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Procurement

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Public-Private Partnerships: Process, Procedures and Politics



BY TRACYE WINFREY HOWARD AND TARA L. WARD

Public-private partnerships may soon come to the fore as a common, if not preferred, method of achieving the current administration’s policy and infrastructure goals without breaking the federal budget bank. As many will recall, President Donald Trump

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emphasized the revitalization of public infrastructure as a priority on the campaign trail and has maintained his focus on infrastructure in the first few months of his presidency. To that end, in late February, the White House issued a statement identifying a “desperate need for improvement” to America’s infrastructure, asserting that the “poor condition” of infrastructure costs American households thousands of dollars each year. At the same time, the president asked Congress to approve a \$1 trillion investment in U.S. infrastructure. Some lawmakers have suggested that, in light of the status of the federal budget, the government will likely have to partner with the private sector to achieve the administration’s envisioned level of investment in infrastructure.

It is in this context — namely, the political landscape in which the public sector will likely increase its reliance on nontraditional procurement vehicles and private investment — that we take up a discussion of private-public partnerships: what they are, how they work and recommendations for how to structure such arrangements so as to avoid controversy and provide the most productive performance.

Background

At a high level, a public-private partnership is a contractual or other type of working relationship between a public agency (federal, state or local) and a private-sector entity. At a more granular level, public-private partnerships are rather difficult to define, as there is no single, agreed-upon definition. Indeed, the State Department, Centers for Disease Control and Prevention, Departments of Agriculture, Commerce, Defense, Energy, Transportation, and Treasury, as well as the Environmental Protection Agency, have all employed differing definitions of “public-private partnership.” Common to most definitions, however, are references to some sort of relationship (binding or nonbinding) between public and private-sector entities, where both sectors contribute skills and assets to the project, and both share in the risks and rewards. Public-private partnerships are commonly used to provide services or facilities related to energy; operation and management/maintenance; public safety; public works; real estate and economic development; technology infrastructure; transportation infrastructure; and water/wastewater infrastructure.

Unlike in traditional federal government contracting, a public-private partnership involves considerable investment on the part of the private entity. It is not simply an agreement under which a private entity is paid to provide a particular good or service. Rather, public-private arrangements contemplate a true partnership between the sectors, both in terms of financial investment and the risk borne by both sectors. In that regard, a public-private partnership also goes beyond a mere grantor-grantee relationship. To be sure, federal grant money may be one source of funding for a state public-private partnership project, but the relationship between the public and private entities involves more collaboration than simply the transfer of funds.

Public-private partnerships take many forms depending on the project and the amount of control versus risk the entities are willing to shoulder. For example, a public-private partnership may be structured as a design-build effort, under which the private-sector entity designs and constructs some sort of structure for a fixed fee, and the public agency is responsible for financing, as well as for operation and maintenance. Variations on this type of partnership contemplate the private entity’s taking responsibility not only for the design and build effort, but also for financing, operating and/or maintaining the project. A public-private partnership may also be structured as a concession agreement, in which the public entity sells the right to operate and maintain an existing project to a private party, e.g., a toll road. In exchange, the private entity is entitled to receive payment from the end users of the project — in our example, the toll fees themselves.

An example of a long-standing public-private partnership arrangement may also be instructive. The Military Housing Privatization Initiative (MHPI), which was implemented as part of the National Defense Authorization Act for fiscal 1996, is a public-private program under which private-sector developers may own, operate, maintain, improve and assume responsibility for military family housing, where doing so is economically advantageous and national security is not adversely affected. Under the MHPI program, the Defense Department (DOD) works with the private sector to revitalize and modernize military family housing through direct

loans, loan guarantees, equity investments and other mechanisms.

Identifying and Pursuing Public-Private Partnership Opportunities

Before taking concrete steps to pursue a public-private partnership, a public entity must determine whether it has the legal authority to do so. In some cases, federal public-private partnerships are authorized and funded through specific legislation. One particularly well-known example is the American Recovery and Reinvestment Act of 2009, which, among other things, provided funds for the Department of Education to pursue “partnership[s] with the private sector and the philanthropic community.” At the same time, express statutory authority may not be necessary for a federal agency to enter into all types of public-private partnerships. If, for example, the agency has general authority to undertake a particular activity, it likely has the authority to pursue that activity through a public-private partnership. However, if the activity will require the agency to expend funds — as many public-private partnerships do — those expenditures will have to comply with applicable appropriation laws.

At the state level, public-private partnerships are typically established pursuant to a statute that specifically authorizes such arrangements. As might be expected, enabling legislation varies widely across the states. For example, some states provide broad authority for public entities to enter into and manage public-private partnership agreements, while others limit such arrangements to specific types of projects. Similarly, some state statutes offer flexibility with regard to the terms and conditions that must be included in such arrangements, while others narrowly define the provisions that can and cannot be included.

Assuming a legal framework exists for pursuing this type of arrangement, the public entity must determine whether a particular project would lend itself to a public-private partnership. As part of that analysis, the public entity may want to consider, for example, whether the scope and goals of the project are sufficiently certain. Because public-private partnerships are based on long-term financing projections, plans and risk-sharing, they are not particularly well-suited for projects that feature constantly changing requirements.

Once an agency identifies a project as a good candidate for a public-private partnership arrangement, the next step is to select a specific partner or partners. As part of that effort, an agency may seek industry input regarding how best to structure a partnership before proceeding with the selection process. The agency may issue a request for qualifications seeking a conceptual project plan before selecting qualified bidders, and ultimately invite those bidders to submit a binding proposal in response to a request for proposals (not unlike federal procurements). An agency also may receive an unsolicited proposal or proposals from industry for a particular project. States vary as to whether such submissions are permissible and how best to introduce competition and transparency into the process.

An agency may determine all or the majority of the terms of the public-private partnership agreement prior to the procurement process, or the parties may negotiate the terms and conditions after a potential or likely partner has been selected. In nailing down the terms and conditions of the agreement, the partners will want

to address more than just expectations regarding the nature and quality of the deliverable itself. The parties will likely want to identify the specific allocation of responsibilities and risk between the public and private sectors, as well as more specific parameters of performance. For example, the agreement may spell out the expected time frame in which the private party will meet any performance milestones; the consequences if it fails to meet those milestones; the process for the private party to communicate about and seek remedies for changed conditions; similar objective measures of the public entity's commitments; and remedies for the public entity's failure to perform in accordance with its obligations.

Challenges and Avoiding Pitfalls

Public-private partnerships are not universally viewed as the be-all, end-all solution to funding and delivering facilities and services, however. Some have suggested that public-private partnerships are more expensive in the long run, and less effective because the private entity's profit motives may be at odds with the public purpose and goals for the project. Typically, the partnership agreement will include language that attempts to combat such concerns, e.g., by spelling out the risks, rewards and payment structure in as transparent a fashion as possible.

In addition, there are several steps private entities can take to bolster the likelihood of a successful public-private partnership arrangement:

1. As a threshold matter, it is important to know the rules governing the public-private partnership marketplace, including the statutory foundation for the partnership. The legal underpinning for these partnerships often delineates the process for submitting competitive proposals and unsolicited proposals. It is critical to understand exactly what those processes are.

2. To prevent misperceptions about the propriety of the partnership, it is helpful for public entities to have a

well-defined statement of the reasons for pursuing a public-private partnership rather than a more traditional procurement vehicle. Without such a well-defined rationale, private-sector entities may want to consider whether they risk becoming collateral damage in future disputes between different public-sector entities that may disagree on the purpose or desirability of the project. Private-sector entities may wish to employ well-informed and recognized individuals as spokespeople and advocates for the use of public-private partnerships generally, as well as for the specific project at issue.

3. Perhaps the most important recommendation for both parties is to choose a partner carefully, as maintaining a long-term relationship between partners is key to a successful partnership. Private-sector entities also should carefully consider whether the project is right for the entity, and vice versa. The private entity's experience and financial capacity will be important factors in its determination of whether it can and should pursue the effort. The source, extent and expected duration of the public entity's funding stream will similarly be important for the private entity to consider when assessing the risks associated with a particular project.

4. The parties should engage in thorough negotiations to arrive at clearly defined terms and conditions. Indeed, the agreement should include a detailed description of the responsibilities, funding mechanism, risks and benefits borne by both the public and private partners, and dispute resolution process. Poorly defined responsibilities and obligations could result in lengthy and costly litigation if disputes arise later in the project.

5. Private-sector entities should have a dedicated person or team for pursuing and managing public-private partnership projects. Ideally, this person or team would be responsible for responses to requests for qualifications and proposals, as well as for managing or overseeing the project as it gets underway.