



P3 Infrastructure Delivery: **Principles for State Legislatures**

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Preface

This policy brief is designed as a supplement to existing National Conference of State Legislatures resources on public-private partnerships (P3s). Informed heavily by the NCSL Foundation Partnership on Multi-Sector Public-Private Partnerships, this report attempts to connect concepts from the NCSL P3 Toolkit with real-world examples and developments in P3 enabling statutes.

Portions of the content within were originally published in the NCSL report, *Public-Private Partnerships for Transportation: A Toolkit for Legislators* (2010) and NCSL's online document, *Building Up: How States Utilize Public-Private Partnerships for Social & Vertical Infrastructure* (2016).

In 2010, NCSL released the P3 Toolkit for Legislators. This report was the final product of the NCSL Foundation's P3 Partners Project, a multi-year initiative partnering state lawmakers with private sector stakeholders to examine P3s and the policy options available to states, with an emphasis on surface transportation systems.

The P3 Partners Project was in response to increased awareness in Congress to the use of P3s and the desire to ensure protection of the public interest in such agreements.

To contribute a balanced, informed perspective that also would help protect states' ability to use P3s as appropriate, NCSL formed a working group of state legislators, legislative staff and representatives of private sector entities to assemble reliable information and identify effective tools for considering P3s in the context of overall transportation funding decisions.

The key focus of NCSL's P3 Toolkit is the formulation of nine principles to help state legislators as they consider and perhaps adopt a procurement and financing approach involving P3s. Roles and responsibilities of various policy actors—legislative branch, executive branch, private sector—also are described. The Toolkit's emphasis is on surface transportation projects.

Existing NCSL P3 Resources

- P3 Toolkit for Legislators—The 2010 P3 Toolkit for Legislators is the most highly regarded P3 resource for state legislators. The toolkit addresses topics and concerns directly related to the legislative perspective and lays out guiding principles for lawmakers to consider when looking at P3 policy.
- P3s for Transportation: Categorization and Analysis of State Statutes—This January 2016 report examines the P3 enabling legislation in the 34 states, D.C. and Puerto Rico that have such laws across nearly 40 various provisions. (This report does not include 2016 state legislation as it was passed after the report was released.)
- Building Up: How States Utilize P3s for Social & Vertical Infrastructure—This web document examines P3s and the state statutes enabling their use for more than just transportation infrastructure.

The 2016 NCSL Foundation Partnership on Multi-Sector Public-Private Partnerships

BY KEVIN PULA

Since 2010, the public debate over P3s has expanded from the transportation sector into other types of government-delivered infrastructure. An increasing number of states—led by Virginia, Texas, Florida, Indiana and Pennsylvania—began entering into P3 agreements to help alleviate shortfalls in critical resources for building, maintaining and operating public infrastructure projects.

As a response to growing state legislative interest and market activity, NCSL once again sought to discuss P3 best practices and challenges.

The 2016 NCSL Foundation Partnership on Multi-Sector Public-Private Partnerships established a strategic working group comprised of state legislators, legislative staff and private-sector stakeholders. Building from the groundwork of its 2010 predecessor, this initiative was designed to explore the use of P3s for non-transportation specific infrastructure. The initiative’s goal is to provide lawmakers and public stakeholders with the expertise and assistance needed to create and implement sound P3 policy.

P3 Policy Primer

The following content in this section is adapted from the NCSL P3 Toolkit for Legislators. A full discussion of P3 models, key characteristics, and benefits and concerns is available in the Toolkit.

P3s DEFINED

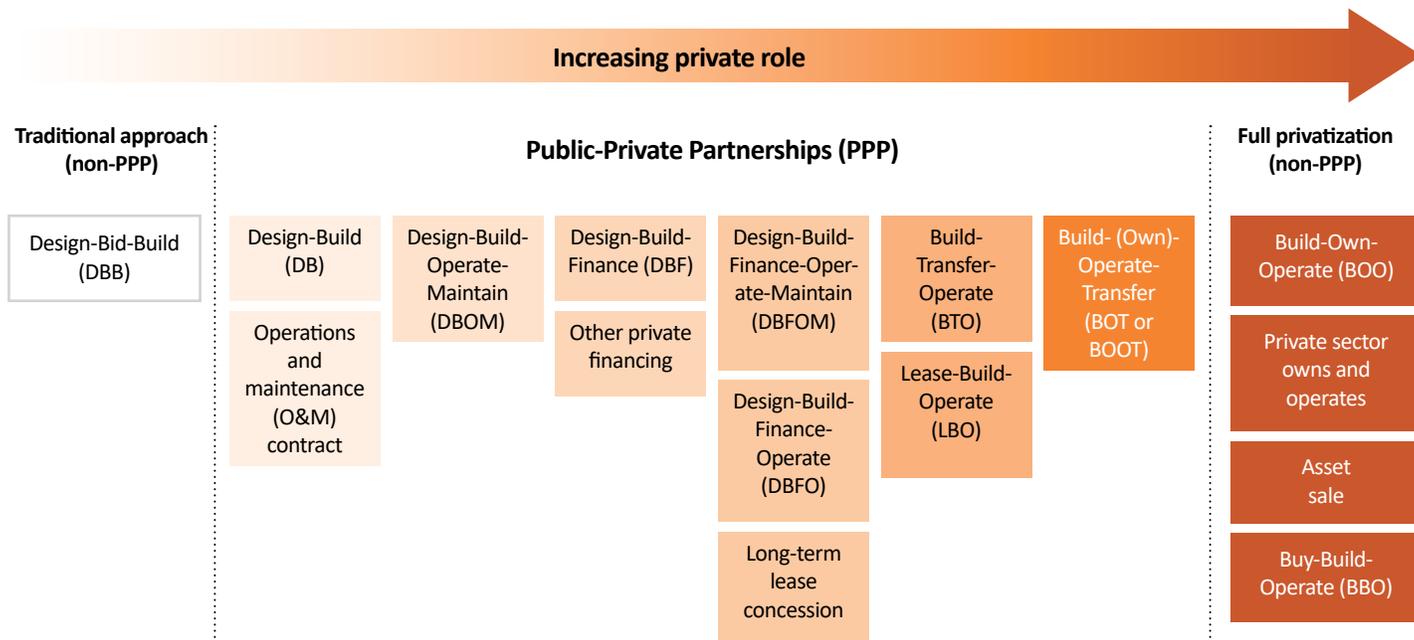
Because P3s cover a broad range of innovative contracting, project delivery and financing arrangements, a singular definition is difficult to establish. P3s take various forms based on the type of infrastructure involved and level of risk sharing sought by the public sector. Key characteristics of P3s, delineating them from typical arrangements between the public and private sectors, include the transfer of risk from the public sector to the private sector, the marrying of multiple steps of the procurement lifecycle and the shifting of some public sector responsibilities to the private sector.

One definition which is widely accepted and can be useful beyond the area of transportation comes from the U.S. Department of Transportation:

“A public-private partnership is a contractual agreement formed between public and private sector partners, which allows more private sector participation than is traditional. The agreements usually involve a government agency contracting with a private company to renovate, construct, operate, maintain, and/or manage a facility or system. While the public sector usually retains ownership in the facility or system, the private party will be given additional decision rights in determining how the project or task will be completed.”

—The U.S. Department of Transportation

Project Delivery Models Along a Continuum of Private Sector Involvement



P3 MODELS

P3s can take the form of a range of models depending on the ultimate goals and resources of the public sector. The spectrum of P3 models (above) ranges from a design-build (DB) model to lease-build-operate (LBO) or build-operate-transfer (BOT) models. Primarily, large-scale P3s in the United States consist of design-build-operate-maintain (DBOM) or design-build-finance-operate-maintain (DBFOM) models.

Marrying multiple phases of procurement within a P3 agreement allows for increased risk transfer and creates innovation within the design, construction and operations phases. For example, in a DBOM or DBFOM agreement where the concessionaire is responsible for the long-term operations and maintenance of an infrastructure asset, they will likely make certain design and construction decisions that would otherwise be unlikely under a design-bid-build model due to costs (i.e. using more costly materials that will require less maintenance or provide ease of operation in the decades to come).

This dynamic is often described as low bid versus best value by proponents of P3s. By accepting higher costs for some aspects of a project, the public sector may realize increased overall value throughout the life of the project.

Another key aspect of P3s is the underlying revenue stream being leveraged by this financing tool. P3s can be delineated into two main buckets per their revenue streams, availability payments or revenue risk (also known as volume-based) projects. Availability payment P3s are structured so that the private concessionaire receives contractually scheduled payments from existing or future public sector budgets. Revenue risk P3s involve allowing the private concessionaire to access, to some degree, a project's revenue stream (such as tolls or user fees) as payment, either in full or in part, for their fulfillment of their responsibilities under the agreement. Revenue risk deals may also include scheduled or milestone payments from non-revenue based funds to supplement the project's user fees.

Revenue risk P3s are closely associated with toll-concession P3s, however, non-transportation based P3s can still include revenue risk. The Denver Union Station P3, the Long Beach Civic Center P3 and the FBI Headquarters P3 all include examples of project revenues streams (special taxing districts, parking facilities, retail development and land-swap agreements) for non-transportation based projects. Depending on the goals of the public sector, these revenues may be used as leverage to transfer risk to the private sector or the user risk may be retained by the public owner.

POTENTIAL BENEFITS, CONCERNS AND CONTROVERSIES

The following content in this section is adapted from NCSL's Building Up: How States Utilize P3s for Social and Vertical Infrastructure. A full discussion of P3 concerns and controversies can be found in that report and the P3 Toolkit.

As P3s have become a focus of the national conversation on infrastructure spending, it is important to consider what they can and cannot provide. Even the most well-intended projects can go astray without proper oversight and consideration.

Some common potential benefits and concerns associated with P3s are listed in the table below.

Potential Benefits	Potential Concerns
Innovative Financing Structures	Loss of Public Control and Flexibility
Project Acceleration	Private Profits at the Public's Expense
Monetization of Existing Assets	Loss of Future Public Revenues
Cost and Time Savings	Risk of Bankruptcy or Default
Lifecycle Efficiencies	Accountability and Transparency
Improved Project Quality	Environmental Issues
Risk Transfer	Labor Concerns
Enhanced Performance Management Oversight	Risk Negotiation
Access to Cutting-edge Technology	Increased Consulting Needs/Costs
Enhanced Operations and Maintenance	Limited Government Oversight
Revenue Sharing	Foreign Companies
Increased Long-Term Quality	Specific Contract Terms

These benefits and concerns need to be addressed at the outset of any P3 agreement. The partnership's concessionaire agreement is considered by many P3 experts to be the most appropriate place to alleviate any potential issues associated with specific projects. Ideological and project-neutral concerns may be addressed in the legislature when debating the creation of P3 enabling laws.

Sound public policy through state law is the primary and most authoritative tool state legislatures have to alleviate any issue. Many state legislatures have enacted statutory provisions to address potential concerns about P3s and enhance the benefits such models can provide. Depending on the goals of the legislature and all parties involved, these benefits and concerns are handled differently, which means enabling laws will vary from state to state.

Critical to the discussion on P3s is the clarification that P3s do not act as a funding source; rather, they can provide additional financing opportunities and create efficiencies leading to cost savings. Nor are P3s a cure-all for infrastructure funding needs.

A primary concern in recent years is the limited practicality of P3s for small and medium cost projects. P3s are closely associated with large transportation projects and it is difficult to discern ways in which P3s can aid rural regions looking for infrastructure improvements. Smaller jurisdictions often lack the staff for less traditional procurements approaches and may be reluctant to utilize highly complex or costly alternatives.

The potential lack of scalability can act as a barrier for small communities to pursue P3s. The substantial financial and legal expertise required drives up costs and can quickly outweigh potential benefits able to be realized on a small project. Thus, bundling is one strategy pursued by some states, with limited success, to achieve a project size large enough to offset increased upfront costs and complexities. By merging multiple small but similar projects, the state could increase the total size of the project to justify the increased costs associated with risk transfer and P3s. Regional councils of governments, state procurement agencies and the U.S. General Services Commission could potentially all play a role in creating bundled opportunities. Expanding procurement opportunities through cooperative purchasing programs or add-

“Kentucky will see an immediate benefit with infrastructure changes and improvements to their state parks and tourism attractions. These sectors will have prime P3 type projects that will see major renovations. The biggest concern is small local governments not being informed or understanding how P3 works. There is much confusion on the local level of what is P3 and how do we finance such a project without being taken advantage of on the local level. We put together a very transparent piece of legislation that was all-encompassing with various sectors and layers of government protection. We wanted to make sure that Kentucky is open for business, but not doing business in the dark of night, but rather in the open. I think we have a great model that all other states can model.”



—Senator Max Wise (Ky.) on the benefits and concerns of P3s for Kentucky

ing “rider clauses” which all governmental entities to participate in a P3 contract will enable state and local agencies in the same region to leverage existing contracts for similar projects.

Pennsylvania is currently involved in two bundled P3 projects, the Rapid Bridge Replacement P3 and the CNG Refueling Stations P3, combining more than 530 small bridges and 29 refueling stations, respectively. It is still unclear to what extent these projects will be successful and the magnitude of realized public benefit.

A related strategy utilized in some jurisdictions includes expanding procurement opportunities through cooperative purchasing programs or adding so called “rider clauses” in P3 contracts which enable other state or local agencies to leverage existing contracts for similar projects.

Another model for leveraging the potential benefits of P3s for smaller and midscale projects is spearheaded by the National Development Council (NDC). The NDC’s American Model™ seeks to abide by two principles: “Public debt structures are less costly than private debt structures and private development is more efficient than the public development process.” By using its group exemption to create a special purpose entity to design, build, operate and maintain a project, NDC has utilized public sector debt structures—tax-exempt 63-20 bonds and 501(c)(3) bonds—to realize 42 P3 projects amounting to more than \$2.5 billion in total development. Over the past three decades, NDC has partnered with both governments and nonprofit institutions to construct municipal office buildings, county justice centers, libraries and other types of social infrastructure by “blending” private sector efficiencies of a P3 with the low cost of public financing.

SELECT EXAMPLES OF NON-TRANSPORTATION SECTOR P3s

■ **Water Infrastructure:** In 2001, Seattle Public Utilities entered into a design-build-operate P3 for the Tolt Water Treatment Facility. The \$101 million project was structured to “better align the design engineers, the contractors/builders, and the operations experts, saving the city tens of millions of dollars.” The project delivers as much as one-third of Seattle’s water needs, treating up to 120 million gallons of water daily.

■ **Broadband:** In August 2015, then-Governor Steven Beshear signed an executive order to form the Kentucky Communications Network Authority (KCNA) and grant authority to oversee the Kentucky Wired P3 project. The \$324 million project seeks to provide Kentucky with 3,000+ miles of broadband infrastructure, providing a “middle mile” backbone to which communities can connect.

■ **Public Buildings:** The often cited Long Beach Courthouse is a P3 agreement between California’s Administrative Office of the Courts (AOC) and the Long Beach Judicial Partners (a company created by the P3’s private-sector consortium). While held in high regard by some, the courthouse project received criticism from California’s non-partisan Legislative Analyst’s Office (LAO). The LAO’s findings closely reflect many of the principles found in NCSL’s P3 Toolkit.

■ **Public Buildings:** In 2002, the city of Redmond partnered with NDC to build a new City Hall. Using tax exempt 63-20 bonds, the National Development Council leased the land from the city of Redmond, and then worked with a developer to design and construct a state-of-the-art municipal building that consolidated 300 employees under one roof and provided 450 structured parking spaces. In July of 2013, The City Council refinanced NDC's 63-20 lease with limited-tax general obligation bond (LTGO) debt in the amount of \$33m. This refinancing achieved a 4.2 percent debt service savings as well as transferred full ownership of the project to the City.

■ **University Housing:** The University System of Georgia entered into a P3 in 2015 to provide for nearly 10,000 beds of on-campus housing. The model, developed in part by the private sector partner Corvias, has been used by other institutions across the country.

■ **Energy Production:** The Ohio State University recently entered into a P3 agreement with Ohio State Energy Partners for the operation of the school's power, heating and cooling systems. The \$1.165 billion partnership will also include sustainability and energy supply projects. Structured as a hybrid availability payment / revenue risk deal, the upfront private-sector payment of more than \$1 billion will be paid back over the 50-year lease through a combination of fixed fees, operating fees and variable-rate fees.

■ **Wastewater:** The Scranton Sewer Authority entered into a P3 that will produce the maximum operational efficiency allowing the authority to reduce pressure on ratepayers from EPA mandates while at the same time cooperating with the City in resolving serious unrelated financial issues. In addition to a purchase price of \$195 million, projected rate savings over the next 28 years are estimated to total about \$350 million.

■ **Recreational Facilities:** Indianapolis's 12 golf courses entered into a P3 agreement with third-party service providers to consolidate overall golf course management and maintenance. Overall financial performance improved with total annual revenues growing by approximately \$735,000. The City then used the same public-private partnership strategy to develop its youth Golf Academy.

■ **Infrastructure Resiliency Projects:** The Fargo Moorhead Area Diversion Project is the first P3 for the U.S. Army Corps of Engineers (Corps) and will provide flood resiliency infrastructure along the Red River in the Fargo, N.D. region. The \$2.2 billion project includes a "Split Delivery" model which will deliver many aspects of the project through a P3 while other aspects will be delivered by the Corps utilizing a design-bid-build model.

“Hawaii moved forward this year by establishing a P3 coordinator that will help collaborate among state agencies to analyze and develop projects based on the needs and goals of the agency and State including proposed economic benefits and fiscal prudence. By establishing a statutory framework for a single P3 coordinator for the entire state, this will help to avoid the confusion of multiple agencies developing their own tools for assessing and implementing P3's. This will create opportunities for growth and expansion of the government services and activities beyond those currently provided with increased public satisfaction and balancing reduced state funds.”



—Representative Ryan Yamane (Hawaii) on the importance of P3 enabling legislation.

Statutes In-Depth: Colorado, Texas and Virginia's Experience

Colorado, Texas and Virginia's P3 enabling laws are among the most robust in the country, and each have a long history (by U.S. standards) with P3 projects. However, as states become more mature in their ability to pursue P3s, unforeseen policy considerations arise. At times this has required the state legislature to consider amending existing P3 laws.

Colorado had P3 laws on the books as early as 1991, providing limited authority for the State Transportation Commission to pursue P3s for non-tolled tunnels (Colo. Rev. Stat. §§43-3-401 to 414). Over time, the legislature saw fit to expand this authority to counties and the Colorado Department of Transportation. Today the state has six different articles of statute pertaining to P3s, each with a separate aspect of authority. The most utilized being Colo. Rev. Stat. §§43-4-801 to 812 providing P3 authority for Colorado's High-Performance Transportation Enterprise.

Additionally, Colorado has added language to its P3 laws to increase public involvement and transparency in their P3 procurements (see the U.S. 36 Express Lanes P3 Project In-Depth on page 11).

Texas' approach to P3 enabling statutes includes authority under multiple titles and within at least six different chapters. First appearing as early as 2003, P3 authority was first provided to regional mobility authorities (Tex. Transportation Code Ann. §§3370.305 to 317) but is now provided also to regional tollway authorities (§§366.401 to 409; §§371.001), the State DOT (§91.054; §§223.201 to 210; §§371.001 to 153), and certain counties and municipalities (§§222.001 to 107).

More recently the Texas Legislature passed legislation to expand P3 authority to the Texas Facilities Commission for the development of distinctly non-transportation infrastructure projects (Tex. Government Code §§2267.001 et seq.).

In 2017, the state legislature choose to not expand P3 authority to additional transportation projects, specifically certain existing toll facilities. Texas House Bill 2861 failed to pass the House of Representatives, thus limiting the expansion of P3 authority to additional projects within the state.

Virginia, see A Closer Look: Virginia's Transportation P3 Law and Ensuring Public Benefit on page 10.

Principles for State Legislators

NCSL's P3 Toolkit for Legislators presented nine principles for State Legislators. In the seven years since the P3 Toolkit was released, dozens of additional P3 projects have come under contract or moved from the construction phase to the operations phase. Lessons, both positive and negative, can be gleaned from each of these projects.

Below we have identified real-world examples, either from individual P3 projects or recent state legislative action, to highlight the importance of these principles.

■ PRINCIPLE 1

Be informed. State decision makers need access to fact-based information that supports sound decisions. NCSL has continuously sought to provide state legislators with fact-based, un-biased and relevant policy information on P3s.

The NCSL Foundation Partnership for Multi-Sector Public-Private Partnerships (convening from 2016 through 2017), of which this report is a product, is the second long-term NCSL project on P3 policy since 2008. The P3 Partners Project (convening from 2008 through 2011) similarly brought together stakeholders from both the public and private sectors to aid legislators' decision-making related to P3s.

“The conversations with policy makers and industry experts helped to create a better understanding of P3s and how they can be used across the country. P3s, as a ‘tool in the toolbox,’ help states to find cost-savings and efficiencies that allow the dollar to be stretched even further than thought. The exploration of P3s help policymakers and transportation professionals find new ways to finance projects. Policymakers don’t have often have a lot of time to digest a lot of policy information. These resources help get the important information about these policy areas to the legislators who will be making decisions. When reviewing ideas to solve some of our most complex policy problems, these summaries help to identify paths forward.”



–Representative Andrew McLean (Maine) on the benefit of NCSL events and resources on P3s.

Both projects included a series of in-person meetings of their respective steering committees to hold substantive discussions on P3 policy and provide value-added content to the participants.

Further, since 2010, NCSL has convened more than a dozen policy sessions on P3s at NCSL meetings. Hundreds of state lawmakers and legislative staff have participated in these sessions to garner policy information and expertise on P3 financing. Most recently, these sessions include:

- 2014: NCSL Capitol Forum Session—“Federal Support for P3s in the States,” Washington, D.C.
- 2016: NCSL Southern States Fiscal Leaders Meeting—“Innovative Financing Mechanisms & Impact of Innovative Financing on State Credit Ratings,” Miami, Fla.
- 2016: NCSL Foundation Partnership on Multi-Sector Public-Private Partnerships Kick-off Meeting, Minneapolis, Minn.
- 2016: NCSL Legislative Summit Pre-Conference—“NCSL Foundation P3 Partnership Meeting,” Chicago, Ill.
- 2017: NCSL Winter Executive Committee Meeting—“NCSL Foundation P3 Partnership Meeting,” Scottsdale, Ariz.

Additionally, NCSL staff have published numerous reports, magazine articles and web documents on P3s.

- 2010: *Public-Private Partnerships for Transportation: A Toolkit for State Legislators*
- 2014: NCSL Legisbrief on The Growing Use of Transportation Public-Private Partnerships
- 2015: “On the Road (and Bridge) Again”—*State Legislatures Magazine*
- 2016: *Public-Private Partnerships for Transportation Categorization and Analysis of State Statutes*
- 2016: *Building Up: How States Utilize Public-Private Partnerships for Social & Vertical Infrastructure*

NCSL has also partnered with several nationally recognized organizations to provide in-person capacity building for state legislators on the topic of P3s and infrastructure financing.

- 2010 NCSL & UK Trade & Investment Government-to-Government Summit on P3s
- 2014 U.S. House Transportation and Infrastructure Committee’s special Panel on Public-Private Partnerships
- 2015 Infrastructure Week Forum with the National Council for Public-Private Partnerships
- 2016 BATIC P3 Basics Overview Training: Washington D.C.
- 2017 BATIC P3 Basics Overview Training: Scottsdale, Ariz.
- 2017 BATIC P3 Basics Overview Training: Boston, Mass.

Similarly, resources produced by NCSL partnering organizations are available to state legislators. The Design Build Institute of America's (DBIA) Public-Private Partnerships: A Design-Build Done Right Primer explores the ability for P3s to expand on the strengths of design-build. The Reason Foundation tracks P3 developments through its annual privatization reports.

■ PRINCIPLE 2:

Separate the debates. Debates about the P3 approach should be distinct from issues such as tolling, taxes or specific deals.

Policy makers and public agencies are aware of the capabilities for P3s beyond the typical brownfield highway reconstruction. Establishing the potential benefits of P3s for projects other than toll roads is critical for states looking to solve perplexing hurdles for non-transportation infrastructure. However, separating the debates of P3s and other policy decisions is difficult and not always possible.

The P3 Toolkit addresses the conflation of P3s with large-scale toll brownfield projects. Michigan and Texas, among other states, have struggled with separating a larger P3 conversation from debates focused on tolls. Michigan experienced this debate during consideration of P3 legislation in 2009. More recently, in 2017 the Texas Legislature voted down legislation to expand P3 authority for nearly 20 existing toll facilities in the state.

Kentucky's 2016 P3 law was the result of a multi-year debate dating back to at least 2012. A main tenet of the P3 debate in the state included tolls, specifically on the Brent Spence Bridge in northeastern Kentucky on the Ohio border. Following four years of debated legislation and a governor's veto in 2014, HB 309 was signed by the Kentucky governor. The new legislation provided broad P3 authority for transportation projects as well as other types of infrastructure.

Ultimately, Kentucky was not able to "separate the debates" but found compromise to move forward with P3 enabling legislation. The final language included a provision forbidding "a public-private partnership related to a project connecting the Commonwealth with the State of Ohio unless the General Assembly expressly authorizes it by passing a joint resolution", specifically targeting the Brent Spence Bridge project.

A misconception persists that P3s are synonymous with toll roads. Recent projects have shown that P3s can be used for a range of infrastructure projects other than transportation (see multi-sector P3 examples on page 4). Further education of the public and elected officials will help to highlight alternative possibilities for states to utilize P3s (see also Principle 4).

■ PRINCIPLE 3

Consider the public interest for all stakeholders. State legislators will want to consider how to protect the public interest throughout the P3 process.

Successful P3 projects rely on the proper alignment of the public sector's and private sector's interests. Creating incentives to allow the private sector to pursue profits while also enhancing the public interest is paramount.

Ideally this can be achieved contractually within the P3's comprehensive agreement, by allocating risk among the parties and providing clear guidelines for the partnership. It also requires consideration by legislators when establishing P3 authority in statute. Ensuring public interest is of upmost importance to the public sector and it cannot always be assumed that decisions made by the private sector will enhance that end.

A Closer Look: Virginia's Transportation P3 Law and Ensuring Public Benefit

Virginia's Public Private Transportation Act of 1995 is regarded by P3 investors and experts as a comprehensive and sound model of P3 state policy. Virginia, a P3 leader in the U.S., has learned that P3 laws should adapt and be amended accordingly as new developments occur.

In 2015, the Virginia Legislature, in response to public concerns over existing P3 projects, enacted HB 1886. This bill established a new requirement for P3 projects. Throughout the life of a project, efforts must be made to ensure the public benefit continues to exist.

Key components of the legislation include:

- Establishes the *Transportation Public-Private Steering Committee* which shall, for any P3 procurement by the Virginia Department of Transportation, determine that the project serves the best interest of the public.
- Requires the *Transportation Public-Private Advisory Committee* to produce, prior to the initiation of a procurement:
 - o A description of the benefits of a P3 compared to other procurement options.
 - o A statement of risks, liabilities, and responsibilities to be assigned to the concessionaire.
 - o A determination of the delivery risk level associated with the project.
 - o A description of how the public interest will be maintained through the transfer of risk.
 - o Rationale demonstrating the benefits of pursuing a P3 rather than traditional procurement.
- Requires the *Transportation Public-Private Steering Committee* to reconfirm the finding of the best interest of the public prior to entering into a comprehensive agreement (ensuring no change to the public interest occurred during the bidding process).

Source: Va. Code §33.2-1803 through §33.2-1803.2 and §33.2-1820.

■ PRINCIPLE 4

Involve and educate stakeholders. Stakeholder involvement helps protect the public interest, gain support and mitigate political risk.

Public stakeholder involvement is crucial to ensuring the public benefit and success of P3s. A well-informed public will pay dividends in the execution and acceptance of P3. Involving the public throughout the process can enhance public awareness of the P3 delivery model and help identify issues, concerns and solutions that may not be apparent otherwise.

Public education may also help mitigate political risk which is borne by the public sector in a P3 project. Projects such as North Carolina's I-77 and Colorado's U.S.-36 have faced political risk due, in part, to lack of public involvement.

NCSL's Public-Private Partnerships for Transportation Categorization and Analysis of State Statutes found that 22 states, Puerto Rico and D.C. include statutory requirements related to providing for public comments, hearings or input. Kentucky's 2016 HB 309 (passed after the report's publishing) also included language related to public involvement. However, it is unclear to what extent these individual provisions impact the actual practice of public involvement.

Effective execution of outreach and transparency measures by the public agency is critical to ensure a meaningful dialogue with the local communities and residents. For meaningful impact, public participation cannot be perfunctory and governmental agencies must strive for transparency in their outreach. Working actively with local leaders, government officials and community stakeholders is paramount to ensuring public involvement is impactful.



Courtesy High Performance Transportation Enterprise

P3 Project In-Depth

Colorado's U.S. 36 Express Lanes project is a \$208.4 million design-build-finance-operate-maintain (DBFOM) P3 project connecting Denver with Boulder, in the northwest part of the Denver Metro Region. The project integrates the new U.S. 36 express lanes with existing express lanes on I-25 to the south. The concessionaire reconstructed the existing four-lane highway while adding a new tolled-express lane in both directions.

After construction was underway, there was considerable public debate and scrutiny, focused primarily on the new express-lane tolls. Some of the public debate turned negative and heated, public meetings devolved into shouting exercises and misinformation abounded. Fears of privatization, unrelenting toll increases and Wall Street meddling dominated the public discourse.

Above the fray, residents, local elected officials and state lawmakers did have legitimate concerns regarding the details of the P3 agreement. Colorado Senator Matt Jones introduced 2014 SB 197 which sought to increase transparency and public involvement in future P3 projects. The bill also attempted to reel back the High-Performance Transportation Enterprise's (HPTE)—a government owned business housed within the Colorado Department of Transportation—authority on future P3s.

The bill was approved by both chambers of the legislature only to be vetoed by Governor John Hickenlooper, primarily due to provisions related to contract length and scope likely to limit HPTE's ability to enter into future P3s. Hickenlooper later retained many of the provisions of HB 197 through executive order D 2014-010, specifically, requiring HPTE to implement new procedures for announcing, implementing and responding to public meetings throughout the life a P3's development.

HPTE is now in negotiations for its second large-scale transportation P3, the Central 70 Project through Denver. Similar to the U.S. 36 Express Lanes P3, this project will include tolled-express lanes and a redesign of an existing highway. Long-standing grievances over the historical impacts of I-70 on local neighborhoods, coupled with the complexity of a P3 project have led to controversy regarding this project.

Sources: Federal Highway Administration U.S. 36 Express Lane Project Profile, The Denver Post and Colorado Department of Transportation.

■ PRINCIPLE 5

Take a long-term perspective. State legislators will want to approach P3 decisions with the long-term impacts in mind.

P3s are not a panacea for a state's infrastructure needs. A common misconception persists that P3s provide a solution for existing funding gaps and can alleviate the short-term pressure associated with declining or non-existent revenue streams.

Lawmakers in many states have found it prudent to ensure long-term considerations are taken into account when considering P3s, and to avoid any pitfalls associated with short-term outlooks. NCSL's P3 Toolkit identified statutory provisions relevant to long-term considerations, including: limited compete or non-compete clauses, labor protections, risk allocation, term lengths, operations and maintenance standards, termination clauses, and hand-back provisions.

Building on this list of provisions, NCSL's P3s for Transportation: Categorization and Analysis of State Statutes found that among existing state P3 laws, some of these provision are much more common than others.

The report finds:

- At least 16 states, Puerto Rico and D.C. limit term lengths for P3 agreements.
- At least 10 states, Puerto Rico and D.C. prohibit non-compete provisions or require alternative routes.
- At least 15 states explicitly require consistency with existing state or local transportation plans.
- At least 22 states, Puerto Rico and D.C. specify provisions in P3 agreements or contracts.
- At least 14 states Puerto Rico and D.C. require cost-benefit, comparative or other analysis for P3s.
- At least 13 states and Puerto Rico address labor issues.
- At least 13 states and D.C. address material default or bankruptcy.

The categories examined within this report do not infer the effectiveness of the specific language, but rather acknowledges the legislature's tacit decision to consider long-term implications. Each of these aspects of P3 statutes, to some degree, contribute to the long-term surety of the public-sector's interest within a P3 arrangement.

Additionally, at least 18 states and Puerto Rico permit public agencies to hire technical and/or legal consultants when pursuing a P3. Ensuring the public sector has the technical and legal expertise to negotiate a P3 and establish appropriate provisions within the concessionaire agreement is critical to ensuring public interests are met throughout the life of the project.

A Closer Look: Indiana’s P3 Law, Bankruptcy and Long-Term Perspective

Indiana’s first P3, the Indiana Toll Road, is a 157-mile tolled freight corridor spanning from Ohio to Illinois across the northern region of Indiana. The original private partner of the \$3.8 billion, 75-year agreement filed for bankruptcy after less than a decade, due in part to the Great Recession and fewer users (toll payers) than anticipated. The state had insulated itself from the use risk in the P3 agreement and therefore the private sector was faced with the financial loss. In 2015, the state agreed to a new concession for the toll road. The new price tag \$5.725 billion for a 66-year lease was substantially higher than the original, signaling the increased value of Indiana’s infrastructure asset.

The state’s P3 law (Ind. Code Ann. §§5-23-1-1 to 5-23-7-2; §§8-15-1-1 to 8-15-3-35; §§8-15.5-1-1 to 8-15.5-13-8; §§8-15.7-1-1 to 8-15.7-16-8; and §§8-23-7-22 to 25) did not directly include provisions related to material default or bankruptcy.

Similar to other states, as described previously, Indiana has continued to adapt and amend its P3 law. In 2015, language was amended to broaden the scope of projects allowable in P3 agreements (IN 2015 HB 1001). And in 2017, lawmakers elected to add language to address P3 project termination (IN 2017 HB 1002). The new language, among other provisions, permits the state to employ the appropriate services for completion of the project, enter into a new P3 for the project and issue bonds to provide needed funding for the project.

■ PRINCIPLE 6

Let infrastructure needs drive P3 projects—not the other way around. P3s should be pursued to support a state’s infrastructure needs and public benefit, not just to raise revenue.

The P3 Toolkit’s original language for Principle 6 was “let the transportation program drive P3 projects—not the other way around. P3s should be pursued to support a state’s transportation strategy, not just raise revenue.”

NCSL’s P3s for Transportation: Categorization and Analysis of State Statutes found enabling statutes in at least 15 states explicitly require a project being considered for a P3 to be consistent with existing state or local transportation plans. The P3 Toolkit cautions lawmakers and decision makers from seeking P3s for financial reasons rather than as a strategic option for fulfilling the existing goals and objectives of their transportation plans.

Through both solicited and unsolicited proposals, states can deliver needed infrastructure projects to meet the unique needs of its residents.

Though many states require consistency with the existing transportation plans, this is not necessarily a prerequisite for adhering to these plans in practice. Pennsylvania’s P3 law does not explicitly require a P3 project to have been part of a transportation plan, however, the Pennsylvania Department of Transportation P3 Office’s guidance on both solicited and unsolicited proposals addresses this issue.

The office provides examples of sources for potential P3 projects which includes the Twelve-Year Transportation Improvement Plan. Further, the High Level Screening process the department applies to unsolicited proposals takes into account whether a proposal is consistent with the existing State Transportation Improvement Plan, Twelve Year Plan or the relevant planning organizations’ Long Range Transportation Plans. Presumably attempting to keep the door open to innovative unsolicited solutions while also considering the pre-established long term infrastructure plans.

Conversely, both Florida’s and Virginia’s P3 laws permit solicited and unsolicited proposals while also explicitly requiring adherence to existing long-term transportation plans which does not preclude amending

the plan in a future update to incorporate an unsolicited solution that addresses a public need.

Principle 6 has implications for non-transportation P3s as well. While formal plans, similar to STIPs and TIPs, do not typically exist for other types of infrastructure, it is still beneficial to consider P3 projects with existing goals and needs in mind. The pursuit of a P3 for a project should be driven by the established need to build additional infrastructure assets or to improve the utility of an existing asset. Clear and transparent goals and objectives are important for determining needs and therefore pursuing P3 projects.

This is not to downplay the potential benefits of unsolicited proposals for non-transportation projects. Critics and even some P3 supporters caution that unsolicited proposals can lead to unwanted expenses and deviate from a state's P3 program. However, states can leverage the entrepreneurial nature of the private sector by considering sound unsolicited P3 proposals. This balance demands a strategic and effective approach by state and government officials to considering unsolicited proposals. It is likely that an established P3 office, such as those in Colorado, Virginia or Pennsylvania, are critical for states and localities to effectively carry out this decision making process.

■ PRINCIPLE 7

Support comprehensive project analyses. Before pursuing a P3, it should be shown to be a better option than traditional project delivery.

P3 procurement is often credited as a tool that helps advance an infrastructure project that otherwise would not have been accomplished under traditional procurement, due either to fiscal constraints or excessive risk. Accelerated procurement and construction is one potential benefit of a P3 and can lead to substantial cost savings from avoiding delay and future inflation. However, project acceleration alone is not enough to justify the use of a P3, as more stringent and in-depth analysis is needed.

Many states have found it prudent to include provisions requiring some form of cost-benefit analysis (CBA) or value-for-money (VFM) analysis when considering a P3. NCSL's P3s for Transportation: Categorization and Analysis of State Statutes found enabling statutes in at least 14 states, Puerto Rico and D.C. require cost-benefit, comparative or other analysis for P3s.

Virginia's Office of Public-Private Partnerships provides online manuals for the P3 value-for-money guidelines in its public-private transportation act (PPTA) and the cost benefit and opportunity analysis guidelines in its Public-Private Education and Infrastructure Facilities Act (PPEA).

In partnership with the Build America Bureau, the BATIC Institute and NCSL have provided P3 technical assistance trainings which include instruction on VFM and CBA processes as they relate to P3s.

Additionally, the Federal Highway Administration (FHWA) provides a P3-Value 2.0 Analytical Tool which can be used by public agencies to "better understand the concepts, inputs, key assumptions and outputs from evaluations of risk, financial feasibility, benefit-cost and 'value for money' analyses used to compare the aggregate financial benefits and costs of a P3 alternative with conventional procurement."

■ PRINCIPLE 8

Be clear about the financial issues. States will want to carefully assess financial goals, an asset's value and how to spend any proceeds.

A significant barrier for states and localities to utilize P3s is the sophisticated financial expertise required. Complex financing arrangements, involving funds from the private sector and often multiple levels of government, is common in P3 agreements. These financial transactions are likely beyond the normal scope of practice for public-sector fiscal offices.

Further, when P3 projects leverage a new or existing revenue stream (this typically occurs in a revenue risk P3 but is also applicable to some availability payment P3s) the revenues must be appropriated accordingly. Some states provide guidance or restrictions on how to appropriate money within their enabling statutes (at least 19 states and Puerto Rico, per NCSL's analysis). Virginia, for example, requires payments under a concession arrangement to be paid into the Transportation Trust Fund and held in a Concessions Payments Subaccount. The use of these funds are restricted by statute (Va. Code §33.2-1528).

Not only should P3s adhere to the existing goals and objectives of planned infrastructure needs (see Principle 6), they should also be congruent with a state’s financial plan and strategy.

Similar to infrastructure bonds, debt obligations associated with P3s can impact a state’s credit sheet. Creditworthiness is an important factor to many states and credit ratings can closely impact a state’s ability to enter into future projects.

Per the rating agency, Standard & Poor’s, P3 debt obligations will be treated differently under revenue risk P3s and availability payment P3s. A “self-supporting” obligation, such as a toll-revenue bond, will likely not be treated as tax-supported debt. An availability payment is more likely to fall into this category.

■ PRINCIPLE 9

Set good ground rules for bidding and negotiations. Legislation should promote fairness, clarity and transparency in the procurement process.

For many states, P3s are a move beyond the historical approach of procurement under a low-bid environment. One key to the success of a P3 is the ability to transfer risk, at a cost, to the private sector. Due to the potential increased costs required by the private sector to accept additional risk, it is unlikely that a P3 bid would be able to compete with the traditional design-bid-build (DBB) process in a low-bid environment.

The idea of “best value” is that a state can garner increased benefits through accelerated delivery, risk transfer and long-term efficiencies that outweigh the increased costs compared to a DBB approach. As defined in Kentucky statute, “best value means a procurement in which the decision is based on the primary objective of meeting the specific business requirements and best interests of [government]. These decisions are based on objective and quantifiable criteria that shall include price and that have been communicated to the offerors as a set forth in the invitation for bids or requests for proposals.” Under state law, P3 contracts are to be competitively awarded based on best value (Ky. Rev. Stat. Ann. §65.028(2)).

As discussed under Principle 6, unsolicited proposals have been a point of debate regarding providing value to a state’s infrastructure assets. Skeptics point out the increased, and un-forecasted, expenses associated with reviewing unsolicited proposals from the private sector. Without a transparent process for initial screening of these proposals, reviewing only a select few can present the appearance of favoritism. To curtail these concerns, states include guidance within their P3 laws.

According to Senator Max Wise (Ky.), “we made sure that the unsolicited bid proposals would be staggered in various 30-60-90 day windows and transparent for all to see.” Similarly, Pennsylvania and Virginia transparently detail their process for considering unsolicited proposals (see Principle 6).

Further, NCSL found that at least 18 states, Puerto Rico and D.C. allow the public sector to charge application fees for proposal review, and at least 16 states and D.C. require requests for competing bids for unsolicited proposals.

Other state P3 laws include many provisions related to transparency, fairness and bidding clarity. It is common for statutes to specify evaluation criteria for P3 proposals (at least 15 states, Puerto Rico and D.C.); provide opportunity for public comment, public hearings or other public participation (at least 22 states, Puerto Rico and D.C.) or require state legislative approval, review or other involvement (at least 26 states and Puerto Rico).

State legislative involvement is important for ensuring public benefit. However, it may lead to legitimate issues for attracting private sector interest. Proper consideration of when state legislative approval should be required or allowed is important for limited “political risk” with large P3 projects. Significant financial and time outlays—obtaining permits, environmental studies, requests for qualification, establishing project scope, etc.—are required prior to reaching the bidding phase of a P3. Legislative involvement at the onset can alleviate surprise and misinformation that may arise if early steps are taken without their considerations.

Appendix A.

Select Additional P3 Resources

THE BATIC INSTITUTE

The Build America Transportation Investment Center (BATIC) Institute: An AASHTO Center for Excellence enhances taxpayer value from transportation investment by promoting public sector capacity building in the analysis, understanding, and use of project finance techniques through a program of training, sharing of best practices, and technical assistance to all State Departments of Transportation and their local partner agencies.

NCSL is a partner of the Build America Transportation Investment Center (BATIC) Institute. Visit the BATIC Institute online at <http://www.financingtransportation.org/>.

BUILD AMERICA BUREAU

“The Build America Bureau is responsible for driving transportation infrastructure development projects in the United States. The Bureau streamlines credit opportunities and grants and provides access to the credit and grant programs with more speed and transparency, while also providing technical assistance and encouraging innovative best practices in project planning, financing, delivery, and monitoring. To achieve this vision, the Bureau draws upon the full resources of U.S. DOT to best utilize the expertise of all the modes within the Department while promoting a culture of innovation and customer service.

“The Build America Bureau encourages the consideration of public-private partnerships (P3s) in the development of transportation improvements. Early involvement of the private sector can bring creativity, efficiency, and capital to address complex transportation problems facing State and local governments.”

FEDERAL HIGHWAY ADMINISTRATION CENTER FOR INNOVATIVE FINANCE SUPPORT

The Federal Highway Administration (FHWA) Center for Innovative Finance Support provides a comprehensive set of tools and resources to assist the transportation community in exploring and implementing innovative strategies to deliver programs and projects. The office, through the Build America Bureau, offers online events, in-person trainings and peer-exchanges which can be tailored for state-specific needs. Additionally, the center provides P3 project profiles with detailed procurement information.

See also the Center’s P3 Project Profiles which provide overview information about many large P3s across the U.S.

MODEL CONTRACTS

One popular idea for decreasing the up-front costs of P3s is the creation of model contracts to streamline the planning, negotiating and contracting phases of a P3 project. The legal and financial expertise required of a P3 project is often beyond the scope of existing government procurement offices, requiring significant outside legal and financial council and adding substantial costs.

The complexity of P3s hinders the prospects of establishing universal model contracts. Although recent steps have been made to provide assistance in this area. The Federal Highway Administration (FHWA) has released model contract guides to assist states in pursuing P3s, the Model Public-Private Partnership Core Toll Concession Contract Guide and the Availability Payment Concessions Public-Private Partnership Model Contract Guide.

ENVIRONMENTAL PROTECTION AGENCY

The Environmental Protection Agency (EPA) has begun exploring the applicability of P3s for water-based infrastructure such as stormwater facilities. Learn more about the EPA’s Community-Based Public-Private Partnerships online at <https://www.epa.gov/G3/financing-green-infrastructure-community-based-public-private-partnerships-cbp3-right-you>.

NATIONAL DEVELOPMENT COUNCIL

The National Development Council’s The American Model™ is an innovative approach to aiding small and medium sized communities to deliver much needed infrastructure projects by blending the low cost of public financing with the innovative expertise of the private sector.

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