

Tight Budgets To Drive Rise In Public-Private Projects

By **Ryan Davis**

Law360, New York (March 23, 2011) -- With local governments in the Midwest and around the U.S. facing tight budgets and pressing infrastructure needs, public-private partnerships for such projects are likely to be more common in the coming years, though such deals may face opposition from a public that is still warming up to the idea of a private role in infrastructure, attorneys said.

Bringing the private sector into infrastructure, a practice that is widespread in other countries but relatively rare in the U.S., has met with political resistance in some areas, but that may be changing, according to John Schmidt, a partner at [Mayer Brown LLP](#) in Chicago.

"I think there has been a gradual spread of awareness of and openness to public-private partnerships," he said.

Schmidt represented the governments of Chicago and Indiana in two high-profile deals in recent years that are frequently cited as examples of successful PPPs: the \$1.8 billion lease of the Chicago Skyway toll road to a private consortium in 2005 and a similar \$3.8 billion deal for the Indiana Toll Road in 2006.

Since public-private partnerships are fairly new to the U.S., there will be a learning curve for state and local governments seeking to follow the lead of those projects, said Jay Lindgren, chair of the infrastructure practice group at [Dorsey & Whitney LLP](#) in Minneapolis.

"For some time to come in the U.S., states will be doing this for the first time, which is where the challenges will arise," he said.

The Appeal of PPPs

Attorneys who work on public-private partnerships are careful to distinguish them from full privatization, where a private entity takes full control of an infrastructure asset. Instead, PPPs are an alternative to the traditional procurement model, where the government puts construction projects out to bid, then manages and maintains the facility once it is complete.

In a PPP the government maintains ownership and contracts with a private company to construct, manage and maintain the facility. Both the government and the private company generally make a financial contribution to the project and share the risk.

Public-private partnerships for infrastructure projects have a definite financial appeal for cash-strapped governments, since they can result in needed improvements at a fraction of what it would cost the government to complete the project on its own. In addition, PPPs can make projects happen far more quickly than if the government had to wait the years it could take to secure funding.

However, since the general public is largely accustomed to governments running roads and bridges, it can be a challenge to generate support for bringing private companies into the equation, attorneys said. Some critics have raised concerns that public-private funding arrangements threaten to take control of the assets away from the public.

Nevertheless, the particularly bruising budget battles a number of states have seen this year could serve to increase the allure of PPPs moving forward, lawyers said. As Schmidt put it, "No government has any money to spend on anything."

Several public-private partnerships that are under way or in the negotiating stages around the country. Schmidt is representing Chicago in a proposed arrangement with a private company to run the city's Midway Airport, while Florida is in the process of a \$1.8 billion rebuilding project for Interstate 595 in partnership with a Spanish company.

In February, Ohio Gov. John Kasich said he planned to find a private company interested in leasing the state's turnpike, and hopes that such a deal could bring in more than \$3 billion.

Not every project is suitable for a public-private partnership, and state and local governments considering PPPs must ensure that what they have in mind is suited to the approach. Partnerships typically don't make sense for smaller projects or those where the plan is not sufficiently well-developed, said Fredric Kessler, a partner at Nossaman LLP in Los Angeles.

"Public-private partnerships are not a complete panacea to the problem of insufficient government funds," he said. "They almost always require some public funds, but they may require much less money than the traditional model if they are structured properly."

Legislative Hurdles

The first obstacle in putting together a public-private partnership is often the fact that state laws need to be changed to make them happen. Many states have laws on the books that only allow governments to be in charge of infrastructure, and in those cases legislation needs to be passed to specifically allow PPPs.

According to the U.S. Department of Transportation, about half of U.S. states have passed such legislation, and bills are currently pending in several other states.

In the 1990s, when legislatures first began introducing PPP laws, many were limited to allowing a specific pilot project. In recent years, however, more states have been introducing and passing bills that give government agencies widespread authority to enter into PPPs, Lindgren said.

"There may be a trend toward broader legislation," he said.

For instance, a Pennsylvania bill that Lindgren said provides sweeping authority for PPPs in the state cleared a key hurdle when it was approved by a subcommittee in early March.

"The fact that infrastructure is so diffuse and localized is the single biggest factor" in putting the deals together, Schmidt said. "You have to work through these issues state by state. The state-by-state battle has been fought successfully, but it takes time."

Political Backlash

Once a state has granted the authority for a project, the projects themselves frequently become controversial, with concerns raised about putting public assets in private hands and the impact on employees and residents.

"Politics always surrounds these projects. I've not been involved in any project without significant opposition," Kessler said.

Kessler worked on a PPP to privately develop and operate the Tacoma Narrows Bridge in Washington, which faced eight lawsuits before it was completed in 2007, and a plan for a monorail in Seattle that was scrapped after voters rejected it.

In a 2009 research paper warning of the risks of PPPs for toll roads, the U.S. Public Interest Research Group argued that such deals should be approached with great caution and warned that short-term benefits are unlikely to outweigh long-term costs.

"By privatizing roadways, officials hand over significant control over regional transportation policy to individuals who are accountable to their shareholders rather than the public," the group said.

Kessler and other PPP attorneys dismiss such fears as overblown. Much of the work lawyers do structuring the deals is intended to ensure that the government retains oversight of the facility and that the private operator is contractually obligated to keep it in a good state of repair, they said.

Despite the claims of some opponents, public-private partnerships are not subject to any less stringent labor or environmental laws than their public counterparts, Kessler said.

"It's a constant battle to address these kinds of issues and educate people," he said. "But some people don't want to be educated."

It's not only the general public that needs to be convinced of the value of a PPP, lawyers said. Opposition can often come from the state agencies that currently manage the facilities, as in Pennsylvania, where a planned lease of the state's turnpike was scuttled amid opposition by the state Turnpike Commission.

Since those agencies "have control over the facilities, they have to be convinced that it makes sense," Schmidt said.

A major part of structuring public-private infrastructure deals is addressing public concerns, Schmidt said. Since any suggestion that the deal is not on the level will generate opposition, "total transparency and complete professionalism are very important," he said.

In addition, he said, leadership and support from political officials is crucial to seeing the deals through.

"These deals are sufficiently complicated and controversial that without strong leadership, they're difficult," he said.

Though opposition to PPPs often takes the form of political campaigning, litigation to stop the projects can also be a risk. But because state legislatures usually pass bills specifically authorizing the projects, it can be difficult for opponents to challenge their legal basis, lawyers said.

A recently dismissed suit by public engineers in California alleged that highway partnership did not comply with the state's PPP law. More often, the suits seeking to stop the projects are brought under environmental laws, said Kessler, who added that "lawsuits go with the territory."

If an influx of PPPs proves to be in the offing for the U.S., it will create an abundance of work for attorneys who structure and advocate for the deals.

"There's no magic bullet" for getting the deals done, Schmidt said. "These are big deals that matter to people because the facilities matter."

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