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THE EXPERTS

PUBLIC-PRIVATE PARTNERSHIP

Getting what you pay for



JAMES WEBB JONES

Financing the needs of an aging population, dealing with national security matters including terrorist threats, fighting two wars simultaneously over 10 years, struggling with the aftermath of serious natural disasters, dealing with short and long term consequences of environmental disasters and carrying the enormous burden of servicing a national debt from mounting federal deficits are some of the significant factors reducing federal funds once available to help local government replace or maintain infrastructure.



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State government also feels the pinch of our financial crisis and is less able to support local government with funding for infrastructure building and maintenance. The reduced amount of state funding available in Virginia by law must be used first for maintenance in the case of highways, bridges and tunnels. As one solution, Public Private Partnerships have emerged as a new mechanism by which some of the most critical infrastructure needs – especially in transportation – can be funded.



DAVID B. OAKLEY

In addition to constructing transportation infrastructure, PPPs include fire protection services, IT services, social services, parks, public safety buildings, libraries, office space, wastewater treatment plants, animal shelters – virtually any service or facility that government provides. Virginia was among the first states to enact modern PPP legislation and Virginia's Public Private Transportation Act is a model.

Local government must approach PPP ventures carefully and cautiously. Some scholars in the field of public policy have argued that PPPs hastily established without good analysis and legal advice sometimes do little to benefit the “public” and do not deserve to be called “partnerships.”

In the case of essential services the government must step back in and take over if a private partner experiences a financial collapse, whether resulting from a poor overall economy or from a poorly planned, financed or managed private partner. PPPs involve risks, and local government needs to evaluate those risks carefully.

Concession agreements and comprehensive

agreements between local government and the private partner should include protection for government to share fairly in the profits over the long term. During the operation of P3 projects after an award, local governments may need to take legal action to terminate or enforce concessions or comprehensive agreements.

Local government officials must keep in mind that any PPP concession involving activities where fees or tolls are charged for extended terms of 40 to 70 years are likely to become a de facto monopoly.

When a private partner has operated a facility for such an extended number of decades experience has shown that seldom can any other entity outbid the original concessionaire at the end of the concession's term. Thus it is very critical that local government have advice from experienced staff or retained counsel when new PPPs are solicited – or in the case of non-solicited projects when the proposal is presented to government by the proposed private partner.

Not only can PPPs be an innovative way for local governments to fund shovel ready, critical projects, they create opportunities for the private sector to create jobs in today's sluggish economy.

In Hampton Roads and throughout VDOT's Southeast Region, the city and county attorneys and their staffs are highly skilled and competent. PPPs, however, present new issues that staff attorneys may not have experienced – and many local governments are now heavily burdened with the need to provide additional services with smaller staffs.

Local and state government generally is losing institutional knowledge on transportation subjects as long term public employees reach retirement age from positions that often are not filled because of the financial crunch nationwide.

PPPs are such a new tool for local government that there is not as much governmental institutional knowledge regarding the subject as will be the case 10 to 12 years from now. Moving forward the challenge for government will be to find ways to bridge all the gaps created by using new innovations for infrastructure in times of reduced funding and shortages of personnel in public service with detailed knowledge and experience with P3 arrangements.

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