New York State Department of Transportation
New York State Thruway Authority
Metropolitan Transportation Authority/Metro-North Railroad

Financial Plan Development

STEP 1:

Develop Core Strategies

Legal Implications of Alternatives

An Independent Legal Analysis of Winston & Strawn LLP

Tappan Zee Bridge/I-287 Corridor Financing Study

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This memorandum sets forth a broad analysis of the legal implications of alternatives with respect to the Tappan Zee Bridge/I-287 Corridor (the "Project"). Planning for the Project is a collaborative effort among various agencies within the State of New York State (the "State"), including the New York State Department of Transportation (the "NYSDOT"), New York State Thruway Authority (the "Thruway Authority"), the Metropolitan Transportation Authority (the "MTA") and Metro-North Commuter Railroad ("Metro-North"). This planning entails consideration of the available options for the financing, construction, ownership and operation of the Project. This memorandum classifies the ownership and operation models into the following categories and contains a discussion of each category: The Thruway Authority Model; The New Authority Model; The Non-Profit Model; the Special Assessment Model; the Public-Private Partnership Model and the Hybrid Model. It then discusses the procurement law issues relating to the Project. Finally, this memorandum considers certain State revenue sources suggested in the Presentation to the NYSDOT Data Book dated May 21, 2009 as well as Federal aid sources for the Project. This document was prepared by Winston & Strawn LLP and reflects the legal analysis of Winston & Strawn LLP.

I. The Thruway Authority Model

A. Financing, Ownership and Operation

The first model contemplates financing, ownership and operation of the Project by the Thruway Authority. The Thruway Authority was created by the New York State Thruway Authority Act of 1950 (the "Thruway Authority Act") to finance, construct, reconstruct, improve, develop and maintain a thruway system.[1] The enabling legislation grants to the Thruway Authority broad powers including the right to borrow money and issue negotiable notes, bonds or other obligations and to provide for the rights of the holders thereof.[2] Such bonds are issued pursuant to a resolution of the Thruway Authority authorizing such issuances.[3] The Thruway Authority's current debt obligations secured by the revenues of the Thruway system (including the Tappan Zee Bridge and related portions of I-287) are the bonds (the "General Revenue Bonds") issued pursuant to the Thruway Authority General Revenue Bond Resolution, adopted August 3, 1992 (as amended and supplemented to the date hereof, the "NYSTA General Resolution").

In order to fund the costs of the Project, the Thruway Authority may issue Additional Bonds (as such term is defined in the NYSTA General Resolution), or junior lien or subordinate bonds under the NYSTA General Resolution. Moreover, the Thruway Authority may fix and collect such fees, rentals and charges for the use of the Thruway system or any part thereof necessary or convenient, with an adequate margin of safety, to produce sufficient revenue

[1] N.Y. Pub. Auth. Law §§ 350-387.

[2] Id. § 354.

[3] Id. § 365.

to meet the expense of maintenance and operation of the Thruway system and to fulfill the terms of any agreements made with the holders of its notes or bonds.[4]

The Thruway Authority has the statutory authority: (i) to acquire, possess and dispose of personal property; (ii) to acquire and hold real property and easements and other rights in the name of the State; (iii) to sell, exchange or otherwise dispose of any real property not necessary for its corporate purposes or pursuant to a determination by its board that such sale or disposal is in the best interest of the Thruway Authority; and (iv) to lease or grant permits to occupy real property not presently required for the purposes of the Thruway Authority held for future use in carrying out its corporate purposes.

The Thruway Authority may assume jurisdiction of any portion of the Thruway and any "highway connections" as the Thruway Authority may deem advisable in the interest of the public to serve traffic needs.[5] The Tappan Zee Bridge and the portion of I-287 that feeds the Tappan Zee Bridge via a section of the Thruway are within the jurisdiction of the Thruway Authority.[6] Moreover, the Thruway Authority has a statutory obligation to operate and maintain the portions of the Thruway system within its jurisdiction. The Thruway Authority Act mandates that operation and maintenance of the Thruway system shall be performed: (a) by the use of Thruway Authority forces and equipment at the expense of the Thruway Authority or by agreement at the expense of the State or other parties; (b) by contract with municipalities or independent contractors; (c) by the Commissioner of the NYSDOT and his subordinates as agents for the Thruway Authority, at the request and the expense of the Thruway Authority; or (d) by a combination of these foregoing methods.[7] Operation and maintenance of the Project would be within the scope of the Thruway Authority's statutory responsibility.

B. Considerations for the Thruway Authority Model

1. Statutory Considerations for Bridge Construction

Pursuant to Section 373 of the Thruway Authority Act, the State pledges, to the holders of bonds secured by a pledge of the tolls or revenues from any bridge or part of the Thruway system thereof constructed by the Thruway Authority across the Hudson River south of the Bear Mountain Bridge, that no bridge shall be constructed or maintained between the Bear Mountain Bridge and the border of New York and New Jersey on the west side of the Hudson River so long as the obligations of the Thruway Authority on such bonds remain outstanding. We believe that (i) this prohibition is intended to apply to the State or to the State and all other entities excluding the Thruway Authority and (ii) the Thruway Authority should be viewed as authorized to finance the construction of the Project through the issuance of Additional Bonds or junior lien or subordinate bonds under the NYSTA General Resolution.

[4] Id. § 354.
[5] Id. § 356.
[6] Id.
[7] Id. § 360.

We note that there is another possible interpretation of Section 373 under which the prohibition of that Section may apply to the State and all other entities including the Thruway Authority. Under this interpretation, the construction of a new Tappan Zee Bridge (including a replacement bridge) by any entity would violate Section 373 unless all bonds secured by a pledge of the tolls or revenues from any bridge or part of the Thruway system are defeased. However, when read in the context of the other provisions of the Thruway Authority Act, we do not believe that this more limited reading is appropriate.

2. Covenant Restriction in NYSTA General Resolution

(a) Additional Bonds

Pursuant to Section 204(A) of the NYSTA General Resolution, Additional Bonds may be issued under the NYSTA General Resolution so long as it can be shown that the Net Revenues (defined in the NYSTA General Resolution) would equal or exceed the Net Revenue Requirement (defined below) in the manner and during the periods set forth in the General Resolution (the "Additional Bonds Test"). The Net Revenue Requirement is defined as the greater of: (i) the sum of Aggregate Debt Service plus amounts to be deposited in the Senior Debt Service Reserve Fund and the Junior Indebtedness Fund plus amounts required to make Reserve Maintenance Payments (each as defined in the NYSTA General Resolution) or (ii) 1.20 times the sum of Aggregate Debt Service. Aggregate Debt Service is defined as the sum of debt service outstanding on all series of bonds issued pursuant to the NYSTA General Resolution. Given that the Additional Bonds Test allows for consideration of board approved rate increases in the determination of Net Revenues, a financial analysis is required in order to determine the amount of Additional Bonds that could be issued in connection with the Project.

(b) Junior Indebtedness and Subordinated Indebtedness of the Thruway Authority

The Thruway Authority may also issue debt, the repayment of which is subordinate to the repayment of the Thruway Authority's senior debt. The restriction of the Additional Bonds Test does not apply to such debt. The Thruway Authority may issue bonds ("Junior Bonds") that represent Junior Indebtedness to finance the construction or reconstruction of a new Tappan Zee bridge. Pursuant to Section 509(1) of the NYSTA General Resolution, Junior Bonds may be secured by a pledge of the Junior Indebtedness Fund and a pledge of Revenues subordinate to the first priority pledge of Revenues for the Thruway Authority's senior bonds. Revenues is defined in the NYSTA General Resolution to include all tolls, revenues, fees, charges, rent and other income and receipts derived from the operation, jurisdiction and control of the Thruway system. In addition, the Thruway Authority may issue bonds ("Subordinated Bonds") that represent Subordinated Indebtedness (defined in the NYSTA General Resolution as "evidence of the indebtedness of the Authority payable out of amounts available in the General Reserve Fund" (as defined in the NYSTA General Resolution)) for any lawful corporate purpose of the Thruway Authority. Pursuant to Section 512(3) of the NYSTA General Resolution, Subordinated Bonds may be secured by a pledge of amounts in the Subordinated Indebtedness Fund and a pledge of Revenues subordinate to the pledge of

Revenues for the senior bonds and the Junior Bonds. While the term Subordinated Indebtedness Fund is not otherwise used or defined in the NYSTA General Resolution, Section 512(3) presumably refers to the General Reserve Fund in accordance with that term's use in the definition of Subordinated Indebtedness.

Section 504 of the NYSTA General Resolution sets forth the flow of funds with respect to Revenues. Revenues are first applied to operating expenses via the Operating Fund, then to debt service on senior bonds via the Senior Debt Service Fund and the Senior Debt Service Reserve Fund, then to debt service on Junior Indebtedness via the Junior Indebtedness Fund, then to other capital funds and finally to debt service on Subordinated Indebtedness via the General Reserve Fund.

C. Addressing the Considerations

1. Amendment of the Thruway Authority Act and the NYSTA General Resolution; Defeasance

To eliminate any ambiguity with respect to Section 373 of the Thruway Authority Act, as well as address the Additional Bonds Test, the Thruway Authority Act and the NYSTA General Resolution could be amended. In order to amend Section 373 to eliminate any question that the Thruway Authority can build a new bridge, it is necessary to defease all bonds secured by toll and fee revenues so that the agreement with bondholders will not be violated. In addition, the amendment could expressly authorize the Thruway Authority to construct the Project pursuant to a public-private partnership ("PPP") and utilizing design-build project delivery as discussed below in Sections V and VIII, respectively.

Issuances of General Revenue Bonds by the Thruway Authority under the NYSTA General Resolution will be subject to the currently constraining Additional Bonds Test. Therefore, the Thruway Authority could amend and restate the NYSTA General Resolution or adopt a new bond resolution in order to provide the Thruway Authority with the flexibility necessary to undertake the Project. The new resolution could set forth a less restrictive coverage ratio requirement and provide broader definitions for the components of the Net Revenue Requirement. In order to amend the NYSTA General Resolution, the outstanding bonds issued pursuant to it must be defeased or the holders of a majority of the bonds must consent to such amendment in accordance with the provisions of the resolution.

2. Tolling on the Thruway System

As a means of increasing Net Revenues, the Thruway Authority may consider expanding the footprint of its tolling system. The Thruway Authority has broad jurisdiction to charge tolls, taxes, fees, licenses or permits for the use of the highway or any of its parts, where the imposition thereof is authorized by law,[8] and subject to public hearings and approval by its Board of Directors. The Thruway Authority Act specifically prohibits tolling on one portion of

[8] N.Y. Veh. & Traff. Law § 1630.

the Thruway: no tolls may be imposed in the "Southern Westchester Connection," the stretch of Thruway between the connection with the Major Deegan Expressway at the city limits of The City of New York and the connection with Tuckahoe Road in Westchester County.[9] The Thruway Authority can impose tolls on currently untolled highways if such highways are within its jurisdiction. While it is within the power of the State to place tolls on roads that were once free of passage, in order for the Thruway Authority to toll roads beyond its jurisdiction the State legislature must grant such authority to the Thruway Authority.

Moreover, if previously untolled portions of the Thruway system will be converted to tolled portions and such portions have benefited, or will benefit, from Federal assistance, consideration should be given to the consequences under the Federal-Aid Highway Program. As a general rule, highways constructed with Federal aid under Title 23 of the U.S. Code are required to be free of tolls.[10] Statutory exceptions have been created for, among other things, reconstruction of a free Federal-aid highway (except on the Interstate system) and converting it to a toll facility.[11] With respect to an Interstate highway facility, tolling has been allowed pursuant to a variety of "pilot" programs authorized by Federal legislation (e.g., "high occupancy vehicle facilities" and "high occupancy toll lanes" programs, value pricing pilot program, and Interstate System Construction Pilot Toll Program).[12] Congress has commenced a reevaluation of existing restrictions and opportunities for new tolling programs in connection with the reauthorization of the Surface Transportation Program. The availability and viability of these programs is unclear given the current status of the reauthorization legislation.

II. The New Authority Model: Creating a New Public Authority or Public Benefit Corporation

New York public authorities and public benefit corporations are created by acts of the State legislature and are compiled by category under the New York Public Authorities Law. For example, the Thruway Authority Act is compiled under the category "Park, Parkway and Highway Authorities." Other categories include Bridge and Tunnel Authorities, under which New York State Bridge Authority (the "NYSBA") is compiled, and Public Utility Authorities. Public benefit corporations include, among others, the New York State Environmental Facilities Corporation, the New York State Housing Finance Agency (the "Housing Finance Agency") and the Dormitory Authority of the State of New York (the "Dormitory Authority").

Public authorities and public benefit corporations are governed by boards of directors or commissioners, who are generally appointed by the Governor. Some boards of public authorities and public benefit corporations have ex-officio members who are elected or appointed public officers or officials, and some boards have members appointed by a local elected official. For example, the Mayor of New York City appoints four members to the MTA board.

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[9] N.Y. Pub. Auth. Law § 356(1).

[10] See 23 U.S.C. § 301.

[11] See 23 U.S.C. § 129.

[12] See generally infra Section X.

The powers given to a public authority or public benefit corporation vary with the purposes for which the entity was created and are tailored to meet such purposes. However, public authorities and public benefit corporations charged with building, maintaining and operating a major asset such as the Tappan Zee Bridge, generally have among their powers, the power to: (i) acquire by purchase, lease, license or otherwise real and personal property; (ii) construct, improve and maintain the asset; (iii) borrow money and issue notes, bonds or other obligations; and (iv) charge and collect tolls and fees etc. for the use of such asset and to pledge the same as security for debt.

Public authorities or public benefit corporations that finance "projects" for the benefit of the public, such as the Housing Finance Agency, the Dormitory Authority and the New York State Urban Development Corporation (the "Urban Development Corporation"), generally have the powers enumerated above except that they do not charge tolls, etc., because they do not maintain or operate major assets.

A new authority could be created and authorized to build, operate and maintain a single asset, the new Tappan Zee bridge, or the new Tappan Zee bridge and other parts of the Project.

Governance of the new authority could be by a board of directors composed of members of the Thruway Authority and/or the MTA who are appointed by the Governor or other members appointed by the Governor. The board could also have members taken from any of the political subdivisions served by the Project or such members could include appointees from a tax or assessment district which may provide a portion of the funds to build, operate and maintain the Project.

While not currently available under New York law, the legislation could authorize the creation of a "joint powers authority" under which multiple political subdivisions would agree to acquire, operate and maintain the new Tappan Zee bridge and fund and finance such acquisition, operation and maintenance.

The legislation creating the new authority or amending the Thruway Authority Act could, among other things, (i) provide for specific authority to enter into design-build contracts, (ii) provide for the authority to form PPPs as described below in Section V.A, (iii) specifically authorize the new authority or the Thruway Authority to enter into "concession agreements" as described below in Section V.B, (iv) exempt the new authority or the Thruway Authority from the procurement requirements described below in Section VIII.B.3, and (v) authorize the new authority or the Thruway Authority to collect revenues from sources other than the new Tappan Zee bridge and the Thruway.

Finally, if the new authority is to build, operate and maintain the new Tappan Zee bridge, or any part of the Thruway system, then the legislation creating the new authority should relieve the Thruway Authority of such responsibility.

III. The Non-Profit Model

Another option to be considered as a financing vehicle for the Project is the use of a newly created, private, non-profit corporation ("NPC"). However, an NPC acting on behalf of a state entity to finance and develop a public project would likely not be exempt from State procurement laws and the current restrictions on PPPs.

The NPC could issue tax-exempt bonds, or use the proceeds of tax-exempt bonds issued by a government agency, to finance the portion of the cost of the Project not funded with Federal-aid or other governmental or private sources of capital. As a supplemental source of funds, capital from a private-sector participant could be infused through indebtedness, including subordinate indebtedness, of the NPC. Pursuant to Section 506 of the New York Not-For-Profit Corporation Law ("NPCL"), such indebtedness must pay reasonable interest not tied to the income or profit of the NPC and must have other customary provisions so that it will be treated as debt, and not disguised equity, for Federal income tax purposes. The tax-exempt bonds and the indebtedness would be Project revenue obligations, insulating the governmental sponsor or sponsors from liability for Project debt service, and depending on the terms of any PPP arrangement, from Project operational risk.

Three types of NPCs and their advantages and disadvantages under applicable law are discussed below. None of the three can be implemented without additional State legislation, as also discussed below. Moreover, the use of an NPC to finance, own and/or operate the Project would require (i) the amendment of the Thruway Authority Act to lift restrictions in that act authorizing only the Thruway Authority to undertake and operate the Project[13] and (ii) the legal defeasance of all of the bonds of the Thruway Authority outstanding under the NYSTA General Resolution (or bondholder consent in accordance with such resolution) in order to remove restrictions in that resolution (as discussed above in Section I.C.1)[14] with respect to the sale or transfer of the Authority's facilities or the use of its revenues to secure debt obligations other than its General Revenue Bonds.

A. "63-20" Type NPC ("63-20 NPC")

Under Revenue Ruling 63-20, 1963-1 C.B. 24, as supplemented by Revenue Procedure 82-26, 1982-1 C.B. 476 (collectively, the "63-20 Rules"), a corporation organized under the New York NPCL is permitted by the Internal Revenue Service ("IRS") to issue tax-exempt bonds on behalf of the state or a political subdivision (the "governmental unit") if, among other things, the governmental unit adopts, prior to the issuance of the bonds, a resolution approving the purposes and activities of the corporation and the obligations to be issued and agrees to accept title to the Project when the bonds are discharged. A corporation could be formed under the NPCL to finance, develop and operate the Project. But it is not clear whether the Thruway Authority or the executive branch of State government is empowered to adopt the required resolution, which would in effect approve the creation of a special purpose financing

[13] See N.Y. Pub. Auth. Law §§ 353, 373.

[14] See NYSTA General Resolution § 607.

vehicle to act on its behalf. Similarly, other governmental units, even if they were granted the power to undertake the Project, lack the ability to approve the use of an NPC to act on their behalf. The statutory powers of the Thruway Authority,[15] the NYSBA[16] and the Triborough Bridge and Tunnel Authority[17] do not include such action.[18] The MTA does have special powers to create subsidiaries[19] but an NPC would be an affiliate, not a subsidiary of the MTA, and in any event, the purposes of such subsidiary would be limited to the purposes of the MTA (providing publicly owned mass transportation facilities),[20] which do not include the construction and maintenance of highway bridges. The executive power of the State is generally limited to "expediting such measures as may be resolved upon by the legislature,"[21] and, subject to the discussion below in B, no measure has been enacted that enables the Governor to authorize private corporations to undertake projects on behalf of the State. Accordingly, State legislation will be needed to permit the Thruway Authority, the State or another governmental unit to act as the sponsor of a 63-20 NPC.

In any event, other aspects of the 63-20 Rules make a 63-20 NPC an unwieldy vehicle to use for the Project, compared to other NPC structures. In general, bonds issued by a 63-20 NPC cannot have a term longer than 80% of the estimated useful life of the Project and at the end of the bond term the governmental sponsor must obtain full, unencumbered legal and beneficial ownership of the Project. In addition, the reasonably estimated fair market value of the financed portion of the Project at the end of the bond term must be at least equal to 20% of the financed cost of the Project. Thus, the governmental sponsor of the 63-20 NPC is required to have a residual interest in the Project that has substantial value. This is incompatible with PPP arrangements in which the private sector participant claims the tax benefits of ownership (i.e., tax depreciation), since such arrangements would require a lease or concession agreement for the entire useful life of the Project, leaving no or a de minimis residual value to the government sponsor. Moreover, if there is a PPP arrangement that grants possession and use of the Project to the private sector participant, the governmental sponsor of the 63-20 NPC must have a right to "claw-back" the facility from the 63-20 NPC at any time by defeasing the bonds of the 63-20 NPC, at which time the PPP arrangement must be canceled. In general, bonds of a 63-20 NPC cannot be advance refunded on a tax-exempt basis. Also, after the 63-20 NPC issues bonds for the original financing, any subsequent bonds issued by the 63-20 NPC (e.g., for additional improvements or to refund a prior issue) cannot have a maturity date later than the final maturity date of the original issue of bonds. This curtails the long-term utility of the 63-20 NPC vehicle in that permitted amortization schedules for subsequent bond issues will become progressively

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15 See N.Y. Pub. Auth. Law §§ 354, 379-381, 383-386.

16 See N.Y. Pub. Auth. Law § 528.

17 See N.Y. Pub. Auth. Law §§ 553 to 553-c.

18 N.Y. Pub. Auth. Law §§ 354 (15), and 525 (15) authorizing the Thruway Authority and the NYSBA, respectively, to "do all things necessary or convenient to carry out its purposes and exercise the powers expressly given in this title," is a foundation too uncertain for an undertaking of the magnitude here contemplated.

19 See N.Y. Pub. Auth. Law § 1266.

20 N.Y. Pub. Auth. Law §§ 1264, 1266(5).

21 See N.Y. Const. art. IV, §3.

shorter. Finally, a 63-20 NPC may act on behalf of only one governmental unit, precluding more than one interested governmental unit from participating in the 63-20 NPC.

B. "57-187" Type NPC ("57-187 NPC")

NPCs created pursuant to a state statute allowing only governmental units to organize the NPC may issue tax-exempt bonds on behalf of its governmental sponsors pursuant to Revenue Ruling 57-187, 1957-1 C.B. 65. Section 1411 of Article 14 of the NPCL is one such State statute. It authorizes one or more local governmental units or the New York Job Development Authority (the "JDA") to form NPCs as local development corporations for various public purposes, including maximizing employment and lessening the burdens of government. In a private letter ruling, the IRS has determined that a Section 1411 local development corporation which was formed by the JDA, and in which the State had a membership interest and control of the governing board, could issue tax-exempt bonds on behalf the State.[22] Article 14 of the NPCL authorizes other kinds of special purpose NPCs aside fom local development corporations. However, none of these would meet the requirements of Rev. Rul. 57-187 and Section 1411 could not be relied upon without an amendment to clarify or expand the scope of local development to include transportation infrastructure projects.

If authorized by State legislation, a 57-187 NPC would be a more flexible tool than a 63-20 NPC, since a 57-187 NPC would be subject to none of the restrictions mentioned above as applicable to a 63-20 NPC.

C. "501(c)(3)" Type NPC ("501(c)(3) NPC")

An NPC that obtains a determination letter from the IRS that it is a tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "IRC") can borrow the proceeds of tax-exempt bonds issued by another governmental unit. Such tax-exempt bonds are referred to as "conduit loan bonds." One of the exempt purposes for which a 501(c)(3) NPC can be organized is the purpose of lessening the burdens of government, which would include developing, financing and carrying out an activity (such as highway bridge construction) typically carried out by state and local governments. However, under present State law, there appears to be no governmental agency with the power to issue conduit loan bonds for the benefit and use of a 501(c)(3) NPC created to finance and develop the Project. The statutory powers of the Thruway Authority do not include the issuance of bonds for the purposes of making loans to third parties. The Urban Development Corporation is a governmental agency empowered, among other things, to issue bonds secured by loans of proceeds for specific eligible projects; therefore, special legislation would be needed to enable the Urban Development Corporation to finance the Project.[23] The Dormitory Authority also issues conduit loan bonds for the benefit of 501(c)(3) NPCs, but for other than certain categories of projects not here relevant (e.g., colleges, universities and medical centers), it can only do so on a case by case basis

[22] IRS Private Letter Ruling 200307004.

[23] See N.Y. Unconsol. Laws §§ 6255, 6268.

through special legislation.[24] Local industrial development agencies (such as the Westchester County Industrial Development Agency) once were, but are not currently, authorized to issue conduit loan bonds for 501(c)(3) NPCs.[25] Even if such authority were to be reinstated, it specifically prohibits the issuance of bonds to finance roads. Thus, State legislation would be required to permit a governmental unit to issue conduit loan bonds to a 501(c)(3) NPC to finance the Project.

Tax-exempt bonds issued for the benefit of a 501(c)(3) NPC would not be subject to any of the restrictions applicable to tax-exempt bonds issued by a 63-20 NPC. The governing board of a 501(c)(3) can be more independent from its sponsoring governmental unit than the governing board of a 57-187 NPC. Based on discussions with the Thruway Authority's bond counsel, this may be helpful to obtain the tax benefit of structuring the issuance of bonds to defease the General Revenue Bonds as an acquisition transaction, rather than a refunding transaction, so that the tax restrictions on advance refunding the General Revenue Bonds would not apply. An important drawback of using a 501(c)(3) NPC is that any PPP arrangement would be restricted to a management contract that satisfied the requirements of Revenue Procedure 97-13, 1997-1C.B. 632. For example, under this IRS pronouncement, the maximum term of the management contract could not exceed the lesser of 15 years and 80% of the expected life of the Project. For an agreement of such length, 95% of the annual compensation of the manager would be required to be a stated dollar amount, fixed at the start of the contract, subject to change only on the basis of an external index not linked to the output or efficiency of the Project. Other disadvantages include the required annual filing of a lengthy information return with the IRS (Form 990) and the potential imposition of unrelated business income tax on those activities of the 501(c)(3) NPC that are not substantially related to its exempt function.

IV. The Special Assessment District Model

Municipalities are authorized under State law to establish special assessment districts.[26] A special assessment is a charge "imposed upon benefited real property in proportion to the benefit received by such property to defray the cost, including operation and maintenance" of a specific public project.[27] A special ad valorem levy is a charge imposed upon benefited real property in proportion to the value of the real property for the same purpose.[28] An assessing unit may be a city, town or county with the power to assess real property.[29] Alternatively, a special assessment or special ad valorem levy may be imposed by a town or county improvement district, district corporation or other district established for the purpose of financing and operating improvements or services intended to benefit the health, welfare, safety or convenience of its inhabitants. Typically, special assessment districts are created to finance all or part of the costs of services such as sewer or waste disposal. Whether real property can be subject to a

[24] N.Y. Pub. Auth. Law §§ 1676, 1680.

[25] See N.Y. Gen. Mun. Law § 854(13).

[26] N.Y. Real Prop. Tax Law § 100 et seq.

[27] Id. § 102(15).

[28] Id. § 102(14).

[29] Id. § 102(1).

special ad valorem levy or special assessment depends on whether the real property is conferred a benefit by the service or improvement to be funded by such charges.

A. The Benefit Requirement

In exchange for the payment of the assessment, the owner of the real property must receive remuneration in the form of a benefit. The benefit conferred must be unique to the owners of the property on which the assessment is made and not shared by the larger community. Additionally, the assessment shall not exceed the value of the benefit conferred. A special assessment for a benefit shared by the community at large or substantially exceeding the value of the benefit conferred may be viewed as an unconstitutional taking of private property for public use.[30]

Real property is benefitted if it is "capable of receiving the service funded by the special ad valorem levy."[31] The focus of the inquiry is the "innate features and legally permissible uses of the property, not the particularities of its owners or occupants or the state of the property at a fixed point in time."[32] The New York Supreme Court has upheld the assessment of a levy for garbage disposal on the owner of undeveloped and unoccupied land, observing that "the benefit can be potential and even theoretical and yet be sufficiently 'direct' to warrant special district taxation of the properties."[33] Because the development of the land remains possible and future owners of the land would benefit from the garbage disposal services, the court found the land was benefitted and therefore properly subject to the levy.[34] In contrast, where the subject real property was telephone lines, the New York Court of Appeals held that a levy for garbage disposal services was impermissible because the telephone lines "cannot, even theoretically, produce garbage."[35] Owners of real property may claim that the properties are not benefitted where the "inherent characteristics of the subject properties preclude them from receiving such services in a legal or practical sense."[36] In other words, so long as the possibility of the benefit running to the property remains, the land will be deemed to be benefitted. If an improvement increases the market value of the land, the owner of the land may obtain the benefit of such an increase by sale of the property.[37]

B. The Local Requirement

The benefit must be public and local. For example, a water district is a public improvement created for the benefit of the inhabitants of a particular locality. In the State,

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[30] See Norwood v. Baker, 172 U.S. 269 (1898).

[31] Niagara Mohawk Power Corp. v. Town of Tonawanda, 796 N.Y.S.2d 202, 203 (Sup. Ct. 2005) (quoting New York Tel. Co. v. Town of Oyster Bay, 796 N.Y.S.2d 7 (Ct. App. 2005)).

[32] New York Tel. Co., 796 N.Y.S.2d at 10.

[33] Mohawk, 796 N.Y.S.2d at 203.

[34] Id.

[35] New York Tel. Co., 796 N.Y.S.2d at 11.

[36] Mohawk, 796 N.Y.S.2d at 203.

[37] People v. Wildy, 262 N.Y. 109 (Ct. App. 1933).

special assessments have been imposed for drainage and flood control programs, lighting systems, parking facilities, parks, sewer systems and plants, water works, refuse disposal, emergency services, waterfront improvements and installing sidewalks and crosswalks. The costs of such public services are assessed locally on the real property that is benefitted. An assessment is imposed by an assessing unit, which may be a city, town or county with the power to assess real property. While the assessing unit's political boundaries and general taxing powers may exceed the boundaries of the area to be specially assessed, the assessing unit's power to impose a special assessment is limited to those areas that are benefitted. Two or more assessing units, pursuant to State law, may consolidate and form a single assessing unit.[38] Further, a special district may be created under State law to impose special assessments on benefitted property.

C. Limitations with Respect to the Project

In order to successfully create a special assessment district, the border of such district would need to be drawn in such a way to include only areas that can be deemed to be uniquely benefitted by the Project. Any benefit that is shared by both the district to be created and those outside of the district would likely not be a local benefit. The Project facilities will be used by both owners of the property to be assessed and persons who are not owners of the property to be taxed. Therefore, use of the Project facilities (i.e., use of the new Tappan Zee bridge) is not likely to be deemed a unique benefit. It is possible that the new bridge will increase the value of developed and undeveloped privately owned land in the vicinity of the Project. While this increase in value may be deemed a unique benefit, the size of the district to be drawn will be limited to those areas that may experience such an increase.

Because the Project facilities will be located in Westchester and Rockland Counties, the formation of a consolidated assessing unit between these two counties may be possible. The assessing unit created must have jurisdiction over the property on which the improvements will be made. Currently, the Thruway Authority has jurisdiction to operate the Thruway and connecting highways. Therefore, legislation creating shared jurisdiction with the assessing unit or transferring jurisdiction from the Thruway Authority to the assessing unit would be required to successfully implement an assessment program.

V. The Public-Private Partnership Model

A. Public-Private Partnerships

PPPs is the name generally given to infrastructure projects which are funded and/or operated through a contractual agreement between government entities and private sector companies. PPP projects can have a broad application in nature and scope, but have been most prominently utilized as an innovative way to approach the construction, operation and maintenance of major transportation projects. For example, the City of Chicago entered into a long-term lease of the Skyway Bridge and the State of Indiana entered into a lease of the Indiana

[38] N.Y. Gen. Mun. Law §§ 102, 1602.

Toll Road. The continuum of potential PPPs with respect to transportation infrastructure projects is unlimited, but can generally be considered in the context of design-build, operation and maintenance, or some combination of these two features.

Design-build contracting is generally not permitted by the State's procurement laws. In a typical design-build context, a public entity enters into a contract with a private company for design and construction services on a project, or a private company designs, builds and finances a project and transfers title to such project to a public entity. In the operation and maintenance context, a public entity and a private company may enter into a long-term concession agreement, lease or license whereby the private company operates and maintains a project, while legal title to such project remains with the public entity. These agreements are for a fixed period of time and will impose on the private company specific covenants and obligations.

Ultimately, each PPP arrangement can tailor the roles and responsibilities of the partners with respect to each aspect of a project based upon the requirements of that particular project and the strengths and abilities of the partners. The following paragraphs address (i) the general characteristics and benefits of concession agreements, leases and licenses that govern the operation and maintenance of infrastructure projects, and (ii) the applicability of such structures to the Project.

B. Concession Agreements, Leases and Licenses

Generally, public entities can enter into concession agreements, leases and licenses with private entities governing the operation and maintenance of a project in order to take advantage of synergies and enhanced efficiencies, and at the same time, advance the public welfare by harnessing the benefits of private innovation and governmental oversight. Through concession agreements, leases and licenses, responsibility for ongoing activities, ranging from operation and maintenance of facilities to the administration and collection of tolls, can be assigned to a private company. In exchange, the private company would pay the public entity significant concession, lease or license fees.

Concession agreements, leases and licenses provide public entities with a great amount of flexibility to be able to efficiently outsource the construction, financing, operation and maintenance of a project while retaining ownership and an appropriate amount of control over such project. Typical concession agreements, leases and licenses include provisions relating to extensive operation and maintenance standards, dispute resolution procedures and remedies upon default, as well as provisions relating to issues of public concern, such as standards of care, protection of labor, environmental and safety concerns and bidding procedures.

Government entities benefit from these forms of PPPs by being able to delegate certain responsibilities to a private company, which may have an expertise regarding how to creatively, efficiently and cost-effectively design, construct, finance, operate and maintain a project. In addition, government entities can allocate the risks involved in the operation and maintenance of a project directly to the private company. The government entity can potentially receive significant value under the concession agreement, lease or license, while saving, on an annual basis, material sums in operation and maintenance costs. Moreover, revenue generated up front for the sale of concession rights can be applied to other government projects. Concession agreements, leases and licenses may result in a benefit to the customer if new and better operated transportation facilities are completed faster and less expensively and result in a higher quality of customer service. Private companies can bring significant resources and expertise to a project and often have access to financing that will allow projects to be completed on time and on budget. Project costs become the responsibility of the private company, and it is often the private company who is in the best position to absorb these costs and mitigate these risks. Private entities also benefit from a PPP structure, for they are able to participate in projects otherwise unavailable to them. In addition, under long-term concession agreements, leases and licenses, the facility being operated may be considered "owned" by the private operator for federal tax purposes and as such, the asset may be depreciated, creating a significant tax benefit to the private investors who helped finance the project.

C. Legal Limitations of Concession Agreements, Leases and Licenses in Connection with the Project

1. General Resolution Prohibition

Any concession agreement, lease or license in connection with the Project would contemplate, in some form, a transfer of the use of assets comprising the Project from the Thruway Authority to a private entity. The NYSTA General Resolution prohibits the sale or transfer of assets of the Thruway system. Section 607 of the NYSTA General Resolution states that no part of the Thruway system shall be sold, mortgaged, leased or otherwise disposed of or encumbered. Therefore, in order for the Thruway Authority to enter into a concession agreement, lease or license in connection with the Project, the NYSTA General Resolution must be amended. Such an amendment will require defeasance of all of the outstanding General Revenue Bonds or the consent of a majority of the bondholders in accordance with the terms of the NYSTA General Resolution.

2. State Law Prohibition

Even if the outstanding General Revenue Bonds were defeased or the NYSTA General Revenue Resolution was amended by bondholder consent, the Thruway Authority Act, as currently in effect, would prohibit a government entity from entering into a concession agreement, lease or license with respect to the Project. The Thruway Authority Act does not expressly provide for the right of the Thruway Authority to enter into a concession agreement, lease or license for the operation and maintenance of the Tappan Zee Bridge. Consequentially, even if the outstanding General Revenue Bonds were defeased in satisfaction of the NYSTA General Resolution or bondholder consent to amending such resolution was obtained, the Thruway Authority would still be prohibited from entering into a concession agreement, lease or license with a private company for the operation and maintenance of the Tappan Zee Bridge by the terms of the Thruway Authority Act.

D. New Enabling Legislation or Amendment to Existing Law

As described above, even assuming defeasance of the outstanding General Revenue Bonds in satisfaction of the NYSTA General Resolution or obtaining bondholder consent to amending such resolution, the Thruway Authority Act, as currently in effect, would prohibit the Thruway Authority from entering into any concession agreement, lease or license with a private entity for the operation and maintenance of the Tappan Zee Bridge. Therefore, in order to take advantage of the benefits of a PPP structure in connection with the Project, either the Thruway Authority Act would need to be amended to authorize the Thruway Authority to enter into a concession agreement, lease or license with a private entity or new enabling legislation would need to be enacted in New York authorizing PPPs (and such enabling legislation would need to take into account, and operate in conjunction with, the existing Thruway Authority Act).

More than 20 states have enacted laws authorizing various forms of PPPs in an effort to promote innovative and cost-effective approaches to the construction, financing, operation and maintenance of transportation infrastructure projects and services. New York State could either adopt new specific PPP legislation which grants powers to a new government entity, or more likely, amend existing law to expand the authority of the Thruway Authority to enter into some form of PPP structure. In either case, the governmental entity responsible for the project would need the authority to, among other things, acquire and dispose of property, enter into contracts with private companies, transfer the operation and maintenance of assets to private companies, transfer the right to administer and collect tolls to private entities, and delegate to private entities various other rights and responsibilities necessary to operate and maintain the Tappan Zee Bridge.

VI. The Hybrid Model: Hybrid Structures

Hybrid structures encompass a broad spectrum of public/private arrangements for sharing the construction, financing and operational risks of the Project. Those documented as a concession agreement, lease, license, or the like generally fit within the NPC model (discussed above in Section III), but the agreement must be tailored to the particular NPC model to qualify the Project for tax-exempt bond financing or tax-exempt private activity bond financing (e.g., for a 501(c)(3) NPC model, the agreement must be a qualified management contract under Rev. Proc. 97-13). Other types of hybrid structures would involve a sharing of the proprietary (ownership) interest in the Project. These could take the form of a joint venture, partnership, or limited liability company in which the governmental agency or authority has a majority or minority interest.

The Thruway Authority, the NYSBA and the MTA lack the statutory authority to enter into a joint venture or partnership, or to form a limited liability company with a private party involving any portion of their property.[39] Additional State legislation is needed to implement these types of arrangements. Also, the joint venture, partnership or limited liability company would be considered a separate entity for tax-exempt financing purposes,[40] with the result that if the entity owned the Project, the only tax-exempt financing that would be available for such entity would be private activity bonds (see Section X.B below). Even if the entity operated, but did not own, the Project, eligibility for tax-exempt financing could be limited to private activity bonds for the following reason. To qualify for other tax-exempt financing, compliance with the IRS' qualified management contract rules of Rev. Proc. 97-13, as mentioned above, would be necessary, and this may not be possible if the hybrid operator and the governmental party or NPC party to the agreement are related or have overlapping board members.

VII. Additional State Revenue Sources

Additional sources of revenue for the Project may be found through increases to or diversions of funds from tax revenues. Taxation is purely within the purview of the State legislature. However, the State legislature may authorize political subdivisions of the State to impose taxes within the jurisdiction of such subdivisions. Alternatively, the State may create a special taxing district in which a tax is imposed. Any new tax or amendment of a current taxing scheme must be set forth in legislation. This Section surveys the operation of various taxes under current law. The diversion of any of the revenues from these taxes away from the current beneficiaries thereof to the Project will require amendment to the statutes governing such taxes.

A. District Personal Income Tax and District Commuter Tax

Under the current State tax statutes, the State and cities with populations of one million or greater are authorized to impose income taxes on their respective residents. No other political subdivision is authorized to tax the income of its residents.[41] State legislation recognizing or creating a new political subdivision and action by the legislative body of such subdivision would be required to create a new taxing subdivision, such as one that would administer a district personal income tax.

While no "district" income tax is currently imposed in the State, the Metropolitan Commuter Transportation Mobility Tax (the "Commuter Tax") is currently imposed on the payroll expenses of employers and the earnings of self-employment in excess of $10,000 annually with the Metropolitan Commuter Transportation District (the "Commuter District").[42] The Commuter District is defined as The City of New York and the counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester.[43] The sole purpose of the

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[39] See N.Y. Pub. Auth. Law §§ 354, 528, 1265.

[40] There may be an exception which would ignore the entity if its members consist only of a governmental authority and a 501(c)(3) NPC. See Prop. Treas. Reg. §1.141-1(e).

[41] See N.Y. Tax Law § 1303.

[42] N.Y. Tax Law § 801.

[43] N.Y. Pub. Auth. Law § 1262.

Commuter Tax is to provide an additional stable and reliable dedicated funding source for the MTA and its subsidiaries and affiliates "to preserve, operate and improve essential transit and transportation services" in the Commuter District.[44] The funds are deposited with the State in the name of the MTA and expended at the discretion of the MTA.[45]

B. District Sales and Use Taxes

The State imposes a four percent sales tax or compensating use tax on goods and services purchased or used in the State. Under the State tax law, any county or city within the State is authorized to impose sales and use taxes at a statutorily determined rate. Each of these sales and use taxes are governed by statute. A political subdivision, other than a county or city, is not currently authorized to enact a sales and use tax. The creation of a "district" to impose similar taxes will require legislative action.

1. Gas Taxes

The sale of gas is subject to the State sales tax. Additionally, the State imposes an excise tax based on the origin of the fuel and the intended end use.[46] Thirty-seven and one-half percent of the excise tax revenue is appropriated for the construction, maintenance and repair of highways and bridges on the State highway system under the direction of the Commissions of Transportation.[47] The State also taxes the distributors of gas, a portion of the proceeds of which is deposited in the Highway and Bridge Trust Fund.[48]

2. Hotel Occupancy Fees

In addition to sales tax, each occupied hotel room in cities with a population of one million or greater is subject to a Convention Center Hotel Unit Fee in the amount of $1.50 per day.[49] The proceeds of the Convention Center Hotel Unit Fee benefit the Convention Center Development Corporation.[50]

3. Utility, Telecommunication and Mobile Telecommunication Charges

The sale of utilities services, telecommunications equipment and services and mobile telecommunications services are subject to the State sales tax. Moreover, the State imposes an additional sales tax on the receipts of utilities providers doing business in the

[44] N.Y. Tax Law § 801.

[45] Id. § 801; N.Y. Pub. Auth. Law § 1262.

[46] N.Y. Tax Law § 284 et seq.

[47] Id. § 289-e.

[48] Id. §§ 284, 312.

[49] Id. §1104.

[50] Id. §§ 1104; 1105(e).

Commuter District. Telecommunications providers are also required to pay an additional excise tax related to the provision of services within the Commuter District.[51]

4. Motor Vehicle Taxes/Fees

The State currently imposes a special tax on passenger car rentals (the "rental tax") in the amount of six percent of the receipts from rentals.[52] In addition the rental tax, car rentals in the Commuter District are subject to a five percent special supplemental tax on passenger car rentals (the "supplemental rental tax").[53]

All taxes, interest and penalties collected on car rentals from the rental tax are deposited in the Dedicated Highway and Bridge Trust Fund.[54] The Dedicated Highway and Bridge Trust Fund is divided into two accounts: (i) the Special Obligation Reserve and Payment Account (the "Payment Account"); and (ii) the Highway and Bridge Capital Account (the "Capital Account").[55] All funds collected from the rental tax are first deposited into the Payment Account.[56] Funds from this account are used to make payments pursuant to a cooperative agreement between the Thruway Authority and the NYSDOT.[57] Any excess funds are then deposited in the Capital Account and may be used for general purposes including building and repairing roads, highways, parkways and bridges.[58]

All taxes, interest, and penalties collected on car rentals from the supplemental rental tax are paid to the credit of the MTA Aid Trust Account of the MTA Financial Assistance Fund.[59] This fund is divided into two separate funds: (i) the Mobility Tax Trust Account and (ii) the MTA Trust Account (the "MTA Trust Account").[60] Funds from the supplemental rental tax are directed into the MTA Trust Account.[61] These funds are then quarterly deposited, after appropriation by the legislature, into the account of the MTA Special Assistance Fund to be expended for purposes which include the pledge as security for and the payment of debt service on bonds of the Triborough Bridge and Tunnel Authority.[62]

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[51] Id. § 186-c.
[52] Id. § 1160(a).
[53] Id. § 1166-A.
[54] Id. § 1167.
[55] N.Y. State Fin. Law § 89-b(2).
[56] Id. § 89-b(3)(a).
[57] Id. §89-b(3)(b).
[58] N.Y. Tax Law § 1167; N.Y. State Fin. Law §§ 89-b(2), 89-b(3)(a), 89-b(3)(b), 89-b(3)(c), 89-b(5)(a).
[59] N.Y. Tax Law § 1167.
[60] N.Y. State Fin. Law § 92-FF(4).
[61] Id. § 92-FF(6).
[62] N.Y. Pub. Auth. Law §1270-a.

C. Real Estate Transfer Tax

The State imposes a real estate transfer tax on all transfers of real property in the State. The tax is assessed at a rate of $2.00 for every $500.00 of consideration transferred.[63] The proceeds of the real estate transfer tax are deposited in the State's Environmental Protection Fund and Clean Water/Clean Air Fund.[64] In addition to the State tax, a number of counties and towns have been authorized to establish a similar transfer tax.[65] For example, the State has granted to Erie County the authority to impose an additional realty transfer tax, the proceeds of which are to be distributed to the Niagara Frontier transportation authority pursuant to agreements between Erie County and the Niagara Frontier Transit Metro System.

D. Mortgage Recording Tax

The State imposes multiple levels of mortgage recording tax at a baseline tax rate of $0.50 for every $100.00 of each mortgage registered. The State imposes additional amounts depending on the location of the real property within or without the Commuter District and the amount of debt secured by the mortgage.[66] Further, the State has authorized certain enumerated cities and counties to impose recording taxes.[67]

E. Parking Fees

Parking facilities, including garages and parking lots, are subject to the State sales tax. The State has authorized cities with populations of one million or greater to impose an additional eight percent tax on parking facilities within the jurisdiction of those cities.[68]

F. Tax Increment Financing

Additional revenue for the Project may be available through tax increment financing. New York law currently allows for regional redevelopment through Tax Increment Financing ("TIF"). Pursuant to this method, a municipality sets forth a plan for improvement, which is financed by bonds secured by a stream of revenues created by the increase in real estate taxes spurred by the improvements. A municipality may be a city, village, town or county other than a county located wholly within a city.[69] Two requirements must be met for a project to be TIF eligible: (i) the district to be improved must be "blighted"; and (ii) the improvement must be beyond the capabilities of a private enterprise.

[63] N.Y. Tax Law § 1402(a).

[64] Id. § 1421.

[65] Id. §§ 1424 et seq.

[66] Id. § 253.

[67] Id. art. 253-A.

[68] Id. § 1212-A(a)(1).

[69] N.Y. Gen. Mun. Law § 970-c(e).

TIF is available to "blighted areas that threaten the economic and social well-being of the people of the state."[70] For purposes of the General Municipal Law, a community is blighted if one of the following conditions exist: (i) a predominance of buildings and structures that are deteriorated or unfit or unsafe for use or occupancy; or (ii) a predominance of economically unproductive lands, buildings or structures, the redevelopment of which is needed to prevent further deterioration, which would jeopardize the economic well-being of the people.[71] The municipality setting forth the TIF plan must be able to demonstrate that the area to be improved is blighted.

Moreover, the project to be completed must be one that cannot be accomplished by private enterprise alone. If the redevelopment of blighted areas requires "public participation and assistance in the acquisition of land, in planning and in the financing of land assembly, in the work of clearance, and in the making of improvements necessary therefor, it is in the public interest to employ the power of eminent domain, to advance or expend public funds for these purposes, and to provide a means by which blighted areas may be redeveloped or rehabilitated."[72]

To take advantage of TIF, the blighted area must be within the jurisdiction of the municipality setting forth the plan. The Project contemplates construction and improvement in at least two counties. Current legislation does not provide that municipalities may be joined in the redevelopment endeavor. Moreover, a public authority is not a municipality eligible for TIF under the current statute. If the Thruway Authority or a similar authority would own and operate the new facility, such authority would not be able to take advantage of TIF. New York's TIF statute does not provide for sharing of the tax increment with other taxing entities. Therefore, school district property taxes are not required to be included in the increment calculation, significantly limiting the TIF debt that can be leveraged. These points can be addressed by amendment of the current TIF legislation.

VIII. Design-Build

A. The Benefits of Design-Build Project Delivery

The traditional approach to project delivery ("design-bid-build") contemplates design services provided by a design professional retained by the project owner, and construction work performed by a contractor who is separately retained by the project owner. Design, procurement and construction services proceed sequentially with bids for construction work based upon a completed design. Design-build is an alternative method of project delivery in which the owner contracts directly with a single entity that is responsible for both design and construction. With design-build, the project owner will typically only provide an outline design or performance specifications to the design-builder who is responsible for designing and constructing the project as a package deal. The benefits of design-build project delivery, as

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[70] Id. § 970-b.
[71] Id. § 970-c.
[72] Id. § 970-b.

opposed to traditional design-bid-build, are well known. Proponents of this approach believe design-build results in reduced project duration and cost certainty by: (i) reducing procurement time due to the streamlining of the procurement process; (ii) allowing project "fast tracking" as construction can commence before the design is completed; (iii) fostering teamwork and improving design quality due to the contractor's early involvement with the design and the regular interaction of design and construction expertise; (iv) expanding the use of innovative construction technology and value engineering; and (v) minimizing inefficiencies and reducing conflicts because responsibility for design and construction are vested with a single entity.

While design-build has become a widely accepted method of project delivery, State architecture and engineering licensing requirements, as well as this State's procurement laws, complicate and, in certain cases, effectively prohibit its use in the public sector. This section focuses on the legal hurdles presented by these licensing and procurement laws and sets forth possible solutions.

B. Restrictions on the Use of Public Sector Design-Build

1. Architect/Engineer Licensing Requirements

New York requires all persons practicing architecture and engineering to be licensed by the State.[73] In many instances, New York law restricts the ability of companies performing design services to engage in other lines of business, by for example, prohibiting such companies from rendering design services through unlicensed individuals and precluding certain forms of business entities from engaging in any business other than the rendering of the professional services for which it is incorporated.[74] Although, under most circumstances, design-build would be effectively prohibited by the plain language of New York's licensing requirements and restrictions on the practice of architecture and engineering contained in the Business Corporation Law and Limited Liability Company Law, New York courts have construed these statutes liberally to permit design-build project delivery so long as the design work is performed or directly supervised by a licensed engineer or architect.[75] Therefore, architecture and engineer licensing requirements complicate, but do not prevent, the use of the design-build project delivery.

2. Competitive Bidding Requirements

New York's various public sector procurement laws do not expressly prohibit design-build. However, these laws, with certain exceptions, pose significant obstacles to, and are inconsistent with, design-build project delivery. Generally speaking, New York's procurement

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[73] See N.Y. Educ. Law §§ 7202 (engineering), 7302 (architecture).

[74] See generally N.Y. Bus. Corp. Law art. 15; N.Y. Lim. Liab. Co. Law art. 12.

[75] See, e.g., Charlebois v. J.M. Weller Associates, 535 N.Y.S.2d 356 (1988); SKR Design Group, Inc. v. Yonehama, Inc., 660 N.Y.S.2d 119 (1st Dep't 1997); Tetra Technologies, Inc. v. Harter, 823 F. Supp. 1116 (S.D.N.Y. 1993); Joseph v. David M. Schwarz/Architectural Servs., 957 F. Supp. 1334, 1346 (S.D.N.Y. 1997). See also 8 N.Y.C.R.R. § 29.3(b) (Board of Regents regulation providing that it is not unprofessional conduct for architects and engineers to delegate or accept delegation of design work through unlicensed contractor or subcontractor).

laws require the award of construction work to the lowest responsible bidder based on sealed, competitive bidding procedures. These statutes mandate traditional design-bid-build project delivery and effectively create a barrier to design-build by requiring (i) the separate procurement of design services through negotiation and (ii) the completion of design work prior to the solicitation and ultimate award of bids for construction. In sum, contractors bid for specified construction work based on a completed design.

The NYSDOT and the Thruway Authority must each comply with sealed, competitive bidding procedures when awarding construction contracts.[76] Likewise, the NYSBA is obligated to comply with sealed, competitive bidding requirements "so far as practicable." While NYSBA's failure to comply with such bidding procedures will not invalidate subsequently awarded construction contracts, the letting of such contracts are subject to the NYSDOT commissioner's supervision and approval.[77] A few public entities are permitted to procure construction-related services without employing traditional design-bid-build procedures. For example, the MTA may declare competitive bidding to be "impractical or inappropriate" and proceed to award construction contracts on the basis of "competitive requests for proposals" by "soliciting proposals and awarding a contract on the basis of a formal evaluation of the characteristics [of the proposal], such as quality, cost, delivery schedule and financing of such proposals against stated selection criteria."[78] Furthermore, since the MTA is not required to competitively bid contracts for design services in the first instance,[79] it may utilize "competitive requests for proposals" for the award of design-build contracts.

3. Multiple-Prime Contracting Requirements: The "Wicks Law"

In addition to competitive bidding requirements, the construction of certain buildings by the State and its political subdivisions contemplate multi-prime contracts for plumbing, HVAC and electrical work, rather than an award of a single construction contract to a general contractor.[80] This multiple-prime contracting scheme is colloquially known as the "Wicks Law." Where applicable, the Wicks Law precludes contracting with a sole source for construction work involving buildings. Although the multiple-prime scheme is inconsistent with sole source design-build, the Wicks Law's application to public works projects and public entities is limited. For example, as noted above, the Wicks Law only applies to buildings. In addition, public benefit corporations – such as the Thruway Authority, MTA and Metro-North –

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[76] See N.Y. High. Law § 38 (NYSDOT bidding procedures); N.Y. Pub. Auth. Law §§ 359 (Thruway Authority bidding procedures), 2879 (public authorities required to establish procurement contracting guidelines).

[77] See N.Y. Pub. Auth. Law § 530.

[78] See N.Y. Pub. Auth. Law § 1265-a.

[79] See N.Y. Pub. Auth. Law § 1265-a(2)(a).

[80] See, e.g., N.Y. State Fin. Law § 135; N.Y. Gen. Mun. Law § 101; Plumbing Contractors Assoc. of Erie County v. City of Buffalo, 334 N.Y.S.2d 9, 12-13 (Sup. Ct. 1972) (General Municipal Law § 101 only applies to construction on or immediately adjacent to buildings). Although the Wicks Law is applicable only to construction of buildings, such buildings may be sub-projects to an overall project that is not one primarily for the construction of buildings.

are generally not considered to be the "State" or a political subdivision, and therefore, the Wicks Law does not apply to their projects.[81]

C. Proposed Solutions to Restrictions on the Use of Design-Build

Due to the general applicability of New York's procurement laws, authority to use alternative project delivery methods (such as design-build) on public projects must come from legislative action, whether an existing or new ownership entity is ultimately the contracting party.[82] There are three basic legislative solutions worth exploring: (i) legislation permitting alternative project delivery methods for a discrete project; (ii) legislation permitting alternative project delivery methods for a specified public entity based on discretionary procedures; and (iii) legislation providing a general/blanket exemption from traditional public bidding requirements.[83]

Based on prior legislative grants permitting alternative project delivery methods, any legislative solution should be narrowly tailored and require the public entity to justify its deviation from traditional competitive bidding by satisfaction of an established set of criteria. Moreover, statutory exemptions from New York's procurement laws have historically required the exempt public entity to comply with specified procedures in evaluating prospective vendor proposals and awarding contracts for construction-related services. For example, prior statutory exemptions permitting alternative project delivery solicitation and awards (along with PPPs) have required the public entity to issue requests for proposals based on specified design or conceptual criteria, subject the proposals to external review by another public agency, award contracts based on negotiation and "best value" considerations or similar standard, and/or comply with applicable labor law provisions.[84]

1. Project-Specific Statutory Exemption

Public entities have successfully obtained statutory authorization to employ alternative project delivery methods for specified projects, which authorization expires by its

[81] See Matter of Plumbing, Heating, Piping and Air Conditioning Contractors Assoc., Inc. v. N.Y. State Thruway Auth., 5 N.Y.2d 420, 423-24 (N.Y. 1959) (Thruway Authority not State "board" or "department" subject to State Finance Law § 135); N.Y. Gen. Mun. Law § 100 (defining "political subdivision"). The NYSDOT is a department of the State, and therefore, subject to the Wicks Law as contained in the State Finance Law. See N.Y. State Fin. Law § 135.

[82] The fact that legislation is necessary for most public entities to utilize alternative project delivery methods is demonstrated by the numerous prior attempts by NYSDOT and Thruway Authority to pass such legislation. See, e.g., Assemb. B. 8745, 222d Leg., Reg. Sess. (N.Y. 1999); Assemb. B. 93-A, 224th Leg., Reg. Sess. (N.Y. 2001); Assemb. B. 7000, 226th Leg., Reg. Sess. (N.Y. 2003); Assemb. B. 9559, Part L, 229th Leg., Reg. Sess. (N.Y. 2006) (budget bill).

[83] For all three solutions, proposed legislation should include language stating "notwithstanding any provision of law to the contrary," or a similar statement, which would permit the new statute to govern over traditional bidding requirements contained in any statute that would otherwise be applicable.

[84] See, e.g., 2000 N.Y. Sess. Laws ch. 605 (City of Buffalo educational facilities); 2004 N.Y. Sess. Laws ch. 669 (City of Niagara school building); 1996 N.Y. Sess. Laws ch. 562 (City of Rensselaer school building facility).

own terms when the project is completed.[85] As noted above, these limited statutory grants typically require the public entity to comply with specified procedures in evaluating and awarding the construction-related work.

2. Entity-Specific Statutory Exemption

A second approach is to obtain statutory authority to dispense with traditional competitive bidding when the public entity complies with a specified procedure to procure construction-related services. The most relevant example of this second approach is found in the MTA's bidding statute, which as noted above, authorizes MTA to dispense with the traditional competitive bidding contained in its governing statute and, instead, utilize "competitive requests for proposals" based on a super-majority vote of MTA's members.[86] Proposed legislation along these lines could also explicitly permit design-build (and authorize public-private partnerships), as part of the public entity's discretionary procedures.[87]

3. General Exemption

Finally, alternative project delivery methods could be authorized through a new statutory authorization that provides a blanket exemption from the traditional public bidding requirements contained in New York's procurement laws. Although this solution would provide the owner entity with the maximum amount of flexibility, it also is the least likely based on historical legislative precedent strongly favoring traditional bidding. For either an existing or a newly created public entity, this solution would entail a specific statutory grant exempting the entity itself from complying with traditional bidding procedures either for a specific project or series of projects, or for all projects that the entity may construct.[88]

IX. Federal Stimulus Package

A. Tax Credit Bonds

The American Recovery and Reinvestment Act of 2009 expanded or created the following tax credit bond programs: Qualified School Construction Bonds[89], Qualified Zone

[85] See, e.g., 1972 N.Y. Sess. Laws ch. 40 (construction of sports stadium in Erie County); 1985 N.Y. Sess. Laws ch. 375 (construction of the Albany Civic Center); 1996 N.Y. Sess. Laws ch. 562 (construction of a school building in the City of Niagara Falls).

[86] See supra Section II.B.

[87] An example of this solution is found in the State University Construction Fund's explicit authorization to award contracts for design-build projects upon approval of State University trustees. See N.Y. Educ. Law § 376.11 (design-build authorization expired in June 2003). The trustees' design-build approval was required to specifically set forth financial and other benefits over traditional competitive bidding procedures.

[88] Although it may be possible for a newly created entity to employ alternative project delivery methods pursuant to statutory language that is silent on the ability to use such methods, it is clearly preferable to obtain explicit statutory language exempting the entity from New York's procurement laws. Of course, for existing entities already subject to New York's procurement laws, an explicit statutory exemption would be required in order to employ alternative project delivery methods, such as design-build.

[89] IRC § 54F.

Academy Bonds,[90] New Clean Renewable Energy Bonds,[91] Qualified Energy Conservation Bonds[92] and Build America Bonds.[93] The only one of these tax-credit bond programs relevant to financing the Project are Build America Bonds.

Build America Bonds are taxable governmental bonds that allow the holders of such bonds to claim a tax credit equal to 35% of the amount of each interest on the bonds.[94] The issuer must elect Build America Bonds status for an issue of bonds, which is only available for bonds that would otherwise qualify as tax-exempt bonds that are not private activity bonds. Accordingly, Build America Bonds can be used to finance the Project to the same extent as tax-exempt bonds, except that they are not available for bonds that would be private activity bonds (as described in Section X.B below). However, the federal authorization for the issuance of Build America Bonds expires on December 31, 2011,[95] therefore, unless the program is extended, it is unlikely to be of use for financing the Project.

B. Tax Subsidy Bonds

1. "Direct Pay" Build America Bonds.

An issuer of Build America Bonds may elect to receive the 35% tax credit directly from the IRS, rather than allow the bond holder to claim the tax credit. This "direct pay" option is available only if all of the bonds proceeds (other than amounts used to pay issuance costs and deposited to a debt service reserve fund) are spent on capital expenditures (i.e., none of the proceeds are used for working capital or refunding). Capital expenditures include costs of acquisition. Thus, if in connection with the transfer of Thruway Authority property to a new authority or an NPC, the new entity issues bonds the proceeds of which are used to defease the General Obligation Bonds, the bonds issued by the new entity would qualify as "direct pay" Build America Bonds only if the transaction was structured for tax purposes as an acquisition of the transferred assets and not as a refunding of the General Obligation Bonds. As with tax credit Build America Bonds, "direct pay" Build America Bonds cannot be issued after December 31, 2010. This program will therefore need to be extended to be of benefit to the financing of the Project.

2. Recovery Zone Economic Development Bonds

Recovery Zone Economic Development Bonds are taxable governmental bonds for which the issuer receives from the IRS tax credit payments equal to 45% of each interest payment on the bonds.[96] The proceeds of the bonds must be used for expenditures to promote

[90] IRC § 54E.

[91] IRC § 54C.

[92] IRC § 54D.

[93] IRC § 54AA.

[94] IRC § 54AA(a). The credit is paid to the bond issuer, not the holder in the case of Build America Bonds which finance new capital expenditures. See discussion infra Section IX.B.1.

[95] See IRC § 54AA(d)(1).

[96] IRC § 1400U-2(a).

development or other economic activity in a "recovery zone," including public infrastructure and public facilities. There is a $10 billion nationwide cap on Recovery Zone Economic Development Bonds, of which $22,334,000 has been allocated to Westchester County and $5,715,000 has been allocated to Rockland County.[97] Assuming the Project is located in a "recovery zone" (generally, an area for which a designation by The U.S. Department of Housing and Urban Development as an "empowerment zone" is in effect, or an area designated by Rockland or Westchester County as having significant poverty or unemployment), the Project would need to compete for an allocation of such Counties' bond caps. After December 31, 2010, Recovery Zone Economic Development Bonds cannot be issued.[98] Accordingly, it is unlikely that these bonds will be available to finance a portion of the cost of the Project.

C. Recovery Zone Facility Bonds

See discussion of private activity bonds in Section X.A below.

X. Federal Financing: Leveraging Innovative Financing Tools

Federal assistance for highway infrastructure is primarily distributed through several grant programs, known collectively as the Federal-Aid Highway Program. Mass transit – i.e., movement of multiple passengers through such mechanisms as buses, light rail, subways, etc. – receives some funding under this program. However, there are also multiple grant programs focused strictly on mass transit activities. Considerable funding is distributed through block grants by the Federal Highway Administration ("FHWA") and Federal Transit Administration ("FTA") based upon statutorily established formulas. While such funds must be used in accordance with Federal guidelines, states have considerable discretion for allocating these funds according to their priorities. Our assumption is that regardless of the model selected, Federal formula grant funds will be allocated to support the Project. The models under consideration all can be structured in a manner that would preserve eligibility for receiving such funding.

In addition to formula funds, there are a number of innovative Federal assistance programs that can often be used to facilitate private funding of infrastructure projects. Several of the most significant of these programs are discussed below. Each of such programs (e.g., TIFIA, GARVEE Bonds, FFGAs, each as defined below) is subject to reauthorization and currently under reconsideration by Congress.

A. Tax Exempt Bonds

Tax-exempt bonds can be issued to finance the Project in conjunction with a PPP arrangement for a private sector investment in or a private sector use of the Project, provided the

[97] IRS Notice 2009-50.

[98] IRC § 1400U-2(b)(1).

bonds are "exempt facility" private activity bonds under the IRC.[99] Two types of exempt facility private activity bonds ("PABs") are pertinent: qualified highway or surface freight transfer facilities bonds[100] and recovery zone facility bonds.[101]

1. Qualified Highway or Surface Freight Facilities Bonds ("Qualified H/SF Bonds")

To qualify as Qualified H/SF Bonds, at least 95% of the "net proceeds" (i.e., proceeds net of any proceeds used to pay bond issuance costs or to make a deposit to debt service reserve fund) must be used for one or more of certain qualified purposes, including any surface transportation project which receives Federal assistance under Title 23 (Federal-Aid Highways) of the United States Code.[102] The Project will be eligible for Federal aid in a variety of ways, e.g, either as a replacement toll road bridge[103] or through waivers of Title 23 restrictions pursuant to special FHWA programs. The Federal aid can take the form of grants, or under the Transportation Infrastructure and Innovation Act (discussed in Section X.C below)[104] secured loans, loan guarantees or lines of credit. There is a $15 billion nationwide limit on the amount of Qualified H/SF Bonds that can be issued.[105] Refundings of Qualified H/SF Bonds do not count against this cap if the refunding meets certain requirements. The allocation of the cap is made on a project by project basis by the Secretary of Transportation. As of the end of December 2008, $4.9 billion of this cap has been allocated. An allocation of cap to a project will be treated by the IRS as conclusive that the project is receiving the required Federal aid.[106]

Qualified H/SF Bonds enable tax-exempt financing to be used in a PPP structure where the private entity uses the Project pursuant to a concession agreement, lease, license or other arrangement, but does not claim the tax ownership of the Project. Thus, once the General Revenue Bonds are defeased and the necessary legislative authorizations are obtained, the Thruway Authority, a new authority, a 63-20 NPC or a 57-187 NPC could, for example, finance the Project through the issuance of Qualified H/SF Bonds as senior project revenue bonds together with other subordinate sources of capital (e.g., a TIFIA loan) and it could contract with a private sector participant to share or fully assume the risk of operation of the Project.

Qualified H/SF Bonds can also be used for a PPP concession agreement, lease or license structure where the concessionaire/lessee/licensee assumes all risks of operation for a term sufficient to transfer tax ownership to the private entity (see Section V above). The bonds

[99] If the PPP arrangement is a management contract that meets the requirements of Rev. Proc. 93-17, see discussion supra Section III.C, the private entity's use of the Project will be ignored for tax purposes and tax-exempt financing for the Project would not need to be qualified private activity bonds.

[100] IRC § 142(m).

[101] IRC § 1400U-3.

[102] IRC § 142(m)(1)(A).

[103] See 23 U.S.C. § 129(a)(1)(B).

[104] See 23 U.S.C. §§ 601-608.

[105] IRC § 142(m)(2).

[106] IRS Notice 2006-20.

could be issued as project revenue bonds of the issuer (although not a 63-20 NPC issuer, for the reasons set forth in Section III.A above) as described in the preceding paragraph or as conduit loan bonds where the proceeds are loaned to the private entity. However, as mentioned in Section III.C above, State legislation will be needed to authorize the Thruway Authority or another governmental authority or agency to issue conduit loan bonds for this purpose.[107] Whether the Qualified H/SF Bonds are issued as project revenue bonds or conduit loan bonds, the tax-exempt financing such bonds provide for a portion of the cost of the Project will limit the private entity claiming tax ownership to straight line tax depreciation over an extended period (20 years) for that portion of the cost of the Project.[108]

2. Recovery Zone Facility Bonds

Recovery Zone Facility Bonds are tax-exempt bonds as to which at least 95% of the net proceeds are to be used for property which is eligible for cost recovery deductions, which is originally used by the taxpayer in a recovery zone and substantially all of the use of which is in the active conduct of a business (other than certain prohibited businesses not here relevant) in the recovery zone.[109] If applicable, these tax-exempt bonds could be used to help finance the Project in a format using a PPP arrangement, even in the absence of any Federal assistance under Title 23. However, the Project must be located in a "recovery zone" (see discussion in Section IX.B.2 above), and, because of the cost recovery deduction requirement, the arrangement would need to transfer tax ownership to the private entity. There is a $10 billion nationwide cap on Recovery Zone Facility Bonds, of which $33,501,000 has been allocated to Westchester County and $8,572,000 has been allocated to Rockland County.[110] Recovery Zone Facility Bonds must be issued before January 1, 2011.[111] Unless this authorization is extended by subsequent Federal legislation, it is unlikely that Recovery Zone Facility Bonds will be available to provide financing for the Project.

B. Transportation Infrastructure and Innovation Act ("TIFIA") Credit Assistance

TIFIA established a Federal credit program for eligible transportation projects of national or regional significance under which the U.S. Department of Transportation (the "USDOT") may provide three forms of credit assistance: (i) direct loans, (ii) loan guarantees, and (iii) standby lines of credit. The assistance is intended to leverage federal funds by attracting private capital and other non-federal co-investment in surface transportation projects.

The TIFIA credit programs offer long term (up to 35 years) credit solutions at a favorable fixed-rate based on US Treasury Rates and provide program participants with substantial flexibility with respect to payment terms and program design. TIFIA credit instruments may be subordinate to capital market debt or commercial loans in the priority of

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[107] Alternatively, a 57-187 NPC created by State legislation could issue the conduit loan bonds.

[108] IRC § 168(g).

[109] IRC § 1400U-3(b), (c).

[110] IRS Notice 2009-50.

[111] IRC § 1400U-3(b)(1)(C).

liens on project cash flow. However, in the event of bankruptcy, insolvency or liquidation, the USDOT would have parity with other creditors. In addition, TIFIA credit programs can be used in conjunction with PABs and other federal funding programs.

In order to qualify for a TIFIA credit program, the anticipated costs of a project must exceed $50 million and the TIFIA portion of the overall financing may not exceed 33% of the anticipated eligible project costs. Furthermore, the senior debt obtained to finance the project must receive an investment grade rating from a nationally recognized credit rating agency. The project must also include a dedicated revenue source, such as tolls, special tax districts, state funding or lease revenue, which will be pledged to secure payments due with respect to the senior debt and TIFIA funding. The project must also be included in the state's transportation planning and programming cycle.

C. Tax Exempt Grant Anticipation Revenue Vehicle Bonds ("GARVEE Bonds")

GARVEE Bonds, among other instruments, may be issued to finance the federal share (e.g., 80%) of Federal-aid eligible project costs. GARVEE Bonds typically contemplate the funding of interest, principal, and bond-related costs through future years' anticipated Federal-aid transportation apportionments. GARVEE Bonds may also be "backstopped" with pledges of other types of anticipated revenue. Eligible financing instruments include bonds, notes, certificates, mortgages, leases or other debt financing techniques. Approval requires demonstration that state and local matching requirements will be met. A key advantage is that little Federal administration or oversight is required in connection with GARVEE Bonds. Use of annual Federal funding for debt service will, naturally, reduce the amount of funding available for other projects. However, the state has the option of servicing the debt through other means if deemed advantageous.

GARVEE Bonds must be issued by a state, a political subdivision of a state, or a public authority. These categories include State Infrastructure Banks and qualifying nonprofit corporations (i.e., 63-20 NPCs) as eligible issuers. Use of this financing method has been steadily increasing and an aggregate of over $9 billion in GARVEE Bonds have been issued by more than 20 states. The State of New York, however, has not yet sought to employ this financing method, the implementation of which would require authorization by State legislation and related regulations.

D. Federal Transit Administration Full Funding Grant Agreements

A FTA Full Funding Grant Agreement ("FFGA") is a special type of grant agreement FTA uses for making a major investment in a new fixed guideway system (e.g., rapid rail, light rail, commuter rail, exclusive bus/high occupancy vehicle lanes, or ferry service) or an extension to an existing fixed guideway system. In exchange for FTA's commitment to provide $25 million or more in Federal funds over a multi-year construction schedule, pursuant to the

Title 49 U.S.C. Section 5309 Major Capital Investment Program, the grantee commits to complete its “new starts” project on time, within budget, and in compliance with all applicable Federal requirements, and to bear any cost increases that might occur subsequent to the award and execution of an FFGA.

An FFGA contains a set of standardized contractual terms and conditions applicable to all “new starts” projects, including definitions, obligations of completion and local share, cost eligibility, project management oversight, and labor protection. The attachments to an FFGA are tailored to each specific project. The attachments address the scope of work, project description, baseline cost estimate, baseline construction schedule, prior grants and related documents for the project, schedule of Federal funds, environmental mitigation, studies to measure the project’s success after it has opened to revenue service, and any special conditions applicable to the project. In return for its investment, the FTA maintains significant control and oversight over the progress and administration of the project.

Projects are selected based on statutory criteria. Since obtaining approval to start construction has typically taken several years, if this option is under consideration, the application process should commence expeditiously.

XI. State Financing Options

A. General Obligation Bonds

Article VII, Section 11 of the New York State Constitution and Section 57 of the State Finance Law provide for the issuance of general obligation bonds of the State. All general obligation bonds of the State must be authorized by an act of the State legislature for a single work or purpose. No act authorizing general obligation bonds of the State shall take effect until it has been approved at a general election of the people of the State.

General obligation bonds are backed by the full faith and credit and taxing power of the State and may be sold through competitive bid or negotiated sale. General obligation bonds are payable in equal annual principal installments or annual installments of principal and interest, which result in substantially level or declining debt service payments over the life of the bonds, the first installment of which shall be payable not more than one year from the date of issue. Where bonds are payable via substantially level or declining debt service payments, either (i) the greatest aggregate amount of debt service payable in any fiscal year shall not differ from the lowest aggregate amount of debt service in any other fiscal year by more than five percent or (ii) the aggregate amount of debt in each fiscal year shall be less than the aggregate amount of debt service in the immediately preceding fiscal year.

Given their full faith and credit pledge, general obligation bonds could provide the Project with a cost-effective funding source. However, the referendum requirement and debt structuring restrictions noted above would have to be incorporated into the financing plan for the Project.

B. State Personal Income Tax Bonds

Section 92-z of the State Finance Law (as amended from time to time, the "PIT Act"), provides for the issuance of, and a source of payment for, State Personal Income Tax Revenue Bonds (the "PIT Bonds") by establishing the Revenue Bond Tax Fund (the "Revenue Bond Tax Fund") held separate and apart from all other moneys of the State in the joint custody of the Commissioner of Taxation and Finance and the Comptroller of the State (the "State Comptroller").

The PIT Act authorizes the Thruway Authority, the Dormitory Authority, the New York State Environmental Facilities Corporation, the Housing Finance Agency and the Urban Development Corporation (collectively, the "Authorized Issuers") to issue PIT Bonds for certain authorized purposes (the "Authorized Purposes"). The Thruway Authority has adopted the State Personal Income Tax Revenue Bonds (Transportation) General Bond Resolution (as amended and supplemented to the date hereof, the "NYSTA PIT Resolution") and has executed the Financing Agreement dated as of August 7, 2002 (the "Financing Agreement") by and between the Thruway Authority and Director of the Division of the Budget of the State (the "Director of the Budget") pursuant to the PIT Act.

PIT Bonds issued by the Thruway Authority are secured by a pledge of (i) the payments made pursuant to the Financing Agreement and (ii) certain funds held by the trustee or the Thruway Authority under a NYSTA PIT Resolution and the investment earnings thereon; which together constitute the pledged property under the NYSTA PIT Resolution.

The PIT Act provides that 25% of the receipts from the New York State personal income tax, which excludes refunds owed to taxpayers and deposits to the School Tax Relief Fund (the "New York State Personal Income Tax Receipts"), shall be deposited in the Revenue Bond Tax Fund.

The State Comptroller is required by the PIT Act to deposit in the Revenue Bond Tax Fund all of the receipts collected from payroll withholding taxes (the "Withholding Component") until an amount equal to 25% of the estimated monthly New York State Personal Income Tax Receipts has been deposited into the Revenue Bond Tax Fund (the "Revenue Bond Tax Fund Receipts"). All PIT Bonds are on a parity with each other as to payments from the Revenue Bond Tax Fund, subject to annual appropriation by the State.

Payments pursuant to the Financing Agreement are made from certain personal income taxes imposed by the State on a statewide basis and deposited, as required by the PIT Act, to the Revenue Bond Tax Fund. The Financing Agreement payments are to be paid by the State Comptroller to the trustee on behalf of the Thruway Authority from amounts deposited to the Revenue Bond Tax Fund. Financing Agreement payments are to equal amounts necessary to pay the debt service and other cash requirements on all PIT Bonds. Payments required by the Financing Agreements entered into by the State are executory only to the extent of the revenues available in the Revenue Bond Tax Fund. The obligation of the State to make Financing Agreement payments is subject to the State legislature making annual appropriations for such purpose and such obligation does not constitute or create a debt of the State or a contractual obligation in excess of the amounts appropriated therefor. In addition, the State has no continuing legal or moral obligation to appropriate money for payments due under the Financing Agreement.

The Thruway Authority is authorized to issue PIT Bonds for certain purposes for which "State-supported debt" may be issued. Section 67-a of the State Finance Law defines State-supported debt as any bonds or notes, including bonds or notes issued to fund reserve funds and costs of issuance, issued by the State or a State public corporation for which the State is constitutionally obligated to pay debt service or is contractually obligated to pay debt service subject to an appropriation.[112] The State is contractually obligated to pay debt service on bonds issued pursuant to the Financing Agreement. Pursuant to the Financing Agreement, the State has agreed to pay the debt service on bonds issued by the Thruway Authority and secured by the payments set forth in the Financing Agreement. Such bonds shall be issued to support any Authorized Purposes. Section 67-b(3) limits the issuance of State-supported debt to capital works or purposes.[113] Section 67-a defines capital works or purposes as:

(i) the acquisition, construction, demolition, or replacement of a fixed asset or assets;

(ii) the major repair or renovation of a fixed asset, or assets which materially extends its useful life or materially improves or increases its capacity; or

(iii) the planning or design of the acquisition, construction, demolition, replacement, major repair or renovation of a fixed asset or assets, including the preparation and review of plans and specifications including engineering and other services, field surveys and sub-surface investigations incidental thereto.

The Project will include the construction of new Tappan Zee bridge, the construction of new roads and/or the repair and renovation of new highway connections and the planning and design attendant to such construction and reconstruction, which are included the statutory definition of capital works or purposes. Therefore, the Thruway Authority, with the approval and at the direction of the State's Division of Budget, could issue PIT Bonds to finance the Project.

C. Dedicated Highway and Bridge Trust Fund Bonds

Pursuant to Section 385 of the Public Authorities Law, the Thruway Authority may issue Dedicated Highway and Bridge Trust Fund Bonds (the "Trust Fund Bonds"), which are special obligations of the Thruway Authority secured by a pledge of payment (the "Cooperative Agreement Payment") made pursuant to the Amended and Restated Master Dedicated Highway and Bridge Trust Fund Cooperative Agreement dated as of March 24, 2005 by and between the State and the Thruway Authority (the "Cooperative Agreement"). The Cooperative Agreement Payment is made from funds in the Dedicated Highway and Bridge

[112] N.Y. State Fin. Law § 67-a.
[113] N.Y. State Fin. Law § 67-b(3).

Trust Fund (the "Trust Fund"), held in the joint custody of the Commissioner of Taxation and Finance and the State Comptroller. The source of the Cooperative Agreement Payments is a statutory allocation of all or a portion of the excise and business privilege taxes and fees imposed by the State on petroleum businesses, motor fuel, highway use, motor vehicles, auto rentals, and transmission and transportation corporations, and certain special revenues. Cooperative Agreement Payments derived from funds held in the Trust Fund are subject to appropriation for such purpose by the State legislature. The Trust Fund Bonds are also secured by a pledge of certain funds held by the Trustee under the Second General Highway and Bridge Trust Fund Bond Resolution, adopted February 27, 2003 (as amended and supplemented to the date hereof, the "Trust Fund Resolution") and the investment earnings thereon. Cooperative Agreement Payments derived from funds held in the Trust Fund are subject to appropriation for such purpose by the State legislature.[114]

The Trust Fund Bonds are not a debt of the State and the State is not liable thereon, nor are the Trust Fund Bonds payable out of any funds of the Thruway Authority or any other source but those pledged by the Thruway Authority therefor. The agreement of the State contained in a Cooperative Agreement shall be deemed executory only to the extent of amounts appropriated therefor. No liability on account of any such payment shall be incurred by the State beyond such appropriations.[115]

The Thruway Authority is authorized to enter into a Cooperative Agreements or agreements with the Commissioner of Transportation for the financing by the Thruway Authority of disbursements made by the State or project sponsor for any of the activities authorized pursuant to the provisions of Section 89-b of the State Finance Law in any case where the expense thereof is paid in whole or in part by the State or project sponsor[116] Pursuant to Section 89-b of the State Finance Law, as described in Section VII.B.4 above, funds in the Trust Fund are to be used to pay debt service on Trust Fund Bonds and for other enumerated purposes including building and repairing roads, highways, parkways and bridges.[117] Therefore, Trust Fund Bonds, with the approval and at the direction of the State's Division of Budget, could be issued by the Thruway Authority to finance the Project.

[114] Id.; N.Y. Pub. Auth. Law § 385.
[115] N.Y. Pub. Auth. Law § 385(6).
[116] N.Y Pub. Auth. Law § 385.
[117] N.Y. Pub. Auth. Law § 89-B.