



## Urgency To Use P3 Grows, But Lack Of Law Is An Obstacle

Law360, New York (November 21, 2014, 7:36 PM ET) -- The United States' crumbling infrastructure and lack of funds is forcing an increasing number of local governments to turn to public-private partnerships, but many states lack comprehensive legislation for so-called P3 deals, requiring law firms to mobilize practices to help get a project developed.

According to the [U.S. Department of Transportation](#), 17 states lacked any P3 legislation as of February, while the remaining 33 states have a varied patchwork of laws, many of which are only related to certain specific projects.

State governments are monitoring the projects that will be completed in the next two to three years to determine whether to create new or additional P3 regulation and legislation. If municipalities become more confident about partnerships, they may use them for a wider range of projects and will need to employ firms with a wide range of specialties to get the work done.

Still, passing comprehensive P3 legislation is fraught with political challenges from the skeptical public, according to Jim Mulligan, a partner with [Snell & Wilmer LLP](#).

### A Rising Need

Secretary of Transportation Anthony Foxx said in July that the U.S. has 100,000 bridges that are "old enough for Medicare," while President Barack Obama has cited transportation research in saying that one in nine bridges are structurally deficient and 40 percent of major highways are congested. The American Society of Civil Engineers has estimated \$3.6 trillion will need to be spent by 2020 to improve the situation.

At the same time, an energy boom is driving a need for more upgrades and expansions of the nation's grid and midstream network. The [Electric Reliability Council of Texas](#) has said that it will spend \$3.6 billion on 16 transmission improvement projects between now and 2018 to address growing needs on the electric grid that serves most of the state.

And last year, the board of [PJM Interconnection LLC](#) approved \$4.6 billion in

additions and upgrades to the mid-Atlantic power grid, much of which will fund projects to help replace more than 20,000 megawatts of retiring generation. And expanding wind farms in the Midwest require their own lines as well.

But the federal government is in deep debt — the U.S. Highway Trust Fund, for example, is propped up by a \$10.9 billion stopgap measure that will only last through May. And states lack the budgets to provide funding, so as a backlog of infrastructure projects accumulates, states are increasingly forced to look for alternative funding.

“States don't often have wherewithal to improve their own infrastructure alone. In order for states to go out and improve highways, they have to raise the money,” putting the burden on taxpayers, said David Weinstein, a partner at [Archer & Greiner PC](#).

States are looking to P3 projects with more urgency. “The need to improve crumbling roads and bridges and to build new transportation infrastructure to reduce congestion make investment in this area a more pressing and obvious need,” [Squire Sanders](#) attorneys wrote in a recent research report.

### **A Patchwork of Laws**

While P3 projects are looking more attractive to local governments, many jurisdictions have no rules — or very limited ones — to govern their introduction.

The hesitation to adopt stems from public concern that P3s — especially agreements to design, develop, build, operate and maintain projects — are tantamount to private takeovers of public life, according to Mulligan.

Politicians have concerns over P3s after hearing about orphaned projects both in the U.S. and overseas, and states with heavy union presence have lobbied against P3s.

Additionally, most projects require more funds to be sustained, leading states to give out unpopular availability payments for benchmarks, according to experts.

“The public sector didn't know enough about it,” Mulligan said. “The states were afraid of getting taken to the cleaners.”

Thirty-three states have passed a variety of P3 laws, but many are only related to specific projects. For example, Alaska only tackled P3s to rebuild a single bridge, while Nevada's P3 bidding excludes toll roads and bridges. Maryland didn't have a statute until 2013, but regulations established a P3 program for nonhighway projects, which state laws had implicitly acknowledged.

Meanwhile, a method of using partnerships through an agency with a broad mandate is sometimes used in states without legislation. New York is one of the 17 states without P3 laws, but the [Port Authority of New York](#) and New Jersey has powers that allow it to engage in P3-like deals.

California, Florida and Texas are among the states with more comprehensive laws for entering into partnerships with private entities. Richard Miller, a partner with [Edwards Wildman Palmer LLP](#), said that the amount of projects under consideration in Florida is greater with the legislation, but the number accomplished to date doesn't appear "appreciably different."

"It seems that developers may have an easier time getting a hearing from officials on P3 concepts with the legislation in place, and may be more inclined to try," Miller said.

### **A Number of Risks**

Of course, different municipalities have different rules, and experience in one jurisdiction doesn't always carry over into a different one, according to [Winston & Strawn LLP](#) partners William Dudine and James Normile. Each project will have a unique set of hurdles to overcome.

Many potential pitfalls need to be considered when planning environmental reviews, siting, permitting, procurement and construction for a project.

Waning political or public appetite for the project may be an issue. Long-lived projects can last through several administrations, including some that might not support them. And a project's environmental or zoning footprint can make or break it in the eyes of the public.

Stranger problems may also crop up. A scandal arose around railway company Keolis, a joint venture partner for Maryland's proposed 16-mile Purple Line light rail, when it ran up against a state law requiring disclosure of ties to the Holocaust. Historians say that Keolis' parent, Societe Nationale des Chemins de fer Francais, transported 76,000 prisoners to concentration camps.

Even after completion, operating revenues often can't cover costs. Projects may need availability payments or permits from municipalities, as tolls alone can't make roads profitable, while airports and entertainment centers may require additional retail and real estate investment on-site to make money.

Attorneys say that even a moribund project can be kept alive by volleying it between the entities involved. However, companies who drop the ball often have

to pay stiff penalties. And the same issue that drives municipalities toward P3s also adds another layer of risk: Local coffers don't always have the necessary credit.

In September, the operator of the \$3.8 billion Indiana Toll Road filed for Chapter 11 protection in Illinois bankruptcy court for owing more than \$6 billion. ITR blamed the recession, saying that interstate trucking declined 6.1 percent from 2007 to 2008 and a further 14.6 percent in 2009.

### **A Plan to Get Deals Done**

Given these complexities, representing a concession or a municipality in a P3 deal usually requires many practice groups to work together, according to Mulligan. Lawyers who specialize in project finance, corporate, government and commercial contracts, environmental, securities, and mergers and acquisitions are all necessary in these deals.

Developers shoot for as many financing options as possible, requiring lawyers to work on all fronts. Besides capital markets and user fees, the state component of the investment usually comes from pass-through tolls, availability payments, tax increment financing and debt instruments, according to the National Conference of State Legislatures. Most states also have investment banks that can be tapped for additional financing.

Attorneys must also know how to secure federal funding. Federal aid matching strategies include flexible matching, tapered matching, toll credits and third-party donations. Federal debt financing tools allow grant anticipation revenue vehicles and private activity bonds.

The federal government also offers assistance from funds created by the Transportation Infrastructure Finance and Innovation Act and Clean Water Act, among others.

Jurisdictions without P3 laws are taking a close look at deals that are already underway as they mull their own legislation. Major projects in active procurement include the Purple Line in Maryland; the I-4 Ultimate project in Florida, which will reconstruct 21 miles of the interstate; and the Rapid Bridge Replacement project in Pennsylvania, which will address 4,500 structurally deficient bridges.

And states are also willing to use the P3 format for more than just infrastructure, according to the Squire Sanders study. Several projects considered for P3 this year include California's Long Beach Civic Center, Indiana's Consolidated Justice Facility and the Multnomah County Courthouse in Oregon.

P3 deals will likely remain challenging to execute, experts say, but necessity will keep them in demand.

“Given the state of our national infrastructure, there's no real choice but to figure out the best way to utilize the private sector,” Mulligan said. “I think there’s no avoiding the [P3] concept.”