

Keys For P3 Contracting Success



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Citizen's Guide to P3
Projects

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Webinar

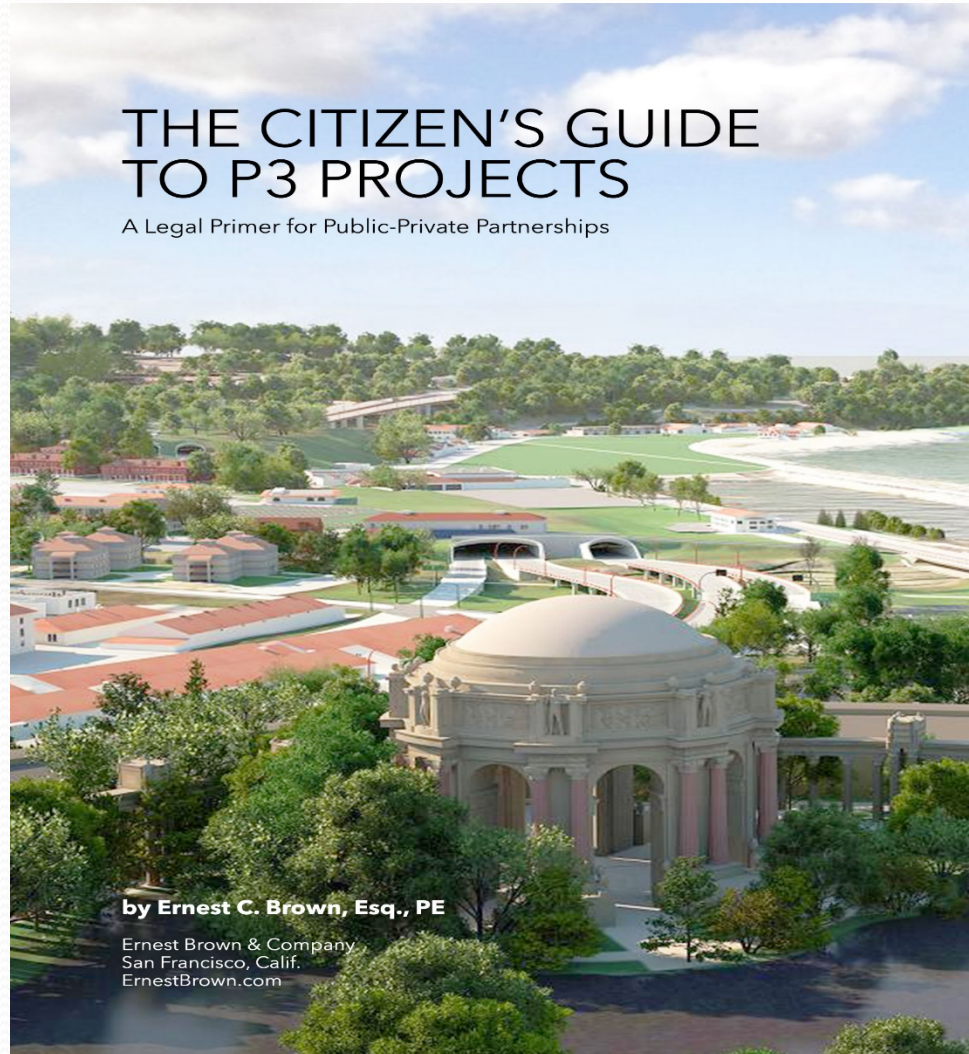
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**Public Private
Partnerships
& the New
ConsensusDocs
900 and 910**

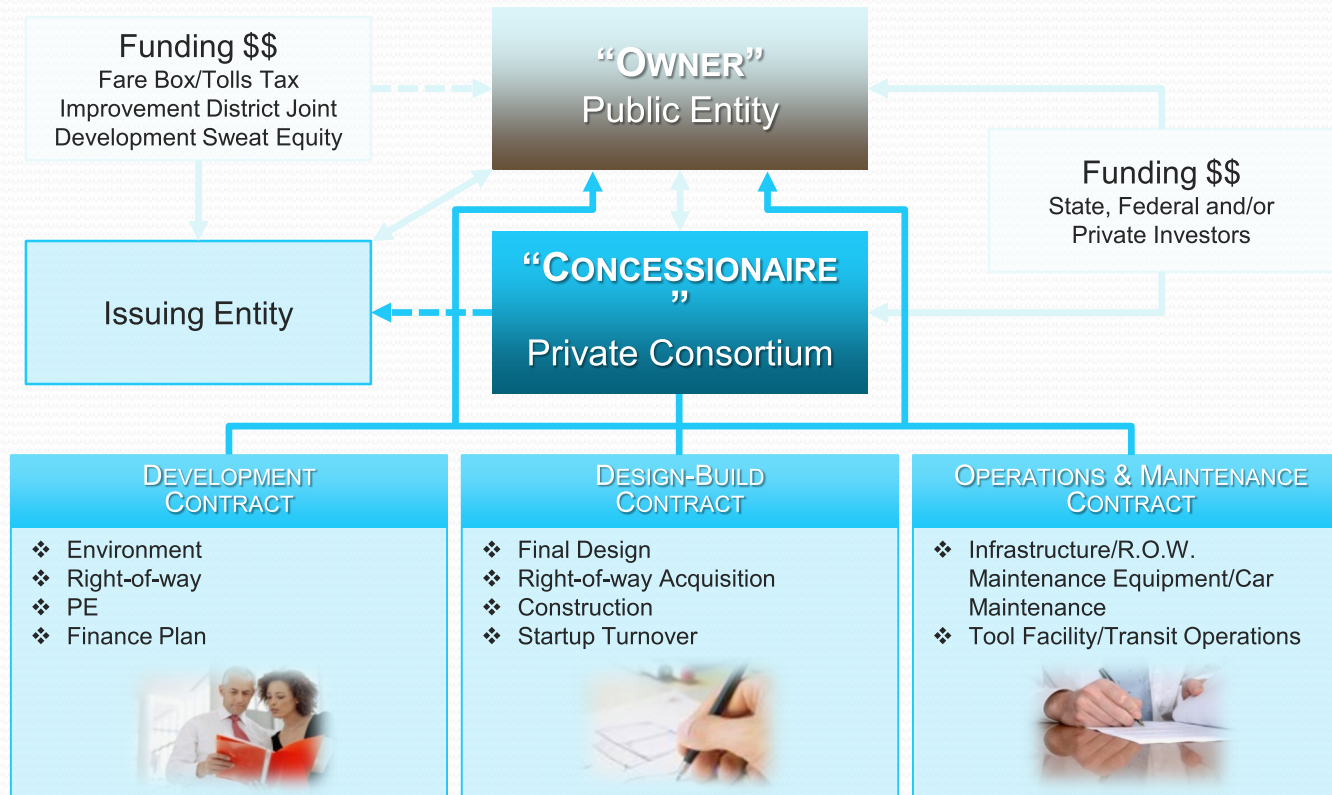
Speaker: Ernest C Brown, Esq PE

**THE CITIZEN'S GUIDE
TO P3 PROJECTS**

A Legal Primer for Public-Private Partnerships



P3 Contract Structure



What is the New CD 900 Form?

It is a DBFOT Agreement!

- **Design, Build, Finance, Operation & Transfer**
- **Use with P3 Projects of All Sizes**
- **Template for Concession Agreement**
- **Use w/ CD 415 Design Build + 910 O & M Agreements**
- **Checklist of Major P3 Concession Issues**
- **A Fair Allocation of Risk**

What is the New CD 910 Form?

It is an **O & M** Agreement

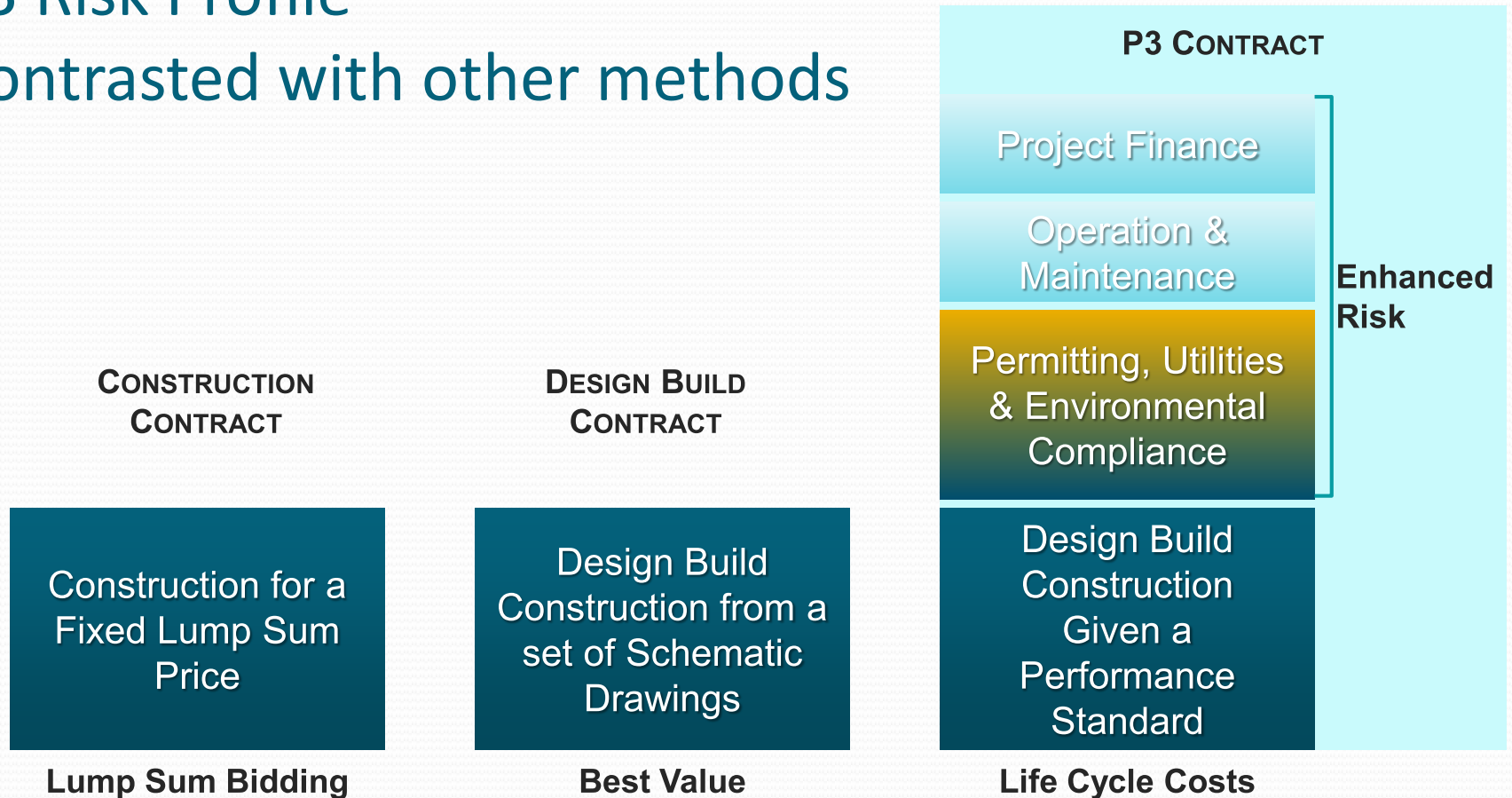
- Template: **O**perations & **M**aintenance Contracts
- Can Be Used for most O & M Assignments
- Emphasis on Long Term Contracts
- Use with CD 900 Concession Agreement
- Checklist of Major O & M Contract Issues
- A Fair Allocation of Risk

The Six Biggest Risks in P3

- Cost of Bid Preparation
- Proposal Quantity Estimates
- Scope Creep During Design
- Utility Relocations
- Third-Party Permits
- Environmental Issues

P3 Risk Profile

Contrasted with other methods



History of P3

- P3s are discussed as a cutting-edge approach to construction financing, yet it is one of the oldest methods used for delivering projects to communities.
- One of the first U.S. Supreme Court cases involving public works was a dispute between the City of Boston and two private infrastructure companies.
 - The year of the case? 1837!
 - *Proprietors of Charles River Bridge v. The Proprietors of Warren Bridge* (U.S. Supreme Court 9 L. Ed. 773 (1837)).

Why the Current Trend Towards P₃'s?

Fiscal crisis in the public sector

Increased capital mobility from the private sector

Private sector is suited to support increased complexity of historically government tasks

Efficiency driven by market incentives



WHY GOVERNMENTS WANT P3's

Risk Transfer

- Revenue/Rates
- Construction
- Technology
- Operations/Maintenance
- Lifecycle/Capital Reinvestment

Resources

- Minimize use of scarce public resources
 - Personnel
 - Monetary
- Access private sector capital to reduce/delay public sector outlays
 - Debt and equity
- Cost certainty
- Projects return to the Public Sector

Expertise

- Access to top firms
- New technologies
- Operational best practices
- Drive value with lifecycle costing
- 'Pre-paid' O&M and Lifecycle

Time

- Accelerate delivery of high priority projects
- Streamlined development process
- Fast-tracked financing using private sector experience and capital resources
- Government can present that projects are moving forward and completed

Growth of Infrastructure Megaprojects

		2005	2006	2007	2008	2009	2010	2011
U.S. Construction Projects	Project count	65,737	124,492	125,745	154,675	177,743	184,423	184,422
\$1 Billion or More	Project count	-	8	10	14	55	85	103
	Percent of total	N/A	0.0064%	0.0080%	0.0091%	0.0309%	0.0461%	0.0559%
\$500 Million or More	Project count	116	157	190	181	158	278	194
	Percent of total	0.1765%	0.1261%	0.1511%	0.1170%	0.0889%	0.1507%	0.1052%

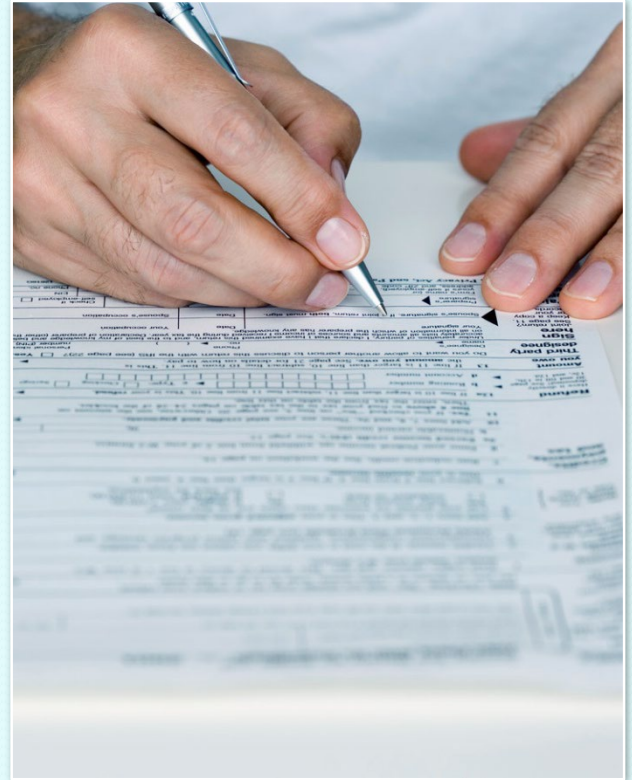
Average project sizes continue to grow beyond the rate of inflation, with a proliferation of “mega-projects”

How to Execute a P3 Project

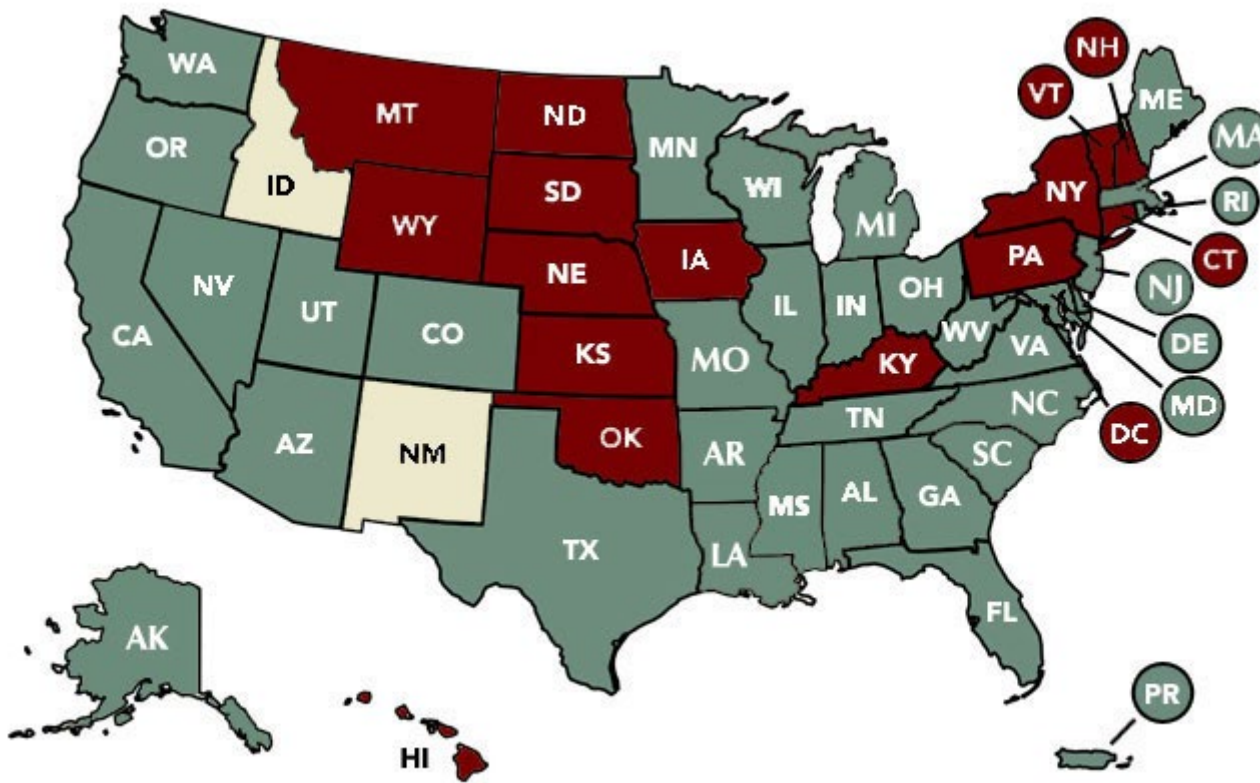
- The Project should convey great public value.
- The Project should have underlying profitability.
- State and municipal governments are paying attention to the successes in other jurisdictions.
- The process will change the ways things are done.
 - More teaming with more varied players
 - More use of capital and financial strength
 - More development costs and bid expertise
 - Less importance on local relationships and knowledge
- Need to decide what role you want to play.

P3 – Typical Legal Structure

- ❖ Development and operation team typically has no interest in land; no fee or lease interest.
- ❖ Concession structure used.
- ❖ Has to be financeable.
- ❖ Allocation of all or part of revenues for toll road.
- ❖ Payments conditioned on performance.
- ❖ Default by government agency results in loss of facility usage rights, etc.



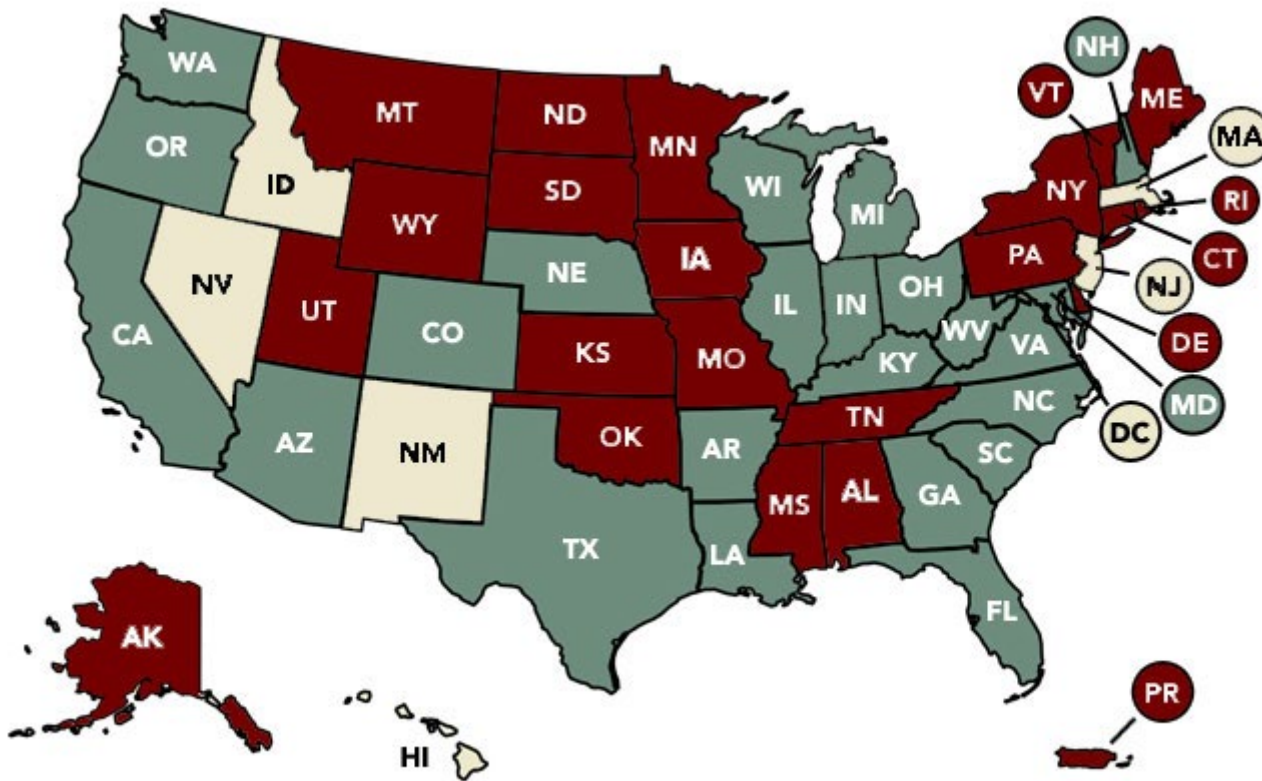
Horizontal P3 Projects



Map Legend

Green	Yes
Red	No
Tan	Not Definitive

Vertical P3 Projects

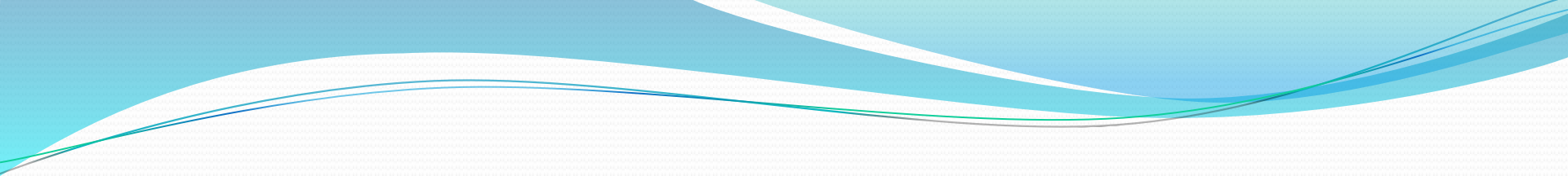


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Shifting Risk to Concessioner

- Design and Development Risk
 - Design suitability, testing problems, delivery of design.
- Construction Risk
 - Permits, environmental, construction schedule & cost.
- Financing Risk
 - Securing financing, maintaining financing, price escalation.
- Operation Risk.
 - Service performance, security, operating costs, maintenance cost, latent defects, demand (uncertain revenue).

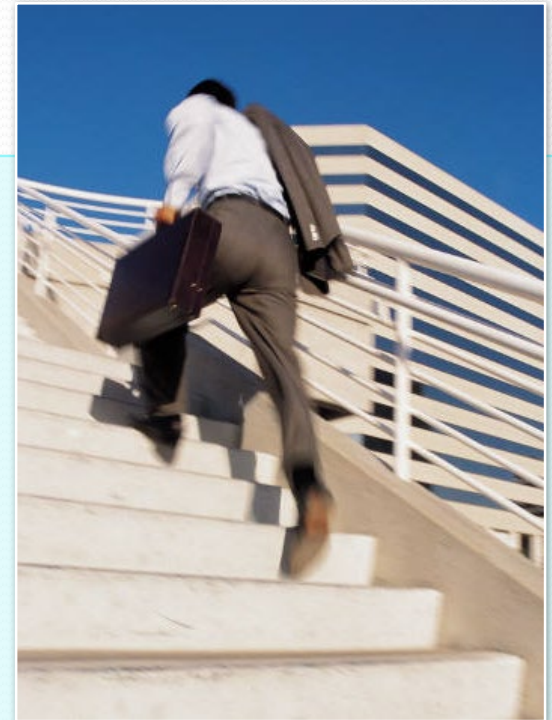


Some Major Players Have Quit & Why

- **Fluor**
- **Granite**
- **Others**

P3 – First Steps

- ❖ Citizen Initiated Project Concept
- ❖ Agency prepares outline requirements.
- ❖ RFQ advertised and issued.
- ❖ Short list of about three proposers who receive RFP.
- ❖ RFP includes performance specifications and proposed project agreement.
- ❖ Small stipend for losing RFP proposers.
- ❖ 6-9 months to prepare response including full schematic design and economic outline.



Construction

- Construction phase is generally the riskiest portion of the project as it entails considerable uncertainty (e.g., site conditions, weather and availability of labor and materials).
- Design-Build (DB) agreement with contractor transfers all construction risk from Project Concessionaire to virtually all design Build Contractor.
- Significant layers of protection for lenders.

Level of Construction Default	Contractor	
	Contractor Parent Guarantee	• Typically 50% of DB contract value
	Demand L/C	• 5 – 15% of DB contract value (scaled to achieve rating target)
	Subguard Insurance	• Insurance on sub-contractor
	Project Co Equity	• 10 – 15% of construction period costs
	Project Co Debt	


ConsensusDocs 900

KEY PROVISIONS

- Source of Funds - §5.1
- Critical Closing Dates - §3.7
- Financial Models - § 3.9.5
- Risk Sharing Provisions - §3.9.7
- Handback of Project to Owner - §7.
- Availability payments - § 9.1.


ConsensusDocs 910

Operation & Maintenance



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BUILDING A BETTER WAY

ConsensusDocs® 910
STANDARD OPERATION AND MAINTENANCE AGREEMENT



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This document was developed through a collaborative effort of organizations representing a wide cross-section of the design and construction industry. This document has important legal and insurance consequences, and it is not intended as a substitute for competent professional services and advice. This



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