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Public-Private Partnerships: The Only Road to Trump's Infrastructure Plan?

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The basic outline for President Trump's infrastructure plan was laid out in February, and this is its essence — $200 billion in federal funding will spur more than $1.5 trillion in infrastructure improvements. Direct federal funding is limited to approximately 20 percent of individual project costs, which represents a significant decrease from current levels, and leaves it to state and local governments to find additional resources to fill the void. While many are still trying to figure out how to fully account for that $1.3 trillion gap, let alone the $200 billion in federal funding, it is clear that the Administration's proposed plan relies heavily on the attraction of private investment and finding ways for public assets to generate revenue to pay for themselves.

Public-private partnerships (also known as PPPs or P3s) have been used in other countries across the globe for many years as a vehicle for private financing of public infrastructure projects. But for a variety of political reasons, this type of funding mechanism has been used infrequently in the United States. According to the Congressional Budget Office, even on toll roads where they're most frequently used, P3s have accounted for just 1 percent of all spending between 1989 and 2011[1]. With state and local governments facing their own budgetary crunches, and the planned decrease in direct federal funding, P3s will likely receive increased attention as a mechanism to finance the construction and operation of public infrastructure.

Though there haven't been too many P3 infrastructure projects completed in the United States compared to other countries, there have been a few notable successes. Long Beach, **California's George Deukmejian Courthouse,** and express lanes on **I-595 in Florida** and **I-495 in Virginia** have worked out well for both the public and private entities. On the reverse side, **California's State Route 91** in Orange County is one of the most well-known examples of a P3 gone wrong. Certainly, there are a number of factors that determine a project's eventual success or failure, but understanding the challenges and risks will allow companies to determine which projects to pursue.

[1]https://www.cbo.gov/publication/42685

In anticipation of the increased use of the P3 project delivery model for public infrastructure projects, here are just some of the business and legal issues companies in the construction industry need to consider before deciding to pursue a given project.

What's Involved in Pursuing a P3 Project?

Unlike traditional construction projects where timetables, owners, and budget sources are clearly defined, P3s are a completely different story. These types of projects can take years and millions of dollars just to structure a project team and prepare a proposal. The organization and structure of the P3 team is of critical importance to the project's success, and the teaming and pursuit agreements can be nearly as important as the project contracts. Here are just a few questions to ask:

- How should the team be organized? As a joint venture or as an LLC?
- How will decisions be made regarding the bid preparation? How about during construction?
- What is the relationship between the financing entity and the design-build entity? What is the relationship between the design-build entity and the operation and maintenance entity?
- Will the various participants joint venture or subcontract with each other?

Answers to these questions are critical to the effective and equitable allocation and management of financial and performance risk and, ultimately, the financial viability of not just the overall project, but each individual participant's piece as well.

What Role Can I Play?

Due to the sheer cost of infrastructure projects to date, only the very largest of companies, often in partnership with other companies and financial investors, have been able to access financing necessary to fund a P3 project. This does not mean, however, that there is no role for local and regional contractors and engineering companies. The size and complexity of the projects, which often include operation and maintenance beyond completion of construction, require teams of engineering, construction, suppliers, and operation and maintenance (O&M) companies. The largest EPC and construction management firms will take the largest equity stakes, but there will be opportunities for regional and local companies to participate on both an equity and traditional subcontractor basis, particularly if P3s are used by local governments for smaller-scale projects. These projects are typically awarded on a competitive, best-value award basis after extensive technical and cost proposals. While first and second tier contractors may have to choose a team to align with, lower tier contractors and consultants will likely be able to submit proposals to several or all of the teams. Price will, of course, be an issue, but technical expertise, creativity, efficiency, and reliability will be equally, or more, important.

How Much Financial and Performance Risk Am I Willing to Take?

Unlike traditionally funded public projects, the P3 team may be required to bear the risk of financial performance of the project, in addition to the typical risks of construction budget and schedule. Private toll roads and other projects that count on the asset to generate revenue to pay back the private investment carry significant investment risk. Moreover, that risk is not limited to the equity participants, as sophisticated P3 participants typically look to spread their risk as much as possible. Thus, the design, construction, operation, and maintenance subcontracts often contain aggressive risk shifting provisions such as pay-if-paid and pass-through liquidating clauses. These limit lower-tier participants to payment if, when, and to the extent the equity participants receive payment from the public entity.