



## OFFICE OF THE STATE COMPTROLLER

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### Controlling Risk Without Gimmicks: New York's Infrastructure Crisis and Public-Private Partnerships

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#### Executive Summary

New York has a growing backlog of unmet public infrastructure needs, with limited public funds to pay for them. The replacement of the Tappan Zee Bridge, for example, seems to be held up due to an estimated \$16 billion price tag. A 2009 report by the Office of the State Comptroller estimated investment needs of \$250 billion to maintain transportation (\$175 billion), municipal wastewater (\$36 billion) and clean water (\$39 billion) infrastructure across the State over the next 20 years.<sup>1</sup>

In response to these challenges, there has been much discussion of a construction and financing technique known as the public-private partnership (P3) as a means of filling the gap. At a time when the State already bears a high tax and debt load, P3 arrangements can provide alternative ways to finance needed improvements. As State policy makers consider undertaking these partnerships, however, they must be aware of the four primary financial risks associated with the public-private partnership model:

- **Failure to Identify the Full Value of Public Property.** P3 agreements may underestimate the value of public assets, and so short-change the public.
- **Unfavorable Pricing Mechanisms.** P3 agreements may include pricing mechanisms or financial contingencies that burden the public with unwarranted expenses, including excessive fee and toll increases.
- **Unrealistic Expectations and Poorly Drafted Agreements.** P3 agreements may create expectations that go unmet, either when a private entity promises more than it can deliver or when the contracts fail to lay out the private partner's obligations adequately. The result may be that the public fails to receive the anticipated benefit.

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<sup>1</sup> See the Office of the State Comptroller's report, *Cracks in the Foundation: Local Government Infrastructure and Capital Planning Needs*, released in August, 2009.

- **Budget Gimmickry.** P3 agreements are sometimes used for short-term fiscal relief, which provides a short-term cash benefit while pushing costs to the future and potentially increasing public debt.

As State policy makers consider using P3 agreements, they must first: 1) identify the best practices for the valuation of public assets; 2) keep private sector profits within reason and ensure resulting services are affordably priced; 3) know what is being promised by the private entity in exchange for the opportunity to participate in the partnership; and 4) adopt financing rules that prevent any disproportionate shift of current capital costs onto future taxpayers.

Protecting the public from these risks may mean limiting private sector profits, which in turn may make P3 projects less attractive to the private sector. Nonetheless, it is the State's obligation and responsibility to ensure that the public's interests are protected. A mutually beneficial P3 agreement can only be reached if the interests of both public and private sector partners are known and accommodated.

## Introduction

Public-private partnerships have attracted interest in recent years because they have the potential to provide new sources of financial support for the construction and maintenance of public infrastructure, such as roads, bridges, and rail lines. Public-private partnerships, also called PPPs or P3 agreements, are contracts between a public agency and a private sector entity that result in greater private sector participation in the financing and delivery of public services and facilities than is normal under traditional procurement practices.

Public-private partnerships are based on the idea that the State can maximize the value of the public's material assets by taking advantage of the private sector's profit motive and market discipline. Proponents believe that the private sector can often allocate resources and manage demand more efficiently than the public sector. The assumption is that the private sector can operate more swiftly and flexibly than government in some cases, and that private entities may take greater financial risks than the public sector is either willing or able to do. The private sector assumes these greater risks in order to take advantage of a new opportunity to obtain profits.

*The introduction of a private profit motive into the public's cost equation requires the State to proceed with caution and foresight.*

P3s have the potential to combine the strengths of the public and private sectors. Supporters of these partnerships argue they have the capacity to incorporate some of the characteristic advantages of free markets – increased competition, more accurate and sensitive pricing, expanded financing options, and timely response to demand – into the provision of public goods. At the same time, the partnership ideally should preserve traditional public interests in areas which markets may be unsuited to handle, such as ensuring general equity and accessibility, avoiding unwanted externalities

(such as pollution), recognizing diverse stakeholders, and coordinating the development and operation of a particular project with the needs of larger systems and adjacent communities. A well-designed P3 balances public and private sector capabilities to advance the common good. To achieve such desirable outcomes, policy makers must exercise great care in reviewing proposals, entering into negotiations and crafting agreements.

Given the fiscal constraints facing New York State and its local governments, P3 agreements may be viewed as an alternative means of constructing and maintaining facilities and providing services. However, many questions must be answered before New York turns to P3 arrangements to address its infrastructure needs. Furthermore, many risks are associated with public-private financing structures, and these risks must be taken into consideration if policy makers are going to avoid unintended negative consequences for New York's residents. While the private sector entity may incur a share of the cost and risk associated with the project or service, the introduction of a private profit motive into the public's cost equation requires the State to proceed with caution and foresight when considering such agreements.

This report focuses on the financial implications of public-private partnerships. There are many additional policy concerns that may be raised by P3 agreements, such as regulatory oversight, workforce impact, and the effect on local communities, which are beyond the scope of this report but require comparable consideration.

## **Types of Public-Private Partnerships**

A public-private partnership is a contractual agreement that gives a private organization responsibility to provide a facility or service that has traditionally been provided by a public entity, such as a State agency or local government. This can include design, construction, renovation, operation, maintenance, or financing of practically any service or facility that benefits the public.

A traditional capital procurement project requires that the State oversee all construction, operation, and financing. The private sector is only involved through the procurement process, which assigns it a limited, defined role. The other extreme – complete privatization -- occurs if the State decides to sell a public asset to the private sector. The new owners would then become responsible for all aspects of the facility or service. However, few governments in the United States have shown interest in selling public infrastructure, because this permanently converts the asset from something created to serve the public good into something that exists solely for private gain. It is interesting to note that the State Constitution forbids New York from selling the Erie Canal and other parts of the public canal system. This prohibition has been in place since the early part of the 19<sup>th</sup> century, reflecting a long-standing concern with the privatization of State capital assets.<sup>2</sup>

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<sup>2</sup> New York State Constitution, Article XV; see also Peter J. Galie, *Ordered Liberty: A Constitutional History of New York*. New York: Fordham University Press (1995).

P3 projects are an attempt to provide options between the extremes of full public and full private control. There are a wide variety of potential public-private partnerships. In fact, a “partnership” begins whenever the government decides to allow the private sector to control one or more of the activities that it traditionally managed on its own.

As the following illustration shows, P3 agreements can fall into a wide range of public and private responsibilities.

### P3 Project Options



	Traditional Government Procurement	Private Operation with Public Financing	Private Operation with Private Financing	Totally Private Ownership
<b>New Facilities</b>	Separate Bids for Design and for Construction	Private Sector Designs and Builds Facility in One Bid	Private Sector Finances, Designs & Builds Facility	Private Sector Controls Entire Process
<b>Existing Facilities</b>	Operated by Public Agency	Operation & Maintenance Contract	Long-Term Lease	Private Sector Buys Facility from the Public
<b>Hybrid</b>		Contract to Develop & Operate Facility		
<b>Ownership</b>	Public	Public	Public	Private Sector

Sources: Federal Highway Administration, Office of Innovative Program Delivery website (accessed November 22, 2010); Congressional Testimony of Bryan Grote, Principal, Mercator Advisors LLC, May 24, 2006; GAO, "Public-Private Partnerships: Terms Related to Building and Facility Partnerships," April 1999; and E.R. Yescombe, *Public-Private Partnerships* (2007), p. 1.

The public partner typically enters these agreements in order to: 1) finance a project for which taxpayer resources may not be available; 2) reduce construction or service costs; or 3) control capital expenditures; or for a combination of these goals. The private partner agrees to become a more active participant, accepting additional financial risk as it pursues opportunities for greater profit. The public partner may receive payment from its private partner for the use of a public asset, but may also choose to forego a direct financial return if the private partner can provide a service that government does not wish to pay for itself.<sup>3</sup>

One of the simplest forms of P3 project is “design-build” bidding, which is an alternative to traditional forms of infrastructure procurement. In the traditional method, a public agency – such as the Department of Transportation – uses a two-stage bidding process, one for an initial design proposal and a second for the construction of the winning design. This is often called “design-bid-build.” In contrast, the “design-build” process eliminates the middle step. Bids are solicited for both design and construction in one step. This can save the public both time and money, but may also

<sup>3</sup> U.S. General Accounting Office, “Public-Private Partnerships: Terms Related to Building and Facility Partnerships,” April 1999, GAO/GGD-99-71, p. 13; U.S. Department of Transportation, “Report to Congress on Public-Private Partnerships,” December 2004, p. 10.

require the State to skip necessary oversight procedures that would normally weed out inappropriate, risky, or proprietary design and construction techniques.

A far more complicated type of P3 project is one that involves the private financing, construction and operation of a totally new facility. This type of project was more common in the 19<sup>th</sup> century, when the State legislature granted charters to private highway, bridge, and railroad companies. These charters often allowed private firms to condemn land, build new facilities, and charge tolls to public users. Some of these companies operated successfully for years, such as the New York Central Railroad, which was first chartered in 1826 as the Mohawk and Hudson Railroad. However, most of the hundreds of State-chartered private companies failed, and their property usually ended up as part of the public transportation system. For example, many of the State's major highway routes began as private turnpikes, while the Bear Mountain Bridge began as a private toll bridge and the Long Island Railroad -- chartered in 1834 -- operated as a private company until 1966.

It is worth noting that private sector consortia often now go to considerable lengths to protect themselves from the financial risks associated with P3 agreements, forming what are known as "special purpose vehicles," which are independent, stand-alone firms that help insulate the parent companies from much of the project-related risk. For example, Cintra, a transportation management firm headquartered in Spain, and Macquarie, an Australian investment firm, created a consortium to bid on concession agreements to operate the Chicago Skyway and the Indiana Toll Road (discussed in greater detail below).

Many other forms of P3 projects exist. While all involve some form of market-based resource allocation, not all involve the private sector. Some who advocate the use of market mechanisms also believe that government does not necessarily need to relinquish assets in order to use public resources more efficiently. For example, the proposal to implement congestion pricing for certain highways in the New York City metropolitan region relies on market allocation of a scarce resource, namely highway capacity, without requiring private sector control of the process. Such market-driven public activities are sometimes called "public-public partnerships."

Although transportation P3s have received the greatest amount of attention, public-private partnerships can be created to provide almost any type of public service. The most common non-transportation P3 agreements are for fixed asset management, especially for drinking and waste water systems. For example, the City of Buffalo recently signed a 10-year P3 contract with Veolia, a French firm, to manage and operate its municipal water systems.<sup>4</sup> Nationwide, about one-half of all drinking water systems are already privately owned.<sup>5</sup> Most of these are relatively small concerns, leaving the large municipal water systems as the main target of new P3 water management proposals.

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<sup>4</sup> Veolia has water service contracts with over 650 communities in North America, according to its website. Veolia is also active in transportation P3 projects and manages public commuter rail and bus transit services for the Massachusetts Bay Commuter Railroad, Houston's MTA, Miami's Tri-Rail, and other systems. See *Trains*, January 2011, p. 22.

<sup>5</sup> Glenn Stone, "The U.S. Water and Waste Water Market," presentation to NCPPP on behalf of Grant Thornton, LLP, November 17, 2010.

## Financial Risks Associated with Public-Private Partnerships

When considering the State's P3 options, the four well-known pitfalls – failure to get the full value of public property, unfavorable pricing, unrealistic expectations, and budget gimmickry – must be recognized and avoided. Whenever the State considers using a P3 agreement, it must therefore identify the best practices for the valuation of public assets, keep private sector profits within reason, know what is being promised in exchange for taxpayer property, and adopt financing rules that prevent an irresponsible shift of current capital and operational costs onto future taxpayers. Protecting the public from these financial risks may mean limiting private sector profits. Such limitations may make P3 projects less attractive to the private sector, but a mutually beneficial P3 agreement can only be reached if the interests of both public and private sector partners are known and respected.

### ***Risk 1: Failure to Identify the Full Value of Public Property***

Although there are a number of accepted private-sector methods for valuing assets in public-private partnerships, there is also considerable disagreement about how to ensure that the public's interest is fairly valued. Most asset valuation models assume that an asset is fairly priced at whatever the market is willing to pay. However, market value may be substantially less than an asset's long-term or replacement value. In some cases, the private sector may not be willing to pay the full value of an asset.

Any asset maximization plan must ensure that the public receives a fair return on the value of its assets. Assets are undervalued when the State receives less than the inherent value of the asset. This danger is acute because public entities are often persuaded to sign leases for very long periods, such as 99 years, even though it is inherently difficult to ascertain the value of major infrastructure assets in the long run.

Furthermore, when a private sector entity is making its proposal for a P3, it may minimize the value of the asset that it will lease or manage for the public. This is because the private sector's market-based definition of fair value is different from that of the public, which is concerned with the long-term worth of the asset. The private sector's lower valuation may also be due to the fact that public assets are hard to price fairly, since they have always been operated in the past on a nonprofit basis. Whatever the reason, the

*The private sector's definition of fair value – what the asset would bring on the market today – is often different from the public's definition of fair value – what the asset is worth to those who own and use it, both now and in the future.*

public partner must protect the taxpayers' interests by getting fair value for the use of their property.<sup>6</sup>

The State must ensure that it has determined the minimum price it is willing to accept before it enters into negotiations over a P3 proposal. This will help avoid any undervaluing of public assets and an unintentional transfer of public wealth to private partners. This principle is especially important if the assets must be replaced at some point in the future by the public at full cost. The State's financial leaders should agree on a realistic and responsible method to value State assets.

## ***Risk 2: Unfavorable Pricing Mechanisms***

P3 agreements usually provide contractually guaranteed increases in the user fees (such as tolls) that are paid by the public. The U.S. Government Accountability Office warns that the public partner must be ready to conduct "rigorous up-front analysis" prior to entering into a P3 agreement.

*Although highway public-private partnerships can be used to obtain financing for highway infrastructure without the use of public sector funding, there is no "free money".... Rather, this funding is a form of privately issued debt that must be repaid. Private concessionaires primarily make a return on their investment by collecting toll revenues. Though concession agreements can limit the extent to which a concessionaire can raise tolls, it is likely that tolls will increase on a privately operated highway to a greater extent than they would on a publicly run toll road.<sup>7</sup>*

The contracts entered into with the Cintra-Maquarie consortium for operation of the Chicago Skyway and Indiana Toll Road both included provisions that guarantee the private partner the right to raise tolls by the highest of three rates per annum: a base rate of 2 percent, the annual percentage increase in the Consumer Price Index (CPI), or the annual percentage increase in the nominal Gross Domestic Product (GDP) per capita.<sup>8</sup> These increases are contractually guaranteed and cannot be blocked by the public partner once the contract is signed.

The following chart provides a hypothetical illustration of how tolls on the New York State Thruway might have increased from the highway's 1954 opening until 2009 if tolls had been permitted to grow at the rate guaranteed by the Skyway and Indiana Toll Road contracts. Although market conditions could limit toll increases, the fact

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<sup>6</sup> Some economists believe that in the absence of reliable benchmark measures, the optimal risk-sharing P3 terms can be found through competitive auctions based on realistic financial projects. See Eduardo Engel, Ronald Fischer and Alexander Galetovic, "The Basic Public Finance of Public-Private Partnerships," NBER Working Paper 13284 (2007).

<sup>7</sup> U.S. Government Accountability Office, "Highway Public-Private Partnerships: Securing Potential Benefits and Protecting the Public Interest Could Result From More Rigorous Up-Front Analysis," July 24, 2008, p. 5-6.

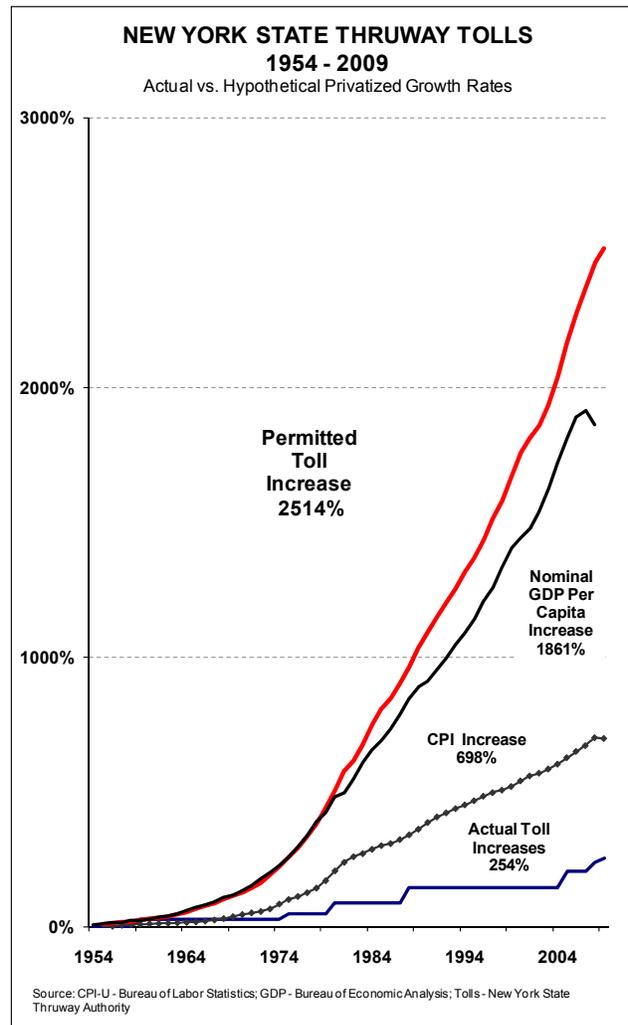
<sup>8</sup> Chicago Skyway Concession and Lease Agreement, October 27, 2004; Indiana Toll Road Concession and Lease Agreement, April 12, 2006; "Then there were two...: Indiana Toll Road vs. Chicago Skyway, An Analytical Review of Two Public/Private Partnerships," NW Financial Group, LLC, November 1, 2006; Independent Expert's Report, KPMG Corporate Finance (Aust) Pty Ltd, October 2006.

remains that the public partner has no input in the decision once toll increases are guaranteed by contract to the private partner.

Note that while actual tolls for passenger vehicles increased 254 percent from the opening of the Thruway through 2009, had the tolls been privatized and had they increased at the maximum allowable rate under the Skyway and Indiana Toll Road contracts, they would have increased a total of 2,514 percent.

This is an example of a P3 agreement that makes economic sense to the private partner, but should be seriously questioned when it comes to the public impact. How could New York justify such guaranteed toll increases?

In some other types of P3 agreements, the public partner pays what is known as an “availability payment.” This is something like an annual toll paid directly by the public partner to the private partner based on the amount of traffic a facility carries. The availability payment may also include a contractually guaranteed annual rate increase on top of the basic traffic payment. The public partner may be in the position of signing a contract for future payments without knowing exactly how much those payments may turn out to be.



### ***Risk 3: Unrealistic Expectations and Poorly Drafted Agreements***

In general, the various problems that can arise with P3 infrastructure agreements are insufficiently understood and discussed. The most common problem is confusion about which partner is financially responsible for such activities as snow and ice removal, police protection, accident repair, employee benefits, and similar normal operating expenses. Another issue is what happens if anticipated revenues fail to materialize, either as a result of unrealistic or overly optimistic financial assumptions, changed patterns of use, inflation, or such unpredictable events as terrorism or natural disaster. Changes in any of these assumptions can dramatically affect the bottom line for either partner.

Another unintended consequence may arise where a particular service or public resource becomes unavailable to a portion of the public, due to excessive cost increases or other use restrictions imposed – intentionally or not – by the private partner. P3 agreements that increase the cost to use a bridge may price some commuters out of the market. When this happens, traffic often diverts to local streets that are not designed or equipped to handle the additional congestion and weight loads.

The State should proceed with great caution when considering P3 agreements for the provision of essential government services. Projects that seem worthwhile initially may turn out to be less beneficial than thought. Some municipalities in Canada, Europe and South America that privatized their water supply systems have recently reversed their decision, and terminated contracts with private firms as a result of the high cost of privatized water.<sup>9</sup> Likewise, a number of private sector partners have renegotiated or terminated their agreements or declared bankruptcy as a result of revenue shortfalls for highway privatization projects in California and Virginia.<sup>10</sup>

The first step in determining if a P3 agreement is right for the public is to identify both the potential benefits and the likely public costs, including all costs external to the agreement itself. The Governmental Accounting Standards Board (GASB) created a working group on P3 concession accounting in 2007 and in December 2010 issued Statement Number 60 *Accounting and Financial Reporting for Service Concession Arrangements*. Another GASB research project is looking into “Fair Value Measurement” in governmental accounting. The work on this project is now entering its prospectus stage, indicating that a final standard is probably several years away.<sup>11</sup>

Other organizations with expertise in governmental accounting, such as the Government Finance Officers Association (GFOA), the Government Accountability Office (GAO), and the Office of Management and Budget (OMB), are also involved in efforts to develop accounting principles for use in assessing and overseeing P3 agreements. To date, however, clear and comprehensive guidelines and measures for the public side of P3 agreements have been lacking.

The bottom line determination in any proposed P3 agreement must be whether or not there is a compelling economic justification for the public to enter into the agreement. The calculations are complicated, but according to P3 financing expert E.R. Yescombe, they must include the following:

- A **cost-benefit analysis** that includes all relevant variables, including material, maintenance and funding costs, as inputs into either a discounted cash flow or an internal rate of return calculation.

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<sup>9</sup> “Water Remunicipalization Tracker” website (accessed November 29, 2010).

<sup>10</sup> U.S. Government Accountability Office, “Highway Public-Private Partnerships: More Rigorous Up-front Analysis Could Better Secure Potential Benefits and Protect the Public Interest,” February 2008.

<sup>11</sup> “GASB Issues Revised Proposal on Service Concession Arrangements,” press release June 17, 2010 and “Fair Value Management,” GASB research project website, accessed December 13, 2010.

- An agreed-upon **public-sector discount rate**. This is a calculation that reflects anticipated long-term risks and benefits related to the operation of a facility or service.
- Understanding of all important economic **externalities** such as the impact on land values, changes in pollution, changes in safety and public health, and so on. These can be hard to quantify, but they have important implications when assessing the desirability of a proposed partnership.<sup>12</sup>

The State's decision to proceed cannot derive solely from the result of a mathematical calculation, no matter how complex, but all these calculations should be known and incorporated into any decision that is made.

One of the principal advantages of public-private partnerships from the public's point of view is that they can shift certain financial risks to the private sector. The two principal types of threats to the expected financial benefits of a P3 are construction risk and usage risk.

- **Construction risk** includes the possibility of cost overruns, unforeseen engineering or site-related problems, or construction delays caused by weather, political, economic or other factors beyond the control of the public or private entity.
- **Usage risk** includes the possibility that the facility will not produce the level of income originally anticipated. The private sector may be willing to accept these risks, which traditionally are borne by the public, if its business model includes ways to minimize such risks.

The allocation of risk in a P3 largely depends on whether the agreement is for an existing asset or for something new. The simple transfer of operational responsibility for an existing facility or service solves very few of the State's policy goals for asset maximization. Conversely, proposals where the private sector is willing to take increased risk and provide new facilities may offer the best potential for maximizing the public benefits of P3s.

Although State and local governments may have little experience with public-private partnerships, and therefore only limited understanding of their ins and outs, the government of the United Kingdom has extensive experience with P3 agreements for all types of public services. As of 2009, there were over 500 operational agreements involving private sector financing in use in the UK. Experience there has shown that P3 agreements are neither a universal panacea for the public nor a sure thing for the private sector. According to the UK's National Audit Office:

*Having examined many PPPs, we have concluded that private finance can deliver benefits, but is not suitable at any price or in every circumstance. It is one of many routes of delivery, which, when used for*

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<sup>12</sup> E. R. Yescombe, *Public-Private Partnerships: Principles of Policy and Finance*, Amsterdam: Elsevier (2007), pp. 58-62.

*the right reasons and managed effectively, can work well. When it is used for the wrong reasons or is managed badly, it does not deliver projects well.*<sup>13</sup>

Both public and private partners in the UK have suffered in recent times, especially as a result of turbulence in the finance sector. Many private partners have been unable to access needed capital, forcing the government to become a project financing source.<sup>14</sup> This may be something that a national government can undertake, but the State should be aware that the private sector cannot always be relied on for the full degree of financial participation that P3 agreements may require.

#### ***Risk 4: Budget Gimmickry***

One of the main reasons that P3 agreements are under consideration at present is that New York State has engaged in poor financial practices for decades—by pushing current expenses into the future, using dedicated capital project resources for current operating expenses, and borrowing far more than it can reasonably afford. The State may now need to turn to the private sector to lend a hand, but it would be another imprudent mistake if P3 agreements were used without safeguarding the public’s long-term financial interests.

Simply put, a great risk the State faces is that it will use any lump sum payments or revenue streams it is offered by the private sector as ‘one-shot’ revenues and other short-term budget expedients, without regard to structural balance in the budget. This is not an idle or theoretical concern. Both the City of Chicago and the State of Indiana did just that, using the payments they received from their P3 partners for short-term “budget relief.”<sup>15</sup>

**Risk of Increasing the State’s Debt Burden** - Some asset maximization proposals are little more than new ways to perpetuate unsound financing practices, such as using new debt to pay for current expenses. This may lower costs in the short-run, but would end up costing much more in the future. It is the kind of financial transaction that the State should avoid. Sometimes the assertion is made that the financial obligations the State might make under P3 agreements should not be viewed as State debt, but rather as equivalent to an ongoing State appropriation. The implication is that P3 agreements will permit the State to get around current debt limits. Especially in light of the nation’s experience with the subprime loan collapse, the State should not enter into agreements that risk locking taxpayers into payments that they cannot afford. A comprehensive reform of the State’s debt and capital financing practices is needed to ensure that potential P3 projects receive sufficient consideration, with an informed awareness of long-term consequences.

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<sup>13</sup> H.M. Treasury, National Audit Office, “Private Finance Projects,” October 2009, p. 6.

<sup>14</sup> H.M. Treasury, National Audit Office, “Financing PFI Projects in the Credit Crisis and the Treasury’s Response,” July 2010.

<sup>15</sup> U.S. Department of Transportation, “Public Policy Considerations in Public-Private Partnership (PPP) Arrangements,” January 2009, p. 19.

**Risk of Uncoordinated Infrastructure Planning** – The nation’s transportation system is a diverse network of highways, mass transit systems, railroads, airports, and sea ports. Although this complicated system is operated by hundreds of federal, state and local agencies, and many private firms, it enjoys a high degree of integration. Public-private partnerships represent a potential threat to the rational coordination of that transportation system. This is because P3 agreements are based on opportunities for private profit rather than a comprehensive consideration of public needs. The private sector is inevitably interested in seeking the most profitable transportation opportunities, leaving the more costly and more difficult services to the public sector. Weaknesses resulting from such “cherry picking” can be made even more troublesome by the “non-compete” clauses in some P3 agreements that prevent government entities from offering alternatives at all.

**Risk of Off-Budget Capital Spending** - An additional concern is raised by the proposed National Infrastructure Bank, which has been promoted as a source of revolving loans and bond guarantees that could be used for a variety of infrastructure needs, such as water systems and transportation projects. New York already has experience with a small, federally sponsored State Infrastructure Bank, which provides off-budget financing for a limited number of transportation projects. This “bank” is really a fund capitalized with money provided by the Federal Highway Administration. It operates outside of the State’s normal procurement and budget system. One of the most prominent projects financed through the State Infrastructure Bank – the Rochester Fast Ferry – failed, leaving a multi-million dollar loan loss. All capital funds of the State, including any provided through a National Infrastructure Bank, must be subject to rigorous financial oversight.

A comprehensive reform of the State’s debt and capital financing practices is needed to ensure that potential P3 projects receive sufficient consideration, with an informed awareness of long-term consequences.

Unless State policy makers adopt a comprehensive infrastructure planning process *before* they consider specific public-private partnerships, the public sector may be left to run only the most expensive parts of the transportation network, with little ability to make the diverse components work as an integrated system. This would not only be expensive in the long run, it would also be contrary to the public’s interest in the development of sustainable transportation options, which are crucial for economic recovery and future growth.

In November 2010, the Office of the State Comptroller released a report on *Planning for the Long Term: Capital Spending Reform in New York State*, which detailed recommendations to reform the State’s capital planning process. These included:

- Restricting the use of public authority debt,
- Imposing a strict and effective cap on public debt,
- Imposing constitutional controls on public debt,
- Restoring control over State debt to voters,

- Creating a New York State Capital Asset and Infrastructure Council,
- Establishing a statewide capital needs assessment procedure,
- Ending off-budget capital spending,
- Enhancing agency reporting, including prioritizing existing capital needs,
- Establishing criteria for new capital initiatives,
- Requiring the demonstration of appropriate connections between funding and infrastructure improvements,
- Integrating Legislative capital budget changes to the Capital Plan, and
- Re-examining existing capital appropriations and reappropriations.

These reforms are necessary to ensure the State properly maintains and improves its infrastructure and capital asset base to meet both current and future needs. If such reforms are not adopted, the chances that P3 agreements will be used as budget gimmicks – rather than as prudent strategies to maximize the value of public assets and achieve long-term goals—remain very high.

## **Additional Considerations**

In addition to financial risks associated with public-private partnerships, there are numerous other public policy considerations that must be taken into account, including:

- **Loss of Public Accountability.** Private entities are not subject to the same level of oversight and public information standards that public agencies are. How much financial secrecy is the public willing to accept in return for P3 savings?
- **Loss of Administrative Control.** Public-private partnerships often shift control of an asset from the public to the private sector. How much oversight can the public sector shift to the private sector while still maintaining and advancing the government's core mission?
- **Loss of Regulatory Oversight.** Asset maximization agreements may be used to by-pass important environmental, labor, procurement, and other protective laws. To what extent can the government continue to protect the public interest under P3 agreements?
- **Loss of Employee Income and Benefits.** Public employees at leased facilities may lose public status, pay, health care, and retirement benefits. What is the impact of privatization on those jobs?
- **Increased Local Burdens.** Localities may incur unanticipated resource strains, such as the burden of serving users who choose to avoid tolled assets in favor of facilities without tolls. Does the State owe localities some form of compensation when it grants the private sector use of and profit from public resources?

- **Socio-Economic Impact.** Higher tolls and fares are inherently regressive, which means that middle-class and poor people pay a disproportionate share of their incomes to use the facilities. What measures are we as a society willing to embrace to reduce any adverse impacts of P3s on lower-income residents?

Public-private partnerships are not just a matter of State financial policy. Many other factors must also be taken into consideration if the State decides to move forward with P3 arrangements. As a report by the U.S. Government Accountability Office warns, when it comes to public-private partnerships, “there are many stakeholders and trade-offs in protecting the public interest.”<sup>16</sup>

## Conclusion

Public-private partnerships may provide a new and useful option for the financing and construction of public infrastructure in New York State, but they also present some of the most complicated and challenging financial arrangements that the State has ever considered.

Public-private partnerships are not currently authorized under New York State law. If the State decides to move in this direction, decision makers must first adopt policies that identify the types of projects that will be eligible for development and operation as P3s, adopt a methodology for determining the value of public assets that are involved, enact statutory changes to existing procurement law, and determine how to prevent potential negative impacts on users, employees, and taxpayers.

There are four essential principles that New York must adopt in order to mitigate the financial risks inherent in public-private partnerships:

**Full and Fair Value:** Identify and use the best practices for the valuation of public assets to ensure that the public receives the full, fair value for the use of its property.

**Reasonable Pricing:** Keep private sector profits within reason to ensure that P3 agreements do not burden the public with unwarranted expenses, excessive fees, or high toll increases.

**Realistic Agreements:** Carefully draft P3 agreements to ensure that they do not include unrealistic expectations or inaccurate financial calculations.

**Responsible Budgeting:** Avoid budget gimmickry by adopting financing rules that prevent a disproportionate shift of current capital costs onto future taxpayers. This must be based on a comprehensive reform of the State’s debt and capital financing practices.

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<sup>16</sup> U.S. Government Accountability Office, “Highway Public-Private Partnerships: More Rigorous Up-Front Analysis Could Better Secure Potential Benefits and Protect the Public Interest,” February 2008.

If State policy makers recognize the importance of these four principles, they can respond by adopting a comprehensive plan for the integration of public-private partnerships into New York's budget, capital financing, and infrastructure planning procedures. In doing so, they will have gone a long way toward protecting the public interest and ensuring that any P3 agreements that are created in New York achieve the correct balance between public and private interests.