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The pitfalls of P3 projects

Daryl-Lynn Carlson, *Financial Post* · Wednesday, Dec. 1, 2010

The success of any publicly-funded construction project is largely due to the lawyers behind the scenes. They are responsible for overseeing all related documentation and the procurement process of private sector developers that will execute the Public-Private Partnership project on time and on budget.

Primarily, they review all the documentation with the goal of identifying risk.

Stephan Scott Trudeau is with the P3 practice group at Davis LLP in Montreal and said there are many things that can go wrong in a P3 project.

“In the development and procurement phase, some of the common risks include public opposition to the project, insufficient competition, vague or inaccurate cash flow projections,” he said. “So that’s where lawyers come into play, to assess and identify risk.”

Then during the design and construction phase, there are a myriad of risks that lawyers have to identify and assess.

“Anything that is vague in a P3 procurement project needs to be flagged,” Mr. Trudeau said. Those typically include quality concerns, construction delays, design changes, bankruptcy and insolvency of any contractors or sub-contractors, along with labor strikes, which lawyers must anticipate and ensure the related documentation allocates the risk to the appropriate parties.

“The key in that phase is to have a rigorous and robust process for dealing with any delays so you need contractual clarity,” he said.

Lawyers are also responsible for finding means to mitigate any related risks they identify such as through insurance. “We have to make sure that all risks are allocated properly so you can have a bankable project and a lender will look at it for financing,” he said.

Davis does P3 work both across Canada and internationally, so currency fluctuations can also be a concern, he said. (The firm is currently facilitating a hospital project for Bermuda.)

Then once all risks have been identified and allocated, there are residual risks that flow to subcontractors. “You have to make sure the contractual obligations flow from one party to another” through all the related documentation, he said.

“As a lawyer, you want to make sure the process is robust, transparent and clear and that the parties know the government is looking for on time and on budget delivery.”

Daniel Ferguson and Brad McLellan are co-chairs of the infrastructure practice group at WeirFoulds LLP in Toronto. They have represented municipalities across Ontario for a diverse range of projects.

They acknowledged there is much public scrutiny over P3 projects, so it’s imperative that all documentation accurately allocates risk.

“We really stress the importance on the public side of early planning so they have a good outline of the project,” Mr. Ferguson said. “The public sector has to be sure that the procurement is done in a defensible, fair and transparent process.”

He said it is imperative to achieve “optimal risk allocation” early on in the process so the private sector parties that may want to bid on the project know what they’re getting into.

Mr. McLellan affirmed that it’s important that the public sector be able to communicate the project and the risks that the private sector is expected to take so the private sector companies will know whether they want to make a bid for the project, or not.

“The documents have to be good documents that lay out the project, the risks and what the parties’ roles and responsibilities are going to be,” he said. “It could be a problem if an RFP (request for proposal) is issued prematurely without those being thought through.

Then, once the project gets underway, “It’s really important that both sides work together and communicate to get the right blend of risk,” Mr. Ferguson said.

“In Ontario there’s been tremendous progress in the past decade both on the public-sector side and the private sector in learning each other’s world, cooperating and working together,” he said.

He noted that on the Infrastructure Ontario web site, there is a section entitled Value for Money and Risk Assessment where anyone can view the criteria that the province sets out for contractors taking on government projects.

However, Mr. McLellan added that there has never been a study on P3 projects to determine which ones were successful and those that weren't.

"We think it would be really helpful if there was an assessment of P3s in North America to see which ones went well and which ones didn't and why," he said.

"Then as we go forward, we could all learn from those that went well or didn't go well and what went wrong, and why."