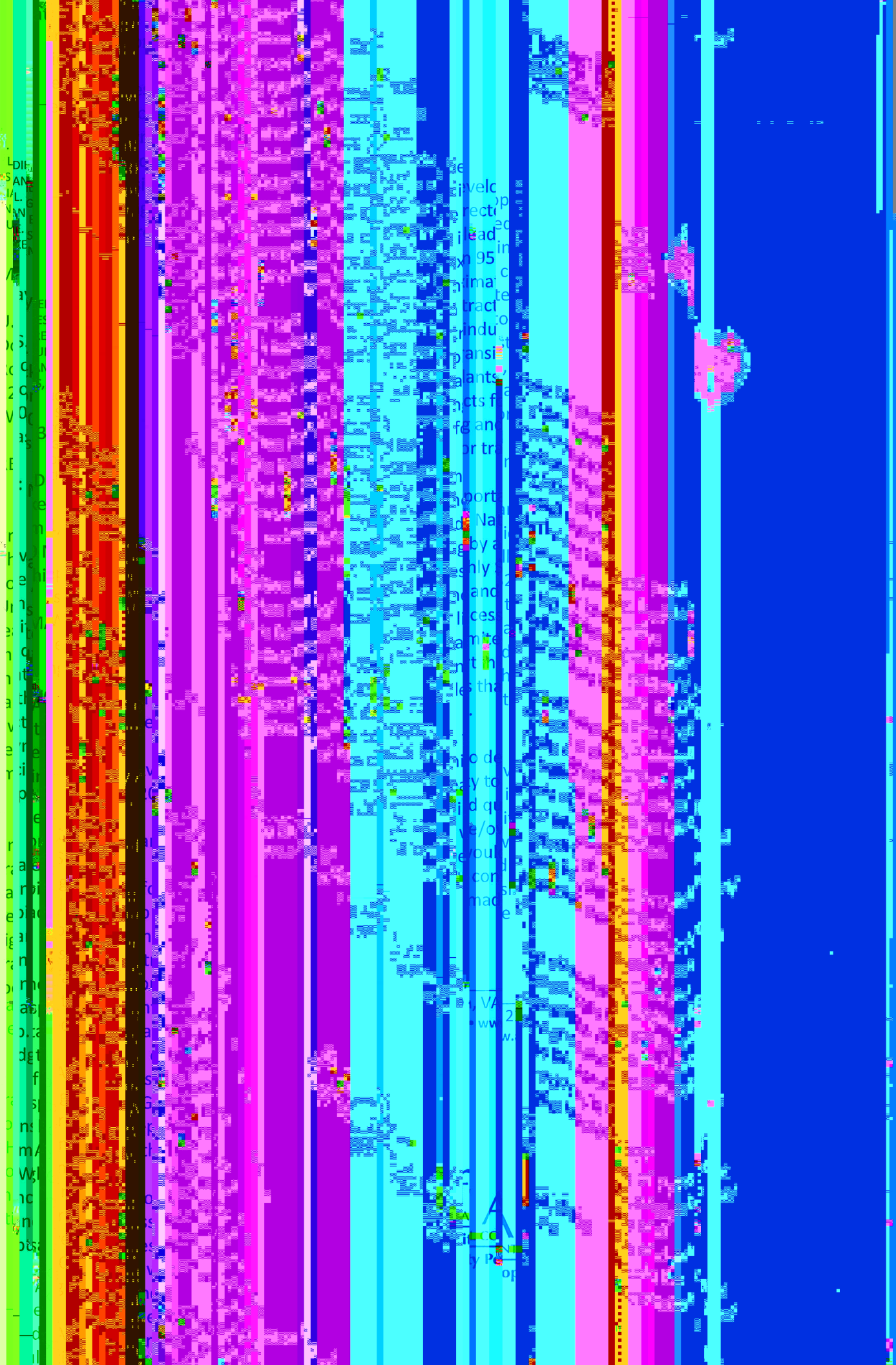


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ultimate objective would be for the model documents, over time, to promote consistency and efficiency in contract drafting for these projects just by their gradual adoption. The model language would become the "reference" or "marker" for project documents, providing industry participants with suggested risk allocation that can be adapted to meet project-specific issues and challenges. These model documents would provide the reference against which all PPP documents are compared to identify differences and force a discussion concerning why any change from the model language is necessary or appropriate.

Concessionaire/Owner Agreement

AGC has long advocated the use of standard construction contracts, outside of the PPP context, in an attempt to efficiently and equitably allocate risks and so that industry stakeholders can save considerable transaction costs (such as legal fees to draft a contract from scratch and negotiate a unique contract for each project). The goal in standard contracts is to provide predictability and minimize adding costs to the construction process to provide for known risk contingencies. By using an industry-accepted foundation, parties no longer need to go through a painstaking negotiation process for each transaction risk. This is the objective behind developing the model PPP documents.

Other countries with far more experience than the United States in providing infrastructure through PPP arrangements have developed standard terms and conditions for concession agreements. The most successful PPP markets – Canada, UK and Australia – all have standardized documents. These standard documents are both a starting point and a benchmark for projects. In addition, these standard documents are updated periodically to reflect market changes. AGC believes that developing a model concessionaire/owner agreement would serve a similar function in reducing conflict, controlling costs and achieving consistency. Of course the US provides a far more challenging situation because of the fifty states with their own laws and requirements and because of the state/federal relationship. This is exactly why having a federal model to use as a starting point would be beneficial. While recognizing that each PPP transaction will be unique, nevertheless, having model documents for the concession/owner agreement and concessionaire design-build agreement would provide the parties, as well as their legal and insurance advisers, a well-reasoned starting point for further discussions.

AGC contractors that have experience working in PPP arrangements have suggested that documents developed by Infrastructure Ontario (IO) should be considered as precedents for the creation of standard PPP transaction model contracts. IO is a government agency in Ontario, Canada established to focus on modernizing and financing the renewal of public infrastructure, maximizing the value of public real estate and managing government facilities. IO provides project delivery, lending, real estate management and asset planning expertise to the various government departments, agencies and municipalities within the province. IO has

established a structured process for the procurement of PPPs. To do this it developed a standard set of documents that include the bidding procedures and contract clauses. It procured the process defines how qualifications and proposals will be evaluated. This has created a consistent process so that all involved parties including lenders, concessionaires and contractors know what to expect - and, most importantly, which risk allocation to expect - when getting involved in an IO sponsored PPP project.

AGC believes these documents would be a good precedent for FHWA to use in developing its own model documents. AGC is working to "Americanize" the concessionaire/owner agreement to make it more compatible with US law and practice and will submit it soon for FHWA consideration as a good example of what could be included in concessionaire/owner agreements.

In addition, AGC believes it would be beneficial for FHWA to hear from the industry why the proposed model document would be beneficial to the future use of PPPs to support transportation infrastructure investment. AGC would welcome a meeting to walk you through the document's content with an explanation as to why the proposed language is suggested.

Concessionaire/Design-Build Agreement

While the concessionaire/design-build agreement is largely a private transaction it will nevertheless have an impact on overall project cost. It is therefore important for project owners and concessionaires to understand that sound principles of risk allocation do not change when a project is financed or procured in a non-traditional method. It is the owner's responsibility to assign risk, but the owner must understand that it will pay a higher price when risk items are assigned to a party that lacks the resources, expertise, relationship and authority necessary to manage them. Contractors do not merely accept risk, but instead price it according to their past experience and expertise. Assigning risk to a contractor that is out of their control will inflate the cost of the project.

A guide published by FHWA, *Risk Assessment and Allocation for Highway Construction Management*, makes this point very well:

[F]our fundamental tenets of sound risk allocation should always be followed:

1. Allocate risk to the party best able to manage them.
2. Allocate the risk in alignment with project goals.
3. Share risk when appropriate to accomplish project goals.
4. Ultimately seek to allocate risks to promote alignment with customer-oriented performance goals.

DOTs have learned through experience with the ongoing construction programs that appropriate risk allocation leads to better projects. The same principles apply to all projects,

including PPPs. However, the PPP arrangement will force a change in the risk allocation model compared to other arrangements. Many risks that are typically held by the public entity in a traditional design-bid-build contract will likely, by the nature of the PPP arrangement, be transferred to the private sector or the public sector at managing these risks. AGC believes that FHWA can play an important role in 1) educating project owners concerning the use of a PPP arrangement about the costs associated with inappropriate risk allocation, and 2) developing model concessionaire/design builder agreements.

An example of the list of issues that should be addressed in the concessionaire/design builder agreement (and also in the concessionaire/owner agreement) include the following:

- Right-of-Way Acquisition
- Permits
- Environmental reviews
- Disturbing Site Conditions
- Utility Relocation
- Indemnification
- Licensed Damages
- Express or Implied Warranties
- Reliance on Owner-Provided Information Change Orders/Interim Directed Change
- Force majeure
- Traditional but heightened contractor risk (e.g., warranty and "fitness for purpose standard")
- Extended duration of contractual warranty/liability exposure period
- Timing disconnects between additional work performed and payment for equitable adjustment when they may have to wait for the operations (revenue) period
- Disclaimer of design information and reference documents
- Flood-down provisions
- Risk from construction defects

This list is not exhaustive but it does include many of the typical risk issues that can and do lead to increased construction costs because of uncertainties and contingencies. It is important for public transportation agencies to understand that in some instances, even in the PPP arrangement they still may be in the best position to address and manage these risks.

AGC also suggests that FHWA develop a risk matrix that identifies the various risks that suggests how they are most appropriately allocated. The matrix could be used by the owner and PPP concessionaire to thoroughly identify, assess, and analyze project risk in a transparent

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