

Public-Private Partnerships: Tips for In-House Counsel

June 24, 2015

By: Jennifer Bales Drake

Public-private partnerships (P3s) have been gaining increased favor in the U.S. as a way for the public sector to harness the expertise and efficiencies of the private sector in meeting the infrastructure and social needs of local and state governments. Although P3s have been used for many years for the building of “toll” roads and bridges, they are now gaining popularity for building and repairing a wide array of infrastructures including: water systems; sewer systems; buses running on natural gas, light rail systems, and other transportation; courthouses; jails; affordable living accommodations, mixed use development of retail and housing on government-owned land, dormitories and housing for universities. P3s have been successfully used in Canada and Europe to build all of the above and more, including hospitals, for many years.

Although there is promise for this type of P3 use in the U.S., there are still many barriers and challenges to overcome. This type of creative financing between entities that do not typically partner (i.e., the public and private sectors) presents unique and challenging issues for in-house counsel trying to protect their companies while not killing the deals. Based on our experience counseling clients in these matters, the following is an overview of issues and considerations that in-house counsel should keep in mind when approaching P3 projects.

Structuring the Projects

One of the biggest challenges facing P3 projects in the U.S. is that no two P3 projects or deals are the same. Experts in the industry often joke that “if you have seen one P3 project, you have seen one P3 project.” Thus, formulaic or cookie-cutter approaches do not work. Although many states have shown interest in developing P3 legislation to help address infrastructure needs, currently there are no federal guidelines and only a small number of state statutes addressing P3 projects. Without such guidance, the learning curve for practitioners is very steep when approaching these opportunities.

Structuring a P3 deal is more complex than traditional projects because of the myriad stakeholders, from various departments and staff members within governmental entities, private developers, architects, engineers and firms providing financing, to attorneys representing many of the parties involved in the P3 projects. In-house counsel can play an integral role in making sure the project has all of the appropriate team members needed to get the project started, and to provide the framework and guidance necessary to keep the project on course and moving forward.

RFPs

The first task to be undertaken in the P3 process is the Requests for Proposals (RFP) and Requests for Information issued by the public entities. These set forth the terms and standards of the projects they want to have developed. RFPs and similar processes are the selection tools that public entities use to determine which entities or teams will be awarded the projects. While the responses to these solicitations are typically demanding and voluminous, they are especially daunting in the P3 process due to the “partnership” aspects of the proposed projects. The in-house counsel for the private entity team plays an important role in navigating this selection process.

It is very important to flesh out the key issues to be addressed or that will be faced if your company is awarded the project. Be sure to check local ordinances or other governing authorities to determine if you can have direct conversations with the public entity prior to submitting your RFP. If you do have the opportunity to interact with the public entity, frame the questions in a way that will enable you to use the answers to your benefit in completing the solicitation process.

Additionally, there will be times when the public entity may issue an RFP that cannot be reasonably or realistically built or developed in the manner requested. In those situations, you can provide a “non-conforming” bid and proposal reflecting an alternative method to develop and complete the project in a more market-based manner. Be mindful that you do not submit a “non-conforming” bid when a project can be successfully completed as requested by the public sector.

Navigating the selection progress in a concise and organized manner is very important because the private sector team will spend significant money and time answering an RFP for a P3 project. The end product of the RFP process will determine whether your team is awarded the project.

Focus Your Team

If your team is awarded the project, it is very important that you use your skills to focus your team on the critical issues at hand. This can be accomplished by looking at the economic drivers verses the non-economic drivers; fostering excellent communication from the beginning; assisting the development team in

cultivating a true sense of partnership; reviewing and relying on the project term sheets so that people do not go off in unneeded directions; creating detailed checklists and issue lists; and creating a detailed timeline that is understood and agreed upon by all parties.

As with most large projects, it is important to create smaller working groups within the larger internal team so that certain teams can move their particular aspects of the deal forward. This will avoid “large-group” inertia so that as each smaller group focuses on and undertakes its responsibilities, all aspects of the project can be readily moved forward.

In a P3, unlike a traditional development, non-economic drivers can motivate the public entity to put out a request to develop a project. In a regular private-

sector project, the economic drivers usually are 90% of the motivation and main reason for undertaking and completing a project. But in a P3, 40% to 60% of the public sector’s reasons for creating and completing the project can be driven by non-economic factors such as political landscape, land use restrictions and community support. This can be a difficult concept for the private side of a P3 team to understand and work with.

Set a Timeline

A valuable way to help the public and private sides of the partnership understand the varying and competing motivations and pressures on each side is a well-developed, realistic timeline that both sides fully understand and agree on. The public sector works on long-term timelines because many of their goals and benchmarks to be achieved are based on long-term commitments, whereas in the private sector, time is money and the commitments are short-term. Creating a timeline also helps you better focus on and consider the big picture and not just the entity’s efficiency and profitability needs. The parties will more readily understand the needs and pressures placed on the public sector.

Just as the pressure to make money quickly is on the private sector, the public sector has its own needs and varying pressures, such as public scrutiny, public pressure and election cycles. With all the complexities of a P3, it is very critical to manage both public and private expectations and details and not get swallowed up by them. Creating a realistic timeline that both the public and private parties buy into and adopt can be critical to a successful and profitable P3.

Know the Local Statutes

Although there are currently few formalized state P3 statutes, P3s are statutory animals by the very nature of the structure. Depending on your state, if there is not a specific statute, P3s are generally governed by local laws and ordinances or charters. From the private side, it is important for in-house counsel to master all statutory requirements that are core to the project. As an attorney, you must

make sure the project is structured to meet all statutory requirements governing it. Many times, there are also governmental incentives that can be applied for and/or used in conjunction with certain P3 projects. It is important to research those possibilities and then structure your deal to not only meet the statutory requirements of the various P3 statutes, or local ordinances, as applicable, but to also make sure the project qualifies for any available governmental incentives. This can play a large role in the financing of the project.

Manage the Politics

As the in-house counsel, you can also play an important role in helping the team to manage the politics of the project. As stated previously, non-economic drivers in a project often are key to the public sector, and the economic drivers are key to the private sector. Do not assume that because the public entity produced its RFP and your company was awarded the project that your interests totally align. Many times the public sector will focus so heavily on the non-economic drivers that it can potentially make the project not viable in the marketplace. This is where good listening, communication, flexibility and creativity become extremely important and where your legal skills add real value.

Communicate

As a private entity working on a project with multiple stakeholders, good communication is critical. It is important to flesh out key issues and address them as a team early in the P3 process. When entering into a public private partnership, the parties may find it difficult to collaborate and understand each other's goals and methods or why certain economic or non-economic drivers are so important to their partners. Often, these misunderstandings are due to the differing lingo and language among the various disciplines. Terms such as "performance measures, goal measurements," and "government or community relations," and even the nature of the financial funding needs and methods can be interpreted differently, thereby causing a breakdown in communication.

These issues can be overcome by truly listening to all parties, and clearly defining and providing goals, measurements and methods in a manner that all parties clearly understand and agree upon. Be sure that economic consequences are thoroughly discussed and understood and that all parties are focused and understand the financing terms and finance ability of the project.

Manage the Project

In addition to the partnership aspects, it is important to properly manage the operation and challenges of a P3 project. In drafting the legal documents for the project, it is critical to build flexibility into your documents. Do your best, based on "standard" projects you have been involved in, to contemplate and anticipate the likely operational issues at the outset of the documentation and

address methods for handling this in your documents.

You also need to draft your documents to contemplate the procedures to be implemented if portions of the project must be reworked or unwound due to unforeseen circumstances such as a change in the law or change in a portion of the financing structure due to unexpected loss of availability payments or loss in tax credits. If you draft documents that have contemplated these types of issues, the project is in a stronger position to be able to successfully address those changes and find viable alternatives if and when they arise.

Consider the Costs

Last but not least, make sure that the deal documentation fully contemplates everyday operational issues at the outset. Make sure your documents have built-in mechanisms that can be used to change management if needed and can address the standard operational issues that typically arise in any project, so that there will not be a need to complete a lengthy and drawn out amendment of the documentation to address this.

Conclusion

Although P3 projects can be long and unfamiliar processes, if they are properly managed, they can become valuable tools in the U.S. to rebuild decaying and dilapidated infrastructure and accommodate new growth that local governments did not and in most cases still do not have the funds to achieve on their own. They also can be valuable tools for building courthouses, jails, affordable housing, parking garages, dormitories and even hospitals at a profit with private money. The more P3 projects that are undertaken and successfully completed, the more standardization of the process will occur so that each one will no longer represent a unique adventure into the unknown.