Infrastructure Justice: Building Equity into Infrastructure Financing

America's infrastructure needs an overhaul. In 2013, the American Society of Civil Engineers' (ASCE) report card on the nation's infrastructure gave the nation an embarrassing grade of "D+" based on unmet needs to repair and rebuild roads, bridges, drinking water and wastewater systems, schools, rail and transit systems, and public parks.[1] ASCE also estimates that the U.S. needs to spend $3.6 trillion in the next seven years to recover from decades of neglect and disinvestment.[2]

- One in nine of the nation's bridges are rated as structurally deficient, while the average age of the nation's 607,380 bridges is currently 42 years.
- 42% of America's major urban highways remain congested, costing the economy an estimated $101 billion in wasted time and fuel annually.
- The average age of the country's 84,000 dams is 52 years old.
- Almost half of American households lack any access to transit, and millions face irregular and undependable service that doesn't stop near their home or workplace.

AT A GLANCE

Rebuilding American infrastructure is one of the best opportunities to create tens of thousands of middle class jobs and careers that serve as the foundation of a healthy economy and that lift families out of poverty.

Beyond basic repair, we need to invest in an innovative 21st century infrastructure essential for a prosperous and fair economy in a globalized and hyper-connected world. Our failure to do so threatens the economic health of our nation, communities and families. Rebuilding American infrastructure is also one of the best opportunities to create tens of thousands of middle-class jobs and careers that serve as the foundation of a healthy economy and that lift families out of poverty. Rebuilding American metropolitan infrastructure is vital to meeting the transportation, housing, recreation and other needs of low-income and working-class communities in American cities across the nation.

Many local and state governments are looking at new financing

[1] American Society of Civil Engineers, 2013 Report Card for America's Infrastructure, 2013. http://www.infrastructurereportcard.org/
[2] Ibid.

arrangements – Public-Private Partnerships (or P3s) that seek to use private capital to finance public projects – to help fill the gap. But inserting private interests into the development of public infrastructure has proven to be difficult and even counterproductive when adequate care isn't taken to protect the public interest and include equity considerations and standards. Governments often fail to fully consider the direct and indirect policy implications of these arrangements, the economic and fiscal impacts of long-term contracts and, perhaps most significantly, fail to seize opportunities to alleviate poverty. Too often cash-strapped governments have taken big risks based on unrealistic projections to justify specific infrastructure projects.

Public funding of infrastructure is well known to be the least expensive way to finance major infrastructure projects. But in light of the pressure governments face to aggressively pursue private funds for public infrastructure, we believe it is critical to clarify our goals and principles so that Public-Private Partnerships are truly structured as win-win-win propositions.

- A win for the public from a rebuilt infrastructure
- A win for the economy in creating jobs that lift families out of poverty that preserves a thriving middle class and builds infrastructure essential for efficient development, production and distribution of goods and services
- And a win that generates an adequate rate of return for double-bottom line investors

Principles of Win-Win-Win Public-Private Partnerships

In the Public Interest believes that the following principles should guide a state or local government's approach to P3 projects:

- The public must maintain democratic control of infrastructure as well as the ability to make public policy decisions in the future. Contract clauses should not hinder governing bodies in their policymaking responsibilities at any point during the contract term.
- Robust and broad public participation in decision-making processes is necessary to ensure infrastructure projects are chosen to meet priority community, employment and economic needs.
- Public infrastructure development, financing, maintenance and operation should be subject to broad public protections, full transparency and accountability to public institutions.
- Rebuilding infrastructure should strengthen the middle class and improve the living standards for those that build, maintain and operate the systems.
- Rebuilding infrastructure should advance public goals and provide opportunities to lift disadvantaged populations out of poverty with good paying jobs and career-enhancing skills.

Setting the Ground Rules Through Enabling Legislation

As of 2013, 33 states and Puerto Rico have passed P3 enabling legislation, authorizing their government to enter into P3 arrangements.[3] Importantly, this legislation clarifies a state's objectives in P3 projects, sets the ground rules for its P3 process, and establishes basic requirements for contracts. As additional states propose P3 enabling legislation, and those with existing statutes seek to modify their language, it is important to consider the inclusion of the following provisions that help protect the public interest, create real employment opportunities that build the middle class, and ensure that infrastructure resulting from P3s truly help fill in our communities' infrastructure gaps.

Maximum Transparency and Public Participation

Transparency is critical to public participation. Without information about proposed and existing P3 deals, the public does not have the necessary information to properly evaluate P3 projects and determine whether they meet the community's interest over the life of the agreement. In a survey of state Departments of Transportation (DOT), more than 70 percent of respondents indicated that public access to information about P3s was an important measure to protect the public interest.[4] P3 enabling legislation should specifically address which state laws and policies related to public information apply in P3 contracts.

- All P3 projects should be subject to the state's open request laws and requirements just as any publicly funded project would be.
- All appropriate documents that the public needs to be able to effectively participate in the P3 process, including planning and bidding documents, should be released to the public at appropriate times before and during the bidding process; and all documents related to the project, including appropriate sections of responses by bidders, should be publicly released on a state website after the contract is awarded, including subsequent annual disclosure of financial and performance data.
- There should be specific designated opportunities for public, community, and stakeholder participation, especially for those impacted by a proposed project, at all important decision-making points, including the project selection, bidding, and contract award processes.
- There should be sufficient time between the announcement of major decisions related to a proposed project and opportunities for public comment and participation to ensure adequate time for serious public deliberation.

Equity-Based Strategic Project Selection

What P3 projects a state considers and how they are selected has significant implications for its infrastructure planning efforts. Enabling legislation should help ensure that projects priorities

[3] National Conference of State Legislatures, Public-Private Partnerships for Transportation: A Toolkit for Legislators January 2013 Updates and Corrections."

[4] National Conference of State Legislatures, Public-Private Partnerships for Transportation: A Toolkit for Legislators, October 2010. http://www.ncsl.org/documents/transportation/PPPTOOLKIT.pdf

aren't driven only by the opportunity for and magnitude of private investment returns but rather are chosen to meet priority community, employment, and economic needs.

- A state's or region's infrastructure strategy should drive what P3 projects the governmental entity pursues. For example, for transportation projects, states should require that a selected P3 project align with existing state, local, and metropolitan transportation plans, and further long-term transportation goals and objectives.
- Any selected project must meet the needs of communities that rely on the asset, including urban and low-income communities, and other disadvantaged communities. The resulting infrastructure must provide equitable access to those who use it, meeting the needs of all affected communities.
- A state should require review of a proposed P3 project by a public body early in the project development process. For example, Florida requires any early-stage P3 proposal to undergo legislative approval during the Legislature's appropriations process.[5]

Careful, Thorough, and Public-Interest Focused Selection and Evaluation Process

The process that a state uses to determine whether a P3 is an appropriate delivery mechanism to build and maintain our infrastructure must incorporate criteria for evaluating a project's adherence to public interest goals. Enabling legislation can set forth a selection process that every proposed P3 project must undergo. While there are numerous ways that a state can set up their selection and evaluation processes, below are several guiding recommendations to help ensure that public interest considerations are at the forefront of P3 selections and that private interests do not trump the public interest. Only by careful, thorough, and transparent project analysis, bidding process, government oversight and enforcement of the contract, can a win-win-win P3 project happen.

- Perform a rigorous upfront analysis to determine if P3 project delivery makes sense over traditional public delivery. One tool that has emerged is the Value for Money (VFM) analysis that estimates total project costs and benefits over the life of the contract, often decades into the future. The VFM analysis is used to determine if the benefits merit the higher cost of private financing for P3 projects. Value for Money analyses must ensure that a cost-benefit analysis' framework, methodology, and inputs are rigorous and explicit, and adequately comprehensive. They must also include a full range of non-financial public interest criteria including social and economic impacts; affordability and accessibility of the infrastructure to low income communities; the number of high quality jobs the project will create; environmental impacts; and accountability and transparency measures. VFM analysis should use a robust and objective Public Sector Comparator to estimate the lifecycle costs of public project delivery and compare costs of private and public finance and service delivery.
- The government should ensure that it has the capacity and expertise to analyze and evaluate proposed P3 projects, adequately negotiate any resulting contract, and oversee and enforce the contract once it is signed. One way to ensure adequate capacity is to

[5] National Conference of State Legislatures, Public-Private Partnerships for Transportation: A Toolkit for Legislators, October 2010. http://www.ncsl.org/documents/transportation/PPPTOOLKIT.pdf

require that sufficient funds are included in the agency budget for these functions before a P3 project moves forward.

- Legislation should also require that a P3 contract award is based on best value, which includes adherence to identified public interest requirements, not just low price.

Broad and Equitable Access

Business models for privatized infrastructure often depend on user fees, such as tolls. While a private partner will seek to maximize revenues through regular increases in user fees, a state must ensure that user fee rates and their subsequent increases do not undermine the important public interest goal benefiting all affected communities. Residents travel over bridges to get to work, drive on roads to get their kids to schools, and use transit systems to get to important appointments. Fee schedules for infrastructure should balance the need for revenue to maintain the facility with the need to keep fee levels affordable to everyone who relies on the asset. Enabling legislation should therefore set requirements around strong public involvement and oversight over user fee rates.

- The agency or some other public body must approve user fee schedule increases by a private entity.

Building the Middle Class

Rebuilding our country's infrastructure should directly translate into opportunities for good family-supporting jobs that benefit local residents. P3 enabling legislation should make these requirements explicit to ensure that these projects create high-quality employment opportunities with transferable workforce skills for people living in the communities where the project will be located. By requiring private partners to adhere to the following job quality and access standards, states can rebuild critical infrastructure while providing opportunities to lift disadvantaged populations out of poverty, strengthen the middle class, and ensure that private dollars benefit the local economy. All jobs created from resulting P3 projects, including construction, maintenance, and operation jobs, should adhere to the following standards:

- Private contractors must provide livable wages and decent benefits to all workers.
- Private contractors should include a targeted hiring program for construction, operation and maintenance of the facility, to ensure that residents in surrounding areas, especially those in nearby low-income urban or other disadvantaged communities, are offered employment and career training opportunities.
- Private contractors should offer sufficient safety and skills training for employees, including opportunities for workers to upgrade their skills and receive credentials that can help them advance in the industry.
- Public employees who are displaced by the P3 project should be offered positions with similar salaries, benefits and protections.

- The state should track and report job quality and targeted hiring outcomes, so the public can see how P3 projects have benefited the community.

Public Interest Contract Provisions

Enabling legislation should determine which terms and conditions are allowed in an actual P3 contract. Some P3 contracts have been criticized for including terms that insulate the private entity from necessary levels of risk at the expense of the public. Below are recommendations for contract requirements that protect the public, while also allowing the private entity to reap an adequate level of return.

- P3 contracts should prohibit non-compete clauses. Many states, such as Florida, Texas, and Arizona already prohibit non-compete clauses.[6]
- P3 contracts should limit compensation clauses. There are many options for how a state might limit compensation clauses. Maryland, for example, prohibits a private entity from being compensated for projects already in state's capital improvement program and transportation program at the time the P3 was signed.[7] Additionally, all events related to public safety access should not be considered compensation events.
- Contracts should be subject to term limits, including renewals and extensions. European Union countries limit P3 contracts to terms between 21 and 35 years.[8]
- Contracts should include meet or exceed quality, labor, and other state standards. These include, but are not limited to:
    - Operations and maintenance standards, including a hand-back provision that specifies the minimum condition that the infrastructure asset when it is returned to the public at the end of the contract term.
    - Performance standards that ensure a high quality asset operates to meet the needs of the community.
    - Environmental performance standards that specify environmental outcomes that the project must achieve.
- Public facilities should be inspected, operated and maintained by public employees directly accountable to public agencies.
- Contracts should include robust oversight provisions, including establishing regular reporting requirements and rights of the state to inspect and audit the infrastructure asset.
- Contracts should include termination and "buy back" clauses, which lay out how the state can take back an infrastructure asset.

[6] National Conference of State Legislatures, Public-Private Partnerships for Transportation: A Toolkit for Legislators, October 2010. http://www.ncsl.org/documents/transportation/PPPTOOLKIT.pdf

[7] Maryland State General Assembly, House Bill 560, 433rd session, 2013.

[8] National Conference of State Legislatures, Public-Private Partnerships for Transportation: A Toolkit for Legislators, October 2010. http://www.ncsl.org/documents/transportation/PPPTOOLKIT.pdf

- Contracts should include provisions related to default and bankruptcy of a private contractor to protect the state and the public in case the project or a private entity financially fails. In addition, the contract should require the concessionaire to provide the state advance notice of financial difficulties it may be experiencing or anticipating.

Sensible Legal Requirements

States should make all legal requirements explicit in enabling legislation to remove any questions regarding the applicability of important laws.

- P3 projects must adhere to all local, state, and federal laws that publicly funded projects do.

In the Public Interest

1825 K St. NW, Suite 210

Washington, DC 20006

202-429-5091