Keys For **P3** Contracting Success

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Webinar
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Public Private Partnerships & the New ConsensusDocs 900 and 910

Speaker: Ernest C Brown, Esq PE
P3 Contract Structure

Funding $\$
- Fare Box/Tolls Tax
- Improvement District
- Joint Development
- Sweat Equity

"OWNER"
Public Entity

Issuing Entity

"CONCESSIONAIRE"
Private Consortium

Funding $\$
- State, Federal and/or Private Investors

DEVELOPMENT CONTRACT
- Environment
- Right-of-way
- PE
- Finance Plan

DESIGN-BUILD CONTRACT
- Final Design
- Right-of-way Acquisition
- Construction
- Startup Turnover

OPERATIONS & MAINTENANCE CONTRACT
- Infrastructure/R.O.W.
- Maintenance Equipment/Car Maintenance
- Tool Facility/Transit Operations
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: Operations & Maintenance 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

**CONSTRUCTION CONTRACT**
- Construction for a Fixed Lump Sum Price
- Lump Sum Bidding

**DESIGN BUILD CONTRACT**
- Design Build Construction from a set of Schematic Drawings
- Best Value

**P3 CONTRACT**
- Project Finance
- Operation & Maintenance
- Permitting, Utilities & Environmental Compliance
- Design Build Construction Given a Performance Standard
- Life Cycle Costs

Enhanced Risk
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? 

<table>
<thead>
<tr>
<th>Reason</th>
</tr>
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<tbody>
<tr>
<td>Fiscal crisis in the public sector</td>
</tr>
<tr>
<td>Increased capital mobility from the private sector</td>
</tr>
<tr>
<td>Private sector is suited to support increased complexity of historically government tasks</td>
</tr>
<tr>
<td>Efficiency driven by market incentives</td>
</tr>
</tbody>
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# Why Governments Want P3’s

<table>
<thead>
<tr>
<th>Risk Transfer</th>
<th>Expertise</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Revenue/Rates</td>
<td>• Access to top firms</td>
</tr>
<tr>
<td>• Construction</td>
<td>• New technologies</td>
</tr>
<tr>
<td>• Technology</td>
<td>• Operational best practices</td>
</tr>
<tr>
<td>• Operations/Maintenance</td>
<td>• Drive value with lifecycle costing</td>
</tr>
<tr>
<td>• Lifecycle/Capital Reinvestment</td>
<td>• ‘Pre-paid’ O&amp;M and Lifecycle</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Resources</th>
<th>Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Minimize use of scarce public resources</td>
<td>• Accelerate delivery of high priority projects</td>
</tr>
<tr>
<td>• Personnel</td>
<td>• Streamlined development process</td>
</tr>
<tr>
<td>• Monetary</td>
<td>• Fast-tracked financing using private sector experience and capital resources</td>
</tr>
<tr>
<td>• Access private sector capital to reduce/delay public sector outlays</td>
<td>• Government can present that projects are moving forward and completed</td>
</tr>
<tr>
<td>• Debt and equity</td>
<td></td>
</tr>
<tr>
<td>• Cost certainty</td>
<td></td>
</tr>
<tr>
<td>• Projects return to the Public Sector</td>
<td></td>
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## Growth of Infrastructure Megaprojects

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

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

Map Legend

- **Green**: Yes
- **Red**: No
- **Tan**: Not Definitive

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.

<table>
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<th>Level of Construction</th>
<th>Description</th>
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<tr>
<td>Contractor</td>
<td>• Typically 50% of DB contract value</td>
</tr>
<tr>
<td>Contractor Parent Guarantee</td>
<td>• 5 – 15% of DB contract value (scaled to achieve rating target)</td>
</tr>
<tr>
<td>Demand L/C</td>
<td>• Insurance on sub-contractor</td>
</tr>
<tr>
<td>Subguard Insurance</td>
<td>• 10 – 15% of construction period costs</td>
</tr>
<tr>
<td>Project Co Equity</td>
<td></td>
</tr>
<tr>
<td>Project Co Debt</td>
<td></td>
</tr>
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</table>
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.
Questions Keys For P3 Contracting Success

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