



June 11, 2012

Bill 34 – THE PUBLIC PRIVATE PARTNERSHIPS TRANSPARENCY AND ACCOUNTABILITY ACT

The Manitoba Heavy Construction Association (MHCA) www.mhca.mb.ca speaks for the heavy construction industry in Manitoba.

Our industry, directly or indirectly, employs approximately 15,000 Manitobans. Its primary organizational focus is working with all levels of government in support of economic growth and the associated enabling characteristics of sustained and strategic infrastructure investment.

We have an established reputation of being collaborative, constructive and principled advocates of public policy with the three levels of government, a reputation we jealously protect. We prefer discussion to conflict.

As an industry we support the use of P3s as but one method of providing municipalities, provinces and the federal government with access to investment in a cost certain, competitive, performance based contractual arrangement with appropriate safe guards for cost and investment value add. That in a nutshell is what P3 agreements offer.

We also support transparency and accountability for the expenditure and investment of public dollars coupled with assurances of value for money analysis, appropriate risk-sharing, financial structure and procurement process. Our association often speaks to and champions transparency and accountability principles. These are not our areas of concern.

We are however, frankly quite concerned with Bill 34 from a number of other perspectives and in brief, they include the following:

1. First and foremost we are very disappointed that legislation introduced to enable *'transparency and accountability'* was itself crafted and tabled without any apparent prior consultation with Manitoba private sector stakeholders and practitioners who would not only have an interest, but experience to offer.

This is in very sharp contrast to what the City of Winnipeg did before it made a decision to proceed with the P3 Charleswood Bridge project, the first of its kind for Winnipeg.

In that instance, the City struck a public/private sector stakeholders group of more than 30 individuals to assess the overall merits of so proceeding before making a project and process selection decision. That lasted over a year. Such consultation did not precede the tabling of Bill 34.

Manitoba companies have been awarded P3 projects beating out international competition in the process.

In two such projects with which I am reasonably familiar - Charleswood Bridge and the Chief Peguis Extension - costs came in significantly below budget, were constructed years ahead of time and will be returned to the City of Winnipeg after a 30 year lease period in pristine condition.

In each of these cases, the P3 contract protects the public with cost certainty and performance based payments - no performance ... no payment.

We do not understand what caused sudden provincial alarm to table otherwise unannounced intentions of needed legislation to address accountability and transparency in the field of P3 projects.

2. We are advised that if the Legislature passes the Act, the regulation development process would involve 'consultation,' and take a year or two. Once regulations are adopted the legislation would be put in force.

The language in the Act however is so broad as to enable any definition a regulator wishes to impose *without any transparent or accountable public debate.*

The Regulations - section 11 - will dramatically shape the final ideology of the Act. Such broad, unfettered authority to shape the law through regulation is in itself the opposite of transparency and accountability which this legislation is ostensibly designed to address.

3. Our reading of the Act suggests that First Nations are excluded from the legislation. Are we correct? Perhaps this is because of a division of federal/provincial jurisdiction but the rationale is not stated and should be clarified.
4. It would be very helpful to understand what kinds of information relative to contract terms would become part of the "*contract summary*" that the Fairness Monitor would have to release to the Auditor General which in turn is made available to the public. (See Section 7.2. f and 7.3. a).

The requirements of the "*contract summary*" provisions of this legislation causes the most angst for private sector entities who propose to engage in the P3 process.

This is not spelled out except in the broadest of definition terms subject further to interpretation and flesh provided through regulations.

Accordingly, any such Act, as a matter of stated principle and not subject to further regulatory definition or restriction, must protect from disclosure, any and all commercial advantage, financial or intellectual property that allows a public or private sector partner to competitively participate.

Absent such a restriction, the private sector will stay away in droves and the public sector - and the taxpaying public by extension - will be disadvantaged by being denied access to ingenuity, and innovation in cost certain, competitive, performance based contractual arrangements.

The Free Press in its June 5, 2012 editorial '*The Province imposes its will,*' - see attached - accurately made this point on the need for privacy when it stated that:

"There are actually legitimate reasons why the private sector insists on confidentiality when bidding on public contracts. It wants to protect trade secrets, unique financing arrangements, labour-management issues and other factors that are considered proprietary.

The Government of Alberta policy on P3s has a long list of facts it does not disclose, including its own business case for a particular project because it might jeopardize the government's competitive advantage. It also does not disclose commercially confidential information in the final agreement with the private sector."

5. P3 projects are of value to a limited number of projects. Some, like P3s Canada, estimate that to be only 20%.

Why is it that the traditional '*design-bid-build*' is not subject to the same scrutiny proposed for P3 projects?

What is it about P3 projects that merit such a rushed review, and based upon what objective research findings or history?

6. Perhaps our greatest concern revolves around accessibility to P3 projects and the lost funding opportunities if the legislation and ultimately regulations dissuade private sector interest and participation.

The necessity of P3's in today's world of budget deficits should be apparent to any objective observer of Manitoba's roughly \$14 billion and Canada's roughly \$240 billion municipal infrastructure deficit.

By appearing as the Act currently crafted does, to limit, interfere, add process and cost, all restricting municipalities' access to P3 delivery methods, the Province will directly be preventing infrastructure projects from being completed on the municipal front and because of the Act's broad application, to provincial infrastructure needs as well.

In the context of living examples, the Charleswood Bridge, Disraeli Freeway and Chief Peguis Extension projects would not have gone ahead if not for the P3 financing model. Nor would the City of Winnipeg be discussing any major infrastructure projects like Plessis Underpass or further Chief Peguis Trail extensions as called for in its adopted Master Transportation Plan.

P3s have the ability to access innovation, ingenuity, cost certainty and risk capital in a manner considerably accelerated than through traditional financing models. Those advantages should be harnessed properly not hindered. Absent access to P3 funding models will have the direct impact of significantly reducing the capacity to address our provincial infrastructure deficit challenges.

Each of the AMM and the City of Winnipeg have publicly expressed concerns about the ability of the 'community of municipalities' in Manitoba to access P3 funding with the legislation as currently written.

We would ask that the province heed those publicly expressed concerns.

RECOMMENDATION

Minister Struthers is referenced as saying that the province's goal is to increase transparency and accountability. We have no reason to disbelieve the Minister.

Given that the government is on record on the side of *transparency and accountability*, then it will have no difficulty in accepting, that the Act as currently drafted, while presumably well-intentioned, is premature and should go no further.

For all of the above reasons, the MHCA respectfully recommends as follows:

"That the government table consideration of Bill 34, and mandate a group of private / public sector subject matter experts and practitioners, to review best practices across jurisdictions and recommend what legislation, regulatory regime, best practices and accompanying structure if any, would make sense for Manitoba."

CONCLUSION

This or any elected government certainly has the 'right' to pass any legislation and/or regulation it chooses having been democratically elected.

However that right is tempered by a 'responsibility,' to exercise best efforts to ensure that proposed legislation or regulation respects the best interests of all citizens.

Respectfully in this instance, at this time, that 'responsibility' has not yet been discharged.

And it is no answer either to suggest that *consultation* will occur in the development of regulations which will perfect, explain or clarify the legislation. This is particularly so when the Act itself was not preceded by stakeholder consultation.

Accordingly we respectfully call upon the government not to exercise its 'right of majority,' but its 'duty of responsibility,' and refer this matter back for consideration as the recommendation suggests.

Respectfully submitted,
MANITOBA HEAVY CONSTRUCTION ASSOCIATION (MHCA)



Per:

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President

cc. Association of Manitoba Municipalities (AMM)
Business Council of Manitoba
Manitoba Chambers of Commerce
MHCA Board of Directors & Members
Manitoba Employers Council (MEC)
Mayor and Council of City of Brandon
Mayor and Council of the City of Thompson
Mayor and Council of the City of Winnipeg
Merit Contractors Association of Manitoba
Winnipeg Chamber of Commerce
Winnipeg Construction Association (WCA)

Province imposes its will

By: Editorial
Posted: 05/28/2012

The City of Winnipeg is the only public body in Manitoba to finance infrastructure projects -- four in total -- through private-public partnerships, and it was the first municipality in Canada to secure funding from the P3 Canada fund, which was created to improve the delivery of public infrastructure and "provide better value, timeliness and accountability."

Somehow, however, the Manitoba government has decided that it, and not the city, is the expert on these matters. The NDP intends to table legislation that will regulate the way the city manages P3s. The city believes the government's motives are less than pure, and that the regulations will complicate the process, slow it down, and increase the cost.

Finance Minister Stan Struthers says the province's only goal is to increase transparency and accountability, while enhancing its own ability to secure federal funding for private-public partnerships.

In particular, Mr. Struthers said the proposed legislation has nothing to do with the city's controversial arrangements with Veolia, an international engineering firm hired to help manage capital and operating budgets for sewage waste disposal.

The Veolia deal is not a traditional P3, but the magnitude of the 30-year contract and the fact it nearly included a deal for the water system, too, sparked intense interest from community groups and others who pay attention to these issues.

The Winnipeg Citizens Coalition, the Canadian Union of Public Employees, Winnipeg Water Watch and the Council of Canadians, among others, complained there wasn't enough public information about the Veolia deal. These groups are also part of the NDP's traditional base, but the province denies any connection between the legislation and their complaints about secrecy.

The Veolia deal was fraught with confusion and it was not well-managed. There should have been a better process and more information for public scrutiny, but it was not a P3 and nothing in the new legislation, if it had been in effect at the time, would have applied, unless, of course, the province has other plans that it has not disclosed.

There are actually legitimate reasons why the private sector insists on confidentiality when bidding on public contracts. It wants to protect trade secrets, unique financing arrangements, labour-management issues and other factors that are considered proprietary.

The Government of Alberta policy on P3s has a long list of facts it does not disclose, including its own business case for a particular project because it might jeopardize the government's competitive advantage. It also does not disclose commercially confidential information in the final agreement with the private sector.

Incidentally, Alberta does not require municipalities to follow its rules, unless they want provincial money. Major cities in Alberta have their own policies on P3s.

The City of Winnipeg's problem is that it does not have a written, publicly available policy on public-private partnerships.

It claims it abides by all the principles sought by the province, including the use of third parties to ensure the business case is sound and that the bidding process is fair.

A public policy allows concerned citizens to understand the process and why some facts may be in the open, while others are confidential. It explains how the public can have input, and where it has no business.

Whatever the province's motive, it's clear the legislation is intended mainly for the City of Winnipeg, since some aspects of the law will apply only for contracts over \$20 million.

The legislation will not apply to projects done in a traditional way, but merely to those that are private-public partnerships.

Once again, the government is demonstrating a paternalistic attitude to the city, where, coincidentally no doubt, its base resides.

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