



Industry urges NY P3 laws

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The state of New York would “greatly benefit” from introducing P3 laws, according to industry experts – despite the state already delivering some of the country’s most ambitious projects. Experts working in the state have suggested that New York could enhance its reputation as a blossoming P3 destination by introducing laws underpinning the delivery of new infrastructure via a P3 structure, writes a *P3 Bulletin* reporter in advance of the publication’s in-depth coverage about New York’s P3 potential features, which quotes PLDW Municipal Infrastructure Attorney Zachery H. Klein. The comprehensive article, with comment by Attorney Klein, is below.

Spreading the News

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[New York is showing signs of an exciting pipeline despite a lack of dedicated legislation. Dan Colombini reports on how the Empire State has harnessed its P3 potential](#)

“The concrete jungle where dreams are made... there’s nothing you can’t do,” says hip hop legend Jay-Z’s New York City-themed hit, *Empire State of Mind*. While it will come as no surprise to find out that a hip hop star would not directly touch on the New York P3 market in his songs, the words have a curious pertinence to the industry as we approach the second quarter of 2016.

Traditionally seen as something of a lost opportunity in the growing US P3 space, the past year has seen New York take great strides into announcing itself onto the main stage.

This, for some, has been a long time coming. Despite the city itself standing as a beacon of the American capitalist dream, New York State has been traditionally slow on the uptake when it comes to utilizing private finance to develop its infrastructure – an issue that has perplexed many stakeholders for some time now.

However, things have started to change. This is in part thanks to the role of the Port Authority of New York and New Jersey (PANYNJ), which operates as a joint venture between the two states and was authorized by Congress. It is therefore neither a New York agency nor a New Jersey agency: it is a separate, federally recognized entity.

This means that the PANYNJ is not subject to New York State law and is therefore free to pursue opportunities under a P3 model, despite the state itself not having any P3 laws. And pursue opportunities it most certainly has.

In November 2013, the PANYNJ and the NYNJ Link Partnership, featuring Macquarie Infrastructure, rubberstamped a deal for the \$1.5bn Goethals Bridge P3. The deal has been financed with a combination of \$461m in tax-exempt bonds, a \$474m loan, and equity contributions from the developers.

It is this deal that has whet the appetite for P3s in the state, with the Port Authority proving that it can put together a large, highly effective and well procured project. This has been followed by the PANYNJ's LaGuardia Airport project, which, at the time of writing, was due to reach financial close on June 1.

While the LaGuardia project has certainly suffered from the usual US-style political wrangling, it has now emerged as a flagship deal for the market and proven that in the PANYNJ, the state of New York has a public sector body that knows how to pull off a deal.

Aside from the work of the PANYNJ, P3 projects in New York have traditionally been implemented as one-offs, only going ahead after obtaining special legislation from the state legislature. In 2011, the state adopted the Infrastructure Investment Act, which permits five authorized state entities to enter into design-build contracts for public infrastructure projects, pursuant to which the Tappan Zee Bridge Replacement Project was undertaken.

Originally slated to expire in December 2014, the Act was extended for two additional years in the 2015/16 State Budget, through March 2017.

This has given Governor Andrew Cuomo an opportunity. "[Penn Station] is dark, it is constrained, it is ugly, it is a lost opportunity," he said in January. "Frankly it is a miserable experience."

And the fact is that many New Yorkers and visitors have long agreed. As a result, Cuomo has announced plans to harness the legislative changes to implement much-needed development of key sites across New York City.

So, building on what had gone before, the Transformational Economic Development Infrastructure and Revitalization Projects Act, was enacted as part of the 2016/17 State Budget. This now allows for the use of alternative financing contracts on the Jacob K. Javits Convention Center, Empire Station Complex, James A. Farley Redevelopment and Pennsylvania Station New York Redevelopment projects, as part of Cuomo's proposed \$100bn investment in the state's infrastructure – clear evidence that political support is growing for the use of P3s across the state.

Under the Penn Station proposals, a joint entity comprising the Empire State Development Agency, Amtrak and the Metropolitan Transportation Authority (MTA) has now begun efforts to find a private partner to finance the proposals in exchange for development rights.

State officials say that the project will cost at least \$3bn, which will largely be paid for by the private sector. The US Department of Transportation, Amtrak and the PANYNJ will assume \$325m of the cost. So some fairly hefty investment is required from the private sector.

The project will see significant redevelopment of the existing Penn Station concourses for the New Jersey Transit and the Long Island Rail Road. Various other nearby sites are also being touted to house Amtrak's cramped waiting area. Rather impressively, this marks the third largescale transportation deal coming out of New York in the past three years. But there is more. The governments of New Jersey and New York have also now established the

creation of the Gateway Development Corporation to develop the bi-state Hudson River tunnel project, paving the way for a potential P3 for the plans and wider deals.

As part of the agreement, the federal government will fund half of the \$20bn commuter rail tunnel linking New Jersey and New York under the Hudson River. The new corporation will be able to access low-cost federal loans to fund the states' portion.

The corporation will be run by the PANYNJ, Amtrak and the US Department of Transportation. And sources close to the market say that the plans have paved the way for a potential P3 not only for the tunnel scheme, but also – more enticingly – a potential future pipeline of deals.

“The Gateway Development Corp is a specific entity set up to manage the specific transaction of improving the railways,” says Mike Matheou, foreign legal consultant and partner at Hogan Lovells. “But it has the advantage of being set up within the Port Authority, and so can take advantage of its powers to put together P3s.”

And that is something that is now anticipated in the future. “We will see P3s from this corporation,” adds Michael Likosky, principal & head of infrastructure at 32 Advisors, and who advised New York State for several years. “But the market must now become more in tune with the governor’s preferences. There is simply a higher bar in New York to be met than in some other states when it comes to expectations of deal quality.”

Likosky believes that New York has become a melting pot of potential, with opportunities for investors of all kinds.

“New York has two lines of business,” he says, referring to the PANYNJ alongside the legislature. “There is the pipeline that is coming from the PANYNJ, which I think traditionally has been very underused.

“People have not been attuned to the power of that organization, but that is now changing. In the past it has had difficulties exercising those powers but now these projects have proven what it can do.”

There also lie further opportunities outside of these large PANYNJ-funded transport deals. In January the state of New York issued a new P3 to establish state-wide provision of a high-speed broadband internet service.

Under the New NY Broadband initiative, the program will require investment from the private sector to develop the proposals, which will also receive \$500m from the state. Residents will be provided with access to broadband services of 25 to 100 megabits per second (Mbps), with private teams being sought to provide the service.

Interested bidders will be required to provide a 50% investment match in the projects they develop.

Firms will be chosen through a reverse auction process, which awards funding to bidders who seek the lowest amount of matching state investment.

Lawless

New York is proving that a lack of dedicated laws does not necessarily hinder the advancement of a pipeline, where political support is in place. Cuomo’s administration, despite not making any major legislative changes, has

clearly learned from the success of past projects and is creating a landscape for privately financed infrastructure deals to flourish.

And this is true at municipal level too, with Nassau County currently flying the P3 flag with an energy deal already in the market and a potential wastewater also in the offing.

“On the local level, municipalities have been able to obtain special legislation on a limited basis,” explains Zachary Klein, an associate with law firm Pannone, Lopes, Devereaux and West, which is advising the county on its P3 plans. “For example, Rockland County Sewer District No. 1 and its development of an advanced wastewater treatment plant on a design-build-operate basis, which was the first municipal wastewater design-build-operate project in New York.

“In addition, municipalities across the state are entering into P3s for solid waste services pursuant to General Municipal Law §120-w, and energy performance contracts pursuant to Section 9-103 of the Energy Law.”

“There are latent powers to do these and other projects in New York. You do not need legislation when you can do it already. The whole enabling legislation thing is false. It distracts and impedes the market,” adds Likosky.

“I believe if the political support is there and a governor has not waded in to say that a deal is not permissible, then it is permissible.”

Even so, the public sector would still like to see further legislative support as the momentum builds. “Faced with the enormous task of upgrading and modernizing antiquated infrastructure-related systems throughout the state, all levels of government in New York would greatly benefit from the adoption of broad-based P3 legislation that can build on the successes of the project-specific pieces of legislation the state has implemented to date,” adds Klein.

Matheou agrees. “What dedicated laws would do is leave the way clear for a broader range of New York State entities to have the P3 tool at their disposal as an option to use when the conditions are right for doing a deal as a P3.”

But while other states have become tangled up in legislative issues, which have hindered the growth of their pipelines, New York has shown what can be achieved with the right will in place. The state now boasts a pipeline of genuine substance ranging from large-scale transportation P3s, right down to smaller municipal projects, such as those currently being developed in Nassau County.

“We have a highly exciting middle market in this state,” says Likosky. “It is a market which rewards agility. One lesson right now within the US infrastructure market is that new funds can become market leaders overnight. See for instance, Plenary Group with its Pennsylvania Bridges, and Star America with four deals closed in its first year.”

“Having robust P3 legislation in place clearly helps an emerging market, but it’s encouraging to see the state’s ambition for launching new projects in anticipation of having the P3 legislation in place in the near future,” says Chris Guthkelch, project director at Skanska Infrastructure Development.

“Strategically [New York is] very important to Skanska...but we judge each project on its merits and having a project backed by robust legislation obviously helps our selection process.”

It is not surprising that the state’s infrastructure needs mirror those of many other states across the US, with pressing investment needed in roads, bridges, tunnels, airports, water infrastructure and social infrastructure (such as schools).

“Each of these sectors could greatly benefit from a well-structured P3 program,” says Squire Patton Boggs P3 attorney Roddy Devlin. But in the meantime, investors look likely to keep a close eye on the impressive growth of the New York pipeline, dedicated laws or not.

“There is substantial appetite for P3 projects, both on the part of private consortia and lenders,” concludes Devlin. “I would expect that any P3 project in New York State would garner significant market interest.”

The *Partnerships Bulletin* and *P3 Bulletin* are magazines and websites providing in-depth updates on partnership working between the public and private sector to procure, build and manage public infrastructure. The media properties are targeted to industry professionals to help them make informed decisions and remain at the cutting edge of partnerships and infrastructure business information.