KILPATRICK TOWNSEND Bilzin Sumberg

8 KEY TAKEAWAYS

Public-Private Partnerships: Opportunities & Challenges for the Construction Industry

A group of industry leaders recently came together as a panel to discuss "Public-Private Partnerships: Opportunities & Challenges for the Construction Industry." This event, presented by the Construction Litigation Committee of the ABA Section of Litigation, reviewed public-private partnerships, distinctions between public and private construction projects, risks associated with the procurement process, and common contractual requirements relating to performance bonds, workforce requirements, public record laws, and reporting and audit rights. Panelists included Brian Gaudet, a Kilpatrick Townsend partner in Houston; Felix Rodriguez, a Bilzin Sumberg partner in Miami; Adrian Felix, a Bilzin Sumberg partner in Miami; and Brian Kirby, General Counsel (U.S. and Canada) for Sacyr in Washington, DC.

Key takeaways from the discussion, include:

1 P3's are used as a way to provide private financing sources to public entities, and help get projects accomplished that might not ordinarily be accomplished because they are either too large or economically unattractive without both private and government involvement.

2 Toll road projects are what many people visualize when thinking of a P3 project, but P3's are not limited to toll road projects. You may find other projects with a public purpose being delivered with the P3 model, such as passenger rail, seaport, courthouse, and mixed-use projects.

3 For the private participants, P3 projects are typically more risky, but provide a potentially greater financial upside. The private participants in the P3 typically take on more risk than in other types of public projects (i.e. expect less relief for weather impacts, environmental impacts, etc.).

4 For the public participants, in addition to tapping into different funding, the P3 process may facilitate more innovation and a holistic long term balancing of cost of construction versus cost to maintain over the expected life span of the asset.

5 Expect additional layers and sources of financial security such as irrevocable letters of credit, parent guarantees, payment and performance bonds, and supply bonds. These financial security instruments need to be carefully crafted to be appropriately limited in scope.

6 Due to the length of time to get a proposed P3 from concept to approval, it is important that the private participants understand that there may be limited ability to pass on price increases during this period; therefore, private participants should factor in price increase risk into their financial model.

7 Expect P3 projects to be the source of case law development, including as to whether private entities working at the direction of a public entity enjoy the benefits of the public entities' sovereign immunity. Expect that the nature of a P3 project will add additional layers of complexity to the analysis than that of a public project.

8 P3 projects are unlike other public projects which are either construction projects or design build projects. P3 projects may involve financing, designing, building, and post-construction operation and maintenance. Those roles may be shared between various project participants in different ways depending on the particular set up of the P3 project.

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