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PUBLIC-PRIVATE PARTNERSHIPS: AN ALTERNATIVE TO TAX-FUNDED INFRASTRUCTURE

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By: Dawn M. Meyers and Robert W. Barron

President Biden's proposed Infrastructure Bill comes with a hefty price tag estimated to be approximately $2 trillion. While such legislation has traditionally been paid for with tax hikes and/or the issuance of bonds, Florida is at the forefront of an alternative funding mechanism – public-private partnerships (P3's).

Florida Statute 255.065 sets forth Florida's P3 framework. Considered perhaps the most advanced and developed P3 structure, many states look to Florida as the standard-bearer when it comes to implementing P3 projects. Now Florida's P3 structure could guide the federal government in its plan to fund the President's Infrastructure Bill.

Under Florida's framework, government agencies shift some control and ownership to private companies in exchange for significant amounts of capital from the private sector to pay for needed public projects. Florida provides for government agencies to competitively solicit for such projects or for private entities to submit unsolicited proposals to government agencies for such projects. However the project originates, though, the government agency and the private entity ultimately enter into a comprehensive agreement whereby the private entity provides the capital or financing for a project that serves a public purpose, as well as the design, building, upgrading, operating, and/or ownership of the project. Typically, the private entity owns the project for some period of time and returns ownership to the government agency at an appointed time. Sometimes the government entity provides the private entity with a long-term ground lease of public property upon which the project is to be constructed and/or operated. Often there is a revenue split among the government agency and private entity, for example, from parking fees in the case of a parking garage or rents and revenues from retail operations. The Florida Statute provides guidance and minimum requirements but specifically states that it is to be "liberally construed to effectuate the purposes" of the Statute. In other words, government agencies and private entities can be creative so long as the project serves a public need or creates a public benefit.

Structuring a P3 raises legal and business issues which differ from the traditional business-to-business transaction model. For instance, we represented a private company that entered into a long-term ground lease with a state-owned university to construct and lease a building on state-owned land and license a dormitory and parking facilities on state-owned land for use in connection with the leased building. When dealing with an agency of the state, traditional indemnification covenants and damage remedies may not be available to the non-state party because of sovereign immunity issues, legislative funding constraints, and state contracting policies regarding such matters. Accordingly, creativity and flexibility need to be employed to address, as much as possible, the legal and business issues which governmental limitations may limit in a manner that is acceptable to the non-state party. Insurance policies may need to be utilized as a substitute for traditional indemnification covenants. The remedies available to the non-state party will need to be carefully considered and modified in light of the limitations placed upon available remedies against a state agency. In that transaction, we were able to address these special issues mutually beneficial to both the non-state party and the state, and the transaction has been a success for both parties.

We have previously written about the wide net President Biden has cast in defining "infrastructure" in his Infrastructure Bill. While P3's have traditionally been used for more traditional infrastructure projects such as roads, bridges, airports, ports, and public buildings (all captured within the President's definition), the new broader definition now places projects such as affordable housing, renewable energy, job retraining, and child care under the “infrastructure” umbrella. As a result, far more industries stand to benefit from the President’s Infrastructure Bill. Suppose the federal government follows Florida’s lead in its use of P3’s as a funding mechanism. In that case, private entities can be creative in their identification of projects and the terms under which they are willing to undertake the projects, government agencies stand to see more viable projects, and the public at large stands to benefit from the resulting increased investment in public projects.

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