

Manitoba Legislation Regulating P3 Projects Proclaimed Into Force

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Effective September 4, 2013, the Government of Manitoba proclaimed into force *The Public-Private Partnerships Transparency and Accountability Act*. The Act applies to all major capital projects undertaken by public sector entities in which a P3 procurement method is used. The term “public sector entity” includes municipalities and other local government entities as well as the Government of Manitoba.

The Act describes P3 arrangements as those under which a private sector entity assumes responsibility for all or substantially all of at least two of the following:

- project design
- project construction
- long-term private sector financing for construction
- long-term operations
- long-term maintenance

or is a project in which a private sector entity is responsible for long-term operations, maintenance or financing, and where ownership ultimately reverts back to the public sector entity.

Not all public works projects are covered by the Act, whether or not they involve a private component. The Act only applies to major capital projects having a projected total cost of \$20 Million or more. This would exclude most municipal projects. Even that may be a low threshold, as the transaction costs involved in creating a P3 development at a commercial level usually require a deal size of \$100 Million or more to be economical for all of the parties involved. In all likelihood, this leaves the provincial government and its agencies and The City of Winnipeg as the project proponents who will be bound by this legislation.

Unlike Ontario and British Columbia, Manitoba does not have a public infrastructure agency. For example, Partnerships BC is a corporation wholly owned by the Province of British Columbia and is charged with planning delivery and oversight of major infrastructure projects, many of which are delivered under public-private partnership arrangements.

The stated purpose of the Act is to enhance transparency and public accountability in the decision-making process leading up to a P3 Capital Project. The Act attempts to accomplish this by:

- requiring a detailed risk and value-for-money analysis to determine if the P3 delivery method creates the best value;
- establishing conflict rules for consultants hired by the municipality to review projects;
- requiring public consultation before starting the bidding process;
- requiring an independent fairness monitor to oversee the bidding process for the benefit of all bidders;
- requiring the public entity to report on the results of the project and to make terms of the P3 arrangement public.

The Act is not without its critics. The Manitoba Heavy Construction Association, for one, noted a lack of consultation in the development of the legislation and expressed practical concerns regarding the uncertainty as to the scope of disclosure required in the contract summary. Political leadership at The City of Winnipeg expressed concerns that the City was effectively being singled-out for this additional level of scrutiny. Which of these concerns will be borne out remains to be seen, as the Act is only applicable to new projects and arrangements since the Act was proclaimed.

With the Act came the *Public-Private Partnerships Regulation*. The Regulation puts some flesh on the bones in terms of setting out the requirements for a project's preliminary analysis, public consultation and the required components of the contract summary.

For example, the preliminary analysis must show anticipated project costs using a public delivery model for the project and compare those to "shadow bids", one for each P3 procurement method that is being contemplated. This is to include a detailed quantitative risk assessment, a risk allocation matrix, a cost-benefit analysis, evaluation of efficiency gains, an explanation of financial assumptions, discount rates, and a preliminary value-for-money assessment using net present cost comparisons. The report is also required to evaluate the level of expertise and competition for the project. It must also show comparative time frames for delivery under different service models, anticipated tax revenues and how assumed risks can be mitigated. All of this requires significant time, professional and staff resources.

Under the Regulation the contract summary must include the description of the project, the names of the parties, the payment structure, security that is to be provided, insurance requirements, a risk allocation matrix, and other information. Considerable care will have to be taken to protect the confidentiality of contract information where necessary to preserve the interests of the private partner. Any uncertainty in this regard can result in unwillingness on the part of potential bidders to participate if it means public disclosure of confidential information in a competitive environment.

Provincial oversight of municipal capital projects is not, by any means, new in Manitoba. Borrowings (including long-term capital loans) by municipalities other than The City of Winnipeg have been subject to Municipal Board review and approval for the longest time. Capital projects that are required for the delivery of many municipal services fall within the bailiwick of the Public Utilities Board. These processes ensure a level of oversight and accountability, prevent contracting for expenditures that might unduly hamstring future councils and, in the case of public utilities, attempt to ensure that the ultimate users of the capital projects bear their costs. P3 delivery models, which can look more like service contracts in some cases, do not fit neatly within the existing oversight mechanisms nor within the financial strictures placed upon municipalities. Only time will tell as to whether the Act introduces an appropriate balance between municipal autonomy and public oversight.

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