Chapter 8

Reducing Risk in Public–Private Partnership Contracts: Two Examples From Highway Tolling Projects

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ABSTRACT

In an effort to address financial constraints and environmental concerns states have increasingly turned to a combination of un-tolled (HOV) and tolled (HOT) lanes. Public-private partnerships (3Ps) are a popular mechanism for this more sustainable approach to highway infrastructure that couples environmental sustainability (efficient utilization of existing lanes, less congestion) with financial sustainability (private investment). This chapter offers an approach to 3P contract writing for HOV/HOT facilities that is structured by a stakeholder analysis of actors in the project accountability environment. By analyzing two Virginia 3P highway projects, the chapter shows it is possible to build into a contract a set of terms and conditions to enhance the likelihood of meeting the goals of multiple stakeholders. By necessity, such contracts cannot specify precise monetary returns and other stakeholder benefits, but they can be written to include trade-offs to minimize losses to one party at the expense of another.

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INTRODUCTION

Financial constraints and environmental concerns are promoting the development of tolled highway projects that encourage less driving with a combination of (untolled) high occupancy vehicle (HOV) lanes and high occupancy toll (HOT) lanes. HOV/HOT projects are financially sustainable when the private sector is a partner who invests money in the project. The projects are environmentally sustainable when they add fewer lane miles of pavement than a traditional roadway expansion, consume less land, and offer drivers a choice between un-tolled lanes and a tolled lane that is faster and less congested.

Public-private partnerships (3Ps) are a popular mechanism for this more sustainable approach to new highway infrastructure. However, many 3Ps are risk-prone due to their complexity and the unpredictable nature of the revenue streams they frequently create (Urban Land Institute, 2013). The risks and uncertainties challenge accountability. This is especially the case when public infrastructure investments assume adequate returns to the parties over an extended time horizon (Hodge, 2004). Given the ambiguity of future events, it is impossible to specify all the desired results in the contract. Thus, it is difficult for the parties to hold each accountable for any failure to deliver. In this regard, 3Ps to build tolled facilities can subvert the conventional approach to accountability and fail to generate the expected financial and environmental benefits.

Public and private sector actors thus may face the prospect of a failed project. Farmer (2018) provides a classic example of a local government suffering a substantial loss from a poorly designed contract with the private sector. The City of St. Louis lost money when its NFL team, the Rams, moved to Los Angeles. The Rams owners used a loophole in their contract with the St. Louis Regional Convention and Sports Complex Authority to avoid paying the rest of the Rams’ share of the $259 million, 30-year bond used to finance the construction of a football stadium (Farmer, 2018).

The Rams were able to leave the taxpayers on the hook for the remaining financial obligation because in its leasing agreement with the team, St. Louis officials agreed that the new stadium would remain rated in the top 25 percent of all NFL stadiums. When the financially-strapped city refused to make the stadium upgrades to keep it in the top 25 percent, the team’s lease was not renewed. St. Louis officials made a simple error—they did not stipulate in the contract that the team must continue to lease the stadium so long as any of the debt remained outstanding.

This chapter offers an approach to 3P contract writing for HOV/HOT facilities that is structured by a stakeholder analysis of the interests of all the actors in the accountability environment surrounding a project’s field. Rather than specifying precise outcomes of the highway projects, the contracts analyzed were strategically
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