Association of The Bar of The City of New York

Developing the 21st Century: Land Use, Construction Law and Project Finance in the Built Environment

Legal Reforms Toward a P3 New Infrastructure Financing Regime

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The Legal Problems with P3

- Infrastructure finance is a discreet capital market which relies on tax-exempt municipal securities. The IRC rules required to achieve tax-exempt status preclude the participation of capital from equity and conventional financing. Remember the short-lived Economic Recovery Tax Act of 1981 (ERTA) which permitted tax-exempt finance with developer depreciation? Arbitrage restrictions, limits on use of proceeds, limits on eligible projects discourage P3 infrastructure.

- Stimulus Act tax credit bonds which provided direct pay subsidies from the US Treasury for use in debt service streams has expired.

The Legal Problems with P3 (con't)

- State law inhibits P3 financing structures:

  i. Ownership and control of assets by government.
  ii. Regulation of public services by government.
  iii. Competitive bidding (Wicks Law) without construction finance risk.
  iv. Prohibitions on the sale or hypothecation of public assets.
  v. Limitation of payment for capital solely through taxes at the local level.
  vi. Sovereignty of small units of local government each with separately negotiated labor contracts and powers to defeat annexation.
  vii. Lack of state authority for regional financing on revenue-backed basis without special Legislative approval.
  viii. Failure of attempts toward consolidation and cost sharing among units of government.

Legal Reforms Required for P3 to Provide New Infrastructure Financing

- Amend federal tax laws to permit equity capital to participate, preferably in conjunction with financing by tax-exempt and tax-credit municipal securities – ERTA revisited.

- Create a national infrastructure bank which participates in financing P3 projects but more importantly subsidizes economic outcomes to reduce equity rate of return risk and ensure funding of operations of public services – no earmarking, no federal selection of projects without local, regional or state initiatives.

Legal Reforms Required for P3 to Provide New Infrastructure Financing (con't)

- Amend the State Constitution

  i. Authorize revenue bonds.
  ii. Authorize an effective tax increment financing statute.
  iii. Authorize regional financing entities with revenue raising powers (i.e., utility authorities; transportation districts).
  iv. Permit private sector equity financing and private ownership of infrastructure facilities with limits on rate of return and mandatory government regulation of delivery of services.

Legal Reforms Required for P3 to Provide New Infrastructure Financing (con't)

- Amend state laws:

  i. Enact enabling legislation to implement constitutional amendments.
  ii. Authorize project labor agreements outside collective bargaining.
  iii. Make the application of the Wicks Law elective – see S8331 (alternative project delivery methods).
  iv. Enact a general design-build statute (make the Rensselaer CSD special act a state law).
  v. Authorize the State Comptroller and the NYS Public Authorities Budget Office to monitor and audit P3 projects.

Legal Reforms Required for P3 to Provide New Infrastructure Financing (con't)

- Amend state laws (con't):

  i. Create a state infrastructure bank which participates in financing P3 projects but more importantly subsidizes economic outcomes to reduce equity rate of return risk and ensure funding of operations of public services – no earmarking, requires local, regional or state initiatives – see S8481 (infrastructure development bank).

  ii. Emphasize revenue streams which support P3 debt service derived from consumers rather than tax payers.

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