

# PROTECTING THE PUBLIC IN PUBLIC-PRIVATE PARTNERSHIPS: STRATEGIES FOR ENSURING ADAPTABILITY IN CONCESSION CONTRACTS

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*State and local government face ever-growing costs in order to provide adequate services, facilities, and infrastructure for their citizens, but traditional means of financing the provision and maintenance of public services is no longer adequate to cover expenses. Concession contracts—a type of public-private partnership whereby governments lease infrastructure assets to private entities, generally in return for large, up-front payments—have been proposed as a potential, innovative solution. The few concession contracts that have been implemented, however, have generated considerable controversy. The biggest concern is that these concessions—which can last upwards of seventy-five years—sacrifice long-term public interest for short-term economic gain. This Note seeks to evaluate the legal strategies available to governments to ensure that governments who enter into concession contracts are able to adapt to changing circumstances throughout the course of the lease. This Note proposes several strategies that governments can implement through structural, regulatory, and contractual channels in order to maximize long-term adaptability and ensure that public interest is not subordinated to private economic gain.*

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## I. INTRODUCTION

Detroit's recent bankruptcy brought a widespread problem in American municipalities to the fore.<sup>1</sup> Local governments face ever-growing costs in order to provide adequate services, facilities, and infrastructure for their citizens, but traditional means of financing public services—such as taxation and the municipal bond market—are no longer adequate to cover city expenses.<sup>2</sup> Governments, scholars, and economists have suggested one potential innovative solution to this problem: concession contracts for the lease of assets. Concession contracts are a type of public-private partnership (“PPP”), defined broadly as a “contractual agreement between public and private sector partners, which allows more private sector participation than is traditional.”<sup>3</sup>

PPPs are not a new phenomenon in the United States. They have been used in a variety of forms to operate facilities, and to provide services and utilities at the federal, state, and local levels, including prisons, water, and waste collection and disposal.<sup>4</sup> Through PPPs, the public sector can take advantage of private sector expertise, innovation, and financing to provide more efficient and higher quality services to the public. In a concession contract, a municipal or local government entity grants a private partner exclusive rights to operate, maintain, and manage a facility or piece of infrastructure for an extended period of time, usually in return for a large, up-front payment.<sup>5</sup> This model addresses

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<sup>1</sup> Monica Davey & Mary Williams Walsh, *Billions in Debt, Detroit Tumbles Into Insolvency*, N.Y. TIMES, July 19, 2013, at A1.

<sup>2</sup> See Kent Rowey, *Public-Private Partnerships Could Be a Lifeline for Cities*, N.Y. TIMES DEALBOOK (July 15, 2013, 12:39 PM), <http://dealbook.nytimes.com/2013/07/15/public-private-partnerships-could-be-a-lifeline-for-cities/>.

<sup>3</sup> U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., REPORT TO CONGRESS ON PUBLIC-PRIVATE PARTNERSHIPS viii (2004) [hereinafter PUBLIC-PRIVATE PARTNERSHIPS REPORT].

<sup>4</sup> See Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 166 (2000).

<sup>5</sup> See Rowey, *supra* note 2.

the government's budget problems in two ways. First, by infusing the government with a large amount of cash to provide for critical public services and facilities; and second, by relieving the government of the yearly costs of operating and maintaining such facilities.

Concession contracts have generated more controversy than other varieties of PPPs. The most troubling aspect for many is the perceived trade-off between short-term economic gain and long-term public interest.<sup>6</sup> City governments facing budget shortfalls are eager to enter into concession contracts,<sup>7</sup> which can generate an immediate cash infusion that can be used to balance budgets, pay off debts, and provide much needed services to citizens. Many of these transactions, however, give a private company effective ownership and control over the asset for many decades, thus binding governments to the terms of the lease for generations into the future.<sup>8</sup> If the practice of leasing infrastructure assets to the private sector is to continue—especially with such long lease terms—it is imperative that regulatory and contractual provisions be put in place to ensure that governments can adapt to changing circumstances, whether those changes involve a city or state's financial situation, administrative ideology, or

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<sup>6</sup> See, e.g., Celeste Pagano, *Proceed with Caution: Avoiding Hazards in Toll Road Privatizations*, 83 ST. JOHN'S L. REV. 351, 354 (2009) ("Governments and citizens are understandably concerned that the up-front payment and the services to be performed . . . accurately reflect the value of the lease, but in addition to valuation questions . . . privatization can raise tensions between conflicting goals within government programs and the potential for conflicts of interest between the goals of the public and private entities involved."); Donald Cohen, *Cities Need to Weigh Costs of Private Partnerships*, N.Y. TIMES DEALBOOK (July 23, 2013, 4:12 PM), <http://dealbook.nytimes.com/2013/07/23/cities-need-to-weigh-costs-of-private-partnerships> (arguing that Chicago's parking meter concession deal "lacked 'meaningful public review' and neglected the city's long-term interests to solve a short-term budget crisis").

<sup>7</sup> See John Ziegler, Note, *The Dangers of Municipal Concession Contracts: A New Vehicle to Improve Accountability and Transparency*, 40 PUB. CONT. L.J. 571, 572–73 (2011).

<sup>8</sup> See Pagano, *supra* note 6, at 374.

unforeseen changes in the infrastructure or service needs of its citizens.

This Note seeks to evaluate the legal strategies available to governments to ensure that adaptability. Part II provides a brief history and background on the use of PPPs abroad and in the United States. Part III discusses the advantages and disadvantages of PPPs. Part IV uses two concession contracts—the 2006 lease of the Indiana Toll Road and the 2008 lease of Chicago’s parking meter system—as case studies to analyze what mechanisms for government adaptability appear in these early asset lease agreements. Part V discusses strategies for adaptability in concession contracting that governments should consider going forward. Specifically, this Note proposes that governments can ensure long-term adaptability through structural, regulatory, and contractual channels. At the structural level, governments should create centralized agencies to standardize the process of procuring, evaluating, and structuring PPPs. At the regulatory or legislative level, states should pass comprehensive enabling statutes that regulate the procedure for governments wishing to enter into PPPs, as well as mandate substantive terms that should be included in the agreements. Finally, at the contractual level, governments should think critically about the costs and benefits of including certain provisions—such as non-compete and compensation clauses—in concession PPP agreements.

## II. BACKGROUND

### A. Public-Private Partnerships Defined

While PPPs have only become a topic of public discourse within the past ten years, U.S. municipalities have for decades “contract[ed] out” to private actors the provision of critical utilities such as water and solid waste collection and disposal.<sup>9</sup> Private provision of these services has been

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<sup>9</sup> See Freeman, *supra* note 4, at 166 (2000); Steven C. Deller, *Local Government Structure, Devolution, and Privatization*, 20 REV. AGRIC. ECON. 135, 136 (1998).