



INFRASTRUCTURE PRACTICE

# ALERT

## FIVE POTHoles IN THE ROAD TO TRANSPORTATION P3S IN PENNSYLVANIA

By Alan F. Wohlstetter

It is spring in Pennsylvania, when thoughts turn to warmer weather, the start of baseball season and public-private partnership (P3) legislation in Harrisburg. Right on schedule, under the leadership of Transportation Committee Chair Rick Geist, the Pennsylvania House Transportation Committee reported out [House Bill 3](#), which, like its Senate counterpart [Senate Bill 344](#), accomplishes three goals not previously addressed by P3 legislation in Pennsylvania.

Most importantly, both bills present a streamlined procurement process to be followed for all transportation P3s – even unsolicited proposals. Earlier bills tried to put such a mechanism in place while P3 procurements were being undertaken – adding an unacceptable level of risk for prospective bidders. Second, both bills articulate the public policies to be served by P3s and ensure that those concerns are not omitted during negotiations with bidders and their bankers. For example, there is a requirement that existing employees in good standing with any transportation facility to be privatized must be employed by the development entity with the same wages and benefits they enjoyed prior to the privatization. In addition, there is a strong diversity requirement for successful bidders. Finally, H.B. 3 establishes a seven-member Public-Private Transportation Partnership Board (the Board) with the authority to evaluate and approve P3 proposals. Four members of the Board are selected by the Legislature and three by the Governor.

### Clear Authority To Toll

Before the House votes on this measure and the Senate Transportation Committee considers its version of P3 legislation, there are five potholes in the road to transportation P3s in Pennsylvania that must be filled to make these agreements workable for P3 investors and protective of the public policies the Legislature holds dear. First, the Board must have clear authority under state law to designate roads – whether new or existing – as toll roads. Without the ability to designate a toll road, a P3 must return to the Legislature for approval, defeating a primary purpose of having P3 legislation in place. This omission leaves the Board with no mechanism for increasing the revenue available for transportation in the Commonwealth – revenue that can be leveraged through a P3.

### Keeping Toll Revenue in the Region

A second pothole is the failure of H.B. 3 to allow money raised through regional tolling to stay in the region. Projects like the 422 Corridor Improvement Program rely on tolls being levied on a state road passing through several counties. If that region is not guaranteed sufficient revenue to operate and maintain the toll road and make necessary improvements to handle diversion – but instead is simply sending toll revenue to PennDOT for its 12-Year Improvement Plan – there is no incentive for the communities to host the toll road. H.B. 3 requires

all toll revenues to be deposited in a public-private transportation account of the Motor License Fund under PennDOT's control, which is constitutionally required to be spent for transportation purposes. While PennDOT should deposit its portion of any P3 payments into the account, the regional tolling authority or propriety public entity should be able to spend its portion of the toll revenue consistent with its statutory purposes.

### The Credit Rating of the Development Entity

When an existing toll road is subject to a P3, government has an incentive to select the proposal that provides the largest upfront payment. H.B. 3 provides for selecting the P3 providing "the best value for the Commonwealth." Such an analysis fails to posit how highly leveraged the P3 may be to obtain the upfront payment it is providing. Since these agreements can last as long as 75 years, is a highly leveraged transaction for a prized transportation asset good public policy? An upfront payment relying heavily on borrowed money has a high monthly debt service payment, which might be unaffordable in the future due to an unpredicted downturn in traffic and no liquidity in the development entity. Adding the credit rating of the development entity into the factors to be considered in selecting the optimal P3 proposal would fill this potential pothole in the legislation.

### Protecting the Development Entity From Unfunded Pension and OPEB Benefits

Protecting the development entity in a P3 from legacy costs for employees is a pothole big enough to swallow a Ford F-150. In January 2011, the Third Circuit Court of Appeals expanded the circumstances under which a purchaser in an asset sale can be liable for the seller's employment-related obligations. In *Einhorn v. ML Ruberton Construction Company*, the court held that such a purchaser can be liable for the seller's delinquent

contributions to a multiemployer benefit plan if the buyer had notice of the delinquency prior to the sale of assets and if there is sufficient evidence of continuity of operations between the buyer and the seller to justify imposing such liability. This decision creates a pothole for a P3 development entity required to assume the employment of existing employees of a toll road such as the Pennsylvania Turnpike. The P3 may potentially inherit an obligation to fund deficiencies in the pension and OPEB plans of its new employees.

### Transparency and Accountability

While H.B. 3 tags PennDOT with responsibility to provide periodic reports to the Board on approved P3s, there are no provisions in the bill requiring the P3 transportation agreement to put responsibility for periodic reporting on the private entity, which is the party best positioned to provide such data. It is not good public policy to enter into a 75-year agreement with a private party with no requirements for financial, operating and maintenance data to allow PennDOT to determine whether all legal and contractual requirements have been met.

### Conclusion

If floor amendments to H.B. 3 or S.B. 344 plug these five potholes, Pennsylvania will take its place among the states with P3 legislation in place that invites the broad participation of the private sector. Without such changes, Pennsylvania will be left with a spring of discontent, and drives on summer and holiday weekends will become an adventure in dodging potholes and posted bridges.

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