

# PPPs & PFIs Coming to N.Y.?

Excerpts from Testimony of P&A Partner  
Jacques Cook Before the New York  
State Commission on State Asset Maximization

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**My remarks are directed at the two points raised below:**

- > **The most effective means for achieving the commission's goals of more efficient leveraging of the state's physical and human capital resources to better serve its citizens.**
- > **Best practices for structuring and implementing public-private partnerships that address the various stakeholders involved.**

Although a complete answer cannot be provided to the above points in the limited time available at this hearing, I would like to restrict my comments to a few issues that I believe may have not been adequately addressed in earlier remarks and in the commission's own draft report.

First, allow me to describe my personal involvement in the subject of public private partnerships, or PPPs. I am an attorney by training, with over 30 years experience, working on behalf of finance institutions, developers and contractors on a wide range of PPP projects in the U.S. and overseas. I started out in this field working with government entities and international financial institutions on traditional international procurement for infrastructure projects, and gradually moved into the realm of PPPs as public authorities explored new and innovative ways of stretching their limited resources to meet the needs of rapidly growing populations and local economies. I have represented the developers of several of the largest toll roads in Chile (Costanera Norte, Vespucio Norte), the construction contractors on several major toll roads in Florida (I-595, Jacksonville Coastal Road), a toll bridge in North Carolina and various power projects throughout Latin America and the Caribbean. In addition, I have lectured and taught courses on PPP procurement in several countries in Africa and Europe, and written extensively on concessions and project finance for PPPs in trade publications here and abroad.

From my professional experiences in the public and private sectors, I have concluded that PPP procurement can be a very effective tool for financing, constructing and operating various types of publicly owned infrastructure facilities such as roads, ports, transmission lines, airports and water and sanitation projects. But while I see positive benefits flowing from the judicious use of PPPs, I am very mindful of their limitations and the often nega-

tive reactions of some people to the idea of involving private, for-profit businesses in the management and financing of publicly owned infrastructure. In this field, it is important to be realistic and pragmatic while understanding the effect that politics can play in the implementation of PPP programs.

Before moving to my substantive remarks, I would like to comment about the relevance of PPPs to today's economic crisis. In light of the Obama administration's stimulus package and the promise of billions of dollars for infrastructure projects, there are some who think that the PPP model no longer is relevant. They argue that our infrastructure requirements can now be met through traditional public works procurement, and that we no longer need to look for solutions involving volatile capital markets. Nothing could be further from the truth. First, the stimulus spending will focus in the first instance on off-the-shelf repair and maintenance projects that can be quickly bid and built. But these projects will not address the need for billion of dollars of investment in new transportation, health and educational facilities, which require long-term planning and financing. We also need to remind ourselves that there is still considerable private capital looking for productive investment opportunities. As Andy Rose, Executive Director of Partnerships UK, stated recently, referring to the situation in the European Union:

*It is important to remember that while the banks are facing a challenging environment, the PPP model remains robust and an attractive asset class for banks due to the government-backed cash flows and the typically well-structured risk allocation. Maintaining appropriate risk transfer enables the private sector and public sector to do what they each do best. For industry, long-term contracts with government re-*

*main an attractive business proposition, and for these reasons, PPPs will continue to play an important role for banks and industry.*

PPP allow governments to leverage existing funds as well as soon-to-be released federal funds and thereby to stretch available appropriations for infrastructure projects. Effectively mobilizing private capital through infrastructure PPPs will thus free up limited state resources, which can be deployed to address other pressing needs.

This commission's preliminary report, dated December 15, 2008, gives an excellent overview of the various arguments used to justify the switch to PPPs. There are two key issues set forth in the report that I believe deserve repeating here at the outset. The first is that the commission is clearly not just seeking to implement PPPs through a sale or lease of pre-existing assets to close a budgetary gap. I applaud this approach because there is a common misconception in the minds of many people, even some well-informed people, referring to the successful leasing of the Indiana Toll Road and the Chicago Skyway in 2007, that PPPs are essentially a form of privatization. Actually, long-term leases are not the standard structure for most PPP projects. Indeed, I would prefer that such transactions be classified as a unique sub-category of PPPs rather than portrayed as a "typical" PPPs. The report correctly notes this distinction and states: "...we are seeking to redefine PPPs in the broadest sense— as a way to combine private-sector capital and expertise with public-sector oversight to realize the state's policy objectives in a sustainable manner." I agree wholeheartedly with that observation.

The second important point described in the report is that PPPs should not be undertaken to meet a short-term budgetary shortfall. Again, the Report correctly focuses on the value maximization and the concept of value for money (VFM) developed by the British and Canadians in their PPP programs. As stated succinctly in the report: "The

process of asset maximization involves seeking the *greatest value for public investments*.” The report’s balanced appraisal stresses that PPPs are not an end in themselves, but rather just one of several tools that the public sector may apply to achieve optimum value for the public. It correctly concludes that “the decision of whether or not to pursue a PPP must be based on an analysis of whether it will provide more value to the public than traditional project methods.”

I will not address all of the excellent ideas and analyses contained in the report. Rather I would like to use this opportunity to emphasize a couple of points that should assist the commission as it moves forward to implement a broad-based PPP program in the various asset classes described in the report. My own experience has convinced me that most PPP programs suffer from two problems, which I urge the commission to address.

The first problem is misinformation. Many stakeholders in infrastructure projects are misled into believing that PPPs will lead to more costly facilities, and that private franchise owners will be able to extract monopoly profits from users and taxpayers. In fact, empirical evidence demonstrates that in countries that have successfully implemented PPPs, the returns to investors have been reasonable, and the all-in costs during the life of PPP infrastructure projects for their financing, construction, operation and maintenance have been lower than comparable public facilities where traditional procurement was applied.

As I see it, the first priority for state and local governments entering the PPP arena should be educating the public about how PPP procurement will benefit the taxpayers in each of the key asset categories in terms of lower costs and improved service. Experience here and overseas has shown that failure to mount a serious and sustained education drive *before* implementing a full-blown PPP program gives opponents of PPPs opportunities to distract and confuse voters, which can lead to the cancellation of even well-designed PPP initiatives. This is, in fact what took place in Brazil in the early 90s where the government encountered opposition from truckers, automobile users and NGOs to its first private toll road projects. That earlier program was shut down by the end of the 90s and only recently has been revived following the introduction of new laws to address the concerns of the stakeholders. We also witnessed a similar reversal of fortune for PPPs in Texas, where the state legislature pushed through a Moratorium Law on PPPs in 2007 barring further PPP highway concessions for several years. That law along with political agitation against PPPs, has undermined confidence in the future of PPPs in that state even before the program has been fully implemented.

The second major issue that will require immediate attention for the development of

PPPs is regulatory oversight and supervision. In most of the states and countries that have implemented PPP programs, it has been necessary to strengthen the public sector’s capacity to oversee and regulate PPP infrastructure projects. PPP procurement also requires the state authorities to train and hire staff who are familiar with the complex financing structures used to finance, construct and operate these facilities, and can effectively manage the bidding and negotiation of the relevant contracts with private-sector investors and contractors. As stated in a report prepared by the U.K. government on the results of its own private finance initiative (PFI) program:

*Strong procurement skills are vital for delivering quality investment on time and in a way that secures value for money for the public sector. It is important that authorities have the capacity and the support needed to pursue both conventional procurement and PFI effectively. PFI requires relevant expertise—like other large and complex procurements—because it involves long-term options appraisal, significant use of specialist advisers and what can be complex contract negotiations reflecting the government’s approach to risk sharing.*

(PFI-Strengthening Long-Term Partnerships. March 2006. HM Treasury)

Finally, it will be important for state authorities to revise state laws and regulations to ensure that PPP procurement is carried out within a legal framework using procurement guidelines adapted to the special characteristics of this type of contracting. For instance, the state could adopt a law similar to the Model PPP Law recommended by the U.S. DOT, which provides sufficient comfort to investors, lenders, contractors, users and taxpayers. Or the state may want to develop its own PPP law. In either case, it will require careful planning and analysis to develop a structure that is suitable for the special needs and circumstances of the state.

While it is certain that some special-interest groups will find fault with any PPP program, it should not be overlooked that these same groups were skeptical in other countries and other states where PPPs have been successfully executed. Labor unions have often expressed concern that PPPs will threaten public-sector jobs, and that government procurement under PPPs will jeopardize union wage covenants with contractors on public facilities. Environmental groups have questioned whether PPPs will weaken environmental regulation applied to public infrastructure projects. Some construction contractors and their subcontractors are also worried that PPPs will jeopardize their ability to compete for jobs on public works. It is safe to say that these issues need to be properly examined and evaluated, and that in some instances, they are not without merit. But we have learned,

again from experience here and abroad, that these concerns can be properly addressed, and appropriate measures can be taken in structuring the bidding and negotiation of PPPs to allay most of these fears.

In the end, PPPs are not justified or implemented to avoid unions, environmental regulations or other lawful activities. They are undertaken, as noted in the opening paragraphs of my testimony and in the commission’s report, to improve the efficiency of public procurement and the quality of the goods and services provided by the private sector to the public. The justification and *raison d’être* for PPPs is linked to the overarching principle of asset maximization and value for money, which inform any serious discussion of PPPs. In effect, most of us advocating the use of PPPs for enhancing our infrastructure are being guided by common sense and pragmatism rather than political ideology. Indeed, I think our president captured this point very well in his inaugural address when he stated: “The question we ask today is not whether our government is too big or too small, but whether it works. . . . Where the answer is yes, we intend to move forward. Where the answer is no, programs will end.” The same principle should be applied in deciding whether to use PPP procurement or traditional procurement for infrastructure projects.

Finally, allow me to make a comment about timeliness for implementation. It cannot be denied that many of the measures I am advocating here will take time to implement. It will in all likelihood take some time to design and implement a state-wide education program. To enact a comprehensive legal and regulatory framework for PPPs will also take months, if not years, to clear the legislative hurdles here and in the various counties and municipalities. Similarly, retraining and retooling procurement personnel in the key agencies will also require many months to develop and implement. In view of the seriousness of the crisis facing the state and the country, I do not believe it would be wise to delay moving ahead with some PPPs until all of the key institutional ingredients for their success are in place. I would therefore recommend that the commission’s report emphasize that time constraints should not be viewed as a reason for delay. It should also identify several PPP projects, that it considers suitable for fast-track implementation while the government prepares itself for a broader PPP program. These fast-track projects would therefore be able to take advantage of stimulus spending and be ready for consideration in the upcoming budget cycle.

I respectfully request that my remarks be included in the public record.

Thank you for your time and attention.

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