

CPARB Public-Private Partnership Committee

Executive Summary of Draft Legislation

CPARB Pre-Reads for September 8, 2016

I. P3 COMMITTEE SUMMARY

- Representatives of public owners (Ports, WSDOT, Sound Transit, Counties, City), contractors, trades/labor, academia, including CPARB and PRC members.
- Series of meetings and exchanges over 14 months. Discussed suitability of existing law (Transportation Innovative Partnerships, RCW 47.29), demand and opportunity for P3 in Washington, challenges and drawbacks, lessons learned from other jurisdictions. Consensus: propose new enabling legislation.
- Multiple drafts of legislation from June 2015 to reach consensus for initial presentation to CPARB in May 2016.

II. KEY FEATURES OF COMMITTEE DRAFT LEGISLATION

Purpose: Provide public owners an efficient vehicle to deliver public works where P3 principles—consolidated design, build, finance, operate, and/or maintain—provide public benefit.

Goals: Provide owners flexibility to maximize public value across a wide spectrum of potential projects. Balance owner flexibility with safeguards for competition, value for money, high labor standards, and opportunities for participation by disadvantaged and underrepresented business groups.

What the Proposed P3 Legislation IS: A flexible, competitive, public procurement and delivery process that consolidates elements of project design, construction, operations, maintenance, and/or financing by private entities, allowing public owners to efficiently utilize specialized private sector expertise and resources, provide performance-based incentives and compensation to maximize value, and allocate risk on projects with a long-term operating component.

What the Proposed P3 Legislation is NOT: A toll road statute. Limited to “megaprojects.” Limited to heavy civil projects. A limit on any existing public contracting methods.

III. PARTICULAR TERMS INCLUDED

P3 Definition: Contract that relates to development, financing, maintenance, and/or operation. May implement Design-Build-Operate-Maintain, Design-Build-Finance, or Design-Build-Finance-Operate-Maintain, or other delivery method.

Procurement: Competitive, structured, RFQ-RFP or RFP process.

Ownership: Any property involved reverts to the public body after the contract term.

Financing: Owner may combine public and private financing and funding sources.

Labor Standards: P3 projects are public works, subject to payment bonds, prevailing wages, and mandatory plans for labor harmony.

Equity: Owner may designate standards for outreach to small, disadvantaged, veteran-owned, minority and women owned, and other underutilized businesses.

Review: Approval from proposed new PRC subcommittee with expertise specific to P3.

From: Keith, Rebecca <Rebecca.Keith@seattle.gov>
Sent: Tuesday, October 04, 2016 6:23 PM
To: James Lynch
Cc: Deakins, Nancy (DES) (nancy.deakins@des.wa.gov); talia.baker@des.wa.gov
Subject: P3 draft legislation comments

Hi Jim,

I know that the deadline is passed for submitting comments on the draft P3 legislation, but I was unexpectedly out of the office several times since the last CPARB meeting and I also sought some input on the financing provisions that I just received today. So, I am submitting comments and questions that I have even though the deadline is passed. I have a number of areas where I think the drafting has typos or needs to be tightened. But I am going to limit my comments to specific policy and process concerns.

1. The statute provides little or no guidance regarding what types of projects are suitable for a P3 procurement and agreement. The requirements of the statute are such that it may result in de facto use for large projects, but why procure through this method rather than authorized 63-20 financed leases, DB, GC/CM or other alternative process. If the real intention is to authorize projects which will be ultimately paid for through tolls or user fees, why not be more direct.
2. The RFP must include the draft form of the agreement/contract, which cannot materially differ from the form included when the project is approved by the P3 subcommittee. Yet the material business terms need to be negotiable and the requirements for the elements of the agreement could be interpreted to require the public entity to pre-determine a lot of things that would benefit from negotiation.
3. The financing issues are very concerning. First, as drafted I am not sure they add any new options for public financing, and may create confusion regarding what types of public financing is legally possible. I don't think the statements change the debt limitations under the state constitution, nor limitations on lending of public credit, nor applicable IRS rules for tax exempt financing.
4. I have heard from at least one other city rep that it is onerous to require the agreement to 'expressly' address 30 specific areas, even if they are not applicable in every case.
5. My understanding is that requiring a plan for 'labor harmony' practically results in requiring a CBA for each project, and as I am reading the statute this would apply for the life of the project. That may have legal ramifications – can this be required by statute – and it could have policy implications for DBE contractors.
6. The definitions section is not the best place for a substantive provision, and the definition of 'public body' includes a very substantive provision that this new statute will control in the event there is a conflict with RCW 47.29. I think there is a big conflict – whether the transportation commission reviews and approves or whether the new CPARB P3 subcommittee approves. And since this new statute authorizes user fees, does that mean legislative approval is no longer required for tolls? These are too significant to leave open to interpretation later.
7. Finally, there are questions about whether the statute really provides enough structure/guidance for the review committee to be making the determination about whether the project is approved as a P3. Continue to have concerns about whether the structure is in place to have the review provide a meaningful value added.

I plan to be at the meeting on October 13, and I apologize for the delay in submitting feedback.



Rebecca Keith
Assistant City Attorney
Contracts and Utilities Sections

Seattle City Attorney's Office
701 Fifth Avenue, Ste. 2050
Seattle, WA 98104-7097
Phone: 206-684-8239
FAX: 206-684-8284
rebecca.keith@seattle.gov

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From: Alan C. Nygaard <anygaard@uw.edu>
Sent: Wednesday, September 28, 2016 2:06 PM
To: James Lynch
Cc: Deakins, Nancy (DES) (nancy.deakins@des.wa.gov); Baker, Talia (DES) (talia.baker@des.wa.gov)
Subject: Request for comments on P3 Legislation

Mr. Lynch,

Thanks you for the opportunity to respond and provide input to the P3 proposal. A number of public owners meet several weeks ago to discuss Design Build practices in the State of Washington. One of the topics for the meeting was the P3 proposed legislation. We quickly reviewed the proposal as most of the attendees were very familiar with the draft.

The overwhelming response to the draft is that it is overly prescriptive. The issue is that the kind of projects envisioned to use this procurement process have such a huge variety of possibilities that the Public Owners need flexibility similar the level of direction that is in the current design build statute along with the proposal for the PRC special subcommittee review.

The draft seemed to be in conflict with current procurement tools and seems to have many rules that add no value to the process. The removal of a significant amount of process does not seem unreasonable when coupled with a review by PRC. The suggestion was either to amend the current design build statutes to add the maintenance and financing options. Or to model the proposed legislation more closely to Design Build statute which is fairly simple and straight forward.

Hope you find this feedback helpful.

ALAN NYGAARD

CPARB Member representing Higher Education
Director of Business Services
Capital Planning & Development

Box 352205
Seattle, WA 98195
206.221.4217
anygaard@uw.edu

W UNIVERSITY of WASHINGTON

From: Gary Rowe <GRowe@wsac.org>
Sent: Monday, July 25, 2016 3:34 PM
To: Bessett, Danelle (DES)
Cc: Josh Weiss
Subject: RE: p3 Proposed Legislation

Follow Up Flag: Follow up
Flag Status: Flagged

Danelle,

I will be prepared to discuss the matter at the next meeting. I have the following concerns.

- There should be more clarity about which public agencies can or cannot utilize P3 financing for projects. The WSDOT has specific legislation authorizing their use of P3. Code cities and chartered counties may also have this authority without specific legislation required.
- The proposed legislation should be referred to the Governor's policy office to determine how it fits or doesn't fit with any other options or proposals regarding the use of P3 by the state and other public agencies.
- I have concerns over whether the Project Review Committee or another committee established and appointed by CPARB would have the necessary and required expertise to oversee any public agency utilizing P3 financing for projects. Along with this concern is what liability might come with this responsibility, in particular, if there was a default on the associated financing of a project.

- Gary

Gary Rowe, P.E.
WSACE Managing Director
WSAC Transportation Policy Director
206 Tenth Avenue S.E.
Olympia, WA 98501-1311
Office: 360.489.3014
Cell: 360.770.7766
Reception: 360.753.1886
Email: growe@wacounties.org
Web: www.wsace.org

From: Bessett, Danelle (DES) [mailto:danelle.bessett@des.wa.gov]
Sent: Wednesday, July 13, 2016 11:27 AM
To: Alan Nygaard <anygaard@uw.edu>; Andrew Thompson <andrew.thompson@gcinc.com>; Bob Maruska <Maruska.B@portseattle.org>; Brent LeVander <blevander@cce-inc.com>; Charles Horn <charleshorn@msn.com>; Frare, Bill (DES) <bill.frare@des.wa.gov>; Gary Rowe <GRowe@wsac.org>; Greg Fuller <greg@fullerelec.com>; Dunshee, Hans <hans.dunshee@leg.wa.gov>; Hazlitt, Tammi (OMWBE) <thazlitt@omwbe.wa.gov>; Irene Reyes <glovelady@excelsupplycompany.com>; Joaquin Hernandez (joaquin.hernandez@bemeyers.com) <joaquin.hernandez@bemeyers.com>; John Ahlers <jahlers@ac-lawyers.com>; Lee Newgent <lee@wabuildingtrades.org>; Mark Riker <markr@smw66.org>; Mike Shinn <mikes@shinnmech.com>; Deakins, Nancy (DES) <nancy.deakins@des.wa.gov>; Santosh Kuruvilla <santosh@xltech.com>; Steve Crawford <crawfords@issaquah.wednet.edu>; Berntsen, Teresa (OMWBE) <TeresaB@omwbe.wa.gov>; Ty Heim <TMHeim@evergreenhealthcare.org>; Buys, Vincent <vincent.buys@leg.wa.gov>; Walter Schacht <walter@saarch.com>
Cc: James Lynch <jlynch@ac-lawyers.com>

Subject: p3 Proposed Legislation

Importance: High

Hello,

In the May meeting the P3 committee presented some [Draft Legislation](#) and other information pertaining to this legislation for evaluation. Please review minutes and see that it was requested that all feedback about legislation was to be reported to me by mid-July. This is just a friendly reminder for feedback, questions or any statements you'd like to see discussed and responded to in September. Please **send to me all comments/questions before August 1st** and James Lynch and I will form a spreadsheet with answers/responses to be presented as a pre-read for September.

Danelle Bessett

DES/Facility Professional Services

Administrative Assistant Teams A, B, C, D & G

360.407.8243

Staff to the Capital Projects Advisory Review Board (CPARB)

& Project Review Committee (PRC)

See www.des.wa.gov/about/committees/CPARB

"Try not to become a person of success, but rather try to become a person of value." Albert Einstein

Subject: FW: PPP Draft Legislation Questions

From: Mark Riker [<mailto:MarkR@smw66.org>]
Sent: Wednesday, August 31, 2016 10:29 AM
To: Thompson, Andrew <Andrew.Thompson@gcinc.com>
Subject: PPP Draft Legislation Questions

Andy,

I have yet to hear back from SMACNA regarding this, but thought I would send you my comments at this time.

Thanks for reaching out to me on this.

A couple of questions I have regarding the PPP Draft Legislation?

I am working off of the draft distributed for the May 12, 2016 CPARB Meeting.

If this is not the current draft, please provide.

Page 2, Item i, what is "maintenance replacement"?

Page 3, Item a, please explain to me how the exemption from "competitive bid" requirements actually works, what the real effect is of this language?.

It seems to potentially conflict with the provisions of item b which begins on page 3 and rolls to page 4.

Page 6, Item 4. a, Evaluation factors do not include compliance history with Prevailing Wage, Apprenticeship Utilization, or Occupational Health and Safety Statutes? This is problematic for us.

Page 10, item 23, the topic of liability for nonperformance should also include a description of how the worker gets made whole when nonperformance may occur. The worker should not be left damaged when a contractor defaults on their contract.

Page 11 Section described under RCW 39.10.540, again please explain the process by which the worker gets made whole, and who is responsible for doing so?

Page 13, Section described under RCW 39.10.570, there is no provision for Apprenticeship Utilization.

Page 13, RCW 39.10.580, Labor Representatives must be a named part of this Subcommittee.

Thanks for your consideration of these questions,

Mark

Mark "Dut" Riker
Business Representative
Sheet Metal Workers Local 66
11831 Beverly Park Road
Building B-2
Everett WA 98204

425-922-3381 (Cell)

425-493-5922 (Direct)

425-493-5901 (Fax)

markr@smw66.org

Please visit our website:

<http://www.smw66.org>



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From: Walter Schacht <walter@saarch.com>
Sent: Tuesday, September 27, 2016 3:53 PM
To: Baker, Talia (DES); Andrew Thompson
Cc: Alan Nygaard ; Frare, Bill (DES); Rebecca Keith (rebecca.keith@seattle.gov); Jeffrey Hamlett; gshaw@LMNarchitects.com; Brian Zealle; Santosh Kuruvilla
Subject: Re: Request for comments on P3 Legislation

Hi All –

We discussed the proposed P3 legislation at the AELC (Architects & Engineers Legislative Council) of Washington and at AIA Washington Council. In addition to the concerns that Van Collins expressed below the following issues have been identified:

- What are the pros and cons of P3 procurement? A presentation was made at the June CPARB meeting about the benefits but nothing was said about the drawbacks. Please present a balanced, comprehensive view to the Board. Where has P3 delivery failed? What lessons can we learn?
- How does the proposed P3 legislation compare to similar legislation in other states? How does it compare the AIA's model legislation guidelines?
- How does P3 impact the ability of small and disadvantaged businesses to serve as prime contractors and consultants (not just subcontractors and subconsultants)?
- How will the ability of design professionals to serve as the owner's strategic advisor be maintained with P3 procurement?

- What types of projects is P3 legislation intended to enable?
- P3 limits competition to a small group of developers and may reduce the ability of contractors and design professionals to participate. How will this be addressed?
- How will public entities who want to utilize P3 demonstrate both the need for and superiority of this form of delivery?
- How will design and construction quality be ensured? What are the requirements for demonstrating the design quality of a proposal?
- The proposed legislation recognizes the rights of workers to a fair wage in terms of its prevailing wages requirements. What mechanism will ensure fair compensation for design professionals?

W.

Walter Schacht, FAIA
schacht | aslani architects, p.c.
901 Fifth Avenue
Seattle, WA 98164
(206) 443-3448 tel
(206) 818-6960 cell
www.saarch.com

From: Santosh Kuruvilla <santosh@xltech.com>
Date: Tuesday, September 27, 2016 at 2:59 PM
To: "Baker, Talia (DES)" <talia.baker@des.wa.gov>
Cc: "nancy.deakins@des.wa.gov" <nancy.deakins@des.wa.gov>, Alan Nygaard <anygaard@uw.edu>, Andrew Thompson <andrew.thompson@gcinc.com>, Bob Maruska <Maruska.B@portseattle.org>, Brent LeVander <blevander@cce-inc.com>, Charles Horn <charleshorn@msn.com>, "nancy.deakins@des.wa.gov" <nancy.deakins@des.wa.gov>, Bill Frare <bill.frare@des.wa.gov>, Gary Rowe <growe@wacounties.org>, Greg Fuller <greg@fullerelec.com>, "Hasegawa, Bob"

<bob.hasegawa@leg.wa.gov>, Irene Reyes <glovelady@excelsupplycompany.com>, Joaquin Hernandez <joaquin.hernandez@bemeyers.com>, Lee Newgent <lee@wabuildingtrades.org>, Mark Riker <markr@smw66.org>, Mike Shinn <mikes@shinnmech.com>, "Rebecca Keith (rebecca.keith@seattle.gov)" <rebecca.keith@seattle.gov>, "Tharinger, Steve" <Steve.Tharinger@leg.wa.gov>, "Buys, Vincent" <vincent.buys@leg.wa.gov>, Steven Crawford <crawfords@issaquah.wednet.edu>, "Hazlitt, Tammi (OMWBE)" <thazlitt@omwbe.wa.gov>, "Berntsen, Teresa (OMWBE)" <TeresaB@omwbe.wa.gov>, Ty Heim <tmheim@evergreenhealthcare.org>, Walter Schacht <walter@saarch.com>, David Talcott <dtalcott@xltech.com>, Jon Adkins <jadkins@xltech.com>, Michelle Rhodes <mrhodes@xltech.com>, Josh Raney <jraney@xltech.com>

Subject: RE: Request for comments on P3 Legislation

Talia,

Good Afternoon.

In response to the request for comments on Draft P3 Legislation from our last CPARB meeting, I reached out to a few groups in the Engineering Community, specifically, APWA (American Public Works Association) and ACEC (American Council of Engineering Companies).

APWA-WA's response is included in the enclosed attachment.

The following is ACEC's response that I garnered from Van Collins, CEO & President of ACEC – WA:

“While ACEC has generally supported alternative financing methods for public works projects, I can see where this proposal could well become very controversial. This is because, unlike prior legislative efforts, this proposal actually incorporates P3 concepts into the design-build procurement process (which has already been raising concerns with some ACEC members). Clearly, the purpose of this proposal is to use the design-build method in such a way as to open what would otherwise be public works projects to a more “private developer” kind of system. In doing so, however, I do have a number of questions and concerns. Here are a few:

- How and when would such authorization reasonably be used as a practical matter (the proposal would apply to all types of projects, vertical and horizontal)? ***[This in Van's opinion is the most important question to answer]***
- Would it be used primarily on projects that have not otherwise been publicly funded (i.e. there might be a net increase in the total number of projects on the street)
- Or, as a corollary, would the proposal reasonably result in no net increase in the total number of projects (i.e. there is a “shifting” of projects from publicly funded to P3, such that there is a negative impact on the number of traditional public works projects)?
- What would reasonably be the ramifications to QBS (both in relation to its use on such P3 projects and to traditional public works projects)?
- Accordingly, what would the competitive marketplace reasonably come to look like for engineering firms in the future?”

Incase additional information or clarification is needed from APWA or ACEC, I can get that for you.

Regards,

Santosh Jacob Kuruvilla, PE, SE, PMP
President



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www.xltech.com

From: Baker, Talia (DES) [mailto:talia.baker@des.wa.gov]

Sent: Tuesday, September 13, 2016 4:32 PM

To: Alan Nygaard <anygaard@uw.edu>; Andrew Thompson <andrew.thompson@gcinc.com>; Baker, Talia (DES) <talia.baker@des.wa.gov>; Bob Maruska <Maruska.B@portseattle.org>; Brent LeVander <blevander@cce-inc.com>; Charles Horn <charleshorn@msn.com>; Deakins, Nancy (DES) <nancy.deakins@des.wa.gov>; Frare, Bill (DES) <bill.frare@des.wa.gov>; Rowe, Gary <growe@wacounties.org>; Greg Fuller <greg@fullerelec.com>; Hasegawa, Bob <bob.hasegawa@leg.wa.gov>; Irene Reyes <glovelady@excelsupplycompany.com>; Joaquin Hernandez <joaquin.hernandez@bemeyers.com>; Lee Newgent <lee@wabuildingtrades.org>; Mark Riker <markr@smw66.org>; Mike Shinn <mikes@shinnmech.com>; Rebecca Keith (rebecca.keith@seattle.gov) <rebecca.keith@seattle.gov>; Tharinger, Steve <Steve.Tharinger@leg.wa.gov>; Buys, Vincent <vincent.buys@leg.wa.gov>; Santosh Kuruvilla <santosh@xltech.com>; Steven Crawford <crawfords@issaquah.wednet.edu>; Hazlitt, Tammi (OMWBE) <thazlitt@omwbe.wa.gov>; Berntsen, Teresa (OMWBE) <TeresaB@omwbe.wa.gov>; Ty Heim <tmheim@evergreenhealthcare.org>; Walter Schacht <walter@saarch.com>

Cc: Deakins, Nancy (DES) <nancy.deakins@des.wa.gov>; Baker, Talia (DES) <talia.baker@des.wa.gov>

Subject: Request for comments on P3 Legislation

Importance: High

Good afternoon Board Members,

If you have comments or questions regarding the posted proposed [Draft P3 Legislation](#) from the September 8th CPARB meeting, please forward them to **James Lynch** at jlynch@ac-lawyers.com with a copy to me and Nancy Deakins no later than **close of business on September 29, 2016**.

This will allow the committee to work on the issues by the October 13th meeting and present their response to the November CPARB meeting.

The October P3 meeting notice will come out shortly, and will be posted to the website by the end of the week.

~ Talia Baker

Administrative Assistant 4
Engineering & Architectural Services
Dept. Enterprise Services
[360-407-8260](tel:360-407-8260)

From: Walter Schacht <walter@saarch.com>
Sent: Monday, July 25, 2016 1:23 PM
To: Bessett, Danelle (DES)
Cc: James Lynch; Alan Nygaard ; Andrew Thompson; Bob Maruska; Brent LeVander; Charles Horn; Frare, Bill (DES); Rowe, Gary; Greg Fuller ; Hazlitt, Tammi (OMWBE); Irene Reyes; Joaquin Hernandez (joaquin.hernandez@bemeyers.com); John Ahlers; Lee Newgent; Mark Riker; Mike Shinn; Deakins, Nancy (DES); Santosh Kuruvilla; Steven Crawford; Berntsen, Teresa (OMWBE); Ty Heim; Buys, Vincent; Jeffrey Hamlett; Van Collins; Cliff Webster; John Eckert; Scott Woerman
Subject: Re: p3 Proposed Legislation

Hi Danelle –

The P3 Committee presentation in July included a presentation from Dr. Ahmed Abdel Aziz on the benefits of public private partnerships. While the information was helpful to the Board's understanding of P3 as an alternative project delivery method it addressed only one perspective. All project delivery methods have pros and cons. In order to have a complete understanding of the impact of P3 procurement on public owners, design professionals and contractors the board should be presented with both sides of the issue.

My discussions with fellow design professionals indicate that there is significant concern about the impacts of P3 on competition, qualifications based selection (QBS), small and disadvantaged businesses, agency control of design, construction and operations, and long term costs to the public – among other issues.

In order to act appropriately on behalf of the broad range of constituencies that the board represents we should have a clear understanding of the positive and negative impacts of P3. I encourage the P3 Committee to invite representatives with alternate points of view to present to the board in September.

Thank you.

W.

Walter Schacht, FAIA
Architects Representative to Capital Projects Advisory Review Board
schacht | aslani architects, p.c.
901 Fifth Avenue
Seattle, WA 98164
(206) 443-3448 tel
(206) 818-6960 cell
www.saarch.com

From: Danelle Bessett <danelle.bessett@des.wa.gov>
Date: Wednesday, July 13, 2016 at 11:27 AM
To: Alan Nygaard <anygaard@uw.edu>, Andrew Thompson <andrew.thompson@gcinc.com>, Bob Maruska <Maruska.B@portseattle.org>, Brent LeVander <blevander@cce-inc.com>, Charles Horn <charleshorn@msn.com>, Bill Frare <bill.frare@des.wa.gov>, Gary Rowe <growe@wacounties.org>, Greg Fuller <greg@fullerelec.com>, "Rep. Dunshee" <hans.dunshee@leg.wa.gov>, "Hazlitt, Tammi (OMWBE)" <thazlitt@omwbe.wa.gov>, Irene Reyes <glovelady@excelsupplycompany.com>, "Joaquin Hernandez (joaquin.hernandez@bemeyers.com)" <joaquin.hernandez@bemeyers.com>, John Ahlers <jahlers@ac-lawyers.com>, Lee Newgent <lee@wabuildingtrades.org>, Mark Riker <markr@smw66.org>, Mike Shinn <mikes@shinnmech.com>,"

"nancy.deakins@des.wa.gov" <nancy.deakins@des.wa.gov>, Santosh Kuruvilla <santosh@xltech.com>, Steven Crawford <crawfords@issaquah.wednet.edu>, "Berntsen, Teresa (OMWBE)" <TeresaB@omwbe.wa.gov>, Ty Heim <tmheim@evergreenhealthcare.org>, "Buys, Vincent" <vincent.buys@leg.wa.gov>, Walter Schacht <walter@saarch.com>

Cc: James Lynch <jlynch@ac-lawyers.com>

Subject: p3 Proposed Legislation

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Danelle Bessett

DES/Facility Professional Services

Administrative Assistant Teams A, B, C, D & G

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& Project Review Committee (PRC)

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"Try not to become a person of success, but rather try to become a person of value." Albert Einstein

From: Wendy Wheat-McCoy
Sent: Thursday, September 15, 2016 10:39 AM
To: John Ahlers; Ahmed Abdel Aziz; Alexis Oliver; Andrew Thompson; Anthony Buckley; Bob Adams; Chris Ascani; Chris Hirst; Chris Toher; Craig McDaniel; Dan Absher; Dan Howell; Daniel Galvin; Darin Chestnut; Dennis Greenlee; Duke Schaub; Frank Young; Mark Gains; Gary Rowe; Greg Ritke; Howard Hillinger; James Lynch; James Soukup; Jerry Dinndorf; Jerry Vanderwood; Kenneth Tyrrell; Linneth Riley-Hall; Loren Armstrong; Mark Kempton; Mark Riker; Mark Williams; Marv Hounjet; Matt Dekkers; Nancy Deakins; Phil Lovell; Phillip Goodman; Rebecca Keith; Robert Maruska; Robynne Thaxton Parkinson; Rodger Benson; Santosh Kuruvilla; Scott Lee; Sheina Hughes; Susan Cruise; Talia Baker (DES); Tom Doig; Tom Zamzow; Vince Campanella; Walter Schacht
Subject: NASCA Collaborative P3 Report

Hello All –

Please see the below email from DES. James will be compiling similar comments and materials to distribute shortly after September 29 for discussion during the October 13 P3 committee meeting.

Wendy M. Wheat-McCoy

Legal Assistant to James Lynch
Ahlers & Cressman PLLC
999 Third Avenue, Suite 3800
Seattle, Washington 98104
Direct: (206) 340-4687
Office: (206) 287-9900
Fax: (206) 287-9902
E-Mail: wmccoy@ac-lawyers.com

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From: Baker, Talia (DES) [<mailto:talia.baker@des.wa.gov>]
Sent: Thursday, September 15, 2016 9:40 AM
To: John Ahlers <jahlers@ac-lawyers.com>; Mark Riker <markr@smw66.org>; Gary Rowe <GRowe@wsac.org>; Rebecca Keith (rebecca.keith@seattle.gov) <rebecca.keith@seattle.gov>
Cc: Alan Nygaard <anygaard@uw.edu>; Andrew Thompson <andrew.thompson@gcinc.com>; Baker, Talia (DES) <talia.baker@des.wa.gov>; Bob Maruska <Maruska.B@portseattle.org>; Brent LeVander <blevander@cce-inc.com>; Charles Horn <charleshorn@msn.com>; Deakins, Nancy (DES) <nancy.deakins@des.wa.gov>; Frare, Bill (DES) <bill.frare@des.wa.gov>; Rowe, Gary <growe@wacounties.org>; Greg Fuller <greg@fullerelec.com>; Hasegawa, Bob <bob.hasegawa@leg.wa.gov>; Irene Reyes <glovelady@excelsupplycompany.com>; Joaquin Hernandez <joaquin.hernandez@bemeyers.com>; Lee Newgent <lee@wabuildingtrades.org>; Mike Shinn <mikes@shinnmech.com>; Tharinger, Steve <Steve.Tharinger@leg.wa.gov>; Buys, Vincent <vincent.buys@leg.wa.gov>; Santosh Kuruvilla <santosh@xltech.com>; Steven Crawford <crawfords@issaquah.wednet.edu>; Hazlitt, Tammi (OMWBE) <thazlitt@omwbe.wa.gov>; Berntsen, Teresa (OMWBE) <TeresaB@omwbe.wa.gov>; Ty Heim <tmheim@evergreenhealthcare.org>; Walter

Schacht <walter@saarch.com>

Subject: NASCA Collaborative P3 Report

DES received the following referenced report on P3 and has been added to the CPARB Public-Private Partnerships Committee information section on the CPARB website. You can reference the report at the link below as well as by using this link to the committee page [Collaborative Resources for P3](#).

NASCA released a joint report, "[Considerations for Public-Private-Partnerships \(P3s\)](#)" with the National Association of State Procurement Officials ([NASPO](#)), the National Association of State Facilities Administrators ([NASFA](#)) and the [Governing Institute](#).

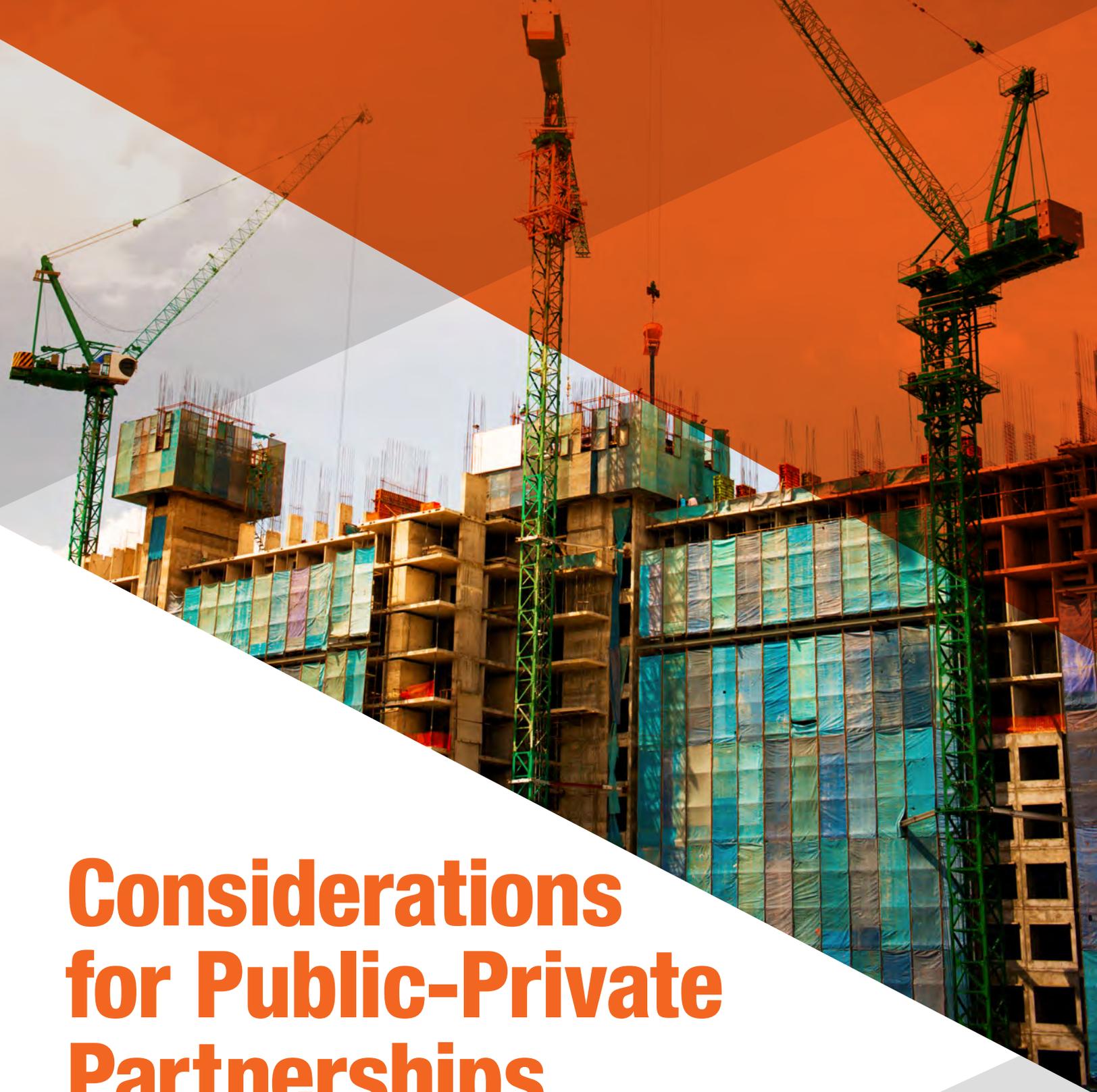
More and more states are being afforded the statutory authority to add Public-Private Partnerships (P3s) as a tool in their toolbox. A public-private partnership is defined as "a long-term agreement between a government and the private sector to share the risks and rewards of delivering an essential public service." This new report highlights how different government entities can work together to develop successful P3s in state government. It includes information on when P3's should be considered, risk factors, practical considerations and current P3 laws.

Earlier this year, and with the support of the Governing Institute, NASCA joined with the National Association of State Procurement Officials (NASPO) and the National Association of State Facilities Administrators (NASFA) to discuss the challenges and opportunities presented by this innovative strategy.

[Download the report now.](#)

Talia Baker

Administrative Assistant 4
Engineering & Architectural Services
Dept. Enterprise Services
[360-407-8260](tel:360-407-8260)



Considerations for Public-Private Partnerships

A joint report from the National Association of State Procurement Officials,
the National Association of State Facilities Administrators and the
National Association of State Chief Administrators



Purpose

As government officials who oversee procurement, facilities and other administrative functions for state governments, we are often asked to weigh in on the merits of various proposals for public-private partnerships (P3s).

Our experience shows us, though, that the success or failure of those arrangements depends a great deal on the details of those projects. We have seen truly innovative projects that used private sector involvement to accomplish what government, by itself, could not. On the other hand, we have seen projects that have not benefitted the public because of how they were structured.

We convened a meeting of the leaders of our organizations to share our experiences and develop principles that our members — as well as other policymakers — should consider when evaluating, developing and maintaining P3s. This paper is the result of those discussions.

What is a Public-Private Partnership?

Governments work with the private sector in countless ways to provide public services. The central idea of P3s, however, is that the interests of the parties are aligned. There are many good definitions for the exact nature of public-private partnerships, but even experts disagree on details such as whether the private partner needs to invest its own capital for the arrangement to qualify as a P3. For the purposes of this document, we will use the definition of P3s outlined in *Governing's* "Guide to Financial Literacy: Understanding the Risks & Rewards of Public-Private Partnerships," which simply defines a P3 as "a long-term agreement between a government and the private sector to share the risks and rewards of delivering an essential public service."

With P3s, a government can allocate (i.e., shift) some or all of that risk to the private partner(s). But keep in mind that risk allocation is not free. Private partners will accept risk, but only in exchange for higher payments, more control over setting fees or tolls, or some other concession. For governments, the central challenge in P3s is knowing which risks to keep, which to allocate and which to share. Table 1 to the right shows the P3 risk matrix — or the risks inherent to most P3s — and which party is typically best able to manage those risks.

When are P3s Worth Considering?

Although P3s can be beneficial, they are not appropriate for every circumstance. Public officials should be cautious to make sure they are not using P3s in cases where:

- ✓ The added expenses of using private capital, rather than public (tax-exempt) capital, is not offset by lower life cycle costs or other benefits
- ✓ The arrangements are simply a way of legally obligating a public entity to spend money it should be spending already (such as on preventive maintenance)
- ✓ The deal would take away a core function of government from public oversight or control

It is worth noting that Virginia, a national leader in the use of P3s, declines four out of every five P3 proposals that come to it, according to Douglas Koelemay, director of Virginia's Office

For the purposes of this document, a public-private partnership is defined as "a long-term agreement between a government and the private sector to share the risks and rewards of delivering an essential public service."

of Public-Private Partnerships. He says those projects are most often rejected because they aren't a priority for the state; the relevant agency doesn't have the capacity to manage the project; the project does not add value; or the idea is unproven.

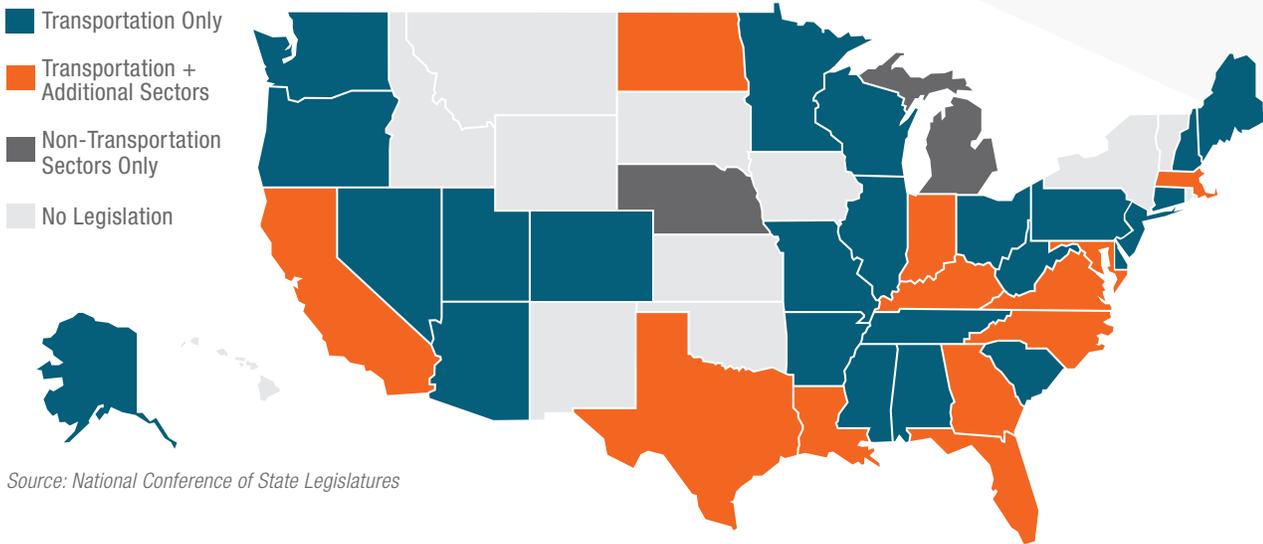
When conducting a cost-benefit assessment of a potential P3, public officials should make sure they have complete, reliable data on the total cost of ownership under the current arrangement. For example, cost comparisons might show how much the government could save by issuing its own (lower-interest) tax-exempt bonds instead of using higher-interest private financing. But the analysis could also show the higher long-term costs of hiring government employees (including their retirement and other benefits) instead of relying on the work of employees in the private sector.

Often, the most transformative P3s come when governments use them to accomplish a task that is not a core function of government. The City of Long Beach in California is pursuing a P3 that would transform its downtown by building a new city hall

Table 1: Typical P3 Risks

RISK	PUBLIC SECTOR	PRIVATE SECTOR	SHARED
Regulatory/Policy	○		
Planning and Design		○	
Permits and Approvals		○	
Construction		○	
Operations/Maintenance		○	
Finance/Market		○	
Private Sector Default		○	
Political			○
Force Majeure			○
Demand			○

States With P3-Enabling Legislation



Source: National Conference of State Legislatures

and port authority headquarters, creating new parks and adding mixed-use development. Likewise, Kentucky has used a P3 to extend broadband access to underserved rural areas.

P3s are also attractive when they meet a pressing need that could not otherwise be addressed. When Kentucky faced a sudden office space shortage (because its offices were being converted back to bourbon warehouses), the state used a P3 to quickly erect a new office building for its displaced employees. It took about a year and a half from the time the builder started construction until workers could move in. Similarly, Prince George's County in Maryland is using a P3 to speed work on building green infrastructure to reduce stormwater pollution in the Chesapeake Bay. The U.S. Environmental Protection Agency required the county to convert almost 5 percent of its total area into surfaces that will either soak up or treat rainwater in the next decade. A private sector company will design and build that infrastructure rapidly, and then operate and maintain it for decades to come.

Practical Considerations

When carrying out P3s, government agencies should be mindful of dynamics that could directly affect the success of the arrangement.

Public engagement is key. P3s remain controversial in many quarters, particularly because of past arrangements that provided little long-term benefit for residents. But public input can better shape arrangements as well. Getting useful input often entails going beyond the public hearings that are commonly required under state laws. Before Transurban — a company that manages and develops urban toll road networks — built toll lanes in northern Virginia, for example, it conducted focus groups to discern what its potential users wanted from the new lanes and what drivers would pay to use them. Likewise, officials in Prince George's County agreed they wanted their green infrastructure improvements to be built by local workers in economically challenged areas. The resulting agreement provides the county with social and economic benefits, along with environmental improvements.

Public engagement should continue even after an agreement is reached, such as informing citizens about how new revenues are spent. State officials should also realize that even capable government lawyers and experts will likely be overmatched, in terms of expertise and resources, when negotiating P3s. Many — although not all — potential partners are large, multinational corporations. This can give them significant advantages in operating facilities or running programs.

But it also means that negotiations can seem one sided, even for smart and resourceful government employees. Government lawyers, for example, tend to be generalists, but their counterparts in the private sector are specialists. Those private experts also likely have several deals under their belts, while P3s are still a novelty for most U.S. government agencies.

There are, however, ways to ensure the public interest is being served. Most importantly, the government officials who must sign off on any agreements must come to the negotiating table with a clear idea of what their goals are for the P3. Before they sign off on any deal, they should look back to those original goals and verify the arrangement accomplishes them.

It is also helpful to research potential partners. P3s often last for a decade, if not longer, so it is important that partners can work well with you. Because P3s last a long time, it is common for issues to arise that will require changes to the original agreement.

Not all P3s are large-scale projects, and there is a good chance that agency officials will know some of the applicants. Fortunately, the larger outside companies have long track records. It is easy to find out what kinds of projects they have been involved in, how they have approached those deals and any problems that have come up in those partnerships. Just knowing the jurisdictions they are active in can come in handy. State officials should also make sure all affected state agencies have representatives at the negotiating table. A transportation agency building a toll road, for example, should include finance experts from the executive budget office in those talks.

States can help evaluate the merits of potential P3s by establishing a special office, modeled after Virginia's Office of Public-Private Partnerships, to help vet projects. It is important that this office offers objective advice, and is not evaluated based on the number of P3 projects inked under its watch. (The most recent federal surface transportation law, called the FAST Act, allows states to use highway money to fund P3 offices.) If a state does not have such an office, agencies can also ask to retain their own expert attorneys as special assistant attorneys general to help negotiate the deals. They can also consult with peers in other states (which can be identified by NASPO, NASFA and NASCA).

P3s and Procurement Laws

Often, states allow agencies to use different procurement standards when negotiating P3s than they would have to follow for other types of contracts. This can be helpful. States commonly require agencies to select the lowest bidder for a project, but that is not always the best approach for selecting a long-term partner for a P3. Agencies picking a partner for a P3 might also want to consider vendors' expertise, track record and ability to work collaboratively with government.

But avoiding normal procurement laws should not be the main purpose of choosing to use a P3 instead of a more typical arrangement. If agencies or government officials find the procurement process cumbersome, they and the rest of the public could be better served by fixing or updating procurement laws or regulations, rather than sidestepping them.

Some agencies with P3 experience advise that it is often helpful for agencies to issue a request for information (RFI) before issuing a request for proposal (RFP) for such projects.

State and local officials should also be mindful of IRS regulations that govern the use of facilities paid for with tax-exempt bonds by private, for-profit entities. (See, generally, 26 U.S. Code § 141.) These regulations are significant enough hurdles that they have prevented states from pursuing deals to lease access to communications towers in remote locations and from adding retail outlets in a downtown government-owned building.

Conclusion

Public-private partnerships can be a powerful tool to help governments accomplish tasks they could not otherwise complete. When structured properly, P3s can bring capital, expertise, efficiencies, innovation and protection from risk to the delivery of public services. But government officials must carefully consider whether a P3 is appropriate. When doing so, they should consult with the public to develop the main goals of a project. They should make sure the P3 is designed to accomplish those goals before agreeing to the project. And they must be willing to work with their partners long after the ink is dry on the contract to address new issues as they arise. ○

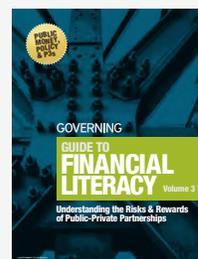
What Role Should Policymakers Play in P3s?

As a policymaker, your job is to build a skillset and nurture a mindset. The "skillset" is about getting the right technical expertise. Building that skillset starts with some specific steps you can help your jurisdictions take long before P3 opportunities materialize:

- Know how much infrastructure your jurisdiction can afford.
- Develop the right technical capacity, such as P3-focused staff members.
- Look for state resources such as P3 coordinating authorities, but be prepared to supplement public resources with independent expertise. Optimize your current, traditional procurement process.

The "mindset" is about anticipating and managing political conflict. Some specific strategies include:

- Define your jurisdiction's objectives and priorities for P3s — it's crucial to consider in advance the trade-offs P3s present and be willing to acknowledge or re-shape those trade-offs as necessary.
- Understand the relevant federal, state and local policy framework.
- Evaluate political feasibility early and often, including knowing how environmental impact statements, mandatory competitive bidding and other legal requirements affect your P3 procurement options.
- Engage the relevant stakeholders.
- Establish a formal, independent process to consider the benefits and costs of a P3 relative to some benchmark.
- Be transparent by sharing the best available revenue forecasts, cost estimates and (where possible) bidding information.



TO LEARN MORE about how P3s work and when they're right for your community, download *Governing's "Guide to Financial Literacy: Understanding the Risks and Rewards of Public-Private Partnerships"* at www.governing.com/papers.

Produced by:

GOVERNING
I N S T I T U T E

TO: CPARB P3 Public, Private Procurement Committee
RE: CPARB Notes – PPP Discussion - September 8th, 2016
GOAL To address/discuss at next P3 Committee Meeting on - Thursday, October 13th, 2016

Summary of concerns from the Architect constituency:

1. Additional information request from P3 Committee:
 - a. P3 Lessons Learned....
 - b. Including where P3 works...
 - c. And is not as effective?
2. Concern/comment: Architect concern regarding erosion of qualifications based selection for design professionals.

Potentially address by giving Public Owners the option to require identification of the lead designer in the RFQ phase?

3. Clarification/comment: Is there recourse and/or direction during procurement and execution?

Revise/tighten/extend the proposed PRC review standards and process.

4. Clarification/comment: Is this statute for Project and also Public Owner certification?

John Ahlers (P3 Committee Member) indicated the proposal is for Project-based approval only, no agency certification.

In addition to these items discussed during the meeting, the AIA comments based on written information provided include but are not limited to:

1. Architect concerns working for private entity rather than public owner
 - a. Standard of care?
 - b. To whom is duty owed?
 - c. QBS erosion (see above)
2. Pursuit costs - reimbursable via stipend?
3. Where the private entity's compensation is not performance-based, many benefits of P3 are undermined

The P3 Committee is envisioning performance-based compensation where appropriate

Based on these items, the AIA proposes the following for consideration:

1. Require professional advisers
2. Require Value for Money
3. Establish centralized P3 Center of Expertise / "P3 Unit"
4. Use 2-Step procurement
5. Authorize stipends

THE AMERICAN INSTITUTE
OF ARCHITECTS

**Public-Private Partnerships:
What Architects Need to Know**



Public-Private Partnerships: What Architects Need to Know

Introduction

Infrastructure needs, including new construction and maintenance of existing infrastructure, far outweigh the ability of government to pay for them. The American Society of Civil Engineers estimates that an investment of \$3.6 trillion is required to reach a state of good repair by 2020.¹ Much of this amount is needed for public schools, correctional facilities, courthouses, and other governmental facilities at the state and local levels. However, faced with treasuries depleted by the Great Recession,² states and local governments continue to delay already overdue infrastructure projects. Consequently, state and local governments and policymakers have been exploring innovative ways to fund, finance, and deliver public infrastructure projects. One such way is the increasingly popular “public-private partnership,” also known as “PPP” and “P3.”

The National Council for Public-Private Partnerships defines a P3 as “a contractual agreement between a public body (federal, state or local) and a private sector entity. Through this agreement, the skills and assets of both sectors (public and private) are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the potential risks and rewards in the delivery of the service and/or facility.”³ While P3s can be structured in a variety of ways, P3s for vertical construction are typically long-term agreements between a public entity and a private entity for the designing, building, financing, maintenance, and, when appropriate, operation of a public infrastructure asset, where the private entity assumes responsibility for the condition and performance for the life of the long-term contract.

With government-funded projects a critical source of business,⁴ the introduction of P3s could have a profound effect on the business and practice of architecture. If P3 use facilitates more vertical infrastructure projects, architects could benefit from additional work that may not otherwise exist. On the other hand, P3s have the potential to shift the role of the architect from being the owner’s agent-advocate to a developer’s subcontractor and introduce a number of other challenges that could be detrimental to the profession. The true extent to which vertical P3s will affect the profession of architecture has yet to be determined.

As interest in P3 continues to rise and legislation begins to take shape in the states, architect-advocacy and engagement efforts are at a pivotal point. Architects have the opportunity to shape P3 policy to promote and protect design quality and enhance the built environment at-large, but this opportunity is fleeting.

This report seeks to provide architects with the understanding and knowledge of P3s necessary to meaningfully and effectively engage in the legislative process. In doing so, this report outlines the fundamental features of P3s, key policy challenges for architects, and potential legislative solutions.

Public-Private Partnership Fundamentals

¹ Scott, Doug. "ASCE's New Report Card Bumps the Nation's Infrastructure Grade Up to a D+." ASCE, 1 March 2013. Web. 29 May 2014 <http://www.asce.org/ascenews/featured.aspx?id=23622324272&blogid=25769815007>.

² Gordon, Tracy. "State and Local Budgets and the Great Recession." The Brookings Institute, 1 Dec. 2012. Web. 29 May 2014. <<http://www.brookings.edu/research/articles/2012/12/state-local-budgets-gordon>>.

³ 7 Keys to Success (NCP3). Web. 29 May 2014. <http://www.ncP3.org/P3-basics/7-keys/>

⁴ State and local government projects are particularly important for architects, making up 25% of architectural billings according to the 2012 AIA firm survey. *The Business of Architecture: The American Institute of Architects, 2012 AIA Survey Report on Firm Characteristics* (2012).

Public-Private Partnerships: What Architects Need to Know

As previously mentioned, P3s “are a long-term performance-based approach to procuring public infrastructure where the private sector assumes a major share of the risks in terms of financing and construction and ensuring effective performance of the infrastructure, from design and planning, to long-term maintenance.”⁵ In more practical terms, this means the public entity:

- Has a single point of responsibility for the design, building, financing, maintenance, and sometimes operations of the asset;
- Does not pay for the asset until it is delivered;
- Pays the cost “over the [contract term] and only if it is properly maintained and performs according to specifications; and”⁶
- Knows the costs for a long-term portion of the asset’s lifespan upfront, “meaning that taxpayers are not on the financial hook for cost overruns, delays or any performance issues over the asset’s life.”⁷

By assuming responsibility for a long-term period of the asset’s life, the private entity becomes fully accountable for the delivered asset and is therefore incentivized, early on, to produce a high-quality product. The payment structure also creates significant financial incentives because the public entity does not begin making performance criteria-based payments until the asset is delivered. Using an output-oriented approach, where the public entity specifies *what* it wants rather than *how* it wants it, maximizes opportunities for innovation and competition and enables the private sector to develop the best solution.

One of the advantages of P3s is that they provide public entities access to private capital, enabling public entities – at least in theory – to obtain financing for a project. While it may seem like an easy solution, P3s are anything but. Public-private partnerships are incredibly complex and require careful consideration. Adequate jurisprudence, public capacity, and other conditions must be in place before the vertical P3 market will become attractive for private investment. Furthermore, if and when favorable conditions exist and attract private sector investment, P3s are still not appropriate for all infrastructure projects – vertical or otherwise – and should not be used unless they serve the public’s best interests.

Policy Challenges and Implications for Architects

Public-private partnerships have the potential to significantly affect the architectural profession. In this climate, architects interested in shaping this emerging delivery model will need to inject themselves – and their concerns – into the legislative process. Legislative proposals regarding P3s will undoubtedly prescribe how architects’ services are procured and define the role architects play in the process. Based on P3 policy, international experience, and enabling legislation from several states, architects face a number of challenges that need to be addressed promptly.

Fundamental Shift in Architect Procurement and Role

In P3s, the private entity assumes full contractual responsibility for delivering the infrastructure asset – and with this single-point of responsibility comes a single procurement. Because of the significant capital required and risks associated with P3s, this single point of responsibility is commonly a special legal entity comprised of an investment firm and development company. In this model, the public entity is

⁵ Frequently Asked Questions (P3 Canada). Web. 29 May 2014. <http://www.p3canada.ca/about-p3s/frequently-asked-questions/>

⁶ *Id.*

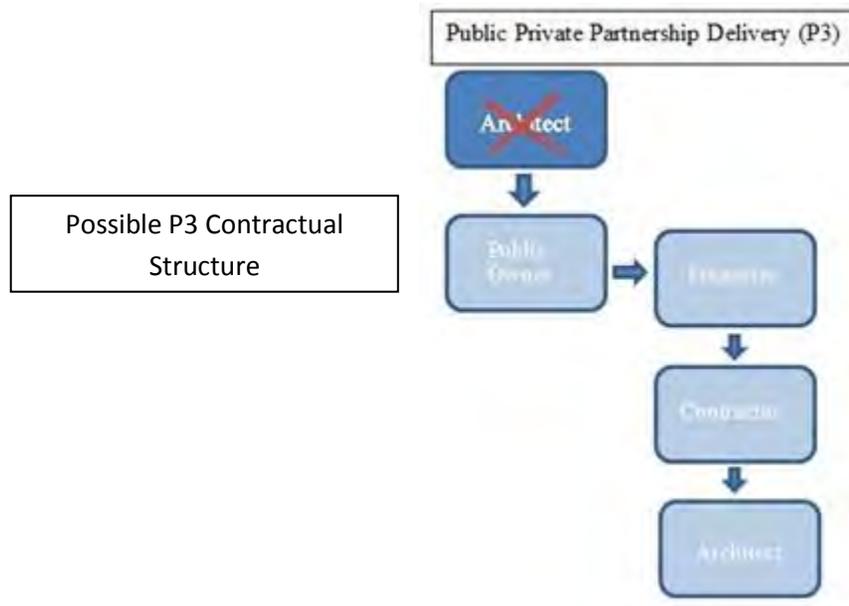
⁷ *Id.*

Public-Private Partnerships: What Architects Need to Know

not specifically contracting for design services, construction services, etc. Rather, the public entity is procuring the delivery of an infrastructure asset. Accordingly, how the private entity goes about delivering the building and procuring the design and other services is almost entirely within its discretion.

Allowing public infrastructure to be delivered largely through private processes has a significant drawback for architects: qualifications-based selection (QBS) procurement laws are not applicable, nor enforceable. Instead, market forces and profit considerations drive the procurement process of architects for P3s. Depending on a firm's profile (e.g., years of experience, relationships within the industry, size, capacity, specialty area in the public sector, geographic reach, access to capital, and assets and liabilities), P3s could have disparate, industry-wide effects on architectural firms, especially those whose area of practice has been focused on public works.

In addition to a shift in procurement, the P3 contractual structure shifts the architect's role from being the owner's agent-advocate to a private entity's subcontractor. This fundamental shift has the potential to diminish the role of the architect and introduce other issues that may have detrimental consequences for both architects and public entities. The direct contractual relationship between the architect and public entity helps ensure that the architect and his or her design is responsive to the public's owner's needs. Architects traditionally hold a direct contract with the owner that obligates the architect to represent the interests of the end user; however, in P3s, the architect's role and duties become muddled (see graphic, below). This situation becomes even less clear when the architect and public entity-owner do not have direct communications – and even if they do, the public owner's needs or desires may be "filtered" through the lens of a developer, financier, and/or a contractor. Best practices and trust should govern, but without a baseline safety net in the procurement laws, there is potential for communication problems.



In addition to obligating the architect to respond to the public entity-owner's needs, a direct contractual relationship between public entity and architect helps to protect the public owner's interests throughout the project. Without this direct contractual relationship, the owner is left to manage, without unbiased professional guidance, important programming, construction-phase, and delivery

Public-Private Partnerships: What Architects Need to Know

issues. When a public entity represents itself, as many will do, it is analogous to a *pro se* defendant, accused of a crime, who negotiates directly with the prosecutor. It can be done, but the *pro se* defendant is at a disadvantage because he or she is negotiating from a weaker position, without professional guidance. Without an attorney who has criminal defense and trial experience, the defendant cannot effectively represent himself or herself. The same principle applies to public owners using P3 as a delivery method without an architect-advisor. Public-private partnership projects are extremely complex from all perspectives. Even the most sophisticated public owners need professional guidance to help navigate the process from beginning to end.

Unsustainable Pursuit Costs and Uncompensated Design Work

For architects, perhaps the most immediately damaging issue of P3s is the heavy cost, generally, of pursuing a project. P3 procurement, like the projects for which the delivery model is used, is complex and expensive, often costing private entities several million dollars because procurement is done through a one-step process via design competition. For architects competing in this process, this often means spending hundreds of thousands if not millions of dollars to develop the substantive pre-design and design work required, with no guarantee of compensation. Architects must consider and study existing topography, climate, subsurface conditions, and existing site utilities, as well as compensate administrative and support staff employed during this time. Because of the high burden of pursuit costs for P3 projects, small, medium, and even the largest architecture firms are unlikely to have the financial resources necessary to submit an unsuccessful bid.

Projects are not Performance-Based

As previously described, a typical vertical P3 arrangement provides that the private entity will not only design and construct the infrastructure asset, but will also be responsible for its financing, maintenance, and operation over a long-term period. This contractual structure incentivizes the private entity to deliver a high-quality and high-functioning building that meets performance-requirements efficiently, effectively, and economically throughout its life. However, if the contract is not performance-based, then the private entity will not be responsible for cost overruns, delays, poor design, and performance issues. Without assuming that risk and having “skin in the game”, the private entity has little financial incentive to deliver a well-designed, optimally-performing building at the outset, let alone one that maintains those standards over the building’s lifespan. Unfortunately, a majority of current vertical P3 jurisprudence, codified and proposed, does not enable or even mention performance-based approach. Failing to authorize and use performance-based P3s is detrimental to public entities and the taxpayer.

Potential Policy Solutions

The following policy proposals could be made to eliminate or mitigate the aforementioned challenges, as well as address other issues inhibiting P3 success:

Require Professional Advisers throughout P3 Process

Because of their complexity, scale, and contractual structure, which shifts the responsibility of designing, constructing, financing, maintaining, and oftentimes operating the infrastructure asset to the private entity, it is critical that public entities have unbiased, professional, technical advice throughout the P3 process to protect their interests. One prudent option for protecting taxpayer investment in vertical infrastructure is to require public entities to have professional advisers, including an architect, from procurement to delivery, at a minimum. The architect-adviser, whose sole contractual obligation is to independently represent the interests of the public entity, would be responsible at the outset for assisting the public entity and determining whether P3 is appropriate, identifying and developing building performance requirements, providing guidance throughout the procurement selection process

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and contract negotiations, monitoring contract performance, and other aspects of the P3 process. The architect-adviser, however, would be precluded from bidding on that P3 project due to a conflict of interest. Having an architect-adviser assisting and advocating for the public entity would ensure the public's design interests are protected and enable more positive design outcomes.

Require Value for Money

Public-private partnerships are not appropriate for all public building projects. Though a project may have certain characteristics indicating it *may* be suitable for P3, a Value for Money Analysis is essential for determining whether a P3 *is* proper for a given project. A Value for Money Analysis is a comparison of the total lifecycle costs of delivering, financing, maintaining, and operating a project over a long-term period through P3 versus other available delivery methods. Public-private partnerships are best suited for projects representing a major capital investment with long-term requirements, a complex risk profile with opportunities for risk transfer, life-cycle costing, measurable outputs, opportunities for innovation, and a competitive process because P3 projects involve significant scale, cost, risk, and obligations. While the benefits of a P3 may exceed costs for some projects, the costs may dramatically outweigh the benefits for others. A standardized, objective process that evaluates whether P3 provides the best value and, therefore, protects public investment is a prerequisite for P3 use. Without a Value for Money Analysis, the public sector may use a P3 inappropriately, resulting in a project costing tens if not hundreds of millions of dollars more than it should. This inefficient, uneconomical approach hurts taxpayers and the profession of architecture because it prevents those already scarce public funds from being used on future infrastructure projects.

Establish Centralized P3 Center of Expertise

The establishment of a centralized P3 center of expertise, or "P3 unit," is internationally recognized as a best practice and key to P3 success. Public-private partnerships require large-scale investment, long-term obligations, careful consideration, and significant expertise. A P3 unit is a dedicated body of experts that identify and analyze P3 opportunities for public entities. A P3 unit can serve many functions, but often entails formulating and coordinating P3 policy, standardizing procedures and requirements, providing technical capacity, navigating legal, financial, and technical complexities, evaluating potential partnership projects, monitoring and enforcing contracts, and gauging and promoting private market interest. This type of dedicated resource naturally has fiscal implications, but given the experience of other countries and even states that have created transportation-focused units, their value well-exceeds their cost. Its creation is received by the private sector as a signal that the jurisdiction is ready for and serious about P3 opportunities. As such, a centralized P3 unit is truly the catalyst for creating a smart, successful, and sustainable P3 environment - a solution architects, private investors, and the public at-large get behind.

Use 2-Step Procurement Process to Award P3 Contract

Though the structure of a typical P3 arrangement does not trigger QBS (because the public entity is procuring the delivery of an asset, rather than professional services), procurement should still include an evaluation of qualifications. Vetting private entities' – and their key personnel's – qualifications before seeking proposals promotes competition and quality outcomes. Narrowing the field of participants in the proposal process to three, for example, provides predictability and increased likelihood of being awarded the contract, making the investment more attractive to private participants. Using qualifications and experience to narrow that competitive field enables the public entity to determine whether a private entity is capable of satisfying their infrastructure needs and delivering the asset at the standards they expect. Because the private entities participating in the procurement process will

Public-Private Partnerships: What Architects Need to Know

typically subcontract much of their work, it is critical that qualification considerations include key personnel, such as architects.

Authorize Stipends for Unsuccessful Bids

Awarding stipends to unsuccessful bidders will lessen the financial burden for firms submitting extensive design and other required work. Providing reasonable compensation for the work produced for P3 procurement may increase competition and proposal quality by making the endeavor slightly more economically feasible, expanding the pool of firms willing and able to participate.

Conclusion

This paper is intended to inform AIA Components about emerging P3 policy. AIA National State & Local Government Relations staff will continue to research and develop materials including model legislation and a matrix of P3-related laws in every state that can be found at <http://www.aia.org/advocacy/state/index.htm> under the “Project Delivery” Tab. We also offer our time through conference calls or component visits to help educate members and contract lobbyists on ways to approach this issue.

P3 is a policy on the rise and on the move. There are opportunities here that can transform this increasingly popular project delivery method into a win-win for all. The solutions proposed herein will benefit both public entities seeking new ways to deliver infrastructure and the architects who will design these future projects.

Public-Private Partnerships
for Public Facilities

LEGISLATIVE RESOURCE GUIDE



INTRODUCTION

This Legislative Resource Guide (the “Guide”) was developed in recognition of the challenge that public entities face in meeting public facility infrastructure demands with constrained budgets.¹ Public-private partnerships, used properly, can address this challenge by giving public entities the option to contract with private entities to provide design, build, finance, operate and maintain turnkey services when the building project meets certain criteria. Because private sector financing for public works raises rightful concerns for corruption and increased costs to the taxpayer, the process for engaging in these transactions must be transparent and should demonstrate a process that prioritizes quality over short-sightedness, resource and risk sharing over unnecessary duplication of efforts and risk exposure, and operational efficiencies over costly and wasteful spending. If enacted improperly without sufficient guidance, however, partnerships will unfortunately cost taxpayers more money and will eventually preclude the use of a legitimate, long-term sustainable project delivery method.

The American Institute of Architects commenced researching the global legislative landscape for public-private partnerships in 2012. What we found is that for more than a decade, jurisdictions in the United States, especially with regard to horizontal infrastructure (civil works—roads, bridges, water treatment), have engaged the private sector in various ways to partner in the delivery of public construction programs; some have explicit statutory authority, others piecemeal. Many US jurisdictions² have begun to address the current “patchwork” statutory landscape with comprehensive legislative enactments to enable public-private partnerships, unequivocally. Several other US jurisdictions are in the process of developing or

debating comprehensive statutory authority.³ And others have limited authority for certain building types or are in a “pilot” structure.⁴ Countries such as Canada, Australia and the United Kingdom have utilized public-private partnerships for more than a decade for both horizontal and vertical infrastructure (public facilities). In those years, mistakes were made and successes were had that beg the attention of lawmakers in the US. Learning from their experiences is an extraordinary opportunity from which US jurisdictions can undoubtedly profit. The AIA has taken the lessons learned and incorporated them into the legislative provisions herein.

This Guide consists of a main section and two appendices. The main section walks the reader through important elements in a successful PPP law. Each element is accompanied by (1) background information explaining why the element should be included in a PPP law, (2) sample legislative language that can be cut, pasted, and amended to suit an existing statutory context, and (3) a reference section for applicable words or phrases that should be defined. Appendix A provides recommended definition language. Appendix B sets forth the suggested legislation comprehensively.

¹ The Institute is engaged in a coalition-building effort with national industry organizations whose expertise and member-focus relates to horizontal public construction (roads, bridges, water, etc) in an effort to broaden the reach and desired application of these legislative provisions to both vertical and horizontal construction. In the interim, these legislative provisions are intended only for vertical infrastructure (i.e. public facilities).

² Including Virginia, Texas, Florida, Maryland, North Carolina, Oregon, Pennsylvania, Puerto Rico

³ Including Tennessee, New York, Kentucky, Georgia, Hawaii, Pennsylvania, Missouri, New Mexico, Colorado, Indiana, Arizona, Arkansas, South Carolina, District of Columbia

⁴ Including Connecticut, New Jersey, California, Kentucky, Colorado, South Carolina, Washington, Georgia

> For more information, please contact the AIA Local Government Division at govaffs@aia.org.



Understanding P3s: What Are They and How Do They Work?

Public-Private Partnerships (“PPP”), as a concept, can mean many different things. At a very basic level it involves any contractual partnership between a public and a private entity. When this simple concept, however, is applied to the complex process of getting public facilities built, a proverbial “iceberg” of issues beneath the surface should be considered. As with all construction projects for public use, there is an extensive and necessary feasibility and planning process that occurs prior to the design phase of the project. After the feasibility and planning phase, numerous basic design concepts are developed and considered with the client end-user. Once the client-end user approves the direction of the conceptual design, there’s an intensive design-development phase that involves transforming the concepts and ideas into a physical form and structure that is depicted in architectural floor plans, building elevations and sections. This back-and-forth design process with the end-user client will continue until the designs are developed to become the technical instructions to build with materials specifications, details and overlaying engineering systems (e.g. structural, mechanical, electrical, plumbing). Laws that acknowledge this complex planning and design process before construction even begins will reap rewards for taxpayers and society.

The process of codifying the concept (described above) is a critical first step. We view the best definition to be one that sets reasonable parameters and incorporates best practices and lessons learned from

public entities with real-world experiences. A codified public private partnership project delivery method for getting public facilities built *should be* “a long-term performance-based approach to procuring public infrastructure where the private sector assumes a major share of the risks in terms of financing and construction and ensuring effective performance of the infrastructure, from design and planning, to long-term maintenance.”⁵ In more practical terms, this means the public entity typically:

- Has a single point of responsibility for the design, construction, financing, maintenance, and sometimes the operation, of the asset;
- Does not pay for the asset until it is occupied;
- Pays the cost of the design and construction of the asset “over the life of the asset and only if it is properly maintained and performs according to specifications...”⁶ and;
- Knows the costs for a long-term portion of the asset’s lifespan upfront, “meaning that taxpayers are not on the financial hook for cost overruns, delays or any performance issues over the asset’s life.”⁷

⁵ PPP Canada, *About P3s, Frequently Asked Questions*, P3CANADA, <http://www.p3canada.ca/en/about-p3s/frequently-asked-questions/> (last visited Nov. 17, 2014).

⁶ *Id.*

⁷ *Id.*

> For more information, please contact the AIA Local Government Division at govaffs@aia.org.

By assuming long-term maintenance responsibility, the private entity is held more accountable for the delivered asset and is therefore incentivized to produce a high-quality, long-lasting asset. The payment structure (a.k.a. the “availability payment”) is performance-based, meaning that payments are not made unless and until the asset is delivered and functioning at the standards specified in the contract. Using an output-oriented approach, where the public entity specifies *what* it wants rather than *how* it wants it, maximizes opportunities for innovation and competition and enables the private sector to develop the best solution.

Because PPP projects should be long-term business transactions for the reasons described above, their use requires careful consideration, significant public capacity, and sufficient private market interest. The legislative framework, therefore, must strike a delicate balance between protecting public interests with legislative provisions that encourage a smart vetting process for suitability and value for money while still encouraging private sector engagement through a flexible and nimble framework.

One of the advantages of PPPs is that they can provide public entities access to private capital, but with this access comes a heightened level of scrutiny (and rightfully so) to protect taxpayers. After all, PPP doesn’t change the fact that the public is still “on the hook” over the long-term for paying for the project. By having a legislative framework that is consistent and predictable, it will provide transparency and enable the private market to gauge the risks and rewards.



ELEMENT RECOMMENDATIONS

Provide Explicit Statutory Authority

BACKGROUND

With explicit authority, public entities can, without hesitation, explore the use of this project delivery method. Likewise, private entities can assess, in a meaningful manner, the risks and rewards of engaging in this kind of long-term business transaction.

SAMPLE LEGISLATIVE PROVISION

Content may be copied and pasted as needed.

Section A. Authorization; Applicability

(a) This Act:

- (1) Creates a process by which Public Entities may partner with Private Entities for the Development of Vertical Infrastructure through the use of Public-Private Partnerships; and
- (2) Authorizes Public Entities to partner with other Public Entities for the Development of infrastructure through the use of Public-Public Partnerships.

(b) All Vertical Infrastructure Public-Private Partnerships shall be procured in the manner described by this Act.

(c) This Chapter does not apply to Horizontal Infrastructure.

APPLICABLE DEFINITIONS [REFERENCE APPENDIX A]

- (i) “Develop” or “Development”
- (ii) “Horizontal Infrastructure”
- (iii) “Private Entity”
- (iv) “Public Entity”
- (v) “Public-Private Partnership”
- (vi) “Public-Public Partnership”
- (vii) “Vertical Infrastructure”

> For more information, please contact the AIA Local Government Division at govaffs@aia.org.

Create an Oversight or Advisory Entity

BACKGROUND

Evaluating whether PPP delivers the best value to the public requires a high level of expertise in finance, law, procurement, planning, and design. The requisite level of expertise in these disciplines is unlikely to be available in existing government agencies and localities interested in PPP procurement. The establishment of an oversight/advisory entity or housing it within an existing agency, also known as a “PPP Entity,” is internationally recognized as a best practice and key to PPP success. Public-private partnerships involve large-scale investment, long-term obligations, and significant expertise. This entity can identify, analyze, and monitor PPP opportunities and projects and its creation is received by the private sector as a signal that the public entity has taken proper steps to create a consistent and predictable regulatory environment for private sector investment.

As expressed in the below provisions, an oversight/advisory entity builds institutional knowledge on the complex process within the state; can provide the legislature with PPP policy guidance; evaluates proposed PPP projects and objectively analyzes whether PPP is appropriate; assists governmental entities in managing private financing and the complex and long-term contracts when necessary; and reduces transactional and other costs borne by the public by harnessing the efficiencies of having this specialized expertise at the state level, instead of inefficiently and unrealistically relying on individual governmental subdivisions. These duties protect the taxpayer by ensuring PPP is only utilized in appropriate situations and is done in a responsible, cost-effective manner.

SAMPLE LEGISLATIVE PROVISION

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Section A. Office of Vertical Infrastructure Planning and Partnerships

(a) The Office of Vertical Infrastructure Planning and Partnerships (OVIPP) shall hereby be established as a public advisory agency.

(b) The OVIPP shall be responsible for administering the provisions of this Act and the guidelines established pursuant thereto. The role of the OVIPP shall involve, but is not limited to:

- (1) providing technical assistance, expertise, and capacity necessary for a successful partnership program;
- (2) creating an attractive, predictable, prosperous, and transparent environment that encourages private investment within the State and protects the public interest;
- (3) gauging and promoting private market interest and investment in the Development of public Vertical Infrastructure within the State;
- (4) assisting in establishing a comprehensive strategy for meeting the State’s Vertical Infrastructure needs;
- (5) identifying, cultivating, and sharing best practices that optimize the value provided to the public and satisfy public accountability, policy, and transparency objectives;

- (6) screening and approving the use of Public-Private Partnerships;
- (7) creating and adopting guidelines establishing a consistent framework to identify, procure, and execute Public-Private Partnerships;
- (8) strengthening public capacity and expertise on partnerships;
- (9) providing guidance on Public-Private Partnership laws, policies, and best practices;
- (10) evaluating and synthesizing any asset inventories submitted by Public Entities to identify current and future Vertical Infrastructure needs within the State, opportunities to utilize Public-Private Partnerships, and maximize resources and efficiency;
- (11) consulting with persons and jurisdictions affected by proposed or potential partnership projects;
- (12) establishing reporting requirements related to the use of Public-Private Partnerships within the State, which shall include, at a minimum, that an evaluative report be prepared within 120 days of Service Delivery of each Qualifying Project;
- (13) submitting an annual report to the Governor describing the nature of all approved partnerships; and
- (14) other duties necessary to effectuate the policies and objectives of this Act.

(c) The OVIPP shall be under the supervision and control of a qualified executive director whose role and function is dedicated to the performance and activities of the OVIPP.

(d) The OVIPP shall, at a minimum, employ or retain the services of persons with expertise in the following:

- (1) Regional or municipal planning;
- (2) Private investment or finance;
- (3) Public real estate development, contract, or procurement law;
- (4) Public Vertical Infrastructure development or financing;
- (5) Architectural and engineering design; and
- (6) Public-Private Partnerships.

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APPLICABLE DEFINITIONS

[REFERENCE APPENDIX A]

- (i) “Develop” or “Development”
- (ii) “Horizontal Infrastructure”
- (iii) OVIPP
- (iv) “Private Entity”
- (v) “Public Entity”
- (vi) “Public-Private Partnership”
- (vii) “Public-Public Partnership”
- (viii) Qualifying Project
- (ix) “Vertical Infrastructure”

Provide for Infrastructure Planning

BACKGROUND

Before determining what infrastructure improvements are needed, it is a best practice for jurisdictions to first evaluate the current inventory of its infrastructure assets (i.e. public facilities). For example: What does it own? Where are the assets located? What is their condition? This is an important assessment prior to approving a PPP and will help jurisdictions make informed, comprehensive decisions.

As expressed in the provisions below, the entity may submit a list of its assets to the oversight/advisory entity to create a “master” asset inventory, allowing the oversight/advisory entity to prioritize the state’s capital needs so that both public and private resources are used in the most efficient way possible.

SAMPLE LEGISLATIVE PROVISION

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Section A. Vertical Infrastructure Planning

(a) A Public Entity may identify and assess Vertical Infrastructure and real property assets within their jurisdiction. Any such asset inventory should include the geographical location and condition of the assets identified.

(b) A Public Entity may submit their inventory to the OVIPP and inventories may be used to assist Public Entities and the OVIPP in prioritizing Vertical Infrastructure funding, capital improvement needs and identifying opportunities for potential partnerships. The OVIPP may evaluate and synthesize the inventories into a comprehensive asset description and prioritization tool for current and future Vertical Infrastructure needs within the State.

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APPLICABLE DEFINITIONS

[REFERENCE APPENDIX A]

(i) “OVIPP”

(ii) “Public Entity”

(iii) “Vertical Infrastructure”

Require an Objective Analysis to Determine Whether the Proposed Project is Suitable

BACKGROUND

The project identification process is essential because it determines whether a prospective project can and should be delivered as a PPP instead of using traditional public procurement methods; this is especially true because PPPs are not suitable for all projects, and projects for which they are suitable typically involve very large-stakes. A finding that PPP is a viable option does not mean that it is the best option. Consequently, such a project must undergo a subsequent evaluation in which the total costs of the project as delivered as a PPP are compared with the total costs of using traditional procurement methods to design/construct and then operate and maintain over a long-term period. This apples-to-apples comparison protects tax dollars by ensuring that a PPP is used only when it delivers the best value out of the available options.

SAMPLE LEGISLATIVE PROVISION

Content may be copied and pasted as needed.

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Section A. Project Identification

(a) In accordance with the guidelines established by the OVIPP, a Public Entity or a Private Entity may present or propose an idea or concept for a project or potential Public-Private Partnership scheme to the OVIPP for discussion or feedback. Any idea or concept presented or proposed by a Private Entity shall be general in nature and shall not include any detailed or specific proposals or plans or be of the nature that would restrict or limit the competitive procurement process required by this Act. A Public Entity shall not solicit, receive, consider, evaluate, or accept any proposal from a Private Entity regarding the Development of any Vertical Infrastructure that is not procured through the processes described in this Act.

(b) A Public Entity that is interested in pursuing the use of a Public-Private Partnership for a specific project may initiate a request for the OVIPP to conduct a screening of that project through the processes and procedures established by OVIPP guidelines, which may include an assessment of:

- (1) whether the Partnership Agreement will be long-term and the Private Developing Entity will carry the Risk of life-cycle costs, including the initial capital outlay for design and construction and operational, maintenance and refurbishment requirements for the length of the contract term;

- (2) whether the Partnership Agreement will or can include measurable performance outputs that are linked to payments or to an otherwise beneficial Business Arrangement;
- (3) whether the project is sufficiently complex to encourage design and technology innovations;
- (4) whether the project creates a genuine business opportunity that is likely to attract a sufficient number of Private Entities and a competitive procurement process;
- (5) whether there are commercial opportunities that add value to the project and will either reduce service payments to the Private Developing Entity or otherwise provide a beneficial Business Arrangement; and
- (6) whether the total life-cycle costs of the project exceed \$100 million dollars.

(c) If, based upon the screening, the OVIPP determines a Public-Private Partnership is suitable for a project, the OVIPP may proceed and conduct a Value for Money Analysis to determine whether a Public Private Partnership is the optimal method, as compared to other Traditional Delivery Methods, through which to deliver the project. Prior to or in conjunction with a Value for Money Analysis, the OVIPP may consider whether the project is consistent with comprehensive Vertical Infrastructure planning and needs.

(d) The OVIPP guidelines shall establish the methodology for carrying out a Value for Money Analysis. This methodology shall include, but is not limited to: a qualitative assessment, a quantitative assessment, a Business Case analysis, and comparison of the net present value of the total, risk-adjusted costs of delivering a project through a Public-Private Partnership and through other Traditional Delivery Methods.

- (e) Where a Value for Money Analysis results in the conclusion that a Public-Private Partnership provides Value for Money and is the most suitable procurement method for Developing the Vertical Infrastructure project, the OVIPP may approve the project to proceed as a Public-Private Partnership. A project that is approved to and does proceed as a Public-Private Partnership shall be procured and Developed in accordance with this Act and will be considered a Qualifying Project.

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APPLICABLE DEFINITIONS
[REFERENCE APPENDIX A]

- (i) “Business Arrangement”
- (ii) “Business Case”
- (iii) “Develop” or “Development”
- (iv) “OVIPP”
- (v) “Partnership Agreement”
- (vi) “Private Entity”
- (vii) “Private Developing Entity”
- (viii) “Public Entity”
- (ix) “Public-Private Partnership”
- (x) “Qualifying Project”
- (xi) “Risk”
- (xii) “Traditional Delivery Method”
- (xiii) “Value for Money”
- (xiv) “Value for Money Analysis”
- (xv) “Vertical Infrastructure”

Ensure Adequate Public Capacity to Manage PPP Contracts

BACKGROUND

Because of the project complexity, which shifts the responsibility of designing, constructing, financing, maintaining, and oftentimes operating the infrastructure asset to the private entity over a long-term period (potentially 30–35 years), it is critical that public entities have unbiased, professional, technical advice before entering into a PPP contract. To protect taxpayer investment, prudent jurisdictions should require public entities to retain professional advisors, if they don't already have them in-house, including design professionals, legal and financial professionals and any other professionals who can assist the public entity in understanding the process and executing it in a way that best serves the public. Retaining these experts has proven to be a critical best practice in other countries that utilize PPP as well as a best practice in the transportation sector.

SAMPLE LEGISLATIVE PROVISION

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Section A. Professional Advisors

(a) Prior to issuing a request for qualifications, a Responsible Public Entity shall, as appropriate or otherwise recommended by the OVIPP, engage Professional Advisors, if such Professional Advisors have not already been retained. In retaining the services of the Professional Advisors, the Responsible Public Entity may utilize the services of professionals already in its employ, where qualified. If the Responsible Public Entity does not have in its employ the qualified professionals, the Responsible Public Entity shall procure the services of professionals pursuant to [insert State's professional services procurement statute or Brooks Act]. The Professional Advisors shall provide technical assistance and consulting services to the Responsible Public Entity and shall not be eligible to participate in any way with the Private Entities competing for the award of the Qualifying Project.

(b) The Professional Advisors shall provide unbiased, expert technical and professional advice, and other related services to the Responsible Public Entity. The Responsible Public Entity's lead staff architect and engineer shall participate in all meaningful and relevant Professional Advisor activities.

(c) The Professional Advisors may, but are not limited to, provide the following services:

- (1) preparing and evaluating procurement documentation;

- (2) reviewing the Private Entities' qualifications and proposed designs;
- (3) preparing and executing the Interim and Partnership Agreements;
- (4) evaluating and measuring performance requirements, including whether Service Delivery has been achieved; and
- (5) performing other duties and services required by the Responsible Public Entity, Partnership Agreement, or OVIPP.

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APPLICABLE DEFINITIONS
[REFERENCE APPENDIX A]

- (i) "OVIPP"
- (ii) "Partnership Agreement"
- (iii) "Professional Advisors"
- (iv) "Private Entity"
- (v) "Public Entity"
- (vi) "Public Private Partnership"
- (vii) "Responsible Public Entity"
- (viii) "Qualifying Project"
- (ix) "Service Delivery"

Provide for a Quality-Based Procurement Process

BACKGROUND

A competitive, transparent, and fair procurement process is critical for selecting the right private partner. This two-step procurement process in which private entities are vetted first on qualifications, with only the most qualified participating in the second step, proposals, accomplishes this goal. In addition to ensuring that a project will be awarded to only the most capable and experienced entity, only inviting short-listed private entities to participate in the expensive proposal process (and providing those entities with stipends to offset the significant costs involved) creates a more competitive process. This is because this process better aligns the varying cost of participating in the procurement with the varying likelihood of being awarded the contract (low cost and unknown likelihood of being awarded the contract in the first step, high cost (slightly offset by a stipend) with increased and predictable odds of being awarded the contract in the second). The result is a two-step process that promotes and attracts a larger pool of talent, creating more options and better value for the public.

SAMPLE LEGISLATIVE PROVISION

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Section A. Request for Qualifications

The Responsible Public Entity, with the assistance of any Professional Advisors, shall prepare and issue a public notice, pursuant to [insert State's public notice requirement statute], of the request for qualifications for the Qualifying Project. The request for qualifications shall include, but is not limited to, details on the following:

- (a) Project background, site, scope, budget and schedule;
- (b) Procurement requirements and procedures that will apply throughout the selection process;
- (c) Qualifications evaluation and scoring criteria, including the relative weighting of criteria;
- (d) Notice of any rules, ordinances, or goals established by the Responsible Public Entity, including: goals for minority- and women-owned, and small business participation and general performance requirements and applicable standards including, but not limited to, energy use, water consumption, security provisions;
- (e) The requirement that each Private Entity submit in its response to the request for qualifications the names and qualifications of the key personnel, including architects, professional engineers, builders, and financiers, whom the Private Entity proposes to use for the Development of the Qualifying Project;

(f) Notice that key personnel identified in a response to the request for qualifications may not be substituted or replaced without prior written approval of the Responsible Public Entity; and

(g) Other information that assists potential Private Entities in understanding the requirements of, and submitting qualifications for, the Qualifying Project.

Section B. Evaluation of Responses to Request for Qualifications

(a) The Responsible Public Entity, with the assistance of any Professional Advisors, shall evaluate and score the qualifications of each Private Entity it received in response to the request for qualifications in accordance with the guidelines prepared by the OVIPP and identified in the published request.

(b) The evaluation and scoring mechanism contained in the OVIPP guidelines shall consider, but is not limited to, the following criteria:

- (1) general reputation, qualifications, and industry experience, including key personnel;
- (2) financial capacity and capability to perform all services throughout the term of the contract;
- (3) managerial resources and management plan;
- (4) safety record;
- (5) past performance and capacity to perform, including key personnel;
- (6) ability to complete work in a timely and satisfactory manner;
- (7) technical competence and experience with similar projects, except that

cost-related or price-related evaluation factors are not permitted at this stage; and

- (8) experience with local and regional climate and geographical conditions.

(c) Each Private Entity must:

- (1) select or designate organizations and professional key personnel that are members of its team based on demonstrated competence and qualifications, in the manner provided by [insert State's professional services procurement statute or Brooks Act];
- (2) certify to the Responsible Public Entity that each selection or designation was based on demonstrated competence and qualifications, in the manner provided by [insert State's professional procurement statute or Brooks Act]; and
- (3) commit that all key personnel have been identified and will not be changed, except for Cause, throughout the proposed project development and operation.

(d) The Responsible Public Entity, with the advice of Professional Advisors, shall analyze responses and shortlist the three highest scoring Private Entities who will be invited to respond to the request for proposals.

Section C. Request for Proposals

(a) The Responsible Public Entity, with the assistance of Professional Advisors, shall prepare and issue a public notice, pursuant to [insert State's public notice requirement statute], of the request for proposals from the three most qualified Private Entities identified under section [Insert Request for Qualifications Section, supra.].

(b) The request for proposals must include, at a minimum, details and documentation of the:

- (1) initial design concept;
- (2) output specifications;
- (3) performance specifications;
- (4) service requirements;
- (5) payment structure mechanism(s);
- (6) proposed risk allocation and key contractual provisions;
- (7) requested elements of the cost proposal or Business Arrangement;
- (8) requested elements of the design proposal, which, at minimum shall require the proposal to:
 - i. build upon the initial design concept, or offer alternative design approaches consistent with the programming needs of the Responsible Public Entity; and
 - ii. anticipate problems with the initial design concept or alternative design approach and offer alternative design solutions.
- (9) proposal scoring criteria, including the relative weighting of proposal elements; notice of any rules, ordinances, or goals established by the Responsible Public Entity, including: goals for minority- and women-owned and small business participation, and general performance requirements and applicable standards including, but not limited to, energy use, water consumption, security provisions; and
- (10) the Responsible Public Entity shall offer an unsuccessful Private Entity

that submits a responsive response to the Public Entity's request for proposals under section [insert Request for Qualifications section, supra.] a stipend for preliminary services fees associated with the development of the proposal, included in the Request for Proposals; and,

- (11) other aspects of the Qualifying Project or evaluation process as the OVIPP or Responsible Public Entity determine necessary.

(c) The Responsible Public Entity shall conduct structured, interactive meetings or workshops with shortlisted Private Entities prior to the submission of proposals that facilitate open and equitable dialogue between the parties and enhance the Private Entities' understanding of the Responsible Public Entity's requirements and expectations. The OVIPP shall create guidelines that establish an efficient fair, impartial, and reliable framework for these interactions.

(d) Proposal responses shall not be required to be received earlier than the 60th day after the date the Responsible Public Entity makes a public request for the proposals from the shortlisted Private Entities.

(e) Proposals shall be submitted so that the cost proposal and the design proposal, that includes the long-term service proposal, are sealed and submitted separately.

(f) Proposals that are not responsive to the request for proposals or do not meet the requirements established by the Responsible Public Entity for the Qualifying Project shall be returned to the Private Entity without further action.

(g) Any materials or data submitted to, or made available to, or received by the Responsible Public Entity, to the extent that the material or data consist of trade secrets, are confidential and are not public

records. Financial information received by the Responsible Public Entity that is related to a proposal is confidential and is not a public record until such time as a proposal is selected.

(h) An unsuccessful responsive Private Entity shall retain all rights to the work product submitted in their proposals. The Responsible Public Entity may not release or disclose to any person, including the successful Private Developing Entity, the work product contained in an unsuccessful responsive proposal. The Responsible Public Entity or its agents may not make use of any unique or non-ordinary design element, technique, method, or process contained in the unsuccessful responsive proposal that was not also contained in the successful proposal at the time of the original submittal, unless the Private Developing Entity acquires a license from the unsuccessful Private Entity. The Responsible Public Entity shall return all copies of any proposal or other information submitted by an unsuccessful responsive Private Entity.

(i) Prior to submission of a proposal, a Private Entity may request a review by the Responsible Public Entity of any information that the Private Entity has identified as confidential, to determine whether information would be subject to disclosure under applicable public records laws.

Section D. Evaluation of Responses to Request for Proposals

(a) The Responsible Public Entity, with the assistance of Professional Advisors and the OVIPP, shall first evaluate and score the sealed design proposal, including the long-term service proposal, in accordance with the criteria and weighting process and other applicable procedures established by the OVIPP and specified in the request for proposals

(b) The Responsible Public Entity, with the assistance of the Professional Advisors and the OVIPP, shall subsequently evaluate and score the sealed preliminary estimated Project cost proposal or Business Arrangement proposal associated with each design proposal, if designs were requested, in accordance with the criteria and weighting process and other applicable procedures established by the OVIPP and specified in the request for proposals. This evaluation shall include a revised Value for Money Analysis that substitutes the proposed Public-Private Partnership Project Costs for the official cost estimates.

(c) Each Private Entity's qualifications and proposal scores shall be combined in the manner described by OVIPP guidelines and the request for proposals and each Private Entity will subsequently be ranked based on that combined score.

(d) A Responsible Public Entity may require an independent audit of any and all cost estimates associated with a Private Entity's proposal, as well as a review of all public costs and potential liabilities to which taxpayers could be exposed. For any Qualifying Project with an estimated construction cost of over \$20 million dollars, the Responsible Public Entity also shall require the Private Entity to pay the costs for the independent audit.

Section E. Negotiation

After ranking the shortlisted Private Entities, the Responsible Public Entity shall first attempt to negotiate a Partnership Agreement with the highest overall ranked Private Entity. If the Responsible Public Entity is unable to reasonably negotiate a satisfactory Partnership Agreement with the selected Private Entity, the Responsible Public Entity shall, formally and in writing, end all negotiations with the Private Developing Entity and proceed to negotiate with the next Private Entity in the order of the

selection ranking until a Partnership Agreement is reached or reasonable negotiations with all ranked Private Entities end.

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APPLICABLE DEFINITIONS

[REFERENCE APPENDIX A]

(i) “Business Arrangement”

(ii) “Cause”

(iii) “Develop” or “Development”

(iv) “OVIPP”

(v) “Partnership Agreement”

(vi) “Private Developing Entity”

(vii) “Private Entity”

(viii) “Professional Advisors”

(ix) “Public-Private Partnership Project Costs”

(x) “Qualifying Project”

(xi) “Responsible Public Entity”

(xii) “Value for Money Analysis”

(xiii) “Vertical Infrastructure”

Allow for Unsolicited Ideas and Concepts, Not Unsolicited Proposals

BACKGROUND

Allowing unsolicited concepts and ideas to be submitted to a public entity or the OVIPP enables public entities to harness the innovation and efficiency of the private sector without creating an uneven and anti-competitive procurement process that can result from permitting unsolicited proposals.

SAMPLE LEGISLATIVE PROVISION

Content may be copied and pasted as needed.



Section A. Unsolicited Ideas and Concepts

(a) A Public Entity shall not solicit, receive, consider, evaluate, or accept any proposal from a Private Entity to Develop any Vertical Infrastructure that is not procured through the processes described in this Chapter. This does not preclude a Public Entity from receiving and considering unsolicited ideas and development concepts from a Private Entity.



APPLICABLE DEFINITIONS

[REFERENCE APPENDIX A]

- (i) “Public Entity”
- (ii) “Private Entity”
- (iii) “Develop”
- (iv) “Vertical Infrastructure”

Provide for a Stipend to Unsuccessful, but Responsive, Bidders

BACKGROUND

Awarding stipends to unsuccessful bidders, whose proposals were responsive to the request for proposal, will lessen the financial burden for firms submitting design and other required work. Pre-construction design work requires extensive effort by architectural and engineering firms. Prior to developing the architectural plan and incorporating the appropriate engineering systems within, design professionals will usually initiate feasibility and environmental studies, assess site conditions and legal limitations for development (e.g. environmental and zoning), prepare site analyses, analyze scale and access issues in relation to surrounding buildings and infrastructure (utilities and transit), analyze the impact of sun path, lines of sight and circulation patterns, and develop a building “program” that outlines how the space within the building will be used and occupied and how its occupants will circulate and relate to each other. After all of this preliminary work has been completed, the design process can begin.

These professional services are inextricably intertwined with design services and are costly in terms of dollars and work hours. Providing reasonable compensation for the work produced, as proposed in the below provision, may increase competition and proposal quality by making the endeavor more economically feasible, thus expanding the pool of firms able to participate. The alternative, and better, scenario would involve elimination of all design competitions in the procurement process to foster a more meaningful design process, between the selected design team and the end-user client.

SAMPLE LEGISLATIVE PROVISION

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Section A. Stipends for Unsuccessful Bidders

(a) The Responsible Public Entity shall offer an unsuccessful Private Entity that submits a responsive response to the Public Entity’s request for proposals under section [insert request for proposals section, supra.] a stipend for preliminary services fees associated with the development of the proposal.

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APPLICABLE DEFINITIONS

[REFERENCE APPENDIX A]

- (i) “Responsible Public Entity”
- (ii) “Private Entity”
- (iii) “Public Entity”

Provide a *General* Framework of Critical Elements for PPP Contracts

BACKGROUND

The content and implementation of a PPP contract are critical to managing the terms, expectations, and risks of the project. Though PPP contracts, like the projects for which they are created, are typically unique, there are certain fundamental contractual elements that should—and must—be addressed in each agreement. Requiring that these contractual elements be addressed (and *not* how they will be addressed) provides public and private parties a predictable and flexible framework both before and during contract negotiations.

SAMPLE LEGISLATIVE PROVISION

Content may be copied and pasted as needed.

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Section A. Partnership Contract

(a) The Responsible Public Entity, subject to any relevant guidelines established by the OVIPP, shall enter into a Partnership Agreement with the Private Entity selected pursuant to processes prescribed in this Act.

(b) The Partnership Agreement shall address the following:

- (1) Scope and term of the agreement;
- (2) Performance specifications;
- (3) Property interests and authorization to occupy throughout the term of the agreement;
- (4) Names and contact information for all team members, including a provi-

sion that commits to maintaining the identified team composition throughout the Partnership Agreement term, except for Cause;

- (5) Process for reviewing the Private Developing Entity's plans and specifications for the Development of the Qualifying Project to ensure that if the plans and specifications conform to standards acceptable to the Responsible Public Entity;
- (6) Delivery schedule, including the date for the acquisition of or the beginning of construction or improvements to the Public Project, and Service Delivery;
- (7) Rights and duties of the Private Developing Entity and Responsible Public Entity through the course of the Development of the Qualifying Project, including in the event of force majeure and other unforeseeable natural events;
- (8) Inspection and monitoring of the Qualifying Project by the Responsible Public Entity, or a representative thereof, to ensure that the Private Developing Entity's Development of the Qualifying Project is in accordance with the Partnership Agreement;
- (9) Specific Service Delivery plan and standards, including mechanism to measure the Service Delivery at the specified performance standards;
- (10) Specific plan to ensure proper maintenance of the Qualifying Project

throughout the term of the Partnership Agreement;

- (11) Specific plan for the disposition and condition of the Qualifying Project upon completion of the Partnership Agreement, and other necessary end of term arrangements;
- (12) Financing obligations of the Private Developing Entity and the Responsible Public Entity;
- (13) Delivery of performance and payment bonds in connection with the development and/or operation of the Qualifying Project and in the forms and amounts satisfactory to the Responsible Public Entity and in compliance with applicable laws for all construction activities;
- (14) Compensation to the Private Developing Entity and the payment structure mechanism. Such compensation and payment structure mechanism shall take into account the conditions in which payment may be adjusted, suspended, or otherwise affected in case of failure to deliver a service or perform an obligation required by the Partnership Agreement;
- (15) Reimbursement to be paid to the Responsible Public Entity for services provided by the Responsible Public Entity;
- (16) Apportionment of expenses between the Private Developing Entity and the Responsible Public Entity;
- (17) Periodic filing by the Private Developing Entity of appropriate financial statements and other Qualifying Project-related reports in a form acceptable to the Responsible Public Entity;

(18) Grounds for, and the policies and procedures governing the rights, responsibilities, and remedies of, the parties in the event the Interim or Partnership Agreements are terminated or there is a Material Default;

(19) Rights and remedies available in the event of default or delay, such as liquidated damages in the event of Service Delivery delays;

(20) Procedures for resolving disputes between the Private Developing Entity and the Responsible Public Entity, including whether arbitration or other alternative dispute resolution mechanisms, such as dispute boards, may be used or required;

(21) Maintenance of a policy or policies of public liability insurance, copies of which shall be filed with the Responsible Public Entity accompanied by proofs of coverage, or self-insurance, each in form and amount satisfactory to the Responsible Public Entity and reasonably sufficient to insure coverage of tort liability to the public employees and to enable continued operation of the Qualifying Project;

(22) Procedures for amendment of the Partnership Agreement, including any scope changes or modifications;

(23) Whether fees and rents may be imposed and collected from members of the public for the use of the Qualifying Project and the basis by which such user fees or rents shall be determined and modified;

(24) Regulation of revenues received from use of the Qualifying Project and the specific portion of revenues from any fee-generating uses to be returned to the Responsible Public Entity and the OVIPP over the life of the agreement; and

(25) A statement ensuring compliance with applicable federal, state and local labor and public work laws.

Section B. Interim Agreement

Before or in connection with the negotiation of a Partnership Agreement, the Responsible Public Entity may enter into an Interim Agreement. An Interim Agreement does not obligate the Responsible Public Entity to enter into a Partnership Agreement. An Interim Agreement shall be limited to provisions terms and conditions that:

- (a) authorize the Private Entity to commence activities for which it may be compensated related to the proposed Qualifying Project, including, but not limited to: project planning and development; design; environmental analysis and mitigation; surveying; and financial and revenue analysis, including ascertaining the availability of financing;
- (b) establish the process and timing of the negotiation of the Partnership Agreement; and
- (c) relate to any aspect of the Development of a Qualifying Project that the OVIPP or parties consider appropriate.

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APPLICABLE DEFINITIONS [REFERENCE APPENDIX A]

- (i) “Cause”
- (ii) “Develop” or “Development”
- (iii) “Interim Agreement”
- (iv) “Material Default”
- (v) “OVIPP”
- (vi) “Partnership Agreement”
- (vii) “Private Developing Entity”
- (viii) “Private Entity”
- (ix) “Public Entity”
- (x) “Qualifying Project”
- (xi) “Responsible Public Entity”
- (xii) “Service Delivery”

Consider Other Miscellaneous Legal Provisions

BACKGROUND

Because of their unique nature—using a single-contract for the design, construction, finance, maintenance, and sometimes operation of an infrastructure asset—the PPP procurement process often entails an unusual, closed-universe framework in which laws that would typically apply to any public procurement, no longer apply to PPP unless expressly included in the PPP law. While this approach seems appropriate given the unique circumstances of PPP procurement, it is important to ensure that any laws intended to apply to PPP, such as eminent domain authority, are clearly identified (and explained, if necessary) in the PPP law to prevent ambiguity or confusion.

SAMPLE LEGISLATIVE PROVISIONS

Content may be copied and pasted as needed.

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Section A. Diversity and Community Engagement

(a) A Private Developing Entity and its contractors shall make a good-faith effort to comply with [insert State’s relevant minority, women, and small business participation statute(s)] and recruit and select minority- and woman-owned and small business entities.

(b) A Private Developing Entity and its contractors shall make a good-faith effort to encourage and utilize qualified, locally-based businesses.

Section B. Notice to Affected Jurisdictions and Public Comment

(a) A Public Entity shall notify each Affected Jurisdiction of its intent to use a Public-Private Partnership before the Public Entity issues the request for qualifications for a Qualifying Project.

(b) A Public Entity shall hold at least one public hearing before the Public Entity begins the process for procuring a project.

Section C. Eminent Domain

This Act does not alter the eminent domain laws of this state or grant the power of eminent domain to any person who is not expressly granted that power under other state law.

Section D. Sovereign Immunity

This Act does not waive the sovereign immunity of a Responsible Public Entity, an Affected Jurisdiction, or an officer or employee thereof with respect to participation in, or approval of, any part of a Qualifying Project or its operation, including, but not limited to, interconnection of the Qualifying Project with any other Vertical Infrastructure. A county or municipality in which a Qualifying Project is located possesses sovereign immunity with respect to the project, including, but not limited to, its design, construction, and operation.

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APPLICABLE DEFINITIONS

[REFERENCE APPENDIX A]

(i) “Affected Jurisdiction”

(ii) “Private Developing Entity”

(iii) “Private Entity”

(iv) “Public Entity”

(v) “Qualifying Project”

(vi) “Vertical Infrastructure”

(vii) “Responsible Public Entity”



APPENDIX A: APPLICABLE DEFINITIONS

- (a) **“Affected Jurisdiction”** shall mean any county, city, town, school district, or municipality in which all or a portion of the Qualifying Project is located in or is affected.
- (b) **“Ancillary Costs”** shall mean the indirect costs of delivering a Project, including: costs incurred by Public Entities related to up-front procurement costs; project management costs; architectural, engineering, financial, legal, risk, and technical advisor fees; and contract management costs over the life of the Project.
- (c) **“Base Costs”** shall mean all capital and operating costs associated with Developing, delivering, and owning the project and related services over a pre-determined period of time.
- (d) **“Business Arrangement”** shall mean the offered or finalized components of an overall agreement between the Public and Private Entities. It can include joint use of final Vertical Infrastructure, additional capabilities, and other factors in addition to cost payments.
- (e) **“Business Case”** shall mean a detailed statement of project objectives and characteristics, owner expectations and requirements, feasibility and Risk analyses, funding sources, and other relevant project information identified by the OVIPP.
- (f) **“Cause”** shall mean an action, such as the termination of a contract or a relationship of employment, that it is based on a breach, misfeasance, or other inappropriate action of the other party.
- (g) **“Develop”** or **“Development”** shall mean the design, construction, alteration, finance, maintenance, or operation of Vertical Infrastructure.
- (h) **“Financing Costs”** shall mean the costs associated with borrowing and issuing public debt.
- (i) **“Horizontal Infrastructure”** shall mean any and all government-funded infrastructure that does not involve a public building except incidental structures with limited public access and use.
- (j) **“Interim Agreement”** shall mean the agreement, including a memorandum of understanding or binding preliminary agreement, authorized by section [insert interim agreement section number] between the Responsible Public Entity and a Private Entity that proposes to Develop a Qualifying Project.
- (k) **“Material Default”** shall mean any default by the Private Developing Entity in the performance of its duties under the Partnership Agreement or Interim Agreement that jeopardizes adequate service to the public from a Qualifying Project.
- (l) **“OVIPP”** shall mean the Office of Vertical Infrastructure Planning and Partnerships established in section [insert OVIPP section number].
- (m) **“Partnership Agreement”** shall mean the agreement required by section [insert Partnership Agreement section number] between a Responsible Public Entity and a Private Developing Entity to Develop a Qualifying Project.

> For more information, please contact the AIA Local Government Division at govaffs@aia.org.

- (n) **“Premium Costs”** shall mean the costs paid to the Private Developing Entity as compensation for the added Risks transferred to them under the Partnership Agreement.
- (o) **“Private Developing Entity”** shall mean the Private Entity that enters into a Partnership Agreement or Interim Agreement with a Responsible Public Entity to Develop a Qualifying Project under this Chapter.
- (p) **“Private Entity”** shall mean any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public-benefit corporation, nonprofit entity, special purpose vehicle, or other private business entity.
- (q) **“Professional Advisors”** shall mean the accounting, architecture, construction, engineering, finance, legal, and project and risk management specialists retained or employed to provide professional expertise and guidance to a Responsible Public Entity pursuant to section [insert Professional Advisors section number].
- (r) **“Public Entity”** shall mean the State and any agency or authority thereof; any county, city or town and any other political subdivision of the State; any public body politic or corporate; or any regional entity that serves a public purpose.
- (s) **“Public-Private Partnership”** (or “PPP”) shall mean a single, long-term, performance-based agreement between a Responsible Public Entity and a Private Developing Entity for the Development of a Qualifying Project, in which appropriate Risks and benefits can be allocated in a cost-effective manner between the contractual partners and where ownership of the Qualifying Project remains with the Responsible Public Entity, and the operation, if any, and maintenance of the Qualifying Project may revert to the Responsible Public Entity at the end of the contract term.
- (t) **“Public-Private Partnership Project Costs”** shall mean the risk-adjusted, net present value of the costs associated with Developing a project through a Public-Private Partnership which include, but are not limited to: Ancillary Costs, Base Costs, Premium Costs, Financing Costs; and value of relevant Risks.
- (u) **“Public-Public Partnership”** shall mean an agreement between two or more Public Entities to jointly develop and use Vertical Infrastructure.
- (v) **“Qualifying Project”** shall mean a Vertical Infrastructure project approved by the OVIPP to proceed as a Public-Private Partnership pursuant to this Chapter.
- (w) **“Responsible Public Entity”** shall mean a Public Entity that has been approved by the OVIPP to Develop a Qualifying Project using a Public-Private Partnership.
- (x) **“Risk”** shall mean any risk associated with the project and the Development thereof that must be identified, assessed, allocated, and managed throughout the life of a project for the project to be successful.
- (y) **“Service Delivery”** shall mean the point in which a Qualifying Project is available and ready to use at the specified performance standards prescribed in the Partnership Agreement.
- (z) **“Traditional Delivery Method”** shall mean a delivery method other than a Public-Private Partnership that Public Entities are authorized to

utilize, individually or in combination, pursuant to [cite State’s procurement method statute(s)] to deliver Vertical Infrastructure.

- (aa) **“Traditional Project Costs”** shall mean the risk-adjusted, net present value of costs associated with Developing a project through Traditional Delivery Methods which include, but are not limited to: Ancillary Costs; Base Costs; Financing Costs; and value of relevant Risks.
- (bb) **“Value for Money”** shall mean an objective assessment of whether a Public Entity’s spending optimizes its use of resources to achieve the intended outcome. Achieving Value for Money is based on the totality of circumstances and may be described in terms of the following criteria:
 - (1) reducing the cost, time, or effort of resources used, with a regard for maintaining quality or;
 - (2) delivering the same level of service, or better, for less cost, time, or effort, with a regard for maintaining quality; and
 - (3) delivering a better service or getting a better return for the same amount of expense, time, or effort.

(cc) **“Value for Money Analysis”** shall mean the value calculated, in percentage terms, when comparing the costs to Develop a project as delivered through a Traditional Delivery Method versus a Public-Private Partnership to determine which procurement approach produces the best value to the public over the long-term.

(dd) **“Vertical Infrastructure”** shall mean any and all buildings funded or owned by a Public Entity to serve a public purpose.



APPENDIX B: AIA COMPREHENSIVE LEGISLATION

The Vertical Infrastructure Planning and Partnership Act

SECTION 1. SHORT TITLE

This Chapter shall be known and may be cited as the “Vertical Infrastructure Planning and Partnership Act”, (“VIPPA”).

SECTION 2. PUBLIC POLICY

Vertical Infrastructure is essential to a vibrant economy. [Insert State] has a growing backlog of unmet Vertical Infrastructure needs, with limited public funds to pay for them. To assist in mitigating expected funding gaps and to secure a sound and resilient economy now and in the future, Public Entities in the State should approach Development of Vertical Infrastructure innovatively and efficiently. Innovation and efficiency can be fully optimized through intergovernmental planning, resource-sharing, and properly applied and approved financing tools to authorize, encourage, and guide Public Entities to partner with other Public and Private Entities to Develop Vertical Infrastructure.

When used appropriately, partnership opportunities have the potential to meet some of the [Insert State]’s Vertical Infrastructure needs by leveraging and supplementing the limited public funds available for projects, delivering improved services and Value for Money, and providing other measurable, long-term benefits to the public. However, partnerships are a sophisticated model for delivering Vertical Infrastructure

that require informed policies, procedures, internal controls, risk management measures, and private sector market interest that are established prior to their use in order to ensure optimal project outcomes and protect the public’s best interest. Comprehensive infrastructure partnership policies will enable and encourage Public Entities to creatively Develop Vertical Infrastructure in a way that reduces financial burdens on taxpayers, makes full use of land resources and buildings, reduces wasteful construction spending, optimizes performance of buildings, minimizes government expenses and public Risk, and maximizes opportunities for private sector investment.

SECTION 3. DEFINITIONS

The following definitions shall apply to this Chapter:

(a) **“Affected Jurisdiction”** shall mean any county, city, town, school district, or municipality in which all or a portion of the Qualifying Project is located in or is affected.

(b) **“Ancillary Costs”** shall mean the indirect costs of delivering a project, including: costs incurred by Public Entities related to up-front procurement costs; project management costs; architectural, engineering, financial, legal, risk, and technical advisor fees; and contract management costs over the life of the project.

> For more information, please contact the AIA Local Government Division at govaffs@aia.org.

(c) **“Base Costs”** shall mean all capital and operating costs associated with Developing, delivering, and owning the project and related services over a pre-determined period of time.

(d) **“Business Arrangement”** shall mean the offered or finalized components of an overall agreement between the Public and Private Entities. It can include joint use of final Vertical Infrastructure, additional capabilities, and other factors in addition to cost payments.

(e) **“Business Case”** shall mean a detailed statement of project objectives and characteristics, owner expectations and requirements, feasibility and Risk analyses, funding sources, and other relevant project information identified by the OVIPP.

(f) **“Cause”** shall mean an action, such as the termination of a contract or a relationship of employment, that it is based on a breach, misfeasance, or other inappropriate action of the other party.

(g) **“Develop”** or **“Development”** shall mean the design, construction, alteration, finance, maintenance, or operation of Vertical Infrastructure.

(h) **“Financing Costs”** shall mean the costs associated with borrowing and issuing public debt.

(i) **“Horizontal Infrastructure”** shall mean any and all government-funded infrastructure that does not involve a public building except incidental structures with limited public access and use .

(j) **“Interim Agreement”** shall mean the agreement, including a memorandum of understanding or binding preliminary agreement, authorized by section 17 between the Responsible Public Entity and a Private Entity that proposes to Develop a Qualifying Project.

(k) **“Material Default”** shall mean any default by the Private Developing Entity in the performance of its duties under the Partnership Agreement or Interim Agreement that jeopardizes adequate service to the public from a Qualifying Project.

(l) **“OVIPP”** shall mean the Office of Vertical Infrastructure Planning and Partnerships established in section 6.

(m) **“Partnership Agreement”** shall mean the agreement required by section 16 between a Responsible Public Entity and a Private Developing Entity to Develop a Qualifying Project.

(n) **“Premium Costs”** shall mean the costs paid to the Private Developing Entity as compensation for the added Risks transferred to them under the Partnership Agreement.

(o) **“Private Developing Entity”** shall mean the Private Entity that enters into a Partnership Agreement or Interim Agreement with a Responsible Public Entity to Develop a Qualifying Project under this Chapter.

(p) **“Private Entity”** shall mean any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public-benefit corporation, nonprofit entity, special purpose vehicle, or other private business entity.

(q) **“Professional Advisors”** shall mean the accounting, architecture, construction, engineering, finance, legal, and project and risk management specialists retained or employed to provide professional expertise and guidance to a Responsible Public Entity pursuant to section 9.

(r) **“Public Entity”** shall mean the State and any agency or authority thereof; any county, city or town and any other political subdivision of the State; any public body

politic or corporate; or any regional entity that serves a public purpose.

(s) **“Public-Private Partnership”** (or “PPP”) shall mean a single, long-term, performance-based agreement between a Responsible Public Entity and a Private Developing Entity for the Development of a Qualifying Project, in which appropriate Risks and benefits can be allocated in a cost-effective manner between the contractual partners and where ownership of the Qualifying Project remains with the Responsible Public Entity, and the operation, if any, and maintenance of the Qualifying Project may revert to the Responsible Public Entity at the end of the contract term.

(t) **“Public-Private Partnership Project Costs”** shall mean the risk-adjusted, net present value of the costs associated with Developing a project through a Public-Private Partnership which include, but are not limited to: Ancillary Costs, Base Costs, Premium Costs, Financing Costs; and value of relevant Risks.

(u) **“Public-Public Partnership”** shall mean an agreement between two or more Public Entities to jointly develop and use Vertical Infrastructure.

(v) **“Qualifying Project”** shall mean a Vertical Infrastructure project approved by the OVIPP to proceed as a Public-Private Partnership pursuant to this Chapter.

(w) **“Responsible Public Entity”** shall mean a Public Entity that has been approved by the OVIPP to Develop a Qualifying Project using a Public-Private Partnership.

(x) **“Risk”** shall mean any risk associated with the project and the Development thereof that must be identified, assessed, allocated, and managed throughout the life of a project for the project to be successful.

(y) **“Service Delivery”** shall mean the point in which a Qualifying Project is available and ready to use at the specified performance standards prescribed in the Partnership Agreement.

(z) **“Traditional Delivery Method”** shall mean a delivery method other than a Public-Private Partnership that Public Entities are authorized to utilize, individually or in combination, pursuant to [cite State’s procurement method statute(s)] to deliver Vertical Infrastructure.

(aa) **“Traditional Project Costs”** shall mean the risk-adjusted, net present value of costs associated with Developing a project through Traditional Delivery Methods which include, but are not limited to: Ancillary Costs; Base Costs; Financing Costs; and value of relevant Risks.

(bb) **“Value for Money”** shall mean an objective assessment of whether a Public Entity’s spending optimizes its use of resources to achieve the intended outcome. Achieving Value for Money is based on the totality of circumstances and may be described in terms of the following criteria:

- a. reducing the cost, time, or effort of resources used, with a regard for maintaining quality or;
- b. delivering the same level of service, or better, for less cost, time, or effort, with a regard for maintaining quality; and
- c. delivering a better service or getting a better return for the same amount of expense, time, or effort.

(cc) **“Value for Money Analysis”** shall mean the value calculated, in percentage terms, when comparing the costs to Develop a project as delivered through a Traditional Delivery Method versus a Public-Private Partnership to determine which procurement approach produces the best value to the public over the long-term.

(dd) “Vertical Infrastructure” shall mean any and all buildings funded or owned by a Public Entity to serve a public purpose.

SECTION 4. AUTHORIZATION; APPLICABILITY

(a) This Chapter:

- (1) Creates a process by which Public Entities may partner with Private Entities for the Development of Vertical Infrastructure through the use of Public-Private Partnerships; and
- (2) Authorizes Public Entities to partner with other Public Entities for the Development of Vertical Infrastructure through the use of Public-Public Partnerships.

(b) All Vertical Infrastructure Public-Private Partnerships shall be procured in the manner described by this Chapter.

(c) A Public Entity shall not solicit, receive, consider, evaluate, or accept any proposal from a Private Entity to Develop any Vertical Infrastructure that is not procured through the processes described in this Chapter. This does not preclude a Public Entity from receiving and considering unsolicited ideas and development concepts from a Private Entity.

(d) This Chapter does not apply to Horizontal Infrastructure.

SECTION 5. VERTICAL INFRASTRUCTURE PLANNING

(a) A Public Entity may identify and assess Vertical Infrastructure assets within their jurisdiction. This inventory shall include the geographical location and condition of such assets.

(b) A Public Entity may submit their inventory to the OVIPP and inventories may be used to assist Public Entities and the OVIPP in prioritizing Vertical Infrastructure funding, capital improvement needs and identifying opportunities for potential partnerships. The OVIPP may evaluate and synthesize the inventories into a comprehensive asset description and prioritization tool for current and future Vertical Infrastructure needs within the State.

SECTION 6. OFFICE OF VERTICAL INFRASTRUCTURE PLANNING AND PARTNERSHIPS

(a) The Office of Vertical Infrastructure Planning and Partnerships (OVIPP) shall hereby be established as a public advisory agency.

(b) The OVIPP shall be responsible for administering the provisions of this Act and the guidelines established pursuant thereto. The role of the OVIPP shall involve, but is not limited to:

- (1) providing technical assistance, expertise, and capacity necessary for a successful partnership program;
- (2) creating an attractive, predictable, prosperous, and transparent environment that encourages private investment within the State and protects the public interest;
- (3) gauging and promoting private interest and investment in the Development of Vertical Infrastructure within the State;
- (4) assisting in establishing a comprehensive strategy for meeting the State’s Vertical Infrastructure needs;
- (5) identifying, cultivating, and sharing best practices that optimize the value provided to the public and satisfy

public accountability, policy, and transparency objectives;

- (6) screening and approving the use of Public-Private Partnerships for Vertical Infrastructure;
- (7) creating and adopting guidelines establishing a consistent framework to identify, procure, and execute Public-Private Partnerships;
- (8) strengthening public capacity and expertise on partnerships;
- (9) providing guidance on Public-Private Partnership laws, policies, and best practices;
- (10) evaluating and synthesizing the asset inventories submitted by Public Entities to identify current and future Vertical Infrastructure needs within the State, opportunities to utilize Public-Private Partnerships, and maximize resources and efficiency;
- (11) consulting with persons and jurisdictions affected by proposed Vertical Infrastructure projects;
- (12) establishing reporting requirements related to the use of Public-Private Partnerships within the State, which shall include, at a minimum, that an evaluative report be prepared within 120 days of Service Delivery of each Qualifying Project;
- (13) submitting an annual report to the Governor describing the nature of all approved partnerships; and
- (14) other duties necessary to effectuate the policies and objectives of this Chapter.

(c) The OVIPP shall be under the supervision and control of a qualified executive director whose role and function is dedicat-

ed to the performance and activities of the OVIPP.

(d) The OVIPP shall, at a minimum, employ or retain the services of persons with expertise in the following:

- (7) Regional or municipal planning;
- (8) Private investment or finance;
- (9) Public real estate development, contract, or procurement law;
- (10) Public infrastructure development or financing;
- (11) Architectural and engineering design; and
- (12) Public-Private Partnerships.

SECTION 7. PROJECT IDENTIFICATION

(a) In accordance with the guidelines established by the OVIPP, a Public Entity or a Private Entity may present or propose an idea or concept for a project or potential Public-Private Partnership scheme to the OVIPP for discussion or feedback. Any idea or concept presented or proposed by a Private Entity shall be general in nature and shall not include any detailed or specific proposals or plans or be of the nature that would restrict or limit the competitive procurement process required by this Chapter. A Public Entity shall not solicit, receive, consider, evaluate, or accept any proposal from a Private Entity regarding the Development of any Vertical Infrastructure that is not procured through the processes described in this Chapter.

(b) A Public Entity that is interested in pursuing the use of a Public-Private Partnership for a specific project may initiate a request for the OVIPP to conduct a screening of that project through the processes and

procedures established by OVIPP guidelines, which may include an assessment of:

- (1) whether the Partnership Agreement will be long-term and the Private Developing Entity will carry the Risk of life-cycle costs, including the initial capital outlay for design and construction and operational, maintenance and refurbishment requirements for the length of the contract term;
- (2) whether the Partnership Agreement will or can include measurable performance outputs that are linked to payments or to an otherwise beneficial Business Arrangement;
- (3) whether the project is sufficiently complex to encourage design and technology innovations;
- (4) whether the project creates a genuine business opportunity that is likely to attract a sufficient number of Private Entities and a competitive procurement process;
- (5) whether there are commercial opportunities that add value to the project and will either reduce service payments to the Private Developing Entity or otherwise provide a beneficial Business Arrangement; and
- (6) whether the total life-cycle costs of the project exceed \$100 million dollars.

(c) If, based upon the screening, the OVIPP determines a Public-Private Partnership is suitable for a project, the OVIPP may proceed and conduct a Value for Money Analysis to determine whether a Public-Private Partnership is the optimal method, as compared to other Traditional Delivery Methods, through which to deliver the project. Prior to or in conjunction with a Value for Money Analysis, the OVIPP may

consider whether the project is consistent with comprehensive Vertical Infrastructure planning and needs.

(d) The OVIPP guidelines shall establish the methodology for carrying out a Value for Money Analysis. This methodology shall include, but is not limited to: a qualitative assessment, a quantitative assessment, a Business Case analysis, and comparison of the net present value of the total, risk-adjusted costs of delivering a project through a Public-Private Partnership and through other Traditional Procurement Methods.

(e) Where a Value for Money Analysis results in the conclusion that a Public-Private Partnership provides Value for Money and is the most suitable procurement method for Developing the Vertical Infrastructure project, the OVIPP may approve the project to proceed as a Public-Private Partnership. A project that is approved to and does proceed as a Public-Private Partnership shall be procured and Developed in accordance with this Chapter and will be considered a Qualifying project.

SECTION 8. NOTICE TO AFFECTED JURISDICTIONS AND PUBLIC COMMENT

(a) Public Entity shall notify each Affected Jurisdiction of its intent to use a Public-Private Partnership before the Public Entity issues the request for qualifications for a Qualifying Project.

(b) A Public Entity shall hold at least one public hearing before the Public Entity begins the process for procuring a Qualifying Project.

SECTION 9. PROFESSIONAL ADVISORS

(a) Prior to issuing a request for qualifications pursuant to section 10, a Responsible

Public Entity shall, as appropriate or otherwise recommended by the OVIPP, engage Professional Advisors, if such Professional Advisors have not already been retained. In retaining the services of the Professional Advisors, the Responsible Public Entity may utilize the services of professionals already in its employ, where qualified. If the Responsible Public Entity does not have in its employ the qualified professionals, the Responsible Public Entity shall procure the services of professionals pursuant to [insert State's professional services procurement statute or Brooks Act]. The Professional Advisors shall provide technical assistance and consulting services to the Responsible Public Entity and shall not be eligible to participate in any way with the Private Entities competing for the award of the Qualifying Project.

(b) The Professional Advisors shall provide unbiased, expert technical and professional advice, and other related services to the Responsible Public Entity. The Responsible Public Entity's lead staff architect and engineer shall participate in all meaningful and relevant Professional Advisor activities.

(c) The Professional Advisors may, but are not limited to provide the following services:

- (1) preparing and evaluating procurement documentation;
- (2) reviewing the Private Entities' qualifications and proposed designs;
- (3) preparing and executing the Interim and Partnership Agreements;
- (4) evaluating and measuring performance requirements, including whether Service Delivery has been achieved; and
- (5) performing other duties and services required by the Responsible Public Entity, Partnership Agreement, or OVIPP.

SECTION 10. REQUEST FOR QUALIFICATIONS

The Responsible Public Entity, with the assistance of any Professional Advisors, shall prepare and issue a public notice, pursuant to [insert State's public notice requirement statute], of the request for qualifications for the Qualifying Project. The request for qualifications shall include, but is not limited to, details on the following:

(a) project background, site, scope, budget and schedule;

(b) Procurement requirements and procedures that will apply throughout the selection process;

(c) Qualifications evaluation and scoring criteria, including the relative weighting of criteria;

(d) Notice of any rules, ordinances, or goals established by the Responsible Public Entity, including: goals for minority- and women-owned, and small business participation and general performance requirements and applicable standards including, but not limited to, energy use, water consumption, security provisions;

(e) The requirement that each Private Entity submit in its response to the request for qualifications the names and qualifications of the key personnel, including architects, professional engineers, builders, and financiers, whom the Private Entity proposes to use for the Development of the Qualifying Project.

(f) Notice that key personnel identified in a response to the request for qualifications may not be substituted or replaced without prior written approval of the Responsible Public Entity; and

(g) Other information that assists potential Private Entities in understanding the

requirements of, and submitting qualifications for, the Qualifying Project.

SECTION II. EVALUATION OF RESPONSES TO REQUEST FOR QUALIFICATIONS

(a) The Responsible Public Entity, with the assistance of any Professional Advisors, shall evaluate and score the qualifications of each Private Entity it received in response to the request for qualifications in accordance with the guidelines prepared by the OVIPP and identified in the published request.

(b) The evaluation and scoring mechanism contained in the OVIPP guidelines shall consider, but is not limited to, the following criteria:

- (1) general reputation, qualifications, and industry experience, including key personnel;
- (2) financial capacity and capability to perform all services throughout the term of the contract;
- (3) managerial resources and management plan;
- (4) safety record;
- (5) past performance and capacity to perform, including key personnel;
- (6) ability to complete work in a timely and satisfactory manner;
- (7) technical competence and experience with similar projects, except that cost-related or price-related evaluation factors are not permitted at this stage; and
- (8) experience with local and regional climate and geographical conditions.

(c) Each Private Entity must:

- (9) select or designate organizations and professional key personnel that are members of its team based on demonstrated competence and qualifications, in the manner provided by [insert State's professional services procurement statute or Brooks Act];
- (10) certify to the Responsible Public Entity that each selection or designation was based on demonstrated competence and qualifications, in the manner provided by [insert State's professional procurement statute or Brooks Act]; and
- (11) commit that all key personnel have been identified and will not be changed, except for Cause, throughout the proposed project development and operation.

(d) The Responsible Public Entity, with the advice of Professional Advisors, shall analyze responses and shortlist the three highest scoring Private Entities who will be invited to respond to the request for proposals.

SECTION 12. REQUEST FOR PROPOSALS

(a) The Responsible Public Entity, with the assistance of Professional Advisors, shall prepare and issue a public notice, pursuant to [insert State's public notice requirement statute], of the request for proposals from the three most qualified Private Entities identified under section 11(d).

(b) The request for proposals must include, at a minimum, details and documentation of the:

- (1) initial design concept;
- (2) output specifications;

- (3) performance specifications;
- (4) service requirements;
- (5) payment structure mechanism(s);
- (6) proposed risk allocation and key contractual provisions;
- (7) requested elements of the cost proposal or Business Arrangement;
- (8) requested elements of the design proposal, which, at minimum shall require the proposal to:
 - i. build upon the initial design concept, or offer alternative design approaches consistent with the programming needs of the Responsible Public Entity; and
 - ii. anticipate problems with the initial design concept or alternative design approach and offer alternative design solutions.
- (9) proposal scoring criteria, including the relative weighting of proposal elements;
- (10) notice of any rules, ordinances, or goals established by the Responsible Public Entity, including: goals for minority- and women-owned and small business participation, and general performance requirements and applicable standards including, but not limited to, energy use, water consumption, security provisions; and
- (11) any anticipated stipend for unsuccessful but responsive proposals; and
- (12) other aspects of the Qualifying Project or evaluation process as the OVIPP or Responsible Public Entity determine necessary.

(c) The Responsible Public Entity shall conduct structured, interactive meetings or workshops with shortlisted Private Entities, pursuant to section 11(d), prior to the submission of proposals that facilitate open and equitable dialogue between the parties and enhance the Private Entities' understanding of the Responsible Public Entity's requirements and expectations.

(d) Proposal responses shall not be required to be received earlier than the 60th day after the date the Responsible Public Entity makes a public request for the proposals from the shortlisted Private Entities.

(e) Proposals shall be submitted so that the cost proposal and the design proposal, that includes the long-term service proposal, are sealed and submitted separately.

(f) Proposals that are not responsive to the request for proposals or do not meet the requirements established by the Responsible Public Entity for the Qualifying Project shall be returned to the Private Entity without further action.

(g) Any materials or data submitted to, or made available to, or received by the Responsible Public Entity, to the extent that the material or data consist of trade secrets, are confidential and are not public records. Financial information received by the Responsible Public Entity that is related to a proposal is confidential and is not a public record until such time as a proposal is selected.

(h) Prior to submission of a proposal, a Private Entity may request a review by the Responsible Public Entity of any information that the Private Entity has identified as confidential, to determine whether information would be subject to disclosure under applicable public records laws.

SECTION 13. EVALUATION OF RESPONSES TO REQUEST FOR PROPOSALS

(a) The Responsible Public Entity, with the assistance of Professional Advisors and the OVIPP, shall first evaluate and score the sealed design proposal, including the long-term service proposal, in accordance with the criteria and weighting process and other applicable procedures established by the OVIPP and specified in the request for proposals

(b) The Responsible Public Entity, with the assistance of the Professional Advisors and the OVIPP, shall subsequently evaluate and score the sealed preliminary estimated project cost proposal or Business Arrangement proposal associated with each design proposal, if designs were requested, in accordance with the criteria and weighting process and other applicable procedures established by the OVIPP and specified in the request for proposals. This evaluation shall include a revised Value for Money Analysis that substitutes the proposed Public-Private Partnership project Costs for the official cost estimates.

(c) Each Private Entity's qualifications and proposal scores shall be combined in the manner described by OVIPP guidelines and the request for proposals and each Private Entity will subsequently be ranked based on that combined score.

(d) A Responsible Public Entity may require an independent audit of any and all cost estimates associated with a Private Entity's proposal, as well as a review of all public costs and potential liabilities to which taxpayers could be exposed. For any Qualifying Project with an estimated construction cost of over \$20 million dollars, the Responsible Public Entity also shall require the Private Entity to pay the costs for the independent audit.

SECTION 14. NEGOTIATION

After ranking the shortlisted Private Entities under section 13, the Responsible Public Entity shall first attempt to negotiate a Partnership Agreement with the highest overall ranked Private Entity. If the Responsible Public Entity is unable to reasonably negotiate a satisfactory Partnership Agreement with the selected Private Entity, the Responsible Public Entity shall, formally and in writing, end all negotiations with the Private Developing Entity and proceed to negotiate with the next Private Entity in the order of the selection ranking until a Partnership Agreement is reached or reasonable negotiations with all ranked Private Entities end.

SECTION 15. ALTERNATIVE PROCESS FOR DESIGN PHASE

If the Responsible Public Entity and OVIPP agree that the Responsible Public Entity should complete, or have completed, the full design of the Vertical Infrastructure for any reason prior to the request for qualifications process as defined in section 10, including functional control of the final infrastructure, this Section for alternative Public-Private Partnership process may be used.

(a) A Private Entity may respond and propose on the construction, construction management, commissioning, operations, and maintenance of the project.

(b) The design and related design services during construction would remain with the Responsible Public Entity or their design contractors, as an extension of the Professional Advisors as discussed in Section 9 of this Chapter. Sections 10 through 14 of this Chapter shall still apply, except with the design function and related submissions removed.

SECTION 16. PARTNERSHIP AGREEMENT

(a) The Responsible Public Entity, subject to any relevant guidelines established by the OVIPP, shall enter into a Partnership Agreement with the Private Entity selected pursuant to processes prescribed in this Chapter.

(b) The Partnership Agreement shall address the following:

- (1) Scope and term of the agreement;
- (2) Output specifications;
- (3) Performance specifications;
- (4) Property interests and authorization to occupy throughout the term of the agreement;
- (5) Names and contact information for all team members, including a provision that commits to maintaining the identified team composition throughout the Partnership Agreement term, except for Cause;
- (6) Process for reviewing the Private Developing Entity's plans and specifications for the Development of the Qualifying Project to ensure that if the plans and specifications conform to standards acceptable to the Responsible Public Entity;
- (7) Delivery schedule, including the date for the acquisition of or the beginning of construction or improvements to the Public project, and Service Delivery;
- (8) Rights and duties of the Private Developing Entity and Responsible Public Entity through the course of the Development of the Qualifying Project, including in the event of

force majeure and other unforeseeable natural events;

- (9) Inspection and monitoring of the Qualifying Project by the Responsible Public Entity, or a representative thereof, to ensure that the Private Developing Entity's Development of the Qualifying Project is in accordance with the Partnership Agreement;
- (10) Specific Service Delivery plan and standards, including mechanism to measure the Service Delivery at the specified performance standards;
- (11) Specific plan to ensure proper maintenance of the Qualifying Project throughout the term of the Partnership Agreement;
- (12) Specific plan for the disposition and condition of the Qualifying Project upon completion of the Partnership Agreement, and other necessary end of term arrangements;
- (13) Financing obligations of the Private Developing Entity and the Responsible Public Entity;
- (14) Delivery of performance and payment bonds in connection with the development and/or operation of the Qualifying Project and in the forms and amounts satisfactory to the Responsible Public Entity and in compliance with applicable laws for all construction activities;
- (15) Compensation to the Private Developing Entity and the payment structure mechanism. Such compensation and payment structure mechanism shall take into account the conditions in which payment may be adjusted, suspended, or otherwise affected in case of failure to deliver a service or

perform an obligation required by the Partnership Agreement;

- (16) Reimbursement to be paid to the Responsible Public Entity for services provided by the Responsible Public Entity;
- (17) Apportionment of expenses between the Private Developing Entity and the Responsible Public Entity;
- (18) Periodic filing by the Private Developing Entity of appropriate financial statements and other Qualifying Project-related reports in a form acceptable to the Responsible Public Entity;
- (19) Grounds for, and the policies and procedures governing the rights, responsibilities, and remedies of, the parties in the event the Interim or Partnership Agreements are terminated or there is a Material Default;
- (20) Rights and remedies available in the event of default or delay, such as liquidated damages in the event of Service Delivery delays;
- (21) Procedures for resolving disputes between the Private Developing Entity and the Responsible Public Entity, including whether arbitration or other alternative dispute resolution mechanisms, such as dispute boards, may be used or required;
- (22) Maintenance of a policy or policies of public liability insurance, copies of which shall be filed with the Responsible Public Entity accompanied by proofs of coverage, or self-insurance, each in form and amount satisfactory to the Responsible Public Entity and reasonably sufficient to insure coverage of tort liability to the public employees and to enable continued operation of the Qualifying Project;

(23) Procedures for amendment of the Partnership Agreement, including any scope changes or modifications;

(24) Whether fees and rents may be imposed and collected from members of the public for the use of the Qualifying Project and the basis by which such user fees or rents shall be determined and modified;

(25) Regulation of revenues received from use of the Qualifying Project and the specific portion of revenues from any fee-generating uses to be returned to the Responsible Public Entity and the OVIPP over the life of the agreement; and

(26) A statement ensuring compliance with applicable federal, state and local labor and public work laws.

SECTION 17. INTERIM AGREEMENT

Before or in connection with the negotiation of a Partnership Agreement, the Responsible Public Entity may enter into an Interim Agreement. An Interim Agreement does not obligate the Responsible Public Entity to enter into a Partnership Agreement. An Interim Agreement shall be limited to provisions terms and conditions that:

(a) authorize the Private Entity to commence activities for which it may be compensated related to the proposed Qualifying Project, including, but not limited to: project planning and development; design; environmental analysis and mitigation; surveying; and financial and revenue analysis, including ascertaining the availability of financing;

(b) establish the process and timing of the negotiation of the Partnership Agreement; and

(c) relate to any aspect of the Development of a Qualifying Project that the OVIPP or parties consider appropriate.

SECTION 18. FAIRNESS STIPEND

The Responsible Public Entity shall offer an unsuccessful Private Entity that submits a responsive response to the Public Entity's request for proposals under section 12 a stipend for preliminary services fees associated with the development of the proposal.

SECTION 19. INTELLECTUAL PROPERTY

(a) An unsuccessful responsive Private Entity shall retain all rights to the work product submitted in their proposals. The Responsible Public Entity may not release or disclose to any person, including the successful Private Developing Entity, the work product contained in an unsuccessful responsive proposal. The Responsible Public Entity or its agents may not make use of any unique or non-ordinary design element, technique, method, or process contained in the unsuccessful responsive proposal that was not also contained in the successful proposal at the time of the original submittal, unless the Private Developing Entity acquires a license from the unsuccessful Private Entity.

(b) The Responsible Public Entity shall return all copies of any proposal or other information submitted by an unsuccessful responsive Private Entity.

SECTION 20. DIVERSITY AND COMMUNITY ENGAGEMENT

(a) A Private Developing Entity and its contractors shall make a good-faith effort to comply with [insert State's relevant minority, women, and small business participation statute(s)] and recruit and select minority- and woman-owned and small business entities.

(b) A Private Developing Entity and its contractors shall make a good-faith effort to encourage and utilize qualified, locally-based businesses.

SECTION 21. EMINENT DOMAIN

This Chapter does not alter the eminent domain laws of this state or grant the power of eminent domain to any person who is not expressly granted that power under other state law.

SECTION 22. SOVEREIGN IMMUNITY

This Chapter does not waive the sovereign immunity of a Responsible Public Entity, an Affected Jurisdiction, or an officer or employee thereof with respect to participation in, or approval of, any part of a Qualifying Project or its operation, including, but not limited to, interconnection of the Qualifying Project with any other Vertical Infrastructure. A county or municipality in which a Qualifying Project is located possesses sovereign immunity with respect to the project, including, but not limited to, its design, construction, and operation.

ACROSS CANADA, public-private partnerships (P3s) are a challenging reality for architectural practices of all sizes. However, even as the umbrella of P3s grows larger, a mounting body of evidence is pointing to the system's flaws.

The latest critique comes from Ontario auditor general Bonnie Lysyk. Last December, her office released a scathing review of infrastructure spending since 2005, when Alternative Financing and Procurement (AFP)—Ontario's name for P3s—was first introduced to the province. The rationale for the new process was to provide the best value for public money, by transferring risk to the private sector. Since then, 74 facilities, including hospitals, courthouses and sporting venues, have been completed or are underway as P3s.

The price tag of these P3s? Eight billion dollars—or 29%—higher than if the same projects were directly managed by the public sector.

In theory, that difference is like an insurance policy, justified by the risks associated with often over-budget infrastructure projects. But the cost of those risks is grossly overestimated, says Lysyk. For the 74 facilities, Infrastructure Ontario estimates the expense of risks—such as unforeseen site conditions, cost overruns, and labour strikes—would be \$18.6 billion with public-sector delivery. That's more than 66% of the base construction cost. Under AFP delivery, risk is transferred to the contractor, and the additional estimated cost to the government is a still significant \$4 billion (15%) premium.

To spell this out: to build these 74 projects directly through the public sector would have cost an estimated \$28 billion. By factoring in Infrastructure Ontario's estimated \$18.6 billion in retained risks, the total comes up to \$46.6 billion.

For the private-sector alternative, the tangible costs—the same base construction price, plus financing costs (at a higher cost of borrowing) and fees for the private-sector partner—tally up to \$36 billion. With the smaller \$4 billion in risk premium allocated to the private contractors, the total comes to \$40 billion.

That yields \$6.6 billion in theoretical savings in favour of P3s. But to arrive at the doom-and-gloom prospect of public-sector projects going 66% over budget, risks are assigned in ways that are unclear at best—and erroneous at worst. The auditor general points out that the maintenance of projects and the risk of delayed approvals are double-counted on the government side. Correcting the accounting for these two risks alone would have tipped the balance in favour of traditional procurement for 18 of the 74 projects.

The assessment of risks on the whole is a murky science. Infrastructure Ontario uses two external firms to assign and value the cost of the

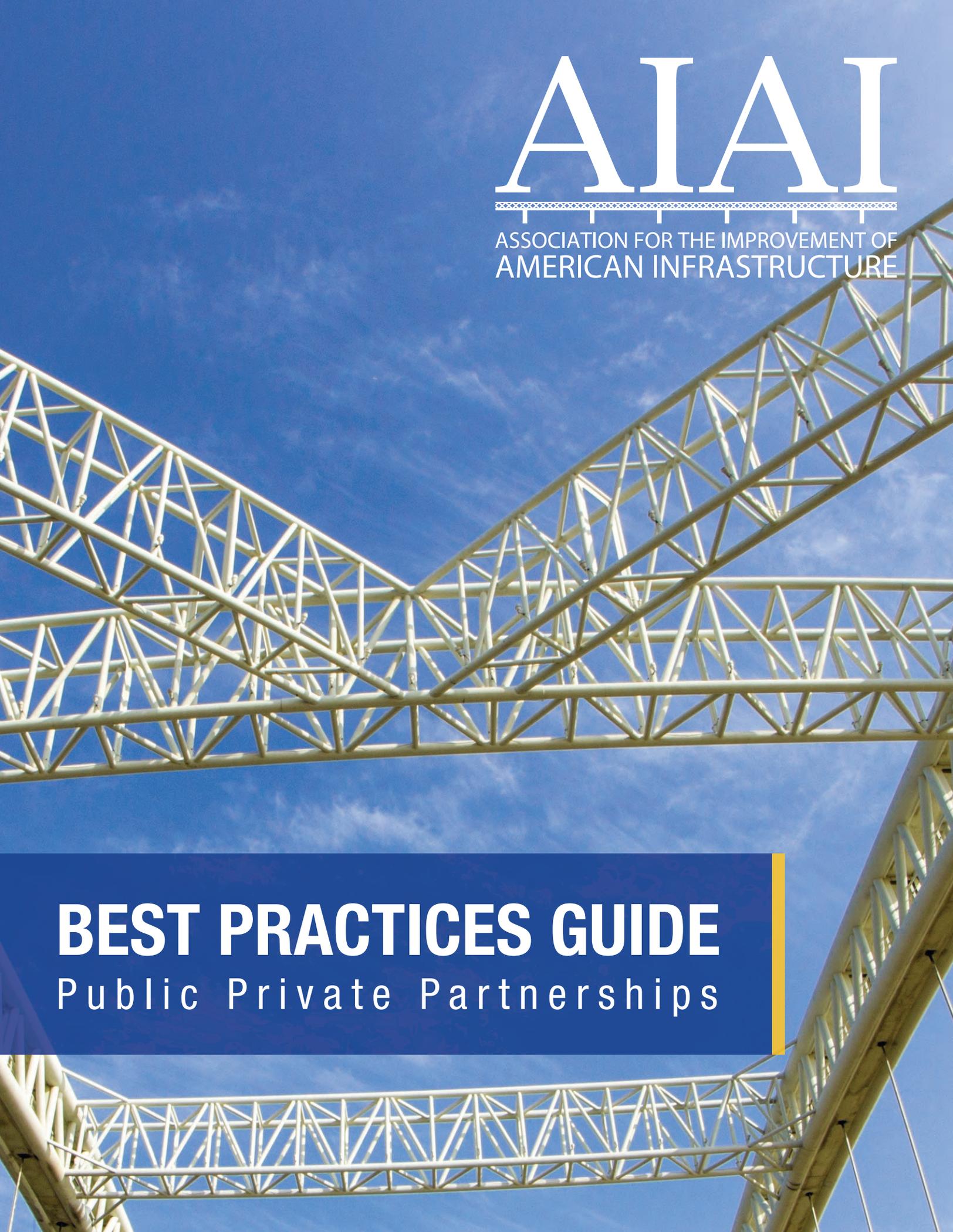
risks. "In our discussions with the external advisers, they confirmed that the probabilities and cost impacts [of each risk] are not based on any empirical data that supports the valuation of the risks, but rather on their professional judgment and experience," reports the auditor general's office. Further details on these calculations are not publicly available, making this shaky ground for significant financial decisions.

For architects, the downsides of P3s are well-known. Bidding for a P3 can involve a massive amount of work that isn't sufficiently compensated—a significant financial gamble for any office. The selection process weighs heavily on the side of lowest cost, rather than the most innovative design. As a member of the winning proponent team, architects work for a developer, not for the building's users. Often they have little direct contact with the client. On both proponent and compliance sides, reams of paperwork can bog down a project's progress—as well as the morale of employees.

P3s also represent poor value for the built environment. With few exceptions, P3 projects fall short of the architectural quality that might have been achieved with a comparable budget, under a traditional stipulated-sum contract.

Clients also find the P3 process frustrating and costly. The auditor general notes one case where an Ontario college procured phase 1 of a project, a building with classroom and retail space, using public-sector delivery. The project was completed on time and on budget. The college was directed to procure phase 2, the construction of a similar building, through AFP. "After inflation and some differences between the two buildings were factored in, the cost per square foot for this second building was expected to be about 10% higher than the cost per square foot for the first building," explains Lysyk's report. "Much of this additional expense stems from higher financing costs and higher ancillary costs (such as legal, engineering and project management fees)." Tellingly, the college tried—unsuccessfully—to be released from using the AFP approach for phase 2. The example demonstrates that there is no reason why well-managed public projects cannot meet the on-time, on-budget requirements that are such a vaunted feature of P3s.

While it's challenging to make the public argument for improved architectural quality and ameliorated work process, the argument for saving taxpayer dollars is a clear one. There are eight billion good reasons why, in Ontario alone, this system needs to change.



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ASSOCIATION FOR THE IMPROVEMENT OF
AMERICAN INFRASTRUCTURE

BEST PRACTICES GUIDE

Public Private Partnerships

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ASSOCIATION FOR THE IMPROVEMENT OF
AMERICAN INFRASTRUCTURE

**AIAI – the Association for the
Improvement of American Infrastructure**

🏠 1430 Broadway
Suite 1106
New York, NY 10018

165 Roslyn Road
Roslyn Heights, NY 11577

☎ (516) 277-2950

✉ readytowork@aiai-infra.org

@ www.aiai-infra.org

📺 @aiai_infra

🌐 AIAI

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Public Private Partnerships

INTRODUCTION TO PUBLIC PRIVATE PARTNERSHIPS

A Public Private Partnership, or a P3 as it is often called, is a contractual agreement formed between a public agency and a private sector entity that allows for private sector participation in the financing, design, construction, operation and maintenance of public infrastructure projects.

The private organization is given responsibility to provide a public good, a facility or service that has traditionally been provided and managed by a public entity, such as a state agency, a local government or a regional authority. The goal of the partnership is to provide benefits to the public through value-added private sector engagement.

The benefits of P3s include job creation, design innovation, efficiencies in project finance, transfer of risk, optimization of resources and capabilities, as well as the timely delivery, operations and long-term maintenance of public infrastructure. This procurement method has demonstrated that these assets are delivered on-time and under budget, utilizing innovative ideas and products to create long-term, life-cycle operational and maintenance efficiencies.

A P3 procurement for the delivery and operations and maintenance of public services and facilities is a viable alternative project delivery approach to complement traditional procurement practices. P3s have been proven throughout the world to be an effective way to deliver much needed civil and social infrastructure.

Partnerships between the public and private sector relate to all types of infrastructure needs. These include civil infrastructure: mass transit, surface and highway transportation, freight rail, air and maritime ports, water and sewer treatment plants, as well as social projects: educational (elementary, secondary and community college) facilities, hospitals, courthouses and correctional facilities, and other municipal or community-use facilities.

Partnerships between the public and private sectors represent opportunity. These relationships enable growth through access to leveraged financing, transfer of risk and optimization of resources and capabilities – in the furtherance of public good.

NOTICE: The material contained in this Best Practices Guide is for information only and does not constitute legal advice or opinions specific to any particular state. The Guide is intended for educational and information purposes only.

APPROACH

The current state of infrastructure in the United States, coupled with an inability to appropriate the funding necessary to restore and replace these critical assets has created a challenge for legislators. Pressed to maintain a meaningful position in an ever more competitive global and national marketplace, state, regional and municipal governments weigh priorities, consider how best to pay for the investments needed, and work to find creative ways to plan, design, finance, build, operate and maintain infrastructure.

P3 legislation enables a municipality or a state, even the Federal government, to tap in to the private sector's willingness to engage and participate in shared and mutually beneficial outcomes. P3s can allow projects to receive funding through traditional means and methods, as well as enable them to draw upon this stream of capital from innovative investors who hope to realize reasonable returns, while investing in local economies. Effective P3 legislation invites submission of original, market-driven proposals to address the needs for public infrastructure.

Since P3s are relatively new to the United States, there is need for education related to this procurement methodology. AIAI was formed to address this mandate. AIAI is comprised of leaders of the construction and development sectors with extensive national and international experience in delivering, operating and maintaining public infrastructure projects.

The best practices documented in this Guide are drawn from an analysis of existing and proposed legislation and current procurement methods of established entities engaged in delivering public infrastructure through such partnerships. Vetted through AIAI membership and coupled with a detailed state-by-state analytic framework, this is formatted to allow stakeholders to understand Public Private Partnerships.

The "Best Practices Guide: Public Private Partnerships" presents P3 as a viable alternative project delivery method and describes legislation to enable effective processes and procedures for the procurement of public infrastructure.

ACKNOWLEDGMENTS

This Best Practices Guide was made possible through the contributions of a broad array of industry participants, public officials and industry professionals who are committed to improving the state of America's Infrastructure.

On behalf of AIAI, special thanks are offered to the Members of AIAI who have contributed to this process and understanding of what it takes to deliver public private partnerships. At the risk of missing anyone who has worked with the team to produce this work-in-progress, thanks to:

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The following outline includes components of legislation with a description of the purpose for that element and an AIAI recommendation for best practices. This guide can be used as a stand-alone resource. It becomes a compelling tool when coupled with in-person education and supporting documentation provided through members and staff, based on their hands-on, practical experience.

1. INTRODUCTION

In an introduction to a proposed P3 bill, public policy objectives are defined for private sector participation in the delivery and financing of public building and infrastructure projects.

Public Private Partnerships, or P3s, are contractual agreements formed between a public agency and a private sector entity. These types of agreements are referred to as Project Finance in the international markets. P3s can provide for shared skills, assets, resources, risks and rewards by both private and public sectors for the delivery of a service or to create a facility for public use. It is critical that P3 legislation conveys the context in which partnerships between public and private sector participants is intended to operate.

The Introduction section details how the proposed bill will facilitate processes and methods to deliver public infrastructure. This may include political dynamics, legislative environment, and the relative fiscal state of both the public sector agency and the economy.

1.1 STATEMENT OF NEED

P3s can include alternative delivery of a broad range of public services enabled through social and civil infrastructure. In the context of proposed P3 legislation, a Statement of Need includes guidance that can address the

specific need or clarify the intent of that proposed statute.

The Statement of Need section details the intent of proposed legislation, thus enabling applicable public agencies to understand what can be accomplished within the intended scope of the legislation, as well as articulate for private sector participants the range of options which may be available to address the needs and priorities of the public private partnerships.

AIAI BEST PRACTICES RECOMMENDATION

P3-enabling legislation should be broad-based, providing flexibility in the procurement processes that will facilitate submission of innovative and comprehensive proposals in support of public infrastructure needs.

1.2 DEFINITIONS

The use of standard terminology related to procurement processes and methodologies allows both public and private sector participants to become familiar with, and adopt and incorporate industry standard definitions within legislation. This will create clarity and align expectations related to P3 procurements.

The Definitions section details generally-accepted, industry standard terms which describe the elements of the proposed bill necessary for understanding its intent.

AIAI BEST PRACTICES RECOMMENDATION

P3 legislation should include definitions which are based on generally-accepted, industry standards in order to facilitate clarity and alignment in the procurement guidelines.

1.3 BREADTH OF MANDATE

Capturing the vision for a proposed P3 bill conveys the scope of P3 utilization to address public infrastructure



needs. Defining the parameters for which P3 procurement may apply increases the breadth of intended outcomes offered by the proposed statute and enhances the potential for public good.

The Breadth of Mandate section details the intent and potential reach of the proposed P3 statute, including its use as an economic development stimulant, as a procurement reform or as an alternative strategy for project delivery when applied to civil or social infrastructure planning, design, financing, building, operations or maintenance.

AIAI BEST PRACTICES RECOMMENDATION

P3 legislation should allow for a broad range of applicability to public infrastructure needs, to include civil and social projects, across as diverse a range of asset types as necessary to meet the needs of the public.

1.4 APPLICABILITY

P3 legislation can be and has been applied to a wide range of infrastructure projects, implemented by the full depth of government entities, including Federal, state, independent regional authority, county, city, town, village, school district or other geo-political subdivision.

The Applicability section details which area of emphasis, as noted in the 'Statement of Need' and legislative intent sections, is the focus of the proposed bill. It can describe the levels of government to which the law would apply, or the types of projects or general guidance as to how the proposed bill is to be integrated with existing legislation.

AIAI BEST PRACTICES RECOMMENDATION

A proposed P3 bill should identify the level(s) of governance for which public infrastructure projects may be procured and managed for the delivery of public infrastructure.

1.5 ASSET CLASS | PROJECT-TYPE

P3 legislation can be applied across a broad array of public needs. A proposed P3 bill can assess the existing legislative framework and identify which categories of projects could be allowed within the scope of the proposed statute. These infrastructure projects include:

Civil engineering projects

- bridges
- roads
- tunnels
- airports
- seaport
- pipelines
- water processing
- sewage treatment
- energy installations; and

Social, building or vertical infrastructure projects

- schools
- hospitals
- municipal buildings
- prisons
- parks or open space
- community-use facilities.

The Asset Class | Project-type section details which projects may be appropriate for P3 alternative project delivery.

AIAI BEST PRACTICES RECOMMENDATION

P3 legislation should allow for a broad range of applicability to include civil and social projects, facilitating a range of procurement options to empower responsible public entities to engage private sector innovation and efficiencies for the delivery of infrastructure assets.

2. AUTHORITY

States have utilized P3 strategies in a variety of ways to spur job creation, streamline government services, catalyze commerce, and fortify infrastructure. Through P3s, states can utilize private sector efficiency to effectively deliver, operate and maintain public infrastructure.

The Authority section details the processes and methods by which responsible public entities pursue and are granted the authority to plan for, execute and manage public private partnerships in support of public infrastructure needs. In order to facilitate and encourage competition and market forces on the part of private sector participants and effective management by public sector stakeholders, clarity and transparency are essential. A proposed P3 bill addresses the processes through which projects and proposals are reviewed and managed.

P3s are administered by or managed through a specific, responsible public entity, or are subject to review by a centralized authority. Proposed P3 legislation identifies which agencies or authorities are involved in procurement and management of P3 projects.

2.1 CENTRAL REVIEW

Public entities may not possess the requisite knowledge to assess the viability of a proposed P3 infrastructure project. A dedicated resource that is available to public entities, for the purpose of reviewing potential P3 projects, allows for the sharing of common experiences, best practices, lessons learned and effective strategies in the initial review and subsequent planning, procurement, operations and maintenance phases of public infrastructure projects. Leveraging specific sector expertise and experience in managing public private partnerships facilitates repeated success in future P3 projects.

A central resource, with knowledge of effective public private partnership strategies, and awareness of the technical or engineering requirements for the asset class being reviewed can best assess the viability of a proposed

project for alternative delivery. This assessment can determine if a P3 procurement is in the best interest of the public, meets industry standards, and has technical and fiscal merits.

The Central Review section details the processes through which projects are reviewed for applicability of alternative project delivery methodologies and public private partnerships.

AIAI BEST PRACTICES RECOMMENDATION

In order for public entities to effectively assess and manage P3 projects, a central review resource should be established, comprised of individuals who possess the requisite technical knowledge, financial expertise and public policy experience.

2.2 EXECUTIVE LEADERSHIP

Leadership is an essential ingredient for successful public private partnerships. Nowhere is this more evident in a P3 than with the chief executive; whether it is the Governor, state-level department of transportation or a school authority, having the commitment and political will in the office in charge of the project is vital. Champions for the merits of public private partnerships and stewards for public accountability ensure the long-term success of P3s in the development of public infrastructure.

The Executive Leadership section details what involvement there is from the executive branch of the state or the responsible public entity, and restrictions placed on the ability to modify the course of approved P3s in procurement.

AIAI BEST PRACTICES RECOMMENDATION

A proposed P3 statute should allow for the continuation of P3 projects that were procured independent of changes in administration or leadership.



2.3 AUTHORITY TO PURSUE P3

It is critical that responsible public agencies have clear guidance and authority to pursue alternative project delivery strategies, such as P3s for public infrastructure projects.

The Authority to Pursue P3 section details processes through which the responsible public entity might apply for and be granted the authority to pursue a P3 as an alternative project delivery strategy for public infrastructure.

AIAI BEST PRACTICES RECOMMENDATION

A proposed P3 statute should specify the level(s) of government, or public sector agency which are eligible to engage in public private partnerships, including as broad a range of options as the responsible public entity is adequately prepared to manage.

2.4 COMMITMENT

The costs involved in the pursuit of public infrastructure projects can be significant and prohibitive when responding to solicitations for public infrastructure. In order to introduce market forces and allow for the most competitive and innovative submissions for public procurement, a proposed P3 bill can address processes that protect both public and private sector participants against unanticipated interruption or cancellation of projects, due to changes in agencies or branches of government beyond the procurement organization. This may include a stipend, which can be viewed as an indication of relative commitment.

The Commitment section details the process through which a responsible public entity will assure their commitment to the completion of a P3-enabled public infrastructure project.

AIAI BEST PRACTICES RECOMMENDATION

Proposed P3 legislation should include specific provisions to detail how a responsible public agency is empowered to ensure completion of a project once it has reached the procurement stage.

2.5 P3 AGREEMENT

The P3 Agreement is a critical component in contractual understanding between and among participants in a public private partnership, and as such is the focal point for detailed discussion and concurrence related to the provisions which will govern the relationship between and among the participants in a public private partnership.

The specific terms and details of the contractual relationship between private sector participants and the responsible public sector entity are stipulated within the context of the P3 Agreement, also referred to as Partnership or Comprehensive Development Agreement. Due to the complex nature of these agreements, advisory resources are often utilized by responsible public agencies involved in P3s.

The P3 Agreement section details the scope of the P3 agreement, including prospective terms and conditions that may be incorporated in the contractual relationship.

AIAI BEST PRACTICES RECOMMENDATION

Proposed P3 legislation should include details related to the development and restrictions or obligations that should be addressed within the P3 Agreement to plan, design, build, finance, operate or maintain the public infrastructure.



3. REVIEW

A proposed P3 bill should highlight how proposals are reviewed and managed. This can include clarifying how a proposal can move through an alternative project delivery assessment and approval, and what step(s) may be taken to ensure that a project is handled within the responsible public entity's applicable procurement processes.

Evaluation of proposals determines the extent to which a proposed project serves a public purpose, meets the criteria for a qualifying project, assesses the qualifications and experience of a private entity developer, reviews the project for financial feasibility, and warrants further consideration as a P3.

3.1 PROPOSALS

A range of procurement options have been used in those jurisdictions where the authority exists to apply alternative project delivery mechanisms such as public private partnerships. In order to facilitate the flow of information regarding needs and capabilities, clear communication is essential. Communicating relevant provisions for procurement processes, within the context of P3 authority, is essential to stakeholders, and sets the stage for development and delivery of strategies for the funding, financing, designing, planning, building, operations and maintenance of public infrastructure projects.

The Proposals section details processes associated with the submission process, once authority has been granted to pursue a P3 project.

AIAI BEST PRACTICES RECOMMENDATION

Proposed P3 legislation should clearly outline public agency procurement processes and methodologies for soliciting, reviewing and evaluating proposals and selecting teams with which the responsible public entity partners to develop public infrastructure.



3.2 UNSOLICITED PROPOSALS

Innovation can be a key contributing factor in the delivery of public infrastructure. A proposed P3 bill can specify whether a public entity may allow for the submission of unsolicited proposals or alternative technical concepts for public infrastructure projects. Leaving open the possibility to learn of creative project concepts can be a difference maker for stakeholders. Allowing for unsolicited proposal submission invites innovation from the private sector in areas that may not have been addressed by the public entity.

The Unsolicited Proposals section details the processes or methodologies through which unsolicited proposals are received, reviewed and managed.

AIAI BEST PRACTICES RECOMMENDATION

Unsolicited proposals should be permitted, in order that market-driven and innovative private sector ideas can positively impact the development of public infrastructure.

3.3 REVIEW PROCESS

Expectations of both public and private participants are managed through clear and specific procurement guidelines. Standard evaluation criteria against which all proposals are assessed create consistency. Clearly articulated guidelines convey the relative importance of factors such as risk sharing, added value and/or economic benefits from the project, as well as the scope, complexity, or urgency of the public infrastructure project, allowing the respondent the information needed to be responsive to the criteria against which they will be measured.

The Review Process section details the processes for the evaluation of solicited and unsolicited proposals.

AIAI BEST PRACTICES RECOMMENDATION

Proposals for public infrastructure projects should be evaluated with published, objective criteria based on the project-specific needs and managed through existing procurement processes; with measurement weighted on a number of value-based factors and not solely price-driven.

4. FISCAL PROVISIONS

The financing of large-scale public infrastructure projects is a critical element to the P3 model. Included within this section are such issues as the application of fees for the submission of proposals, access to financing resources available from agencies or entities other than the responsible public entity, and what, if any, funding may be made available for a project from the agency managing the delivery of the public infrastructure project. The greatest degree of flexibility should be incorporated into procurement strategies, processes and methodologies when taking into consideration funding and financing alternatives that can enhance the fiscal viability of proposed P3s in support of civil and social public infrastructure projects.

4.1 FAIRNESS STIPEND

In taking into consideration the complexity and scale of public infrastructure projects, a proposed P3 bill may choose to consider the commitments made by private respondents that have progressed beyond the initial assessment phase of the procurement process. In so doing, a proposed P3 bill can allow for stipends, which are often viewed as indicative of relative commitment of the procuring agency.

The Fairness Stipend section details provisions for terms and conditions under which a stipend would be authorized.

AIAI BEST PRACTICES RECOMMENDATION

The responsible public entity should be authorized to pay a stipend to an unsuccessful bidder or proposer that has reached the pre-qualified bidder stage.

4.2 FEE FOR SUBMISSION OF PROPOSALS

Industry standard practices can and should be implemented for P3 projects, in order to encourage the broadest possible inclusion of industry leadership and creativity.

The Fee for Submission of Proposals section details what, if any, submission fees are applicable and whether they apply to qualified responses to a public entity's solicitation.

AIAI BEST PRACTICES RECOMMENDATION

In order to generate sufficient and appropriate responses to solicitations for proposals for public infrastructure projects, every effort should be made to exclude any provision for a submission fee.

4.3 SUBMISSION FEES FOR UNSOLICITED PROPOSALS

The best ideas for infrastructure solutions may originate from unconventional sources. A P3 bill can identify what, if any, obstacles can be cleared or resources are necessary and appropriate to address due diligence requirements related to proposals for infrastructure projects which may not originate from a response to a solicitation for a public infrastructure project.

An appropriate fee may be included in procurement processes at the state, local or Federal levels, in order to offset anticipated costs to evaluate the merits of unsolicited proposals and to enhance the level of innovation and sophistication brought to responsible public agencies for the development of public infrastructure projects through public private partnerships.

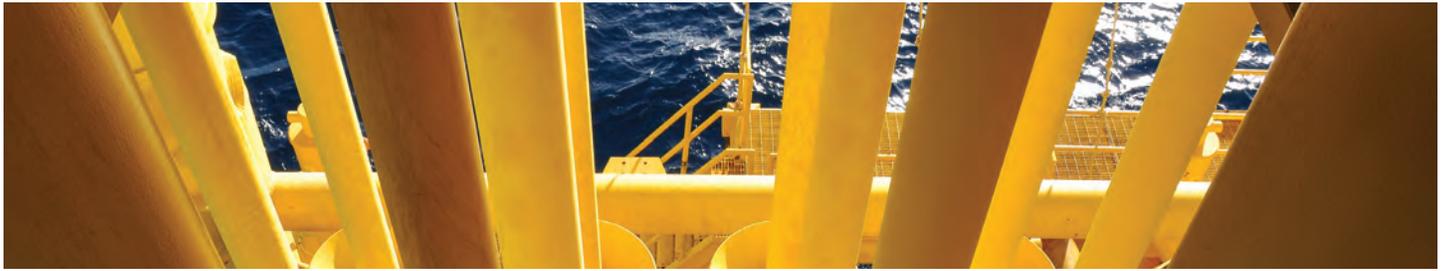
The Submission Fees for Unsolicited Proposals section details what fees may apply, and a description of the intended use of those fees.

AIAI BEST PRACTICES RECOMMENDATION

In order to encourage the submission of qualified proposals for public infrastructure projects, P3 legislation should include a provision for submission fees for unsolicited proposals.

4.4 FUNDING

P3s leverage access to private sector debt and equity commitments, and combine these resources with public sector funds, as available, to determine and access the financing necessary to deliver public infrastructure.



The Funding section details whether public funding is available under the proposed statute, and if applicable, specific provisions that will govern their access and the use of public funds.

AIAI BEST PRACTICES RECOMMENDATION

The greatest degree of flexibility should be encouraged when it comes to identifying financing alternatives, in order that P3 projects can leverage access to funding or financing in the form of public funds, private debt, equity, or credit assistance from local, state or Federal programs.

4.5 FINANCING RESOURCES

Access to public funding or financing resources differs according to the level of governance assigned to manage or procure a public infrastructure project through a public private partnership. As credit or debt financing resources continue to evolve, their eligibility as a finance instrument in support of public infrastructure projects can serve to enhance the viability of a P3 project.

The Financing Resource section details whether a responsible public entity can access financing resources from other public agencies, such as Transportation Infrastructure Finance and Innovation Act (TIFIA) loan or credit assistance program, or the applicability of Private Activity Bonds (PABs).

AIAI BEST PRACTICES RECOMMENDATION

The broadest possible applicability of public sector, project financing resources, such as TIFIA and PABs, should be considered and utilized to meet the project finance requirements for both civil and social infrastructure.

4.6 CONFIDENTIALITY

Innovation is an essential ingredient for meaningful engagement between public and private sector participants. In order to stimulate and encourage the introduction of market innovation in design and planning, building technologies and construction techniques, finance and operations, it is critical that participants communicate and work together to develop an atmosphere of trust and confidence among and between the parties in a public private partnership. The strongest application of confidentiality protection will allow responders to provide innovation and creativity in submissions.

The proposed P3 bill should protect confidential information, stipulating how procurement processes allow for the protection of proposed fees and cost structure, design innovation, engineering and alternative technical concepts.

The Confidentiality section details the protection provided for confidentiality of proposed fees and finance structures, sources of funds, and uses of capital and alternative technical concepts; taking into account accessibility to otherwise publically available resources through the Freedom of Information Act.

AIAI BEST PRACTICES RECOMMENDATION

Intellectual property should be protected by the public procurement processes, in order that market forces and innovation can be brought to bear on public private partnerships for public infrastructure projects.



5. APPLICABLE LAW

In taking into consideration the existing body of legislation and any notable case law history which may impact P3s, a section related to the applicable legal framework may include: allowance for the use of eminent domain; performance and payment security; prevailing wage; or other locally pertinent statutory provisions.

In order to clarify intent or avoid confusion when interpreting legislative authority or procurement guidelines, proposed P3 legislation should assess, take into account and address those existing statutes and body of law, both Constitutional and case law, which could otherwise impact the smooth and efficient delivery of public infrastructure.

5.1 EMINENT DOMAIN

A proposed bill for infrastructure development, either buildings or large-scale engineering projects, should address whether or how legislative authority may convey to local governments (states, counties, regional authorities, cities, towns, villages or applicable political sub-divisions, school districts or other responsible public entities) the ability to pass laws to govern themselves as regards Fifth Amendment takings, so long as they abide state and Federal constitutions.

The Eminent Domain section details specific provisions to align with the US Constitutional intent related to eminent domain, or Fifth Amendment takings, which could have an impact on public infrastructure development, either social or civil.

AIAI BEST PRACTICES RECOMMENDATION

A proposed P3 bill should clearly articulate alignment with US Constitutional intent related to eminent domain, taking into account existing state and Federal authority as stated in the respective Constitutions.

5.2 LABOR

Clarifying participation of labor, municipal or public sector employees, creates the opportunity and the forum for the understanding of and alignment with project goals and long-term objectives.

Proposed infrastructure development legislation can address the authority that may be granted to responsible public entities to direct or manage procurement processes, including any provision for participation of municipal labor, project labor agreements or other labor-related matters.

The Labor section details the dynamic between and among public sector employees, or municipal labor, including distinction from privatization, utilization of project labor agreements or other instruments which could impact the delivery of public infrastructure.

AIAI BEST PRACTICES RECOMMENDATION

A proposed P3 bill should clearly articulate how public sector employees, or municipal labor will be incorporated into infrastructure project delivery strategies.

5.3 DIVERSITY & COMMUNITY ENGAGEMENT

Participation of locally-based businesses and disadvantaged, minority- and women-owned business enterprises, as well as those businesses that fully support veteran employment, can have significant influences on the long-term success of public infrastructure projects and regional economic revitalization. The use of qualified locally-based businesses can enhance the surrounding community through local job growth and economic development.

The Diversity & Community Engagement section details incentives or mandates at the state and Federal level for inclusion and participation of minority- or women-owned, veteran friendly or small business enterprises, municipal unions or locally-based businesses.

AIAI BEST PRACTICES RECOMMENDATION

Legislation for the development of public infrastructure should encourage innovation and creative solutions for local and regional economic impact through inclusion of the most qualified, locally-based businesses for addressing local job growth and long-term economic stimulation.

5.4 PERFORMANCE & PAYMENT SECURITY

The stability of the emerging infrastructure finance and investment sector relies upon a range of industry participants. In order to effectively capture the full commitment of all, a proposed bill should require both performance and payment bonds for the design build or construction phase of the project.

This Performance & Payment Security section details the proposed statute's treatment of a responsible public agency's performance and payment bond requirements that protect the public's interest in contract completion and protect sub-contractors, suppliers and laborers against the risk of non-payment during the design, build or construction phase of the project. This section can address relationships

between public partners, private sector participants and members of the special purpose entity.

AIAI BEST PRACTICES RECOMMENDATION

Securities for P3s are required to satisfy the needs of financial institutions, owners, subcontractors and suppliers. A combination of both liquid securities and performance and payment bonds provides the flexibility needed to reach financial close. Flexibility should be provided to require the appropriate level of security. Example: Code of Virginia, The PPTA, section 56-566.A.1.

5.5 INTELLECTUAL PROPERTY

Access to innovation is one of the most valuable benefits of a public private partnership. Protection of intellectual property for innovative solutions for proposed infrastructure plans, techniques, technologies or delivery methods creates the opportunity for the public sector entity to encourage and engage the creativity of private sector participants.

Established firms which pursue P3 relationships with a public sector entity may create proprietary information which could be of direct benefit to the project. There may be instances, when that intellectual property has been developed by an unsuccessful bidder, where a license can be extended to a successful bidder in order to capture the value of such innovations for a project.

Where applicable, a licensing fee for the use or application of that proprietary information can be incorporated into the project's cost structure.

The Intellectual Property section details methods and means around which innovation and creativity are protected or licensed.

AIAI BEST PRACTICES RECOMMENDATION

Public agency procurement guidelines should protect intellectual property or work product that is unique to a specific project developed in response to a solicitation for public infrastructure.



SUMMARY

Public Private Partnerships are contractual agreements formed between a public agency and a private sector entity. Proposed bills should detail legislative and procurement processes for private sector participation in the planning, designing, financing, building, operating and maintaining public building and infrastructure projects.

P3s provide for shared skills, assets, resources, risks, and rewards by both private and public sectors for the delivery of a service or to create a facility to address needs for public use.

The benefits of P3s include job creation, design innovation, efficiencies in project finance, transfer of risk, optimization of resources and capabilities, as well as the timely delivery, operations and long-term maintenance of public infrastructure. This procurement method has demonstrated that these assets are delivered on-time and under budget, utilizing innovative ideas and products to create long-term, life-cycle operational and maintenance efficiencies.

Best practices, drawn from around the country and across the globe, highlight a number of key ingredients for successful P3s. These include:

- Demonstrated leadership commitment;
- Central Review resources;
- Breadth of applicability to both social and civil infrastructure;
- Access to funding resources and project financing tools;
- Incentives for Innovation;
- Fairness Doctrine;
- Protection of intellectual property;
- Competitiveness Stipend; and
- Best available resources, including MWBE participation and community engagement.

Additional information is available to AIAI Members, as well as to the general public; and can be found on-line at: www.AIAI-Infra.org. These resources include detailed descriptions of best practices as drawn from case studies, comparable examples and review of model legislation, as well as draft language suitable for statutes that may be proposed in support of public private partnerships intended to address the needs of the public.

NOTES



NOTES





ABOUT AIAI

AIAI - the Association for the Improvement of American Infrastructure is a non-profit organization formed in the District of Columbia to help shape the direction of the national Public Private Partnership marketplace. AIAI serves as a national proponent to facilitate education and legislation through targeted advocacy.

- The Board of Directors of AIAI is comprised of leaders of the construction and development industry. Their extensive national and international experience and industry knowledge provides clear direction for developing and advocating policy and legislative solutions, allowing more equitable and effective partnerships across diverse market sectors from transportation and energy to education, health and public service institutions.

AIAI

ASSOCIATION FOR THE IMPROVEMENT OF
AMERICAN INFRASTRUCTURE

AIAI
1430 Broadway, Suite 1106
New York, NY 10018

T. 516.277.2950
www.aiai-infra.org

Contact:
readytowork@aiai-infra.org



**PUBLIC
MONEY,
POLICY
& P3s**

GOVERNING

GUIDE TO

**FINANCIAL
LITERACY**

Volume 3

**Understanding the Risks & Rewards
of Public-Private Partnerships**

Permeable pavement absorbs stormwater and reduces polluted runoff in Prince George's County, Md.

PUTTING CITIZENS FIRST WITH AN Innovative Approach to P3s

Next-generation public-private partnerships (P3s) will focus on goals citizens want to support — especially projects that inspire them, such as ensuring access to safe water supply or quality affordable housing.

Corvias Group, a leader in forward-thinking P3s, tackles large-scale public infrastructure challenges through trusted partnerships that also help organizations achieve their public policy and socioeconomic goals. The private firm puts clients first to produce sustainable, long-term solutions that focus more on performance than profit.

Working together for the public good

Case in point: In 2015, Prince George's County, Md., engaged Corvias as lead partner in its "Clean Water Partnership," a 30-year, \$100 million commitment for financing coordination, planning, design, construction and maintenance of green stormwater infrastructure. The ambitious effort will update needed water works, and also help the fast-growing region accommodate accelerating demand for new sidewalks, pavement

and rooftops that create more permeable surfaces. By employing rooftop vegetation, rain gardens and other fresh approaches to capture rainwater, the initiative can also help beautify neighborhoods.

The P3 arrangement is unusual in that it places the onus of performance and maintenance on Corvias, which gets full payment only if it meets targets related to water runoff quality and amounts — and related socioeconomic goals. For example, the agreement requires that 35 percent of labor hired for design, construction and maintenance come from local disadvantaged minority- and women-owned businesses. Corvias earns its full, capped fee only if it exceeds these targets. Additionally, the agreement automatically reinvests any savings directly back into the project for true risk sharing.

Prince George's County oversees program goals and compliance, provides revenue for the program from water utility fees, and still owns all the infrastructure and real estate. For more information, visit www.thecleanwaterpartnership.com

Corvias®

To learn more about how Corvias works within next-generation P3s to remedy some of America's most challenging infrastructure and facilities deficiencies, visit <http://www.corvias.com>



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28 Conclusion

When you see **highlighted words**,
check the glossary on Page 30 to learn more.

GOVERNING

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1100 Connecticut Ave. N.W., Suite 1300,
Washington, D.C. 20036
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INTRODUCTION

The Continental Army certainly had General Washington – and the French. But after the disaster at Valley Forge, it also had something much more mundane: maintenance and operations seen to by private contractors.

In December 1777, General George Washington led the Continental Army into its first permanent camp at Valley Forge, Pa. Spirits were low. They had just surrendered Philadelphia, and a long, punishing winter lay ahead. In the months that followed, thousands of troops died from starvation and disease. At his darkest moment, Washington wrote a friend to express his admiration for the “incomparable patience and fidelity” of his troops as they suffered with “little less than a famine.”¹

In late 1783, those same troops defeated the mighty British army. How did they go from starvation to success? Historians point to Washington’s leadership, American ingenuity and some help from the French. But the Continental Army also won because of careful attention to something much more mundane: maintenance and operations. After the disaster at Valley Forge, the Continental Congress reorganized and centralized the army’s procurement, transportation, logistics, payroll and other essential support functions. Perhaps most important, it hired private contractors to manage those functions, and gave those contractors wide latitude to manage as they saw fit. The result was a far more capable, efficient and effective army.

Nearly 250 years later, governments continue to find new ways to leverage private sector money, expertise, innovation and flexibility. This is especially true for states and localities, which in the past 20 years have rapidly expanded the scope, scale and stakes of that leverage. This practice of deeper private sector involvement in public services is broadly known as public-private partnerships, or P3s.



P3s are now a permanent part of state and local governments' service delivery toolkit. For proof, look no further than Florida's \$2.3 billion "I-4 Ultimate" highway project; the \$200 million civic center in Long Beach, Calif.; the recently approved \$4 billion rebuild of the main terminal at New York's LaGuardia Airport; and dozens of other major infrastructure projects set in motion by P3s.²

Expanding interest in P3s has a lot to do with financial necessity. The American Society of Civil Engineers (ASCE) recently highlighted \$3.6 trillion worth of pressing state and local infrastructure investment needs.³ Add to that: A 2015 Governing Institute survey⁴ found half of state and local public officials believe lack of infrastructure investment is their most significant financial problem. P3s can help address this spending gap by, among other things, using private sector money to jump-start projects that might not happen otherwise. That's also why this guide focuses on P3 infrastructure projects, with some special emphasis on emerging applications for areas such as stormwater management, broadband and public buildings.

But P3s are more than just a financing tool. They can introduce innovative designs and technologies. They can connect vital services and infrastructure to other policy goals such as economic development, community revitalization and workforce development. They can also help free up badly needed capital spending and borrowing capacity for other projects. The potential rewards are numerous.

So are the risks. A poorly designed or executed P3 can cost taxpayers more than what they'd pay under traditional public sector procurement. Moreover, governments must actively monitor and enforce the terms of their P3s. This demands considerable resources and technical expertise that many governments simply do not have.⁵ Skeptics also point out that many taxpayers and policymakers mistake P3s for "free money." As you'll see throughout this guide,

P3s might change who pays for a project at first, but in the long run, taxpayers and those who use infrastructure always cover the bill. In other words, P3s are a financing tool, not a funding mechanism. As long as P3s offer the allure of easy money, policymakers and taxpayers will want to learn more.⁶ For these and many other reasons, it's essential for policymakers to understand what P3s are, how they work and when they're right for a community.

50% of state and local public officials say lack of infrastructure investment is their most significant financial problem.



This guide answers three main questions:

1 What are P3s?

We'll unpack this term and focus on the P3s state and local policymakers typically encounter.

2 What role should policymakers play in P3s?

In short, your role is to "build the skillset, and build the mindset" to prepare your jurisdiction for the challenging work of carefully considering P3 opportunities. We'll describe what that means.

3 How can governments share the risks and rewards of P3s?

Once you've determined a P3 might be appropriate for a particular policy objective or project, there are many ways to structure that P3 to maximize its chances of success.

Our goal is to help you "know what you don't know."

After reading this guide, you'll know the basics and where to go to learn more. That's why throughout you'll see questions you can and should ask as you're considering P3s.

WHAT ARE **PUBLIC-PRIVATE PARTNERSHIPS?**

Many things have been called “public-private partnerships.” Consider the following:

✓ **On Oct. 3, 2008**, Hank Paulson and Tim Geithner, secretary of the Treasury and president of the Federal Reserve Bank of New York, respectively, unveiled the Troubled Asset Relief Program (TARP). TARP was the federal government’s \$700 billion plan to address the growing sub-prime mortgage crisis. The plan was to, in effect, buy up many of the “toxic” assets that were hurting investors. Treasury officials hailed the plan as a “public-private partnership” to restore financial stability.

✓ **In 2010**, the city of Overland Park, Kan., approved a financing package to attract a major sporting goods store to its Corbin Park Shopping Center. That financing package included public tax money generated by a new transportation development district and community improvement district authorized to support the project. City leaders lauded the plan as an aggressive, innovative “public-private partnership.”

✓ **In February 2016**, 12 countries — including the U.S., Canada and Japan — signed the Trans-Pacific Partnership, a multi-year trade agreement designed to promote economic growth throughout the Pacific Rim region. Leaders across the signatory countries hailed the agreement as a groundbreaking “public-private partnership.”

✓ **In August 2013**, The Trump Organization finalized a long-term lease with the General Services Administration to redevelop the Old Post Office building in Washington, D.C. Donald Trump plans to invest at least \$200 million to convert the former government building into a luxury hotel. He has called the deal a terrific “public-private partnership.”

These are all stories of strong cooperation between governments and the private sector, but cooperation alone does not equal a P3. In fact, most P3 experts agree on a much narrower definition that we’ll use throughout this guide:

A public-private partnership is a long-term agreement between a government and the private sector to share the risks and rewards of delivering an essential public service.

With that definition in mind, it's clear how the previously cited examples are not really P3s. The TARP was not a service, but rather a way to quickly stabilize financial markets by shifting financial risk from banks to the federal government. Governments support private development through a variety of financing tools like transportation development districts and community improvement districts, but that support is designed to promote economic development, not directly provide a public service. Trade partnerships don't produce a service; they change the rules of the game for how countries trade with each other. Leasing a government building to a private developer for luxury lodging is not a public service. Government can be a meaningful participant in these types of deals, but that doesn't make them a P3.

P3s vs. Traditional Procurement

At the outset it's useful to compare P3s to traditional public sector procurement. We'll focus on infrastructure since that's where much of today's P3 activity is focused. Figure 1 shows the various stages of an infrastructure project. Governments are traditionally responsible for the parts of the project shaded green. Private partners are traditionally involved with the parts shaded blue.

Let's apply this in the context of a new wastewater treatment facility. With traditional procurement, a government — usually a local utility or city/county public works department — borrows money to pay for the project, acquires or repurposes land for the project, and does some preliminary design work. With that preliminary work complete, the government develops a request for qualifications (RFQ) from private design/engineering firms. That RFQ will usually call for the private partner to finalize the design, obtain required permits from state and federal regulators, and attend to any other preliminary design concerns. Private firms respond to that request, and the government awards a contract to the best qualified firm. Once the design work is complete, the government requests bids from construction companies to build the facility according to the finalized plan. It then awards a contract to the selected construction company and monitors the construction process. Once the facility is built, the government will own, operate and maintain that facility for the rest of its useful life.

The middle panel of Figure 1 shows how this same procurement could happen through a common P3 structure known as a

FIGURE 1:

Traditional Procurement vs. Public-Private Partnerships vs. Privatization

TRADITIONAL PUBLIC SECTOR PROCUREMENT

Manage Project			
Design	Build	Operate	Maintain
Finance Project			
Own Project			

DESIGN-BUILD-OPERATE-MAINTAIN (DBOM) P3

Manage Project			
Design	Build	Operate	Maintain
Finance Project			
Own Project			

JOINT VENTURE P3

Manage Project			
Design	Build	Operate	Maintain
Finance Project		Operate	
Own Project		Operate	

BROWNFIELD PRIVATIZATION

Manage Project			
Design	Build	Operate	Maintain
Finance Project			
Own Project			

Public Sector Private Sector



Social Impact Bonds as P3s?

Many recent high-profile public-private collaborations have actually been government partnerships with nonprofits organized around social impact bonds. Like P3s, social impact bonds are focused on outcomes. A nonprofit agrees to try out a new service delivery approach, and if that approach works, the government agrees to share a portion of the public money saved. Financing to launch

that new approach comes from private sector investors.

Most social impact bonds also engage a charitable foundation(s) that agrees to remunerate the private investors if the new approach fails. Social impact bond enthusiasts believe this approach can bring innovative new solutions to bear

on challenging social problems such as homelessness and juvenile recidivism.

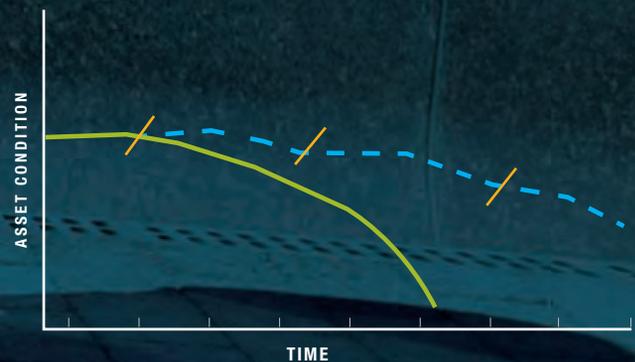
Social impact bonds are an exciting and important development. However, from the government's vantage, the risks are neither shared nor manageable, and therefore a social impact bond is not a P3.



Preventive Maintenance and Life Cycle Costs

Maintenance is an essential but often overlooked part of public infrastructure. By some estimates, for every dollar a government spends to design a piece of infrastructure, it will spend \$10 to build it and \$100 to maintain it. The figure below illustrates why the timing of maintenance spending matters. The solid line shows how the condition of a typical road, bridge or other asset deteriorates over time if not maintained. The key point here is that the decline is not linear. At some point, the asset quickly deteriorates to an unusable state. The dashed line shows that same condition if the asset is properly maintained, with periodic spending on preventive maintenance shown in the diagonal orange lines. Proper maintenance equates to a much longer useful life.

The challenge is that preventive maintenance needs must compete with capital spending on newer, more visible projects. And it often loses. P3s with an operations and maintenance component can help address this problem. If the private partner's payment depends on the asset's condition, it is far more likely to make those periodic investments in maintenance. Unlike most governments, that private partner will have the financial, operational and political flexibility to make those investments when needed.



By some estimates, for every dollar a government spends to design a piece of infrastructure, it will spend \$10 to build it and \$100 to maintain it.

“design-build-operate-maintain,” or **DBOM**. Here, the government selects a single private partner to design the facility, build it, and then operate and maintain it (O&M) for several years. The private partner staffs the facility, performs routine inspections and repairs, updates the facility’s technology and manages compliance with Environmental Protection Agency (EPA) rules and other mandates. In most DBOMs, the O&M includes routine maintenance such as cleaning and inspections, but also financing and carrying out capital maintenance such as replacing pipes, filters and other expensive, long-lived components of the facility.

In exchange, the government pays the private partner a fee to operate that facility on its behalf. For some P3s, that fee is a percentage of the fees paid by the end users of the facility. Under a different model, the government makes fixed payments, known as **availability payments**, that are not directly related to the revenue the facility generates. Many P3s blend elements of both.

Why Would a Government Prefer a DBOM to Traditional Procurement?

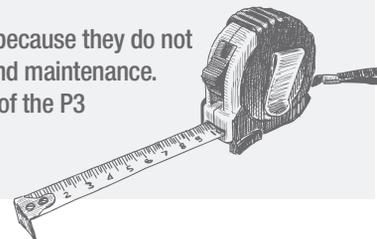
Lower transaction costs. Working with a single private partner across all stages of the project eliminates the costs of developing, awarding and monitoring separate contracts at each stage. In other words, a P3 can reduce the transaction costs of bringing the private sector into the project.

Synergy across the phases. There’s an old saying that if mechanics designed cars, then every hose and valve would be much easier to reach. Cars might not be beautiful, but they’d be easy to maintain and, in turn, much cheaper to own. That concept applies just as well

Design-Build

What we call P3s today began with the **design-build** approach to public infrastructure. Under this structure, the government engages the same private partner(s) for both the design and build phases. This model has been used extensively for highways, bridges, ports and other projects where matching the proposed design to the best available construction techniques can save time and money.

Design-build contracts are not P3s because they do not involve shared risk for operations and maintenance. They are, however, a building block of the P3 approaches described herein.



to major public infrastructure. If the private partner is responsible for O&M, it has a powerful incentive to design the facility to minimize the long-term costs to staff, operate and maintain it.

Expedited delivery. By some estimates, construction costs increase 3 percent each year. Prices on commodities like cement and steel can rise quickly. Interest rates can increase unexpectedly, driving up financing costs. Labor costs rise when local market conditions improve and unionized employees negotiate new contracts. With these and other factors at work, it’s difficult to know what the design and build phases might cost through traditional procurement. However, it’s not difficult to see that completing the design

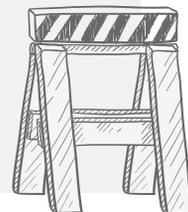


Pennsylvania’s Rapid Bridge Replacement Project

In 2015, the Pennsylvania Department of Transportation (Penn DOT) launched its Rapid Bridge Replacement Project. The project is a DBOM designed to expedite the replacement of 558 bridges across the commonwealth in just 3 years. Plenary Walsh Keystone Partners — a consortium of Pennsylvania investment banks and construction companies — is the private partner. Under this P3, Plenary Walsh is responsible for construction and O&M of all bridges in the project for 25 years. Penn DOT will make availability payments contingent on metrics such as bridge pavement condition and minimal traffic disruptions during construction. Plenary Walsh also plans to engage dozens of local sub-contractors, mainly at the build phase. The project is financed entirely with public money, including **private activity bonds** and periodic state appropriations.

Most of the bridges slated for replacement are simple, rural, low-volume structures with similar design characteristics. That’s why this project lends itself well to the high-performance infrastructure procurement approach. Penn DOT can develop a simple but flexible master design, standardized procurement and contracting documents, and clear procedures to measure contract performance.

For more information, visit the project’s website at <http://parapidbridges.com>.





Stormwater Infrastructure in Prince George's County, Md.

Like many jurisdictions near the Chesapeake Bay, Prince George's County, Md., must comply with strict EPA rules about stormwater runoff and discharge. It's also one of the fastest-growing counties in the U.S. and is rapidly redeveloping much of its urban infill. These two trends together created a unique P3 opportunity.

In 2014, the county entered into a DBOM with Corvias Solutions for a 30-year, \$100 million partnership to develop countywide stormwater infrastructure to treat more than 15,000 acres of impervious surfaces. Corvias will design and build more than 46,000 individual pieces of stormwater infrastructure such as rain gardens, "green" roofs and bioswales. By necessity, much of that infrastructure will be located on land controlled by schools, homeowners' associations, religious organizations and other local interests. It follows that Corvias' success will depend in large part on its ability to successfully engage community stakeholders. Financing is 100 percent public, mostly through municipal bonds backed by stormwater utility fees.

This is a good example of an early innovation P3. Stormwater is a dynamic policy environment. Federal and state clean water rules change regularly, and stormwater infrastructure technology is evolving quickly. Moreover, from the outset the county made clear that it wanted this P3 to drive community and economic development, especially in some of the county's most blighted areas. The county engaged Corvias early and often, and Corvias developed a variety of designs that county officials had not considered prior to the partnership. In pursuit of the economic and community development goals, Corvias also plans to engage dozens of local sub-contractors in both the design-build and O&M phases.

and build phases quickly will almost certainly save money. Most research on P3s shows that DBOMs are almost always completed faster than traditional procurements.

Cost certainty. Once the design and build phases are complete, it's just as difficult to know what it might cost to operate and maintain the facility over time. A well-executed P3 with a transparent long-term payment schedule can address this problem. Certainty about the long-term costs to build and operate a facility — known as its life cycle costs — can bring about substantial financial and political benefits.

Before going further it's crucial to understand another defining characteristic of P3s: an emphasis on outcomes. To illustrate, let's return to the wastewater treatment example. In a traditional procurement, the government tells the design and build contractors what to design, how the facility should look, what materials should be used to build it and so forth. This approach is popular and timeless because we know how to hold it accountable. It's clear if the contractor meets the public's expectations.

P3s demand a different approach. If the wastewater example were a P3, the government would specify what it wants the facility to do. Presumably, it should have the capacity to treat several million gallons of water each day to levels of cleanliness that meet or exceed EPA water quality standards. But how the facility looks and works would be up to the private partner. To know if the private partner is performing, the government must shift its focus of accountability. Instead of tracking where money is spent, the government must now test water quality levels, monitor the facility's condition and performance, and enforce the other contract provisions.

High-Performance Procurement vs. Innovating Early

From the government's vantage, there are two types of DBOMs. The first is a standardized DBOM. With these projects, the government can reliably predict the long-term O&M strategy and costs related to the infrastructure in question. Small bridges in rural areas are a good example. These bridges must be built to accommodate predictable types of traffic patterns through terrain that's not likely to change. If the government can standardize its bridge design specifications and performance standards, then it can use the DBOM model to expedite new bridge construction. Private partners simply make small adaptations to a basic design, carry out the build and, later, the O&M.

Governments have deployed this standardized DBOM approach — also known as **high-performance procurement** or performance-based procurement — for many different types of infrastructure, including schools, hospitals and more recently, "net zero" energy-efficient public buildings. In fact, some have suggested that governments can capture most or all of the potential value of P3s by simply adapting their existing infrastructure procurement processes to better reflect P3-type dynamics. Newer approaches to procurement such as managed competition and vested outsourcing are designed to that effect, and may be a better choice than P3s for many projects.

The second type of DBOM is what we might call an early innovation DBOM. In this case, the government cannot reliably estimate a project's O&M strategy and costs. In fact, many innovation-led

DBOMs begin with a set of policy goals, but without any expectation of what type of project should be built to meet those goals. With this approach, private partners are brought into projects much sooner. They participate in the early design discussions and identify a variety of potential design options, often with careful attention to the later O&M costs. See the Prince George's County, Md., case study on page 11 for a good illustration of an early innovation DBOM.

Advocates argue this approach can unlock private sector innovation. Private partners are much more attuned to the cutting-edge technologies and design features that can be brought to bear on a P3. By bringing private partners into a project early, the argument goes, governments can arrive at an innovative, customized solution to their particular infrastructure need sooner. Critics argue governments should never engage the private sector without clear ideas about what they want from the engagement.

This distinction in DBOM types is important because governments need to prepare differently for each. With standardized DBOMs, the government role is more compliance-focused. The main tasks are to streamline and standardize request for proposal documents, contracts, performance and audit standards, and many other processes. With early innovation DBOMs, the goal is to ensure the process is transparent and accountable. Government staff working in this space tend to focus more on ensuring adequate public input and participation, evaluating life cycle costs and verifying other key project assumptions.

States — including Virginia, Florida and Texas — have established P3 agencies within state government tasked with promoting and evaluating P3 opportunities. Most do analytical work related to both types of DBOMs. As their work progresses, they are building a stronger pipeline of P3 projects to their respective states and becoming more adept at vetting projects long before those projects reach citizens or policymakers.

Joint Ventures

With traditional procurement and with many DBOMs, most or all of the money comes from the government. Most governments finance projects “pay as you go” from current resources, or they borrow

KentuckyWired

KentuckyWired is a DBFOM that will build a 3,400-mile high-speed broadband network to serve rural Kentucky. Macquarie Capital, an Australian investment bank, is the private partner. The \$324 million project is financed with a blend of public sources, including municipal bonds, state appropriations and a grant from the federal Connect America Fund. Macquarie also contributed nearly \$25 million of equity. In exchange, Macquarie was granted the right to sell high-speed Internet service for 20 years in the communities served by the network once it's completed.



money. In fact, access to tax-exempt financing through the municipal bond market is one of the central and unique features of U.S. state and local public finance. When it's available, it's considerably cheaper than other forms of infrastructure financing. One of the simple rules of thumb in infrastructure finance is that if a project is a priority, and if you can finance that project with long-term debt, then debt is almost certainly a better option than a P3.

But this is changing. Many state and local governments could borrow money for new projects, but they can't be certain they'll have the revenue to pay that money back. Others simply cannot borrow more money because they have reached their statutory and other restrictions on the amount of debt they can carry.

Meanwhile, private investors are hungry for opportunities to invest in public infrastructure. By some estimates, the top 30 infrastructure funds have raised \$180 billion.⁷ Major international investment banks such as Macquarie have dedicated units of investment bankers looking for deals. Many large public pension funds, desperate for better returns on their own assets, are looking for investments that offer a strong rate of return. Under the right conditions, state and local infrastructure is precisely that kind of investment.

When private investment comes into a P3 it's usually through a joint venture. In this arrangement, the government and private partner(s) together form a new corporation — known as a **special purpose vehicle** (SPV) or project company — that builds, owns and operates the facility. With these additional components in place, a DBOM can become a DBFOM.

SPVs are special because they can take equity investments. To invest in a company's equity is to own a share or piece of it. Equity investors in joint ventures expect to be paid some portion of the revenues the venture generates. They also expect to get their investment back when the P3 ends or when they sell their equity to the government or another investor. But unlike bonds and other fixed income investments, the potential return on an equity investment is not always clear. In fact, in most joint ventures, equity holders are the first to lose their investment if the project fails. That's why equity investment is much riskier to investors, and in turn much more expensive to the government than traditional bond financing. This style of financing P3s is known as **project finance**. See the Long Beach Courthouse example on page 13 for a good illustration of a recent joint venture.

Privatization

It's also useful to briefly contrast P3s with **privatization**. Privatization is among the most controversial and widely discussed topics in state and local government today. It's different from P3s in one crucial respect: ownership. In a P3, the government continues to own the facility even though the private partner operates and maintains it. As far as citizens are concerned, the government still owns and is directly accountable for delivering the service.

With privatization, the government relinquishes ownership. In the U.S. this most often means the government grants a private operator — called a concessionaire — an exclusive right

Long Beach Courthouse DBFOM

In 2010, the California Judicial Council entered into a 35-year DBFOM arrangement with Long Beach Judicial Partners, Inc., (LBJP) to develop a new \$490 million state courthouse in Long Beach. LBJP is a special purpose vehicle created by Meridiam Infrastructure, a global infrastructure investment fund. Meridiam financed the entire project with equity, and LBJP later sold more than \$500 million in bonds to refinance the project once finished. LBJP sub-contracted with Clark Construction and AECOM for the design and build, and with Johnson Controls for much of the O&M.

The Judicial Council will make annual availability payments, which are contingent on satisfactory performance in areas such as availability of courtrooms, holding cell and audio/visual technology. This project has generated considerable controversy due mostly to major differences between the project costs estimated by the council's value for money analysis and the actual project costs.

Source: Adapted from AECOM, "Public-Private Partnerships for Public Buildings," www.performancebasedbuildingcoalition.com

The **Chicago Skyway** is a good example of privatization. The private partners have the exclusive right to operate and collect tolls on the Skyway for the next 99 years. After that, they will hand back the Skyway to the city.



to operate the facility for a set period. This concession has the same effect as transferring ownership. This is shown in the bottom panel of Figure 1.

The Chicago Skyway is a good recent example. In 2004, the city of Chicago granted a team of foreign partners led by Cintra, a Spanish construction and logistics firm, and the Macquarie Group the exclusive right to operate and collect tolls on the Skyway for the next 99 years. After that, Cintra-Macquarie will hand back the Skyway to the city. In exchange, Cintra-Macquarie gave the city an upfront payment of \$1.8 billion. Other high-profile recent privatizations include the Indiana Toll Road and the I-495 Capital Beltway in greater Washington, D.C., among others.

Privatizations have contributed much to the misconception that P3s are “free money.” After all, many state and local elected officials would not hesitate to take a large upfront payment from a private partner in exchange for the chance to give away the political, financial and technical challenges of running a major piece of infrastructure. The problem is that they are not free. Taxpayers ultimately pay for the O&M on a privatized public asset, usually through steady increases in tolls and user charges. Critics have also shown that in many privatizations the government does not have adequate oversight or recourse to hold the private partner accountable. For these and many other reasons, most privatizations are not organized around genuinely shared risk between the public and private partners, and are therefore not P3s for our purposes.

Essential Questions

- How do we currently fund (or not fund) our capital budget?
- What are our major revenue sources for capital investment?
- Are these sources expected to grow?
- What is the local experience with similar P3s?
- Which new technologies or processes could P3s help us access?

Building Strong Communities

with Carbon Neutral Buildings

Once the stuff of science fiction, carbon neutral buildings — or buildings that produce as much energy as they consume — now have potential to become mainstream.

Carbon neutral buildings combine efficiency and technology to minimize energy consumption. Because they use less energy, carbon neutral buildings lower greenhouse gas emissions and overall operational costs. Complementary strategies such as rainwater harvesting and re-use can further reduce a building's environmental footprint.

Thanks to processes and innovations developed and implemented with AIA architects, even existing buildings can be cost effectively retrofitted to become carbon neutral.

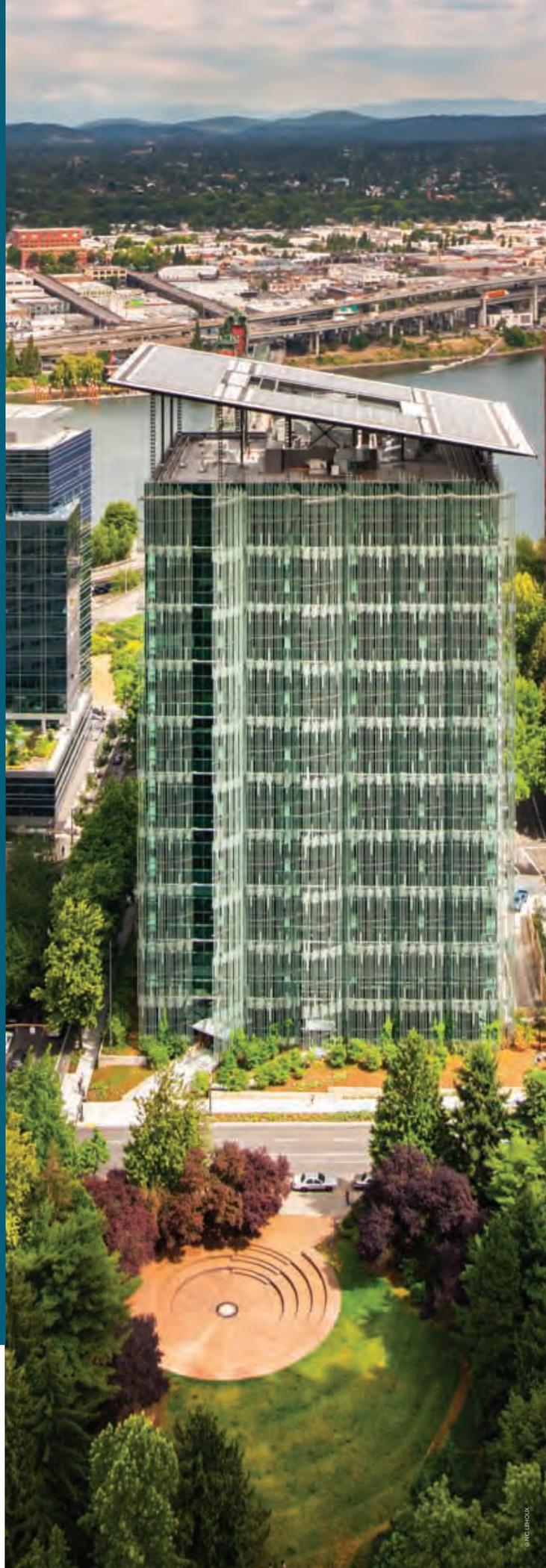
Communities that design and retrofit carbon neutral public buildings demonstrate energy leadership, technological innovation and commitment to a sustainable future. By investing in energy best practices and technologies, these communities become more sustainable and resilient to overcome economic and environmental challenges. And with lower energy expenses, businesses and taxpayers have more money to put back into their communities.

The more efficient use of natural resources is just one way architects help governments build local sustainability and resiliency. With a rich history of developing and supporting better communities, AIA and its members have long worked with governments to promote environmental leadership, economic development and design innovation.

For more information, visit: www.aia.org



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RISK ALLOCATION AND RISK MANAGEMENT IN P3S

DAVID KIDD

All public infrastructure projects have risks. Cost overruns, traffic delays and angry taxpayers come to mind. With traditional procurement, a state or local government bears almost all that risk.

With P3s, a government can allocate (i.e., shift) some or all of that risk to the private partner(s). But keep in mind that risk allocation is not free. Private partners will accept risk, but only in exchange for higher payments, more control over setting fees or tolls, or some other concession. For governments, the central challenge in P3s is knowing which risks to keep, which risks to allocate and which risks to share. That’s the focus of this section.

Figure 2 shows the P3 risk matrix – or the risks inherent to most P3s – and which party is typically best able to manage those risks. There are many types of regulatory/policy risks. First and foremost is the question of whether the P3 is legal under state law and other applicable laws. Specifically, does the government have the authority to finance a project with private investment, or must it use traditional municipal bonds? Is the government allowed to levy tolls or other charges if that’s what the P3 financing requires? Is it allowed to receive unsolicited bids for projects, or must all projects be competitively bid? Is it required to compare the estimated costs of a P3 to some estimate of the cost for a traditional procurement? Many P3s have failed because the answers to these questions were ambiguous. Some states have robust legal frameworks that answer these questions definitively. Most do not. P3s are all but impossible to develop and manage without that framework. Since only the government can change its own policies, these risks cannot be shifted to the private partner.

That said, P3s typically shift most of the risks related to construction and operations to the private partner. Figure 3 lists some of the tools used to manage those risks. Private partners take on planning and design risk at the early stages of a P3 while developing the engineering, architecture, site planning and basic financial structure. Mistakes at that stage

FIGURE 2:
Typical P3 Risks

RISK	PUBLIC SECTOR	PRIVATE SECTOR	SHARED
Regulatory/Policy	○		
Planning and Design		○	
Permits and Approvals		○	
Construction		○	
Operations/Maintenance		○	
Finance/Market		○	
Private Sector Default		○	
Political			○
Force Majeure			○
Demand			○

FIGURE 3:
Typical P3 Risk-Sharing Strategies



will cascade through the project’s life cycle costs. This risk is managed in most joint ventures through an equity investment. The private partner puts equity into the project early on. Planning and design problems that increase overall project costs will decrease the value of that investment, and in turn, the value of the private partner’s equity. For the government, this means the private partner has an additional incentive to get the planning and design correct. For the private partner, it means the government is more likely to see the project through despite any planning or design challenges.

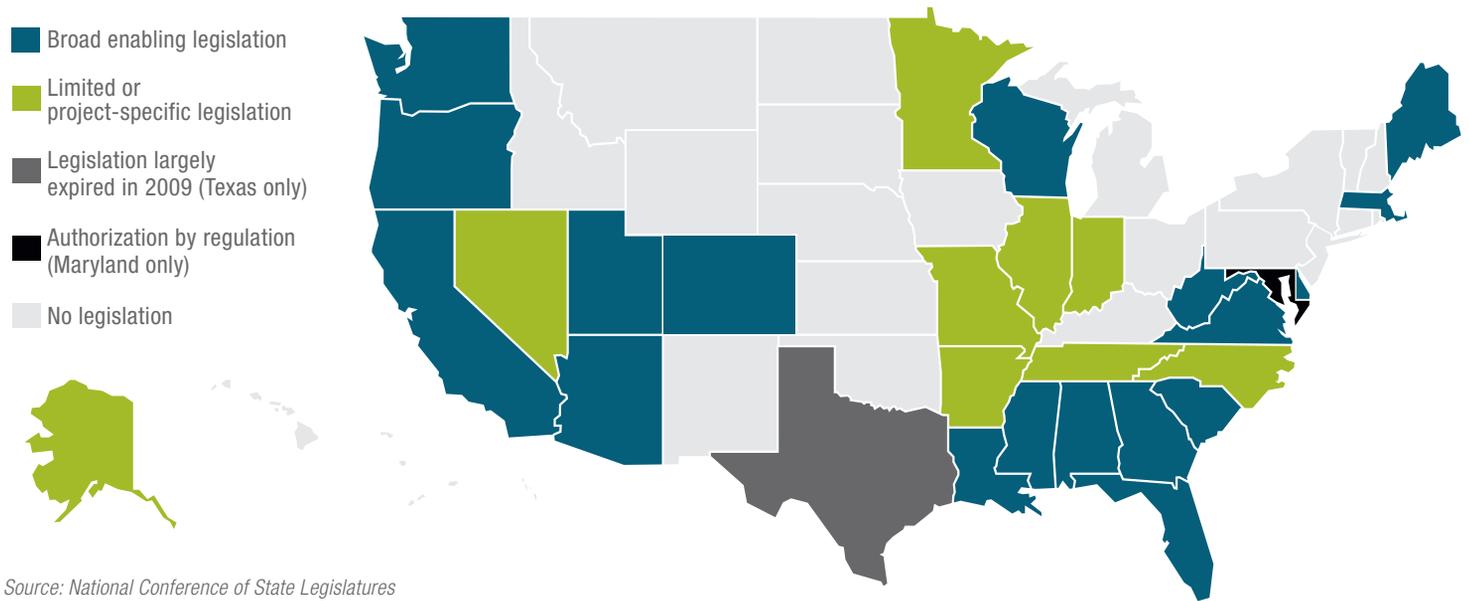
Private partners typically bear the risk for permits and approvals. Most P3s are operated by the private partner and are therefore permitted by the government as private entities. Sometimes this means negotiating directly with the government on the other side of the P3. More often it means working with higher levels of

With P3s, a government can allocate (i.e., shift) some or all of the risk associated with public infrastructure projects to the private partner(s). But keep in mind that risk allocation is not free.



Statutory Authority for P3s

Different states have different legal and policy frameworks that set the rules of the game for P3s. This map shows that variation in one area — transportation P3s.



government such as state water quality regulators, the federal EPA or the Federal Highway Administration. Permitting processes like environmental impact studies help mitigate this risk by making the project’s potential environmental impacts clear to the public. Some P3s also call for the private partner to pay the government a concession payment if a permitting or approval issue delays the project delivery or impairs its operations.

Construction risk can take many forms. If geological reports are wrong, and crews have to dig through harder than expected soils, then excavation costs will increase. If costs of concrete, steel or wood increase, then overall construction costs will increase. If local union construction laborers strike, the project will be delayed and labor costs will increase. In most P3s, the private partner is responsible for these risks, but the government can encourage delivery on time and under budget by offering bonus payments to that effect. It can also use fixed price contracts where the price paid for construction is the same even if actual costs exceed expected costs. Once the asset is built, many of these same concerns become risks to operations and maintenance, and governments can manage those risks much like they do construction risks.

If the cost to finance the construction or ongoing maintenance increases, the private partner must also bear financial/market risk. This can happen in volatile interest rate environments where the cost to borrow money can increase quickly and unexpectedly. Private partners are uniquely positioned to manage this risk through insurance contracts, and through options, swaps and other financial management tools. For government, the best

defense against financial risk is to properly evaluate the private partner’s assumed financing costs, usually through a **value for money** or comparable approach.

There is also a chance the private partner could fail to make its required contributions to the project. This is known as default risk, and happened in several P3s following the 2008 financial crisis. A common strategy to manage default risk is to require the private partner to set aside some of its own money in security reserves

Value for Money

Value for Money (VfM) is a formal process to compare the life cycle costs of a P3 to the hypothetical life cycle costs of a similar project through traditional public sector procurement. Some VfM processes are quite complex, requiring the government to prepare a “shadow bid” for public sector procurement based on sophisticated but hypothetical revenue and expense forecasts. The criticism of these formal approaches is that they require too many assumptions and arbitrary inputs. That’s why many jurisdictions use VfM, but rely instead on expert opinions and other information to draw those same comparisons. There is no correct or incorrect VfM methodology. A VfM is effective if it’s transparent, logical and provides useful information to policymakers when considering a P3.





P3s typically shift most of the risks related to construction and operations to the private partner.

Risk Transfer and Bankruptcy

If the private partner in a P3 defaults, is acquired by another company or encounters some other major change, will any of the allocated risks become shared risks? Put differently: Will the risk transfer stick?⁹ P3 experts tend to agree that Chapter 11 and other U.S. bankruptcy laws are effective tools to protect the public's interest in P3s. That is, if a private partner defaults or goes bankrupt, the government is generally free to close down the P3 and take the project in a new direction. This is quite different from the experience in other countries where the private partner can litigate to recover losses from the government and delay the project in the process.

at the start of the project. If the private partner defaults or goes bankrupt, the government can use those security reserves to pay bondholders or other creditors.

Certain risks are also best shared rather than shifted to the private partner(s). The most potent political risk is that taxpayer sentiment turns against a project, especially when the project requires new taxes or fees. Both the government and the private partners can play a role in managing the unique blend of political and financial risk inherent in P3s. We'll go into more detail on this in the next section.

"Acts of God" include any unforeseeable and unavoidable development that makes it impossible for one party to fulfill its obligation to the partnership. This includes natural disasters such as floods or earthquakes that damage the project, but also wars, terrorism and other incidents that make the project unsafe for operators or users. Most P3s include a **force majeure** (i.e., "act of God") provision that dictates how both parties will work together to keep the project working, or how one party will remunerate the other in the event of such a development.

The most important shared risk is the risk the project will not generate its expected revenues, also known as demand risk. In the case of the wastewater treatment plant, this is the risk that the new facility does not generate enough new wastewater utility revenue. This could happen because the revenue forecasts were too optimistic, or because customers cut back their use in response to the new fees required by the P3.

Private partners bear demand risk because if the project does not meet their revenue expectations, they do not receive their expected return on investment. Governments share this risk two ways. One is to agree to a non-compete clause. In the previous example, this means the government would agree to not build a similar wastewater treatment plant to serve the same customer base. This built-in monopoly ensures enough demand for the P3. Governments can also share this risk by agreeing to additional availability payments in the event that revenues do not meet expectations. More on this in the next section.

Political Risk and P3 Funding

Taxpayers won't support a P3 if they don't understand it. They need to know how it works, how it's different from the status quo, and most important, what it will cost them. Oddly enough, policymakers often lament that much of the taxpayer opposition to P3s is rooted in misinformation and misunderstanding — sometimes cultivated by P3 opponents — about where the money comes from.⁸ As a policymaker, it's imperative you understand how choices about where to get the money for a P3 can make it more or less politically feasible.

First and foremost, it's important to distinguish financing from funding. Financing is the upfront money. It's the money that pays for project design and build. Funding is how the government pays for the project over time. It's how the initial project investors are repaid, and how the government pays for the long-term maintenance and operations. State and local governments can finance P3s through debt, equity, loans, savings, capital reserves and many other

sources. However, the funding for a P3 can only come from one of two sources: tolls or availability payments.

Tolls include money collected from users at toll roads or bridges. It can also refer to new fees and user charges added to utility bills or other "pay-as-you-use" structures. Tolling assumes the asset or facility built by the P3 generates discrete revenues that can be captured to repay the lenders who financed the design and build phases, and to pay the private operator for ongoing O&M. This style of finance, where a project is financed entirely through its own revenues, is known as project finance. This is quite different from traditional public finance where a government pledges to support the project with other public money as necessary.

Governments find toll-based projects attractive because they do not require much upfront investment. With enough private investors, a P3 can get to the design-build phase with little or no public money. For governments that cannot borrow additional money, either because of legal debt limits or because taxpayers will not agree to support the project through new taxes, this is an enticing proposition. The trade-off is that project finance is often two to three times more expensive than traditional public finance. Investors can't be repaid until the project begins to generate revenue, and they stand to lose some of their investment if the project's actual revenues fall short of expectations.¹⁰ Project finance investors price in this risk when negotiating the P3's terms.

Availability payments, by contrast, can come from virtually any government revenue source. Here the government pays the private partner a regular amount to make the asset in question available to the public. The money for those payments is sometimes, but not always, composed of revenues the project generates. This distinction — funding exclusively through project revenues versus funding through availability payments — is crucial.

Tolling presents some special political risks:

- **Sticker shock.** American taxpayers are used to paying for infrastructure with general revenues such as sales and income taxes. Because they pay for it indirectly through these general



Maximizing Investments and Reducing Risks with an Experienced P3 Advisor

Understanding the interconnectedness of technical performance, risk transfer, deal structure and financing options is crucial to maximizing the value of a public-private partnership (P3). Getting to that point of understanding is complex and challenging.

That's why many government sponsors are turning to Arup, a multinational professional services firm that provides design engineering, deal advisory and management consulting services, to help them successfully evaluate and deliver their P3 projects.

Arup's Transaction Advice team translates complex technical, business and other issues into financial analysis and clear recommendations that provide a solid foundation for making informed decisions on project delivery and procurement. Arup's advisors can also provide financial advice on P3 projects, prepare financial business cases, consult on contract and commercial issues, conduct technical due diligence, develop performance specifications and evaluate bids.

The firm's track record includes a number of successful global P3s, including the new Long Beach Civic Center Project. On this project, Arup was the lead advisor to the City and Port of Long Beach, assisting the government sponsors in selecting a private sector partner to develop, design, build, finance, operate and maintain a new city hall, public library and Port headquarters; revitalize a public park; and create additional downtown commercial development.

As the Lead Advisor, Arup helped the City and Port structure and negotiate the partnership and attain project approval, including:

- Recommending a procurement strategy within scheduling constraints
- Preparing an RFP with clear goals and requirements
- Framing and maintaining the City's stated affordability limit as critical to the procurement process
- Leading the bid selection process and post-bid negotiation
- Integrating financial, commercial, real estate, design, engineering and cost consulting

Under Arup's guidance the City was able to:

- Significantly reduce the project development timeline, which is typically between three and five years, to just over two years
- Attain unanimous approvals from the City Council and Board of Harbor Commissioners to both select their preferred development partner and, later, enter into negotiated contracts
- Leverage its real estate assets to cross-subsidize the P3 and stimulate economic development downtown
- Close the deal at a price the City could afford

The project recently achieved commercial and financial close in April 2016. Congratulations to the City and Port of Long Beach!

IMAGE COURTESY OF PLENIARY EDGEMOOR CIVIC PARTNERSHIP (AS DEVELOPER), SKIDMOOR OWINGS & MERRILL (AS DESIGNER), AND ARUP (AS OWNER'S ADVISOR)

ARUP

For more information about P3 consulting with Arup's Transaction Advice team, please contact:

Ignacio Barandiaran, Principal
(415) 946-0202
Ignacio.Barandiaran@arup.com

Orion Fulton, Associate Principal
(415) 946-0599
Orion.Fulton@arup.com

sources, rather than directly through tolls or other “pay-to-play” structures, they sometimes believe public infrastructure is free. This would be true if those general revenues covered the full costs to build and maintain our state and local infrastructure network.

In fact, those sources cover only a fraction of those costs. At the same time, taxpayers have recently opposed increases to those indirect funding sources, especially transportation-specific sources such as the gas tax. In turn, the list of unfunded state and local infrastructure maintenance projects grows longer every year. Tolling changes this dynamic. A private partner will agree to a performance-based, toll-based P3 only if that toll reflects at least the full cost to build, operate and maintain the asset in question. Otherwise, the investment will not be profitable, or the asset will not perform as expected. But given the huge gap between what taxpayers now pay and what it actually costs to operate major infrastructure, tolls on those types of projects are often so high that taxpayers experience sticker shock. That sticker shock can quickly morph into political opposition to a P3.

- **Double taxation.** If taxpayers believe they pay for infrastructure through general taxes, then why should they pay tolls for a P3 on top of those taxes? Once again, the answer is those general taxes

don't cover the full cost to operate and maintain that infrastructure. Concerns about double taxation were particularly salient in several P3s that had to be substantially reworked at the design phase, such as the Midtown Tunnel project in Virginia and the Presidio Parkway project in San Francisco.

- **Distributional equity.** Decades of scholarly research has shown that tolls are bad for the poor. In particular, the working poor are more likely to use tolled roads to commute to work or to pay tolls on public transit. They pay the same amount in tolls as others, but that amount is a much larger share of their income. In other words, tolls are a regressive tax. P3 detractors have successfully mobilized public opposition to several P3s around these concerns about distributional equity and the overall fairness of tolling.

Availability payments have their own political risks. In fact, critics call availability payments “shadow tolls.” These risks include:

- **Unclear incidence.** Availability payments are comprised, in part or entirely, by general revenues. As a result, all taxpayers contribute to them. But how those payments affect different types of taxpayers depends on what the government decides



Concerns about double taxation were particularly salient in several P3s that had to be substantially reworked at the design phase, including the Presidio Parkway project in San Francisco.

not to do so that it can fund those payments. The political risk is that it's not always clear who pays them, and in the absence of data, proponents and advocates alike advance their own stories, however informed or uninformed, about how availability payments affect citizens.

- **Elusive cost savings.** Availability payments on a potential P3 are often compared to current spending on the project (for existing or brownfield projects) or to current spending on similar, new projects. Current spending levels will always be less than the proposed availability payments because those levels do not reflect the full cost to operate and maintain the asset over time. In the context of those comparisons, it's difficult for taxpayers to see how paying more for the same piece of infrastructure is actually cheaper and more efficient in the long run.
- **Credible commitment.** With toll-based P3s, most or all of the project's revenues can be ring-fenced, or legally earmarked to repay the project's cost. Ring-fenced budget appropriations are far more difficult to guarantee, especially for state or local governments that might experience fiscal stress in the future. This adds additional risk that investors will price in to their expected rate of return. It can also strain ongoing relationships with investors.

Essential Questions

- What are the relevant state and local laws that speak to P3s? Do we have the legal authority to receive unsolicited P3 bids? To establish a special purpose vehicle? To impose new tolls or other fees on existing or new infrastructure?
- Do we have a VfM process or other formal method to evaluate the expected risks and benefits of P3s?
- What is our own experience, and the experience of nearby jurisdictions, with tolls and other direct user charges?
- For P3s under consideration, what is the basis for the assumptions about the projected demand for the facility/service?



POLICYMAKERS' ROLE IN P3S

By now it should be clear that P3s make us think differently about infrastructure. They bring different stakeholders to the table, and they force us to grapple with trade-offs we don't often consider with traditional infrastructure procurement.

All this begs a simple question: What role should policymakers play in P3s? The answer: As a policymaker, your job is to build a skillset and nurture a mindset.

The “skillset” is about getting the right technical expertise. To deploy P3s well, your jurisdiction must be able to evaluate project economics, negotiate contracts, anticipate unforeseen challenges, incorporate new and often untested service delivery techniques and technologies, dissect sophisticated project financing models and ruthlessly enforce long-term contracts. Most state and local governments don't have the capacity to do this type of work. But with your leadership, your government can take important steps in that direction.

Building that skillset starts with some specific steps you can help your jurisdictions take long before P3 opportunities materialize:

- **Know how much infrastructure your jurisdiction can afford.** Many state and local governments do a formal debt capacity study¹¹ or debt affordability study as part of their capital budgeting process to identify how much money they could borrow to pay for infrastructure. Your jurisdiction's level of potential P3 investment will be different than its debt limit

because not all P3s are debt, but the basic constraints on affordability still apply.

- **Develop the right technical capacity.** As mentioned before, jurisdictions such as the commonwealth of Virginia are developing P3-focused staffs. These employees work with staff at the VA Department of Transportation and other state agencies to evaluate P3 opportunities, negotiate P3 contracts, manage public outreach processes around P3s, and monitor and enforce key P3 contract provisions. Having even some of that expertise will help your jurisdiction quickly and effectively respond to P3 opportunities.
- **Ask for help.** Resources available to facilitate state and local government P3s vary across states. Some states have P3 coordinating authorities that can offer technical and financial resources. Be prepared to supplement those public resources with independent expertise, being mindful that independent advice can be extraordinarily difficult find and cost prohibitive.
- **Optimize your current, traditional procurement process.** Is it possible to capture some of the benefits of P3s without P3s? For many, services managed competition — where government employees compete with their private sector counterparts

As a policymaker, your job is to build a skillset and nurture a mindset. The “skillset” is about getting the right technical expertise. The “mindset” is about anticipating and managing political conflict.



for public work — is an effective way to drive down costs and improve service delivery quality without a full-blown P3. The same applies to design-build, high-performance procurement and other procurement models that can impart some of the benefits of P3s without the political risks.

The “mindset” is about anticipating and managing political conflict. P3s upset the status quo. They enjoin citizens to confront the “full” or “actual” costs of infrastructure, even though those costs are often obscured in traditional state and local budgets. They bring new stakeholders into a community, and they displace the developers, contractors, bankers, government employees and other stakeholders who have vested interests in the traditional procurement process.

That said, as a policymaker, your role is to set the appropriate policy framework for P3s, engage the right stakeholders and communicate directly with the public. That’s what it means to nurture a P3 mindset, even if your jurisdiction decides to not pursue P3s. Some specific strategies to that effect include:

- **Define your jurisdiction’s objectives and priorities for P3s.** Are you considering P3s as an alternative to traditional public financing? As a tool to connect infrastructure to additional policy priorities such as economic and community development? To free up debt capacity or other capital spending capacity? To bring new, outside expertise to bear on infrastructure design questions? P3s can accomplish many of these goals, but not all of them. It’s crucial to consider in advance the trade-offs P3s present, and be willing to acknowledge or re-shape those trade-offs as necessary.
- **Understand the relevant federal, state and local policy framework.** Know how environmental impact statements, concurrence obligations, mandatory competitive bidding, and other legal requirements affect your P3 procurement options for large capital projects. If your state or local policy framework is incomplete or ambiguous, update it as much as possible to explicitly allow or prohibit the procurement mechanics of P3s.
- **Evaluate political feasibility early and often.** Unlike value for money or benefit-cost analysis, there is no formal methodology to evaluate political feasibility. It is, however, essential to have a clear sense of whether taxpayers and key stakeholders support a project long before you solicit bids or begin to negotiate with a private partner. Talk to constituents. Make sure they understand the goals and objectives you’ve defined for an infrastructure project long before discussing specific procurement methods like P3s. Where possible, listen carefully and respond to public sentiment about willingness to pay tolls and new fees. Without that willingness to pay, most P3s will fail.
- **Engage the relevant stakeholders.** Discuss with taxpayers, contractors, labor unions and others the likely impacts of a P3

on public sector jobs and contracts. Some P3s will inevitably result in fewer public sector jobs, especially in areas such as maintenance and operations. At the same time, P3s also enable a variety of projects that might not otherwise happen, and as a result create new public sector contracting and employment opportunities. Stakeholders must be aware of these trade-offs. Don’t proceed with P3 procurement without a workable consensus among the key stakeholders about the potential benefits and costs of a P3.

- **Do your homework.** Establish a formal, independent process to consider the benefits and costs of a P3 relative to some benchmark. Be clear about the assumptions behind that analysis and its drawbacks.
- **Be transparent.** Much of what we call political risk is rooted in misunderstandings, both unintentional and intentional, of the benefits and costs of P3s. Share the best available revenue forecasts, cost estimates and (where possible) bidding information. Address concerns and disagreements about the assumptions behind those forecasts and estimates. For P3s in progress, routinely audit and review the private partner’s performance and share those audit results.

It takes time, patience, effort and resources to build the right skillset and nurture a P3 mindset. These are important steps to take, even and especially if your jurisdiction agrees to not employ P3s.

Essential Questions

- Do we have a mechanism to meaningfully engage citizens and other stakeholders in P3 decisions?
- What is our current debt capacity? How much debt can we afford, both legally and financially?
- Do we have the capacity within our own professional staff to perform VfM and evaluate other dimensions of P3s? If not, do we have the authority and resources to hire independent experts to assist with that analysis?
- How might we define a successful or effective P3?

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The commonwealth of Kentucky has long suffered when it comes to broadband internet availability, ranking 46th in the nation. It also continues to grapple with significant job losses in the key industry of coal mining.

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Public officials believe the new digital infrastructure will help Kentucky attract more businesses, and therefore, jobs. It will lay the foundation for digital learning and support public safety, healthcare and tourism — especially in Eastern Kentucky, which has suffered the brunt of job losses. Private hospitals, service providers, schools and businesses can also benefit from using this middle-mile network.

Juniper Networks: Helping Exceed Expectations
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undertaking relies on private vendors to design, build and operate the network. The 30-year agreement eliminates much risk for the commonwealth, and places the burden of network performance on private partners. It sets deadlines to fix outages, requires 99.99 percent uptime and establishes other metrics for speed and redundancy.

To meet those high standards, Macquarie consortium partner Fujitsu chose industry frontrunner Juniper Networks after much vetting to provide the network building blocks. Fujitsu felt confident that Juniper's advanced edge routers and switches, along with world-leading innovation, collaboration and extensive product line, would allow them to exceed expectations.

When complete in 2018, Kentucky officials see the venture helping them go from high-speed laggard to leader much quicker than possible on their own.

And by pulling together a deal that includes private investment and the nation's most trusted vendors, Kentucky looks poised to reap all the benefits.

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Conclusion

Experts have produced dozens of “Best Practices” and “Ten Principles” lists to help you think about P3s. Hopefully this guide has made clear that from a policymaker’s vantage, P3s are far too complex, nuanced and idiosyncratic to simplify this way.

Instead, this guide concludes with the “Proverbs of P3s.” A proverb is a piece of shared wisdom. We’ve all heard “good things come to those who wait” or “actions speak louder than words.” These sayings are useful because they simplify our complex, chaotic world. P3 experts seem to agree on a few key points about how to best evaluate, finance and structure P3s.

Here’s the catch: A good proverb has an equal and opposite counter-proverb. Good things might come to those who wait, BUT “time waits for no one.” Actions might speak louder than words, BUT “the pen is mightier than the sword.”

A core theme throughout the Guide to Financial Literacy series is that your jurisdiction’s money should follow its mission. As a policymaker, your job is to set priorities — i.e., the mission — and make certain your government’s money aligns with those priorities. That’s why it’s important to point out these proverbs. They won’t tell you whether or how to pursue a P3, but they can help you think about if and how P3s can help you better align your jurisdiction’s money with its mission.



The Five Proverbs of Public-Private Partnerships

1

“CLEAR AND MEASURABLE GOALS ARE ESSENTIAL” BUT “Innovate and adapt.” Policymakers are in charge of defining a community’s goals and priorities for P3s, and for articulating what it will mean for a P3 to succeed. And yet, some of the most successful P3s have happened when governments redefine those goals after learning about the tools, technologies and other innovations that private partners can bring to the table.

2

“P3S AREN’T FOR ROUTINE PROJECTS” BUT “Standardize and streamline.” P3s work best when they can introduce new technologies and processes to infrastructure provision. Or, put differently, they’re not for routine projects. And yet, many jurisdictions are working to standardize P3 procurement processes precisely to promote P3 innovation in a more standardized, scaled-up way.

3

“DO YOUR HOMEWORK” BUT “Beware of ‘garbage in-garbage out’ analysis.” VfM and other financial analysis is now a best practice when evaluating P3s. At the same time, VfM experts agree those techniques are far from perfect. They require a lot of assumptions. Many of those assumptions are based on arbitrary or even made up numbers. So even though VfM is essential, the results of a VfM should not be the main criterion when deciding to go with a P3.

4

“GET INDEPENDENT ADVICE” BUT “There’s no independent advice.” P3s are growing in scope, scale and popularity, but they’re still a “boutique” industry. Individuals with substantive experience with P3s are in demand across the public, private and nonprofit sectors. Few of them are willing to work exclusively for governments, and even fewer are willing to work within public sector resource constraints. But independent expert advice is nonetheless an essential part of solid P3 due diligence.

5

“TRUST IS KEY” BUT “Get the contract correct.” P3s are long-term agreements. They evolve and change. If the partnership is strong, the P3 will also evolve and change. But that inherent trust must be backstopped with strong contract provisions that protect both parties’ interests. This is a delicate balancing act that when mishandled can sink an otherwise promising P3.

FURTHER RESOURCES

American Association of State Highway and Transportation Officials, Build America Transportation Investment Center (BATIC) — www.financingtransportation.org

Brookings Institution, Metropolitan Policy Program, “Public Good, Private Capital: Drivers of Successful Infrastructure Public-Private Partnerships” — http://www.brookings.edu/~media/research/files/reports/2014/12/17-ppp/bmpp_privatecapitalpublicgood.pdf

Building America’s Future — www.bafuture.org

Federal Highway Administration, “Guidebook for Risk Assessment in Public-Private Partnerships” — https://www.fhwa.dot.gov/ipd/pdfs/p3/p3_guidebook_risk_assessment_030314.pdf

Government Finance Officers Association, Advisory on Public-Private Partnerships — <http://www.gfoa.org/public-private-partnerships-p3>

Impact Infrastructure — <http://www.impactinfrastructure.com/>

National Council on Public-Private Partnerships — www.ncppp.org

National Conference of State Legislatures, “Public-Private Partnerships: A Toolkit for Legislators” — <http://www.ncsl.org/research/transportation/public-private-partnerships-for-transportation.aspx>

National Governor’s Association, State Resource Center on Innovative Infrastructure Strategies — <http://www.nga.org/cms/InnovativeInfrastructure>

National League of Cities, “Paying for Local Infrastructure in a New Era of Federalism” — http://www.tml.org/p/NLC_CSAR_SML_Report_2016_webFINAL.pdf

Performance-Based Buildings Coalition — <http://www.p3buildings.org/>

Stanford University Global Projects Center, Financial Literacy in Public-Private Partnerships — <https://gpc.stanford.edu/research/p3-flips-program>

Urban Land Institute, “Ten Principles for Successful Public-Private Partnerships” — http://uli.org/wp-content/uploads/2005/01/TP_Partnerships.pdf

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Justin Marlowe, primary author, is the endowed professor of Public Finance and Civic Engagement at the Daniel J. Evans School of Public Policy and Governance at the University of Washington. He is a certified government financial manager and is the author of more than 70 books and articles on state and local public finance.

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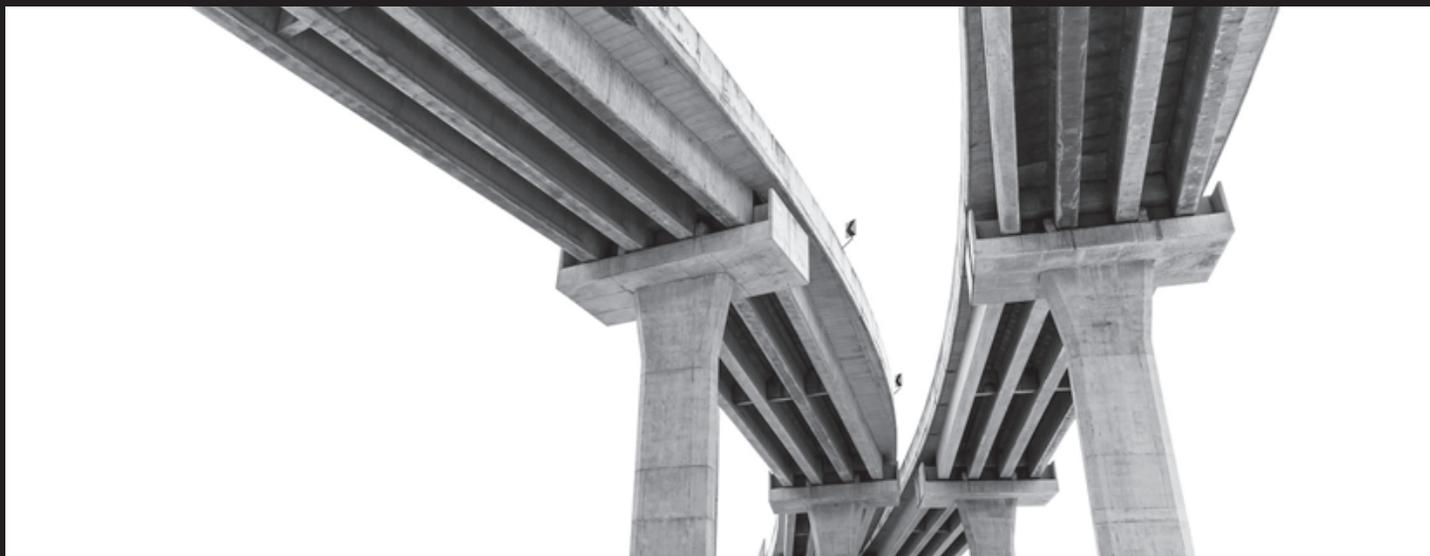
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3. American Society for Civil Engineers (2013), “Report Card for America’s Infrastructure,” available at: <http://infrastructurereportcard.org/a/#p/home>
4. *Governing* Guide to Financial Literacy: Connecting Money, Policies and Priorities (2014), available at: www.governing.com/publicfinance
5. J. Ben Watkins and Nora Wittstruck (2015), “Public-Private Partnerships: An Infrastructure Development Tool to Evaluate with Caution,” *Government Finance Review* (August), pp. 32-36, available at: www.gfoa.org/sites/default/files/GFR081532.pdf
6. For more on municipal bonds, see Volume 1 of the *Governing* Guide to Financial Literacy, available at: www.governing.com/publicfinance
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GLOSSARY OF TERMS AND CONCEPTS

Term	Definition
Availability Payments	Financial feature of some public-private partnerships where a government pays a private partner to make an asset “available” for public use; also known as “shadow tolls;” different from traditional tolls, where users pay for the service directly
Design-Build	Procurement method where a single private entity designs and builds a public project; different from traditional procurement where one private entity designs and a different entity builds
DBOM	Public-private partnership where the private partner is responsible for the design, construction (i.e., “build”), long-term operations and ongoing maintenance of a project
Discount Rate	Mathematical assumption used to set a stream of future payments equal to today’s dollars (i.e., net present value); key point of contention in value for money analysis for public-private partnerships
Force Majeure	Feature of many public-private partnership contracts that outlines what happens to the project in the event of some unforeseen circumstance (literally “acts of God”) like a natural disaster or terrorist attack
High-Performance Procurement	Infrastructure procurement technique that produces standardized, routinized infrastructure projects through design-build-operate-maintain P3s; also known as “performance-based procurement”
Life Cycle Cost Analysis	Technique to estimate the total costs to build, operate and maintain an asset over its useful working life
Private Activity Bond	Bond issued by a state or local government to finance a project built by a private entity; financing tool for many public-private partnerships
Privatization	Infrastructure management process where a state or local government grants a private partner – known as a “concessionaire” – the right to collect tolls or fees from a piece of public infrastructure in exchange for a commitment to maintain that infrastructure for an extended period
Project Finance	Financing technique where a project is financed by its own cash flows rather than by a pledge from the sponsoring organization; often requires equity investments and “non-recourse” loans; common where the private partner in a public-private partnership is responsible for some or all of the financing
Public Sector Comparator	Evaluation process where a government compares the costs of a proposed public-private partnership to the costs of the same project through traditional procurement
Special Purpose Vehicle	Company formed as part of a joint venture P3; owns the assets created through the partnership, and has the power to contract with other entities to operate and maintain those assets; also known as a “project company”
Value for Money	Type of cost-benefit analysis where the benefits to the public of a P3 are compared to the benefits to the public of a traditional public sector procurement

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