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New York State Commission Seeks to Foster Public Private Partnerships

Seizing an opportunity to advance a number of languishing public asset projects, as well as setting the stage for a fundamental change in the way that large-scale asset projects are handled, the State of New York stands poised to embark upon an unprecedented effort to partner with the private sector via public private partnership ("PPP") investments in infrastructure. This move will affect infrastructure development across a broad range of areas—ranging from transportation to energy, information technology, and more—and presents tremendous opportunities to private enterprises and investors seeking involvement with projects within these fields.

Report Emphasizes Benefits, Value of Private Investment

Last year, the New York State Commission on State Asset Maximization, established by Governor Paterson last year to examine how asset maximization can benefit New York State and to determine whether any specific State assets are suitable candidates for PPPs, issued its Final Report. The Report recommends a process for sustainable asset maximization that aims at promoting New York's public policy values and identifies distinct pilot projects in the following major asset classes: (a) transportation; (b) energy; (c) information technology; (d) social infrastructure and higher education; and (e) underutilized and surplus properties. Specifically, the Commission recognizes a growing need for PPPs in infrastructure development and seeks to increase public value from state assets by leveraging private resources.

The Commission's recommendation to explore PPP investment in infrastructure, emphasized the fact that well-executed projects create attractive and transparent alternative investment options with the flexibility to withstand economic cycles. Recognizing the increased appetite among the private sector for investment in infrastructure, as well as the marked growth of equity infrastructure funds, the Commission urges New York to take advantage of opportunities within the market and seek out PPPs that will boost public and private investment in infrastructure and sustain it over the long-term.

A Streamlined Approach to PPPs

PPPs in New York are not a new concept. To date, the State has successfully designed and implemented several innovative transportation and social infrastructure PPPs. However, the process by which the State has implemented each PPP has varied greatly, and the largely piecemeal approach has been recognized as inefficient. The Commission argues that a streamlined, standardized asset maximization process is required for the State to achieve the greatest cost savings and public value—and for private investors to maximize their returns.

A set of Guiding Principles has been articulated that represents the criteria used by the Commission to evaluate certain pilot projects for asset maximization and PPP involvement in New York. Key factors include:

1. Spending need and cost savings (the proverbial "Value for Money" concept);
2. Private sector ability and interest; and
3. Regulatory and political feasibility.

The Commission also sets forth three considerations for evaluating prospective private partners for PPPs:

1. The partner's solvency and creditworthiness;
2. The partner's performance track record; and
3. The partner's guiding principles, including hiring and contracting policy standards directly affecting workers.

Pilot Projects Identified

The Commission has identified several pilot projects as opportunities for asset maximization in each of the major asset classes. These recommendations include:

Transportation

- Packaging several separate bridge projects (short-span bridge replacements in upstate New York; the replacement of the Kosciuszko Bridge in New York City; and the rehabilitation/replacement of the Robert Moses Causeway on Long Island) as one overall bridge improvement program through separate, stand alone PPPs;
- Creating a PPP between the New York State Department of Transportation, private railroad companies, and rail service providers to advance the development of high-speed rail passenger service on up to three designated corridors in New York;
- Consolidating maintenance, repair, and operation of the Gowanus Expressway (I-278) into a single PPP;
- Utilizing public and private financing to encourage Transit-Oriented Development (TOD) projects, in which communities cluster commercial and residential development around rapid transit;

Energy

- Supporting and encouraging PPPs to develop electricity transmission and distribution infrastructure, including "smart-grid" technologies, using state-owned lands and right-of-ways;
- Consolidating the purchase of electricity to lower energy expenses in public and publicly-supported buildings;
- Utilizing long-term power purchase contracts with renewable energy developers to incentivize green businesses to locate to New York;
- Through PPPs, developing offshore wind energy on New York's Great Lakes; expanding hydropower generation along the Erie Canal; and implementing renewable energy technologies on State-owned facilities;

Information Technology

- Pursuing a PPP with the telecommunications industry in which the State identifies and leases building rooftops, land holdings and other fixed assets for wireless carriers to expand their commercial network;
- Establishing a PPP to help finance new construction and consolidation of existing State data centers;
- Promoting increased broadband internet access by allocating risk among the public owners and private contractors charged with constructing an expanded broadband network;

Social Infrastructure and Higher Education

- Allowing school districts with major anticipated capital construction programs, such as Yonkers and Syracuse, to contract with private sector entities to provide financing, construction, and maintenance of school facilities in exchange for ongoing lease payments;
- Utilizing PPPs to shift major risk associated with the construction, design, financing, operations, technology, etc., to private partners;
- Allowing public builders constructing buildings for the State and City Universities of New York (S.U.N.Y. and C.U.N.Y.) to employ alternative construction delivery mechanisms that shift risk to the private partner and fast-track project delivery;
- Advancing a select number of pilot PPPs to test the benefits of leasing S.U.N.Y. and C.U.N.Y. campus land to private entities to finance targeted capital construction and to achieve supplementary operational funding;

Underutilized and Surplus Properties

- Formalizing a PPP between the Empire State Development Corporation and the Office of General Services to centralize authority in managing the state's real estate needs;
- Developing creative PPPs, which utilize joint ventures, license agreements, ground leases and other transaction alternatives, to fulfill the State's short-term financing needs while building long-term real property value;
- Establishing a PPP between the City of New York and the State to support the New York City Brownfield Cleanup Program.

The Future of PPPs in New York

The Commission's Report concludes with a two-pronged message: first, PPPs are a tool for bringing innovation, risk transfer, and incremental capital and manpower to bear on physical and social infrastructure projects that would otherwise languish; and second, it is vital for New York State to seize the opportunity to develop a new financing skill-set in order to protect its economic competitiveness.

It is clear from the Commission's Report that New York is keen to join the growing list of states hoping to tap into the large reserve of private capital looking for long-term, stable investment opportunities. Notwithstanding the lure of such opportunities, successful implementation of PPPs requires the delicate interweaving of sophisticated financial techniques, complicated commercial relationships, extensive government regulation, and highly developed technical expertise.

Venable's team of attorneys has significant experience assisting in the creation, negotiation, documentation and financing of PPPs in various industries in multiple jurisdictions around the country. For more information regarding the creation of PPPs in New York, as well as in other states around the country, contact a member of Venable's national Public Private Partnership team, whose names appear at left.

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