New Financing Trends and Consequences on the Tunneling Contracts

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What’s Old is New

- In the 19th Century many major projects were privately funded with the blessing of the Government.
- In the 20th Century most major projects were funded by the Government.
- In the 21st Century the private sector is once again funding projects.
SAME PLAYERS

- Politicians
- Engineers
- Lawyers
- Banks
- Insurers
The Problem

- Late 20th century economic policy has left many countries cash poor
- Citizens demand complex expensive infrastructure
- Societies unwilling or unable to fund assets today with long design lives (e.g., 150 years for a tunnel)
- Downsizing of Government causing migration of expertise to private sector
- Globalisation - expertise and capacity to deliver major infrastructure does not reside in countries; it's found in trans-national corporations
A Solution? - PPP

- The Public Private Partnership model allows a community to enjoy an asset it demands today (but cannot or will not purchase) by securing access to the private sector's money and expertise.

- In exchange for access to its money and expertise, the private sector demands an economic return.
Multi billion dollar projects

- PPPs are a real option
  - Attracts the best resources
  - Early mobilisation
  - Corporate backup
  - Purchasing power
  - Economies of scale

- Earliest possible delivery – public and economic benefits
PARTNERSHIP

- Legal dimensions of these relationships are critical
- State Laws (binding the government into the future)
  - Revolutions are made of such things
Striking the Balance

- **Financial capital**
  - A PPP can span 100% private capital requirements to only a fraction of the project

- **Intellectual capital**
  - A PPP can span 100% private intellectual capital requirements to only a fraction of the project

- **Return on investment**
  - A PPP can embrace the full spectrum of financial return from substantial ownership of an asset to rights to an income stream or a simple return on investment
Projects Delivering Underground Space

- Technically complex
- Satisfying an acute need
- Demand significant resources
  - Financial
  - Technical
  - Intellectual
  - Organisational
- Progress mostly invisible to the public
- May serve a function that can have a cash flow attached (e.g. a toll)
Challenges

- Management of risks
  - Continues beyond construction – into operation phase
  - Contracts must be responsive for issues
    - over long time
    - changing phases
    - changing performance demands
  - Long term contractual framework demanded
Marriage

- Legal documents establishing PPP relationship are critical
  - Must stand test of time
    - Anticipate classes of issues and provide resolution of disputes (30+ years)
    - Transcend political changes (social changes)
    - Reflect Profit/Function balance (when partnerships breaks down it is usually a question of fairness)
  - Be responsive to the partners needs today, and their changing needs in time
Be Careful of your wishes
Lawyers

- Unless properly instructed and skilled in underground infrastructure issues may create documents insensitive to tunnel project special needs.

- An adversarial approach may be counterproductive.
Legitimate Tensions

- Governments power to govern
- Private sector return on investment
Culture

- No “Standard” PPP
- People, Governments, Companies are all different
Challenge

- Delivery of ongoing operational underground infrastructure
  - Meeting changed local performance requirements
  - Meeting changed local political requirements
  - Meeting changed local legal requirements
  - Meeting local community requirements

- Where either the Public or Private party are either unwilling or unable to accommodate such a relationship to facilitate the project – no PPP
PPP

- Identify projects suited to PPP
  - Costs
  - Returns
  - Performance
  - Expected outcomes

- Structure PPP to make attractive
  - Public/
  - Private
Insurance

- Contracts can deal with insurance in a multitude of ways

- Insurance needs differ – between projects and at stages in projects

- E.g. ITIG Code
  - (Construction not operation)
Standardised PPP documents?

- Depends upon circumstances
- PPP’s demand flexibility in approach
- Each country/region/organisation/project needs PPP consideration for a long marriage!
Binding (restricting) aspects of Government “discretion” for many years

Nature and extent of restrictions is easily mishandled – legally/Politically
Failures

▪ Tolls

▪ Government either builds, or has built competing infrastructure

▪ Legitimately
  ▪ Changed circumstances allow government funded tunnel or bridge or....
  ▪ New PPP to address ongoing capacity issues

▪ Wrongly
  ▪ Government receives “payment” to provide new “competing concession”
  ▪ Politics demand re-opening of alternative roads
Social Rejection

- Citizens “refuse” to use toll roads
  - Culture of free roads
  - Reaction to combined cost of multiple tolls for single journeys (Cross City Tunnel Sydney)
Failed Projections

- Over Optimistic projected use
- Over Optimistic projected payment
- Floored Economic Projections
  - Economic downturn
  - Changed mode of travel
  - etc
Alternatives?

- Fee for availability of asset (independent of use)
- Fee for use of asset (but paid by Government as a shadow toll)
- etc
General Legal Proposition

- Government has residual legal power to change the rules.
- Politics change over infrastructure life
- Always a risk of political/legal contractual intervention
Conclusion

- PPP delivers excellent outcomes for *some* projects
- *Not* a Solution to all projects
- Legal provisions can craft the framework for ongoing relationship management 30+ years
- Lawyers must craft special terms suited to the needs of the “Partners” in a PPP
- There can be no International PPP “standard” as the relationship between the Public and Private sectors is necessarily quite different between countries and projects
- Tolling for Private sector cash flows can be perilous
- Management of PPP risks is best achieved by agreed “process” and apportionment of risks in tailored contracts
Thank you for your attention