

A Primer on Public-Private Partnerships in Construction

by *Monica L. Freeman*

What is a Public-Private Partnership?

The United States is currently faced with the monumental task of updating its infrastructure, and it is apparent that the government alone may not be best equipped to handle the multitude of large scale construction projects. The traditional model for public construction has been “design-bid-build” where the public entity is fully responsible for design, the costs of construction, and ultimately for operation and maintenance of the public improvement. In 2017, the American Society of Civil Engineers gave the United States a D+ rating on infrastructure, suggesting that there must be action and investment in order to avert a national crisis.¹ Research has shown that state governments bear the burden of financing the majority of infrastructure projects, with states shelling out well over three times the amount of the federal government’s \$96

billion investment.² With the government’s increasing intent to combat the infrastructure crisis, many states are turning to private entities to complete these projects through the use of public-private partnerships.

A public-private partnership (“P3”) is a method of procurement that begins when a public agency forms a partnership with a private agent, so that the private agent can assume a role in the project that is traditionally held by the public agent.³ The private agent is sought out for some particular skill, such as the ability to design, construct, or finance a project.⁴ This form of partnership can be particularly beneficial for projects that involve infrastructure, allowing the public agency to maintain accountability and ownership of the project while transferring some risk to the private agent.⁵ Essentially, the partnership allows the public and private entities to pool their skills and resources to complete a project, ultimately benefiting local communities.⁶ Depending on the nature of the investment by the private agent, its investment may be repaid by the public entity through generating public revenue, such as exacting tolls for the use of a bridge.⁷ Other forms of repayment include fees, shadow tolls, availability payments, and local taxation. Establishing a P3 does not automatically create a funding source, however the partnership between the public and private entities allows the participants to have access to financing opportunities and potential cost savings that they may not be able to obtain individually.⁸

Not all projects are best suited for the application of P3. Care must be taken to ensure that a project will serve the public’s interests and needs, with consideration of the private entity’s interests as secondary.⁹ Recently, P3s have been formed to tackle large scale projects that are difficult for public entities to complete.¹⁰ In particular, P3s have been used in

Monica L. Freeman



Monica L. Freeman is a partner at Woods & Aitken LLP and practices in the firm’s Commercial Litigation and Construction Law practice groups. Monica counsels business owners, general contractors, subcontractors, and design professionals on construction and commercial disputes, contract formation, and negotiations. Monica obtained both her undergraduate degree in Business Administration and law degree from the University of Nebraska-Lincoln. Monica is an active member in the Greater Omaha Chapter of the National Association of Women in Construction.

A PRIMER ON PUBLIC-PRIVATE PARTNERSHIPS IN CONSTRUCTION

transportation projects with some success. P3s can also be used to bundle multiple, smaller projects together (e.g. replacement and maintenance of 500 small to mid-sized bridges) to create a larger overall project and to leverage economies of scale.¹¹

Establishing a P3 has several benefits and drawbacks. As previously mentioned, the P3 allows the public entity to transfer the risk of the project, but this transfer also reduces public control and flexibility.¹² Financing by the private entity allows the public entity to avoid the issuance of bonds and incurring additional debt, however public entities may be able to obtain lower interest rates due to tax-exempt status and the perceived low-risk nature of bonds as an investment.¹³ The cost to negotiate and draft the documents to set up a P3 can be significant, however in states with enabling legislation this cost may be reduced because the laws specify many of the material contract terms.¹⁴ The P3 model is well-equipped to deter underbidding and enable faster construction, as private funding is not subjected to the same contingencies as public funding that may become unavailable before or during a project.¹⁵ Entering into a P3 arrangement allows the public entity to utilize the expertise of its private partner for the project, which expertise may not be otherwise available, particularly within small or local governments, without additional cost.¹⁶

Types of Public-Private Partnerships

Public-private partnerships can be used for both new and existing facilities and the types of P3s used may differ depending upon the nature of the facility. The P3 types are generally straightforward, with the names functioning as a descriptor of the overarching responsibilities that are assigned to the private entity. Additionally, each P3 arrangement involves varying degrees of risk for the parties involved.

Design-Build (DB)

Design-build is likely the most recognized and most used type of P3 in the United States. It is so common, in fact, that it may seem out of place in this list. Design-build can be described as “a method of project delivery in which one entity – the design-build team – works under a single contract with the project owner to provide design and construction services.”¹⁷ Design-build can be considered a P3 arrangement because when used for public construction, the public owner transfers the responsibility for project design (along with the associated risks) to the design-builder, creating a partnership of sorts between the public and private sectors. Of all of the types of P3, the design-build arrangement creates the least risk for the private entity. In 2002, Nebraska adopted the legislation that allowed the use of design-build for school districts.¹⁸ In 2008, the Nebraska legislature expanded the use of the design-build delivery method to include all political subdivisions.¹⁹

Design-Build-Operate (DBO)

Design-build-operate, as its name states, is an arrangement where the private entity is responsible for design, construction, and operation of the project. This type of arrangement may be appropriate for projects that require highly technical operations expertise and personnel.²⁰

Design-Build-Maintain (DBM)

Design-build-maintain involves transfer by the public entity to the private entity not only the responsibility to design and build, but also the maintenance of the project.²¹ The parties usually agree to a fixed amount for maintenance services, with the private entity typically bearing the risk of higher than anticipated maintenance costs.²²

Design-Build-Operate-Maintain (DBOM)

Under the design-build-operate-maintain form, the design, construction, operation, and maintenance are all the responsibility of the private entity.²³ The public agency finances the project, and also retains ownership.²⁴ This type of arrangement may be preferred over DBO or DBM because sole responsibility for operation and maintenance by the private entity may reduce the risk that the project falls into disrepair if unexpected costs arise.²⁵

Design-Build-Finance-Operate-Maintain (DBFOM)

Design-build-finance-operate-maintain incorporates all of the responsibilities of its predecessors, but also charges the private entity with the procurement of financing for the project.²⁶ The public entity still maintains ownership of the project.²⁷ While this form involves the highest level of risk for private entities, it is potentially more efficient because it defers to the discretion of the private entity in many aspects.²⁸ Essentially, there are fewer hands stirring the pot, and the private entity has the interest of sufficiently completing the work in a timely and cost-effective manner.

Design-Build-Finance-Operate-Maintain-Transfer (DBFOMT)

Design-build-finance-operate-maintain-transfer is different from DBFOM in one significant way. In this form the private entity owns the project, or the asset, for the term of the P3 agreement. After the agreement concludes, ownership, operations and maintenance responsibility are transferred to the public entity.²⁹

Lease

In the lease form, the private entity enters into a lease agreement for the use of a public facility.³⁰ This is a lower-risk agreement that allows the private entity to use its own

A PRIMER ON PUBLIC-PRIVATE PARTNERSHIPS IN CONSTRUCTION

resources to improve, operate, or maintain the leased facility.³¹ Operation and maintenance is usually subject to a contractual agreement with the public entity, in which the private entity may receive some payment from the public in exchange for using the facility.³² Leases may be attractive because there is often historical data available to show the projected revenue and expenses involved in the operation and maintenance of a facility.³³ The lease of a public asset may also greatly reduce a burdensome budget, as Chicago discovered when it leased a skyway, greatly improving a troubled budget and credit rating.³⁴

Concession

Concession agreements are most often thought of in connection with existing facilities (i.e., brownfields) but can also be used for new construction (i.e., greenfields). Concessions allow the public entity to sell the private entity the right to operate and maintain an existing facility for a specified period of time.³⁵ The private entity is repaid through fees or tolls paid by the end users of the project or facility.³⁶

Current Legislation for and Use of Public-Private Partnerships

With the increasing use of P3s, a majority of states have created legislation to enable more fluid adoption of the

agreements.³⁷ Over a dozen states have adopted legislation that provides broad authorization for these agreements, and nearly twice that number of states authorize P3s in one primary sector.³⁸ Some states, like Nebraska, have yet to approve legislation for these partnerships,³⁹ or have limited authorization to one primary sector,⁴⁰ or authorization may be limited to specific purposes.⁴¹

Legislation is an inherently valuable tool in promoting the acceptance of P3s, and its absence could be an inhibiting factor in the promotion of P3s.⁴² State legislatures possess a vital role in the P3 process, as they are tasked with discerning if these agreements will serve the public interest and provide a public benefit.⁴³ The first legislative step for the adoption of P3s should be the creation of enabling statutes.⁴⁴ States that have enacted enabling statutes have focused on general issues, such as authorization, and also on project governance, proposals, and funding.⁴⁵ These statutes lay the groundwork that helps garner public interest, as well as declaring the requirements to enter into the agreements in order to best serve both parties.⁴⁶

Several states are already models of effective P3 adoption, demonstrating that these procurement mechanisms can be beneficial to the public. For instance, the 495 and 95 Express Lanes were recently completed in Virginia,⁴⁷ a state that has enacted legislation⁴⁸ that encourages the use of P3s for



Safe Harbour Exchange, LLC

An affiliate of Nebraska Title Company

The Qualified Intermediary for Your 1031 Exchange



Jennifer Strand, Esq.



Jody Schmidt



Sarah Watts

Fast, Secure, Reliable Service

- › Simultaneous Exchanges
- › Delayed Exchanges
- › Reverse and Improvement Exchanges



NEBRASKA TITLE COMPANY
SERVICE BEYOND EXPECTATION


402.476.8818 | nebtileco.com

Lincoln | Omaha | Papillion | Beatrice | Kearney | Scottsbluff | David City | Crete | Fairbury | Auburn | Plattsmouth

A PRIMER ON PUBLIC-PRIVATE PARTNERSHIPS IN CONSTRUCTION

transportation projects. The Express Lanes project created nearly 30 miles of highway, allowing the private sector to develop, design, finance, construct, maintain, and operate the project.⁴⁹ This project reduced traffic congestion for daily commuters, in addition to the benefit of carpool lanes.⁵⁰ Interestingly, Virginia has also enacted legislation in relation to P3s, mandating that the public agency must show that the project has public interest.⁵¹ Florida and Pennsylvania have drawn praise in their use of an availability payment approach in their P3 agreements for transportation projects.⁵² Florida's I-4 Ultimate refurbished deteriorating highways, allowing milestone and completion payments that were independent of toll collections.⁵³ Pennsylvania's Rapid Bridge Replacement Project involved the construction or repair of over 500 bridges suffering from structural deficiencies, resulting in twenty percent (20%) cost savings over traditional Department of Transportation methods.⁵⁴ Colorado turned to P3 with its Eagle Project, using a concession agreement between the Regional Transportation District and Denver Transit Partners (a group of private entities) to carry out a voter-approved expansion to rail and bus services in the Denver area.⁵⁵

In some instances, states are pooling their resources to more broadly address infrastructure issues within their boundaries. For example, the West Coast Infrastructure Exchange (WCX) was formed as a non-profit in 2012 and includes representatives from the states of California, Oregon, Washington, and the province of British Columbia, Canada.⁵⁶ The WCX sees its role, in part, as a "translation point" between public and private entities to address infrastructure issues and to develop and share best practices and training on P3 related topics like innovative financing and maintenance methods.⁵⁷

Public-private partnerships are traditionally thought of in the context of large-scale transportation projects, however, given the nationwide infrastructure crisis, it would be prudent for local and state governments and potential private partners to consider ways that P3s could be used for smaller-scale projects and other public assets, like water treatment and waste disposal systems. The following article, *Public-Private Partnership in Nebraska*, by Nick Batter addresses opportunities for P3 and other innovative construction methods in Nebraska. 

The author wishes to thank Patrick Daly, law clerk with Woods & Aitken LLP, for his contributions to this article.

Endnotes

- ¹ *2017 Infrastructure Report Card*, AM. SOC'Y OF CIV. ENGINEERS (2017), available at <https://www.infrastructurereportcard.org/>.
- ² *Public Spending on Transportation and Water Infrastructure, 1956 to 2014*, CONG. BUDGET OFF., (Mar. 2, 2015), available at <https://www.cbo.gov/publication/49910> (citing statistics of \$320 billion compared to \$96 billion from a study of 2014's infrastructure spending).
- ³ *Building-Up: How States Utilize Public-Private Partnerships*

for Social & Vertical Infrastructure, NAT'L CONF. OF ST. LEGIS. (Feb. 16, 2017) ("Building-Up"), available at <http://www.ncsl.org/research/transportation/building-up-how-states-utilize-public-private-partnerships-for-public-multi-sector-vertical-infrastructure.aspx#Whatis>.

- ⁴ PRACTICAL LAW FINANCE, PUBLIC PRIVATE PARTNERSHIPS: ISSUES AND CONSIDERATIONS 3 (2017), available at Westlaw ("Practical Law").
- ⁵ See *Building-Up*, *supra* note 3.
- ⁶ *7 Keys to Success*, THE NAT'L COUNCIL FOR PUBLIC-PRIVATE PARTNERSHIPS (Feb. 25, 2013), available at <https://www.ncppp.org/ppp-basics/7-keys/>.
- ⁷ *Public-Private Partnerships for Transportation: A Toolkit for Legislators*, NAT'L CONF. OF ST. LEGIS. (Dec. 17, 2015), <http://www.ncsl.org/research/transportation/public-private-partnerships-for-transportation.aspx>.
- ⁸ See *Building-Up*, *supra* note 3.
- ⁹ *Id.*
- ¹⁰ *Id.*
- ¹¹ *Id.*
- ¹² See *Practical Law*, *supra* note 4.
- ¹³ *Id.*
- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ *Id.*
- ¹⁷ *What is Design-Build?*, DESIGN-BUILD INSTITUTE OF AMERICA, available at <https://www.dbia.org/about/Pages/What-is-Design-Build.aspx>.
- ¹⁸ See Neb. Laws 2002, LB 391, originally codified at Neb. Rev. Stat. § 79-2001, *et seq.*
- ¹⁹ See Neb. Rev. Stat. § 13-2901 *et seq.*
- ²⁰ See *Practical Law*, *supra* note 4.
- ²¹ *Id.*
- ²² *Id.*
- ²³ *Id.*
- ²⁴ *Id.*
- ²⁵ *Id.*
- ²⁶ *Id.*
- ²⁷ *Id.*
- ²⁸ *Id.*
- ²⁹ *Id.*
- ³⁰ *Id.*
- ³¹ *Id.*
- ³² *Id.*
- ³³ *The Role of PPPs in Addressing Congestion*, U.S. DEPT. OF TRANSP. FED. HIGHWAY ADMIN. (Jul. 2007), available at <https://www.fhwa.dot.gov/publications/publicroads/07july/04.cfm>.
- ³⁴ *Id.*
- ³⁵ See *Practical Law*, *supra* note 4.
- ³⁶ *Id.*
- ³⁷ See generally *State Legislation Matrix*, DESIGN-BUILD INST. OF AM. (Dec. 2017), https://www.dbia.org/resource-center/p3-resources/Documents/p3_state_statute_report.pdf.
- ³⁸ See *Design-Build State Authorization*, DESIGN-BUILD INSTITUTE OF AMERICA (Jan. 2018), available at http://www.dbia.org/advocacy/state/Documents/design_build_maps.pdf (the states that provide wide authorization for P3s are: California, Nevada, Texas, Oklahoma, Arkansas, Michigan, Indiana, Kentucky, Virginia, North Carolina, South Carolina, Georgia, Florida, and Washington, D.C.).
- ³⁹ See *id.* (States that do not currently authorize P3s through legislation include: Montana, Idaho, Wyoming, New Mexico, South

A PRIMER ON PUBLIC-PRIVATE PARTNERSHIPS IN CONSTRUCTION

- Dakota, Nebraska, Kansas, Iowa, New York, Vermont, Rhode Island, and Hawaii).
- ⁴⁰ See *id.* (authorizing P3s in one primary sector in (Washington, Oregon, Arizona, Colorado, North Dakota, Minnesota, Missouri, Louisiana, Wisconsin, Illinois, Tennessee, Alabama, Ohio, West Virginia, Pennsylvania, New Jersey, Delaware, Maryland, Massachusetts, New Hampshire, and Maine).
- ⁴¹ See *id.* (limiting P3 agreements to a specific purpose in Utah, Alaska, Mississippi, and Connecticut).
- ⁴² SYRACUSE UNIVERSITY, PUBLIC-PRIVATE PARTNERSHIPS: BENEFITS AND OPPORTUNITIES FOR IMPROVEMENT WITHIN THE UNITED STATES 18 (Jul. 20, 2017), available at <http://eng-cs.syr.edu/wp-content/uploads/2017/04/P3Report.pdf>.
- ⁴³ See *Building-Up*, *supra* note 3.
- ⁴⁴ *Id.*
- ⁴⁵ See *id.* (Addressing authorized entities, limitations, project types, bids, confidentiality and fees, consultants, public commentary, legislative and government involvement, advisory boards, tolling, revenue sharing, funding mechanisms, tax exemptions, cost-benefit analysis, labor issues, default and bankruptcy, and specific provisions).
- ⁴⁶ *Id.*
- ⁴⁷ *P3 Market Outlook: Robust Pipeline Ahead*, SITE SELECTION MAG. (Sep. 2017), available at <https://siteselection.com/issues/2017/sep/cover.cfm>.
- ⁴⁸ VA. CODE ANN. § 33.2-1800 *et seq.* (2017); VA. CODE ANN. § 56-575.1 *et seq.* (2017)
- ⁴⁹ Project Profile: I-95 HOV / HOT Lanes, CENTER FOR INNOVATIVE FIN. SUPPORT, available at https://www.fhwa.dot.gov/ipd/project_profiles/va_i95.aspx.
- ⁵⁰ *Id.*
- ⁵¹ See *Building-Up*, *supra* note 3; see also VA. CODE ANN. § 33.2-1803.1 (2017).
- ⁵² See *Building-Up*, *supra* note 3.
- ⁵³ Project Profile: I-4 Ultimate, CENTER FOR INNOVATIVE FIN. SUPPORT, available at https://www.fhwa.dot.gov/ipd/project_profiles/fl_i4ultimate.aspx; See also FLA. STAT. § 334.30, § 343.875. and §348.0004 (2017).
- ⁵⁴ Project Profile: Pennsylvania Rapid Bridge Replacement Project, CENTER FOR INNOVATIVE FIN. SUPPORT, available at https://www.fhwa.dot.gov/ipd/project_profiles/pa_rapid_bridge.aspx; see also 74 PA. CONS. STAT. ANN. §§ 9101 to 9124 (2017).
- ⁵⁵ Project Profile: Eagle Project, CENTER FOR INNOVATIVE FIN. SUPPORT, available at https://www.fhwa.dot.gov/ipd/project_profiles/co_eagle_project.aspx; see also COL. REV. STAT. § 32-9-101, § 42-1-1201 *et seq.*, §43-2-219, § 43-3-202.5, and §43-4-806 (2017).
- ⁵⁶ *About Us*, WEST COAST INFRASTRUCTURE EXCHANGE, available at <http://westcoastx.com/about/>.
- ⁵⁷ *Id.*



ARBITRATION AND MEDIATION SERVICES

The Honorable William M. "Bill" Connolly, retired after twenty-two years on the bench with the Nebraska Supreme Court, is now Of Counsel with the firm of Erickson | Sederstrom practicing in Arbitration and Mediation.

WWW.ESLAW.COM
(402)384-6896
BCONNOLLY@ESLAW.COM