VfM) analysis, disclosure of all public grants and subsidies, and realistic modeling of risk. The guidance makes steps in this direction, and we would encourage further consideration of these issues.

As mentioned above, we are particularly interested in and encouraged by the Labor Standards Chapter recommended by the Department of Labor (DOL) in collaboration with the Department of Transportation (DOT) as it applies to all concession agreements. This chapter will ensure concessionaires will not only effectively comply with existing federal agreements but provides a means to create and encourage high-road labor practices above and beyond existing federal and state law. In particular, we believe adoption of these standards should be a consideration of Departments and concessionaires as part of either the bidding process or the terms of a contract. We have always maintained that structuring these deals to ensure that workers and communities are the beneficiaries, not the victims, will ensure their ultimate viability. The Labor Best Practices section provides an effective starting point to meet this goal.

We believe the Labor Standards Chapter, as drafted, is appropriately comprehensive in scope in order to address the many impacts workers may face in relation to a P3 deal. We would like to highlight and build upon the sections related to Incumbent Worker Nondisplacement and Protections, Health and Retirement, Prevailing Wage and Fringe Benefits, and Project Labor Agreements (PLAs). Collectively, these sections are particularly important in ensuring P3s maintain and augment, rather than undermine, long-standing and effective industry standards governing worker protections, wages, and benefits.

When a private entity takes over an existing project or becomes the concessionaire on a new project, it is important that the employees are either retained or their protections, wages and benefits are, to the greatest extent possible, preserved. As section XX.4, Incumbent Worker Nondisplacement and Protections, notes, displacing employees not only has harmful effects on the affected workers but can severely undermine the delivery of services through the loss of institutional knowledge and expertise. By retaining an experienced and trained workforce, a concessionaire can ensure service stability. We very much support the inclusion of the Service Contract Act and the Section 13(c) protective arrangements as models to protect workers from job loss and to provide them employment opportunities in the event the P3 agreement displaces or substantially worsens the employment status of the incumbent workforce.

In order to prevent issues of displacement, we also endorse section XX.4's work arrangement in which a private concessionaire can continue to utilize the public entity, or use an employee leasing agreement, for the delivery of the operations and maintenance functions of a project. This model, successfully deployed in a number of transit P3 procurements, ensures that the employees retain the pay, pension and other benefits they have long enjoyed.

To this point, we would like to emphasize that section XX.3.2, Health and Retirement Benefits make note of and highlight *defined benefit* pension plans in discussing "retirement coverage" or benefits. Retirement plans come in two basic varieties: defined benefit and defined contribution. For many transportation employees working at public entities, a defined benefit plan, in which employers are responsible for funding promised benefits, has provided effective retirement security. In contrast, defined contribution plans, or 401ks, shift investment responsibility and risk to the employees, and their growth has exacerbated retirement insecurity and inequality by providing lower retirement benefits. This distinction is noteworthy given that in practice many P3 agreements have shifted defined benefit plans to defined contribution retirement vehicles. Given that this section correctly notes that benefit packages otherwise "promote improved operational execution and productivity" and help encourage a "stable workforce that is capable of meeting critical safety demands," we believe the type of retirement benefit is worth noting.

The elimination of defined benefit pensions resulting from P3s, contracting out and/or privatization has created significant economic hardship for many transportation workers. This cut in employee benefits creates workplace upheaval and increases employees' economic insecurity. If the labor best practices chapter is designed to encourage employers to "invest in their workforces, create and retain high-quality jobs, and deliver the best quality performance" (page 1) it should highlight the significant pain caused by eliminating the guaranteed retirement security provided by defined benefit pension plans unmatched by the volatility of defined contribution plan value. This substantial cut in benefits can force qualified and experienced workers to seek employment elsewhere. Among those workers who stay, it often causes significant problems with morale and job performance. This distinction should also be considered in section XX.4 in its discussion of retaining employee "pension" arrangements.

Finally, we strongly support inclusion of the Prevailing Wage and Fringe Benefit and Project Labor Agreement sections. Prevailing wage standards, which ensure that workers are paid no less than "prevailing wages" in the area in which a project is located, help attract a high-skilled and dependable workforce to ensure work is completed efficiently and effectively, and prevent issues of turnover and training costs associated with low-pay and poor benefits. Similarly, Project Labor Agreements (PLAs) help eliminate cost-overruns and project delays by effectively coordinating complex construction worksites by establishing the terms and conditions of labor in advance. Collectively, Davis-Bacon and PLAs work in tandem to protect workers and communities from the use of underpaid labor while ensuring projects are performed safely, on time and on budget by qualified and trained personnel.

We are very encouraged by the inclusion of a joint DOT-DOL Labor Best Practices chapter to inform P3 concessions. The chapter will inform Departments, municipalities, and private concessionaires of their existing responsibilities to uphold labor protections and provide an important tool for them to structure P3s without sacrificing worker protections, wages and

benefits. By promoting a high-road labor standard that benefits workers and communities, we can ensure P3s deliver for all parties and do not erode long-standing worker protections and prevailing industry standards.

We appreciate the opportunity to comment on this important notice, and we hope our comments will be taken into consideration and that the Labor Standards Best Practices chapter be incorporated into DOT recommendations on P3 concession agreements.

Sincerely,

A handwritten signature in black ink, appearing to read "Edward Wytkind". The signature is somewhat stylized and scribbled.

Edward Wytkind  
President



**Transportation Trades Department, AFL-CIO**  
*A bold voice for transportation workers*

***TTD MEMBER UNIONS***

Air Line Pilots Association (ALPA)  
Amalgamated Transit Union (ATU)  
American Federation of Government Employees (AFGE)  
American Federation of State, County and Municipal Employees (AFSCME)  
American Federation of Teachers (AFT)  
Association of Flight Attendants-CWA (AFA-CWA)  
American Train Dispatchers Association (ATDA)  
Brotherhood of Railroad Signalmen (BRS)  
Communications Workers of America (CWA)  
International Association of Fire Fighters (IAFF)  
International Association of Machinists and Aerospace Workers (IAM)  
International Brotherhood of Boilermakers, Iron Ship Builders,  
Blacksmiths, Forgers and Helpers (IBB)  
International Brotherhood of Electrical Workers (IBEW)  
International Longshoremen's Association (ILA)  
International Organization of Masters, Mates & Pilots, ILA (MM&P)  
International Union of Operating Engineers (IUOE)  
Laborers' International Union of North America (LIUNA)  
Marine Engineers' Beneficial Association (MEBA)  
National Air Traffic Controllers Association (NATCA)  
National Association of Letter Carriers (NALC)  
National Conference of Firemen and Oilers, SEIU (NCFO, SEIU)  
National Federation of Public and Private Employees (NFOPAPE)  
Office and Professional Employees International Union (OPEIU)  
Professional Aviation Safety Specialists (PASS)  
Sailors' Union of the Pacific (SUP)  
Sheet Metal, Air, Rail and Transportation Workers (SMART)  
SMART-Transportation Division  
Transportation Communications Union/ IAM (TCU)  
Transport Workers Union of America (TWU)  
UNITE HERE!  
United Mine Workers of America (UMWA)  
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service  
Workers International Union (USW)

*These 32 labor organizations are members of and represented by the TTD*

