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Think Tank Warns of Downsides to P3 Noncompete Clauses.

Many developers seek to incorporate noncompete clauses in their P3 agreements to ensure their project investments will deliver an expected rate of return. However, one think tank cautions public agencies to consider what unforeseen changes could occur over the life of a project that may cause these provisions to turn what was a beneficial project into a public liability.

Noncompete clauses are designed to discourage the government from developing projects or policies that could compete for or in other ways reduce revenues the developer expects to earn from the project, the Center for American Progress explains in a July 27 report. Examples include provisions that penalize an agency for building a free road that could lure drivers away from a toll road the developer is building or passage of a law that suddenly imposes a statewide cap on the amount of fees that a toll road operator can impose.

Many developers see noncompete provisions as a way of decreasing their financial risk, regardless of the economic or political changes their public partners may initiate or endure. These agreements lock in financial stability for the private partner but this guarantee may come at the expense of the public partner's bottom line.

The center cites Chicago's decision in 2008 to lease many of its parking meters to a private company for 75 years in exchange for a one-time payment of $1.15 billion. Under the deal, the city retained some say over which and how many parking spaces it leased to the company but this flexibility came at a price. The city government agreed to pay a fee for making any policy or regulatory changes that might reduce the company's parking fee revenues, such as adding public parking spaces close to the leased spaces, reducing parking fines below an agreed-upon level, reducing the number of spaces the company controls or relocating a company-leased parking space from a high- to low-demand area. Under the terms of this agreement, Chicago has thus far paid the firm $31 million for making these types of changes — at a period during which its population, and therefore, its tax base was on the decline.

"This suggests that the city would have been better off simply borrowing the sum it received through the deal. Issuing municipal debt would have provided needed capital at a fixed price without locking the public into an agreement that provides a low-risk, near monopoly position for a private concessionaire," the center explains.

Because many P3 agreements stretch for decades, "government negotiators are forced to try to foresee all future possible scenarios — an essentially impossible task," the report warns. The strict nature of many of these agreements lock governments into terms and conditions that can ultimately can work against rather than for the public good.

For this reason, policymakers should avoid noncompete clauses whenever possible. If noncompete clauses are deemed necessary, the state must ensure that the concessionaire accepts a lower rate of return that reflects the reduced revenue risk the provision provides," the center advises.

NCPPP

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