Public-Private Partnerships
Opportunities and Risks for Consulting Engineers
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Opportunities and Risks for Consulting Engineers

Edited by
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and Patricia B. Gary

ACEC
American Council of Engineering Companies
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Preface

For many public owners and other stakeholders in infrastructure projects, public-private partnerships (P3s) offer tremendous promise as a source of development and financing of much-needed new (greenfield) and refurbishment/improvement (brownfield) infrastructure projects. In many respects, virtually all private sector participants involved in the financing, design, construction, and operation and maintenance of public infrastructure projects at the federal, state, and municipal levels stand to gain from the realization of this promise.

Nonetheless, P3s, despite all the promise and opportunity they generate, are not a panacea for the challenges of infrastructure development and funding.

This book focuses on the opportunities and risks presented by P3s for consulting engineers. Chapters 1 to 3 in Part 1 of this book define various opportunities and roles for consulting engineers and discuss domestic and international experiences in P3s. Chapters 4 to 7 in Part 2 focus on certain aspects of the professional practice of consulting engineers involved in P3s. Chapter 8 in Part 3 discusses the risk allocation and professional liability exposure issues for consulting engineers in the P3 context.

For consulting engineers, P3s involve new and challenging opportunities and risk exposures, all of which need to be understood by consulting engineers. What has the domestic experience and international experience demonstrated in terms of opportunities and risks for consulting engineers involved in P3 projects? What is different about evaluating risk for consulting engineers involved in P3 projects? What roles and opportunities do consulting engineers have on P3 projects? What are the responsibilities and risks associated with those varying roles? How can and should consulting engineers effectively manage P3 risks? What type of contract terms impact risk exposure for consulting engineers? What is the role of insurance in managing risk on P3 projects?

These are some of the many questions explored in this book.

Anyone reading this book with the expectation that it will serve as a piece of wholesale and unqualified advocacy for public-private partnerships will be mistaken and disappointed. We have far more modest, realistic, and pragmatic objectives in mind in writing the book. P3s will not be right for many, perhaps most, consulting engineers. For others, they may represent and deliver a tremendous opportunity for future prosperity. This book is intended to avoid judgments and leave the deci-
sion of involvement in a P3 project to the individual consulting engineer (or his/her firm). The objective of this book is to provide an informed and balanced foundation upon which consulting engineers can make prudent judgments about their involvement in P3 projects.

The authors—individually and collectively—bring to this objective significant experience and knowledge.

Presently, there is not much written about P3s from the specific perspective of consulting engineers. In that respect, our expectation is that this book will contribute to the experience, knowledge, and learning on this subject.
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Part 1
P3 Opportunities and Experience
1

What Are Public-Private Partnerships?
Brent Walters

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1.0 Introduction

Private sector involvement in the process, risks, and rewards of building or maintaining public infrastructure and services is not necessarily a new concept. However, the recent surge in interest in public-private partnerships (P3s or PPPs) appears more focused on increasingly complex arrangements between the public and private sectors. This chapter introduces the concept of the public-private partnership, provides general background on the project delivery method, and establishes a common definition of P3 useful for the consulting engineer. Additionally, this chapter provides a brief history of the P3 model and examines the increasing interest in—and
utilization of—the P3 method domestically and internationally. To date, most P3s have been used with transportation projects. Not surprisingly, the majority of existing literature focuses on the P3 in the transportation setting. This chapter also explores the P3s in other sectors to provide a broader context and encourage the consulting engineer to consider all possible P3 projects.

1.0.1 What Is a P3? What Is Not?

Private enterprise, government, and advocacy groups refer generically to P3s as arrangements involving public and private sectors with varying degrees of financial investment by and operational responsibility of the private partner. However, there is a dearth of material defining or explaining the P3 from the consulting engineer’s perspective. In addition, existing definitions focus on the contractual aspect of the delivery method—the binding agreement between government and non-government entities—rather than on the unique roles of the parties in such an agreement. In the P3, the public’s historically exclusive role in the linear planning, funding, design, construction, operation, and maintenance of a project is handed over, in whole or in part, to the private partner in exchange for a multitude of (potential) benefits. Consulting engineers are familiar with the traditional approach in which the public owner contracts separately for each phase or cycle of a project. In the P3 project, some or all of these phases are handed over to a single entity in exchange for that entity taking on project risks traditionally borne by the public owner.

1.0.2 Some Definitions of the P3

For the consulting engineer, settling on a definition of P3 is useful to better clarify the engineer’s risks, rewards, and role in a P3 project. Instead of focusing on the P3 as a creature of contract, it is more useful to focus on the P3 as a concept. While a P3 is, as the name implies, a collaboration between the public and private sectors for the purpose of delivering a service or infrastructure asset, we will focus here on the sharing of ideas, expertise, and financing and the varying degrees of participation by the private partner in the long-term risks and rewards of the project.

Existing P3 definitions include:

• “Contractual agreements between public and private entities that expand traditional private sector role in the delivery of infrastructure projects.”¹
• “A contractual agreement between a public agency (federal, state or local) and a private sector entity. Through this agreement, the skills and assets of each sector . . . 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 risks and rewards potential in the delivery of the service and/or facility.”²
• “Legally-binding contract between government and business for the provision
of assets and the delivery of services that allocates responsibilities and business risks among the various partners.”³

In addition, states with some form of P3 agency, enabling legislation, or policy all define the delivery method differently. In its Final Report to the Governor and General Assembly of the State of Maryland, that state’s Joint Legislative and Executive Commission on Oversight of Public-Private Partnerships provides a thorough summary of other states’ definitions and use of P3s.⁴ The report gives additional information the reader may find useful regarding states’ policy statements, the type of project a state may procure utilizing the P3 model (many states limit the use to transportation projects), and other useful information. Table 1 (pages 6–7) summarizes how ten states and Puerto Rico define a public-private partnership.

In any case, most P3 definitions are so broadly written that some more traditional procurements would fall under their purview, including nearly any instance where the public hires out a governmental function (defense contracting, debt collection on government loans, the Federal Reserve bank, outsourcing of professional services, trash collection, Medicare)—”everything from outsourcing of services to full privatization of government activities”⁵—to a private business.

1.0.3 A Definition We Can Agree on for the Consulting Engineer

For purposes of this publication and from the consulting engineer’s point of view, a public-private partnership is a project-delivery method in which a private entity takes on risks and responsibilities in addition to design and construction of a public project. No doubt, a true P3 includes some amount of risk transfer. For example, by procuring operation and maintenance of a facility or structure, the public owner transfers the risk of poor construction to the private partner by requiring the private partner to bear the costs associated with the poor construction (and not by coincidence does the owner hope to get better quality design and construction). However, even in the P3 project with the greatest private involvement, there remains a sharing of risks and responsibilities. “These partnerships are not simply tools for funding projects, but they require full commitment from all partners for the entire undertaking.”⁶

Is a Design-Build Project a P3?

The design community has become more familiar and willing to provide services for the non-public owner due to the growth and (purported) success of the design-build project delivery method. In the design-build world, however, the builder’s “investment” is generally limited to a guaranteed maximum price in designing and constructing the project. With only standard construction callback warranties to consider, the builder is less concerned with the project’s long-term

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<tr>
<th>State (and projects covered by legislation)</th>
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<tr>
<td>Maryland (Current)</td>
<td>A sale or lease agreement between a unit of state government and a private entity under which the private entity assumes control of the operation and maintenance of an existing state facility; or the private entity constructs, reconstructs, finances, or operates a state facility or a facility for state use and will collect fees, charges, rents, or tolls for the use of the facility.</td>
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<td>Arizona (Transportation P3s only)</td>
<td>The development or operation of any transportation facility using a variety of project delivery methods and forms of agreement, which may include predevelopment agreements; agreements or concessions to design, build, finance, operate or maintain an eligible facility; and any other method or agreement that will serve the public interest.</td>
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<td>California (Transportation P3s only. Separate statute addresses design-build for all state projects.)</td>
<td>A comprehensive development agreement with DOT and a private entity for the planning, design, development, finance, construction, reconstruction, rehabilitation, improvement, acquisition, lease, operation or maintenance of highway, public street, rail or related facilities supplemental to existing facilities currently owned and operated by DOT.</td>
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<tr>
<td>Colorado (Transportation P3s only)</td>
<td>A nontraditional arrangement between DOT and one or more private or public entities that provides for: acceptance of a private contribution to a transportation system project or service in exchange for a public benefit concerning that project or service other than only a money payment; sharing of resources and the means of providing transportation system projects or services; or cooperation in researching, developing, and implementing transportation system projects or services.</td>
</tr>
<tr>
<td>Colorado (All other P3s)</td>
<td>A nontraditional arrangement between an agency and one or more nonprofit entities that provides for acceptance of a nonprofit contribution to an agency project or service in exchange for a public benefit concerning the project or service other than only a money payment; sharing of resources and the means of providing projects or services; or cooperation in researching, developing, and implementing projects or services.</td>
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<td>Connecticut (Addresses all types of P3 projects)</td>
<td>The contractual relationship between a state agency and a private entity to design, develop, finance, construct, operate or maintain one or more state facilities where the agency has estimated that the revenue generated by such facilities, in combination with other funding sources, including appropriated funds, will be sufficient to fund the cost to develop, maintain and operate such facility. A partnership agreement may not be established for the operation and maintenance of a facility unless there is also a financing and development component.</td>
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<tr>
<td>State (and projects covered by legislation)</td>
<td>Definition</td>
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<td><strong>Florida</strong> (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.)</td>
<td>Transportation P3s are defined as agreements with private entities, or consortia thereof, for the building, operation, ownership, or financing of transportation facilities.</td>
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<td><strong>Illinois</strong> (Applicable to transportation only)</td>
<td>The agreement between the contractor and the transportation agency (DOT or Illinois State Toll Highway Authority) relating to one or more of the development, financing, or operation of a new or existing road, highway, bridge, tunnel, intermodal facility, intercity or high-speed passenger rail, or other transportation infrastructure, excluding airports.</td>
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<tr>
<td><strong>Minnesota</strong> (Applicability limited to toll facilities)</td>
<td>Development agreement is a written agreement between a road authority and a private operator that provides for the development, financing, design, construction, improvement, rehabilitation, ownership, and operation of a toll facility.</td>
</tr>
<tr>
<td><strong>Puerto Rico</strong> (Legislation covers all types of P3s.)</td>
<td>Any agreement between a government entity and one or more persons to delegate operations, functions, services, or responsibilities of any government entity, as well as to design, develop, finance, maintain or operate one or more facilities, or any combination thereof.</td>
</tr>
<tr>
<td><strong>Texas</strong> (Transportation P3s only)</td>
<td>CDAs are agreements that provide for design and construction, rehabilitation, expansion, or improvement and may also provide for the financing, acquisition, maintenance, or operation of a toll project; facilities on the Trans-Texas Corridor; a project that includes both tolled and non-tolled lanes; a project in which the private entity has an interest in the project; or a project financed wholly or partly with private activity bonds.</td>
</tr>
<tr>
<td><strong>Virginia</strong> (Transportation P3s only)</td>
<td>An agreement between a public entity and a private entity to develop, finance, construct, operate or maintain any road, bridge, tunnel, overpass, ferry, airport, mass transit facility, parking facility, port facility or similar commercial facility used for transportation purposes.</td>
</tr>
<tr>
<td><strong>Virginia</strong> (All other P3s)</td>
<td>An agreement between a public entity and a private entity to develop, finance, construct, operate or maintain any education facility, any building or facility that meets a public purpose and is developed or operated by a public entity, any improvements or equipment to enhance public safety, utilities, broadband, telecommunications and other communications and technology infrastructure, recreational facilities, improvements to unimproved state or local land, or solid waste management facilities.</td>
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considerations and instead focuses on delivering a project that meets the owner's prescribed requirements at the lowest price. Additionally, the design-build approach is no different than more traditional delivery methods in that the designer-builder need not worry about funding the operation, as the public owner has already secured the financing necessary to build the project.\textsuperscript{7} For these reasons, the definition of P3 offered here does not include the design-build delivery system.\textsuperscript{8}

\subsection*{1.1 P3 Variations}

Even with the refined definition provided here, there remains a multitude of potential forms of P3 involving planning, design, construction, financing, operation, or maintenance of the public asset or service, a “plethora of combinations of P3s that mix different elements and transfer different types of risk to the private sector.”\textsuperscript{9} Regardless of the P3 flavor, the concept remains as follows: to capitalize on the ingenuity of free enterprise, with potentially easier access to capital, in order to share responsibilities with the government in delivering public services or infrastructure. In other words, a P3 means “using private-sector resources to meet America’s essential needs.”\textsuperscript{10} Or, better yet, “to introduce a relevant novelty in the pursuing of a solution to a new or unsolved need.”\textsuperscript{11}

Though the P3 method has as many versions as there are acronyms to describe them (DBOM, DBOT, DBF), the upshot for the consulting engineering community is that \textit{the P3 should always include the “Big D”—design}. Precisely \textit{who} the consulting engineer works for can change depending on the \textit{form} of P3 at play, and \textit{what} is expected from the consulting engineer may change as well. These concerns are discussed below, but first it is useful to briefly describe the types of P3, depicted in Figure 1, above, which shows the various combinations of responsibilities shared between the private and public partners.
Generally, there are three different P3 groups: (1) design-build-plus, (2) lease arrangements, and (3) transfer of ownership. These groups follow the continuum depicted in Figure 2, above, in that group 1 (design-build-plus) includes more public responsibilities and group 3 (transfer of ownership) includes more private responsibilities. It only follows that risk borne by the private partner increases as the private partner takes on more risk. The interrelation between responsibility and risk is demonstrated in Figure 2.

1.1.1 **Design-Build-Plus**

In “design-build-plus,” the private partner is solely responsible for designing and constructing the project and takes on one or more risks after completion of construction. Design-build-plus variations include the following.\(^\text{12}\)
Design-Build-Operate/Design-Build-Maintain. This is similar to the customary design-build project delivery method except that the builder has an additional role beyond the completion of the project. While the public partner retains ownership of the asset and finances the project, the private partner stays on board for a stated period of time and is responsible for the asset’s maintenance. Risk of poor design and construction shifts to the builder, at least during the project’s maintenance phase. As in the design-build-maintain variation, discussed below, the private partner’s responsibilities do not end at completion of construction in design-build-operate. Instead, the private partner remains responsible for operation of a facility or asset. Adding the operational responsibilities to the private partner “maintains the continuity of private sector involvement and can facilitate private-sector financing of public projects supported by user fees generated during the operational phase.”

- Examples of the design-build-operate or design-build-maintain model include New Jersey Transit’s Hudson-Bergen Light Rail project. Here, the public partner retained financial risk, but under a 15-year fixed-price agreement, the private partner designed and constructed the light rail segments with a guaranteed completion date, provided the vehicle fleet, and operated and maintained the system. The San Juan Tren Urbano is another recent example using a structure similar to the Hudson-Bergen project.

- The water industry provides additional examples using the design-build-operate model, where private water companies contract with public water utilities for the development and operation of new facilities, such as the Lake Pleasant Water Treatment Plant in Phoenix.

Design-Build-Operate-Maintain. In this arrangement, the public partner retains responsibility for funding the project but the private partner assumes all other responsibilities and risks for a stated duration of time. “The public [partner] maintains ownership and retains a significant level of oversight of the operations through terms defined in the contract.”

- Example: The Las Vegas Monorail Project started as a privately owned transit system built by two casino companies. The state contracted with the private entities to design-build-operate-maintain an expanded system to serve the Vegas Strip.

Design-Build-Finance-Operate-Maintain (DBFOM). Adding financing responsibilities into the mix, the DBFOM model is the most “P3ish” within the design-build-plus category, as everything but ownership is transferred to the private partner. The degree to which the private partner is responsible for financing can vary significantly. “One commonality that cuts across all DBFOM projects is that they are either partly or wholly financed by debt leveraging revenue streams dedicated to the project.” This variant is common in the transportation sector, where user fees (i.e.,