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## ARTICLES

THE USE OF PUBLIC-PRIVATE PARTNERSHIPS AS A MODEL FOR  
THE DELIVERY OF GOODS AND SERVICES TO THE  
GOVERNMENT—IS THIS A NEW CONCEPT IN GOVERNMENT  
CONTRACTING?

*Vincent J. Napoleon, Diana V. Vilmenay & Nia Newton*



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# ARTICLES

## THE USE OF PUBLIC-PRIVATE PARTNERSHIPS AS A MODEL FOR THE DELIVERY OF GOODS AND SERVICES TO THE GOVERNMENT—IS THIS A NEW CONCEPT IN GOVERNMENT CONTRACTING?

*Vincent J. Napoleon, Diana V. Vilmenay & Nia Newton\**

I. Introduction.....	121
II. P3s in Government Contracting Yesterday.....	123
III. Types of P3s.....	125
A. Concession .....	126
B. Build-Own-Operate.....	127
C. Build/Operate/Transfer.....	127
D. Operations and Maintenance, and Management .....	128
E. Design-Build-Operate .....	129
IV. How P3s are Financed .....	129
V. Advantages of P3s in Government Contracting.....	131
A. Risk Transfer.....	132
B. Cost Reduction .....	134

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C. Private Sector Incentives .....	135
VI. Disadvantages of P3s in Government Contracting .....	135
A. High Financing and Transaction Costs .....	136
B. Loss of Project Control and Revenues .....	136
C. Unforeseen Consequences.....	137
VII. Factors to Determine Whether to Engage in a P3 .....	137
VIII. P3s in Government Contracting Today.....	138
A. P3 in Sustainment and Depot-Level Maintenance .....	140
B. Corps of Engineers .....	144
C. Transportation and Infrastructure.....	147
D. Homeland Security .....	150
IX. Facilitating Other Uses of P3s .....	152
A. White House Initiative to Expand P3s .....	152
B. Congressional P3 Action.....	154
X. P3s in State and Local Government Contracting .....	155
XI. Conclusion: P3s in Government Contracting Tomorrow.....	161

## I. INTRODUCTION

In the wake of current and recent events including a new presidential administration in the White House, global terrorism, and sequestration, the federal government continues to be confronted with budgetary challenges as it attempts to provide services to its citizens and provide for the common defense. As a result, there has been a growing interest and dependence by the federal government on the private sector to develop novel ways to provide goods and services that would result in minimum government investment with less government risk. This interest generally stems from factors such as budget restraints, project complexity, need for private sector resources and expertise, and the government's ever-changing priorities.<sup>1</sup> Equally, the private sector continues to rely on major Department of Defense ("DoD") and other non-DoD programs and contracts to fuel shareholder value. Notwithstanding this continuous mutual dependence between the public and private sectors, questions remain as to whether public-private partnerships are a new concept in government contracting. In sum, public-private partnerships are not a new concept, but instead they have emerged to the forefront as public and private sector interdependence has revived public-private partnerships in government contracting.

At its core, the term "public-private partnership" or "P3" describes the contractual scenario in which the public sector partners with the private sector to complete a project that will benefit the public.<sup>2</sup> To understand the P3 is to envision a project delivery model that exists somewhere between public project delivery (where the public agency owns and operates the asset)

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<sup>1</sup> See Robert Puentes & Patrick Sabol, *Private Capital, Public Good: Drivers of Successful Infrastructure Public Private Partnerships*, BROOKINGS INST. (Dec. 17, 2014), <http://www.brookings.edu/research/reports/2014/12/17-infrastructure-public-private-partnerships-sabol-puentes>.

<sup>2</sup> The P3 concept was used as early as during the time of the Roman Empire under Caesar Augustus' rule. Caesar Augustus authorized the Salassi tribe (a Celtic tribe that resided in the Alpine region of northern Italy and Gaul) to raise money (by way of tolls) from travelers crossing portions of the Saint Bernhard Pass in exchange for the tribe's management of and assistance to travelers crossing the pass. See David Plunkett & Erin Minor, *Public-Private Partnerships: Primer, Pointers & Potential Pitfalls*, ABA BRIEFING PAPER (2013). See also Sarah Jamil, *The Miscellaneous Desirability of P3s and an Approach to Design an Appropriate Constitution* (Jan. 2008), [https://www.wipo.uni-freiburg.de/dateien/tagungen/reformen/the\\_miscellaneous\\_desirability\\_of\\_public.pdf](https://www.wipo.uni-freiburg.de/dateien/tagungen/reformen/the_miscellaneous_desirability_of_public.pdf); Vincent Napoleon & Diana Vilmenay, *Public-Private Partnerships—Is this a New Concept in Government Contracting?*, GOV'T CONTRACTS ALERT (Nixon Peabody LLP, Wash., D.C.), June 12, 2015, at 1.

and privatization (where the private sector owns and operates the asset). There are different types of P3s, but most forms share two important characteristics: (1) financial investment by the private sector and (2) risk transfer from the public sector to the private sector.<sup>3</sup> Accordingly, P3s provide certain assets where governments often lack full financial resources and expertise and, as a consequence, look to the private sector to assist with developing infrastructure, among other important projects.<sup>4</sup>

P3 projects differ from traditional procurement contracts in several respects. They are typically large, long-term endeavors over which the private partner holds a significant amount of control and inherits greater risk. When successful, P3s bring capital to the target market and create local job opportunities. When effective, they spur consumption, increase wealth, and promote stronger economies. “In certain circumstances, P3 projects can bring innovative solutions to infrastructure challenges . . . a broad array of interested and invested parties . . . substantial [project] experience . . . [and financial rigor and incentives from the private sector] to deliver project[s] on-time and on-budget.”<sup>5</sup> P3 projects also tend to draw other private investors to the market, thus creating a stronger model for long-term economic growth.

In the federal government contracting context, P3s are simply contracts between the government and the private sector contractor that often result in greater private sector participation in project delivery. In this respect, successful P3s serve as vehicles to improve government services at less cost to the taxpayers since, among other things, the cost burden shifts from the government to the private sector when completing a project. When used properly, P3s encourage the public and private sectors to cooperate, innovate,

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<sup>3</sup> IMF, *Public-Private Partnerships*, Fiscal Affairs Department (Mar. 12, 2013).

<sup>4</sup> Here the term “infrastructure” is used broadly to describe the “basic equipment and structures (such as roads and bridges) that are needed for a country, region, or organization to function properly” and “the resources (as personnel, buildings, or equipment) required for an activity” for the public. *Infrastructure*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/infrastructure> (last visited Apr. 1, 2017).

<sup>5</sup> TRANSPORTATION & INFRASTRUCTURE COMMITTEE, PUBLIC-PRIVATE PARTNERSHIPS: FINDINGS AND RECOMMENDATIONS OF THE SPECIAL PANEL ON PUBLIC-PRIVATE PARTNERSHIPS 10 (2014) [hereinafter TRANSPORTATION & INFRASTRUCTURE REPORT].

and collaborate with the ultimate objective of working toward a mutual goal of project success.<sup>6</sup>

There has not been much case law regarding P3s, although United States jurisprudence is developing. For example, in *LaSalle v. United States*, the United States Court of Federal Claims clarified the difference between a P3 contract and a commercial partnership agreement.<sup>7</sup> The court found that while a commercial partnership is one in which two parties share risk, control, and profits, a public-private partnership generally shifts the risk, control, and profits to only one of the parties.<sup>8</sup>

This Article examines P3s in the context of government contracting and how P3s are utilized to achieve the government objective of efficient execution and delivery of projects for the benefit of the citizenry. To this end, the Article begins by providing a historical context of P3s as well as a review of several common types of P3s. The Article additionally explores how a typical P3 is financed. Moving forward, the Article analyzes the advantages and disadvantages of the P3 model in government contracting and discusses several examples of P3s in use currently in the DoD and other government agencies. It explains how P3s are facilitated in other areas of the federal government and concludes with an examination of the use of P3s in state and local government.

## II. P3S IN GOVERNMENT CONTRACTING YESTERDAY

There has been a recent trend towards reliance on P3s as a model for the delivery of goods and services to the federal government. However, the fact of the matter is that P3s are not new. While the term “public-private partnership” was not widely used in the United States until the 1990s, the leveraging of private-sector resources for the benefit of the public-sector is a concept that has been used for more than 300 years.<sup>9</sup> For example, the

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<sup>6</sup> See John Foyer et al., *Public-Private Partnerships and the Public Accountability Question*, PUB. ADMIN. REV. 475, 477 (2010), <http://sites.duke.edu/niou/files/2011/05/Forrer-Lee-Newcomer-and-Boyer-Public-Private-Partnership-and-the-Public-Accountability-Question.pdf>.

<sup>7</sup> *LaSalle v. United States*, 48 Fed. Cl. 797, 810 (2001).

<sup>8</sup> *Id.*

<sup>9</sup> The P3 concept was used as early as during the time of the Roman Empire under Caesar Augustus' rule. Caesar Augustus authorized the Salassi tribe (a Celtic tribe that resided in the Alpine region of northern Italy and Gaul) to raise money (by way of tolls) from travelers crossing portions of the Saint

Continental Congress during the Revolutionary War utilized the private sector (privateers) by permitting their harassment of the British navy.<sup>10</sup> P3s also developed in the West through private sector construction of the nation's transportation infrastructure, especially the cross-continental railway and the development of private tollways and canals.<sup>11</sup>

It appears as though America's first organized P3 was in 1652, when the private company Water Works Company of Boston built a channel to transport water to a reservoir for storage and to provide local residents with drinking water.<sup>12</sup> Two years later, Richard Thurley, a contractor and colonist, named, designed, financed, and built the first legally implemented toll bridge.<sup>13</sup> The toll bridge crossed the Newbury River in Massachusetts connecting two Massachusetts towns, and provided an important trading route for the residing colonists.<sup>14</sup> In 1795, following the colonial period and the Revolutionary War, America's new government had very little capital and the costs of completing a graded gravel road were too steep.<sup>15</sup> Nevertheless, there was still a need to develop the new nation's infrastructure. The government used P3s for the development of the Philadelphia and Lancaster Turnpike Road to, among other things, move produce from Lancaster County to Philadelphia.<sup>16</sup> With the permission of the government, the Philadelphia and Lancaster Turnpike Road Company constructed the toll road with the objective of receiving payment from the

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Bernhard Pass in exchange for the tribe's management of and assistance to travelers crossing the pass. See citations *supra* note 2.

<sup>10</sup> Foyer et al., *supra* note 6, at 475; Napoleon & Vilmenay, *supra* note 2.

<sup>11</sup> Foyer et al., *supra* note 6, at 475; Napoleon & Vilmenay, *supra* note 2.

<sup>12</sup> Plunkett & Minor, *supra* note 2, at 3; Stephanie Satterfield & Leslie Sluger, *How Do You Like Your Infrastructure: Public or Private?*, SOC'Y FOR MKTG. PROF'L. SERVS. FOUND. 4 (2010), <http://www.ncppp.org/wp-content/uploads/2013/03/PS-2010-HowDoYouLike.pdf>.

<sup>13</sup> Plunkett & Minor, *supra* note 2, at 3.

<sup>14</sup> *Id.*

<sup>15</sup> *Philadelphia and Lancaster Turnpike Road [New Nation] Historical Marker*, EXPLORE PA HISTORY, <http://explorepahistory.com/hmarker.php?markerId=1-A-28D>.

<sup>16</sup> Bernard Harris, *Public-private Partnerships Reinventing PennDOT*, LANCASTERONLINE (May 14, 2014), [http://lancasteronline.com/news/local/public-private-partnerships-reinventing-penn-dot/article\\_297fdb14-db9c-11e3-b9c8-001a4bcf6878.html](http://lancasteronline.com/news/local/public-private-partnerships-reinventing-penn-dot/article_297fdb14-db9c-11e3-b9c8-001a4bcf6878.html). A new nation had no money to build infrastructure, so a private owner built the first long-distance, broken-stone-and-gravel surface, opening the territory northwest of the Ohio River. The turnpike was built to move produce and manufactured goods from Lancaster County to Philadelphia. The private owner of the road (the Philadelphia and Lancaster Turnpike Company) was repaid from tolls. The road was blocked by wooden gates, or "pikes," that would be "turned" to open the road after the tolls were paid; thus, the term "turnpike."

tolls collected for use of the road.<sup>17</sup> After completion of the road, the government continued to amend and lengthen the company's charter to help increase revenues, provide convenient routes, and fine toll evaders.<sup>18</sup> The road has been identified as the first significant turnpike and the "beginning of organized road improvement after the long period of economic confusion following the American Revolution."<sup>19</sup>

It has been said that P3s are "the *modus vivendi* of America's contemporary nonprofit sector largely because [P3s] are a basic characteristic of American politics and social welfare system—not by design but by happenstance."<sup>20</sup> This assessment is largely rooted in the fact that governments—at not only the federal level, but also the state and local levels—often lack the resources necessary to provide the depth and types of services and infrastructure necessary to support the underlying communities.

### III. TYPES OF P3S

The type of P3 used is determined by "what rights, obligations, and risks are assumed by the public or private parties within the partnership."<sup>21</sup> In the traditional government contracts context, these rights, obligations, and risks are memorialized in a number of different forms and variations, including, but not limited to, Concession; Build-Own-Operate; Build/Operate/Transfer; Operations, Maintenance and Management; and Design-Build-Operate.<sup>22</sup> P3s are similar to traditional government contracts in that they inherently encompass a risk mitigation model that operates to balance the risk of a project between the contractor and the government.<sup>23</sup> Shifting the risk burden

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 1795—*The Philadelphia and Lancaster Turnpike Road*, U.S. DEP'T TRANSP., FED. HIGHWAY ADMIN. (Jan. 31, 2017), <https://www.fhwa.dot.gov/rakeman/1795.htm>.

<sup>20</sup> Lynne Moulton & Helmut Anheier, *Public-Private Partnerships in the United States: Historical Patterns and Current Trends*, CIVIL SOC'Y WORKING PAPER 16, Feb. 2001, at 3, [http://eprints.lse.ac.uk/29058/1/CSWP\\_16\\_web.pdf](http://eprints.lse.ac.uk/29058/1/CSWP_16_web.pdf).

<sup>21</sup> The World Bank, *Attracting Investors to African Public-Private Partnerships: A Project Preparation Guide*, at 8 (2009), <https://openknowledge.worldbank.org/bitstream/handle/10986/2588/461310revised017808213773070Revised.pdf?sequence=1>.

<sup>22</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO/GGD-99-71, PUBLIC-PRIVATE PARTNERSHIP TERMS RELATED TO BUILDING AND FACILITY PARTNERSHIPS (1999).

<sup>23</sup> See Napoleon & Vilmenay, *supra* note 2.



based on contract type—firm fixed price or cost plus reimbursement—along with ensuring the contractor provides a mix of specialized technical skills, innovation, and funding is a way in which the government engages the private sector and promotes interaction between the government agency and the private partner.

#### *A. Concession*

In a concession P3, a public authority grants a private sector “operator” responsibility for the operation, maintenance, financing, and management of an infrastructure asset while retaining ownership of the asset and receiving rights to the asset once the concession ends.<sup>24</sup> Notably, under a concession, the private sector operator assumes the risk for the condition of the asset and for the investment itself.<sup>25</sup> A concession P3 can cover an existing asset or utility or exist for a new building project.<sup>26</sup> The concession period will generally last 25 to 30 years and the public’s payment for the use of the concession serves as the source of revenue for the operator.<sup>27</sup>

One unique aspect of the concession is that the asset provides instant cash flow to pay the operator and to set aside funds to pay back the investment and/or to service the debt. Another unique aspect of the concession is the focus on output as opposed to input.<sup>28</sup> For concessions, the operator will generally set the parameters for operation of the asset and performance standards. A typical example of a concession P3 is a toll road; the public sector partner leases to its private partner a toll road for 30 years in exchange for an upfront payment, one that the public sector partner will use to fund other projects and that the private partner will presumably make back in tolls paid by people using the road. The private partner will be responsible for operation and maintenance of the road, but once the term expires, the public sector partner will retain operational control.

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<sup>24</sup> *Concessions, Build-Operate-Transfer (BOT) and Design-Build-Operate (DBO) Projects*, WORLD BANK GRP. PUBLIC-PRIVATE P’SHIP IN INFRASTRUCTURE RES. CTR., <http://ppp.worldbank.org/public-private-partnership/agreements/concessions-bots-dbos> [hereinafter P3 RESOURCE].

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

### *B. Build-Own-Operate*

Under a Build-Own-Operate (“BOO”) transaction, the public sector does not own the facility and is not required to purchase or take title of the facility.<sup>29</sup> Instead, a private sector contractor will be responsible for building and operating the facility.<sup>30</sup> Unlike a regular private investment, BOO transactions typically have some continuing level of government involvement because there is either: (1) an essential public service of some kind with few suppliers of that service, or (2) a need for the government to exercise its power of coercion and reduce procedural obstacles in the way of a project’s start (i.e., eminent domain).<sup>31</sup> Although the government does not provide direct funding, it may assist in offering other financial incentives such as tax-exempt status.<sup>32</sup> This P3 type has some variations, which include build-develop-operate and design-build-finance-operate-maintenance.<sup>33</sup> An example of a BOO P3 is a water treatment facility. The private company builds and runs the water facility by processing raw water into filtered water, and the public sector utility subsequently delivers the water to customers.

### *C. Build/Operate/Transfer*

In a Build/Operate/Transfer (“BOT”) project, the private sector is authorized to build and operate a facility or system generally built and operated by the public sector. The private sector would be granted the right from the public sector to operate this facility or system for the period of a concession term, and would ultimately be responsible for the project’s financing. Typically, a concession term could range from 25 to 30 years depending on the project. The duration serves as an incentive to participate in government projects by allowing the private-sector partner enough time to recover its return on investment. Once the term ends, the facility or system

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<sup>29</sup> *Types of Partnerships*, NAT’L COUNCIL FOR PUBLIC-PRIVATE P’S HIPS, [http:// www.ncppp.org/ppp-basics/types-of-partnerships/](http://www.ncppp.org/ppp-basics/types-of-partnerships/) [hereinafter NCPPP].

<sup>30</sup> *Id.*

<sup>31</sup> John Quiggin, Professor of Economics, James Cook University, Presentation made to the conference, BOOT: In the Public Interest? (Mar. 1998), <http://www.uq.edu.au/economics/johnquiggin/Conference/BOOT.html>.

<sup>32</sup> NCPPP, *supra* note 29.

<sup>33</sup> P3 RESOURCE, *supra* note 24.

would be transferred to the public authority. The BOT has been called a classic tool for project finance, because, for example, “the revenues are often obtained from a single ‘offtake purchaser’ such as a utility or government, who purchases project output from the project company.”<sup>34</sup>

Unlike the concession P3, there is no instant revenue stream from the facility or system.<sup>35</sup> Railways, for example, have been developed using the BOT model. The public sector partner chooses a private partner to build the railway, and the private partner then starts to implement the project when it forms a team, executes studies, obtains financing and permits, and proceeds with design development.<sup>36</sup> Once the design is approved by the public partner, construction of the railway begins. Upon completion of the railway, the railway opens for public use and repayment of the railway to the private partner is covered by incoming revenues.<sup>37</sup> After a predetermined term, the private partner transfers ownership of the facility to the public sector partner and the public sector then owns and operates the railway.

#### *D. Operations, Maintenance, and Management*

In an Operations and Maintenance (“OM”) project, a public partner contracts with a private partner to provide and/or maintain an already existing service.<sup>38</sup> While the public partner remains obligated to provide the service, day-to-day management rests with the private sector. The simplest OM model does not usually shift risk of asset conditions to the private partner but alternatively pays the private partner a fixed fee that covers the performance of specific tasks and accompanying expenses. An OM contract will typically last 3 to 5 years, and holds relatively little revenue risk for the private partner. An Operations, Maintenance, and Management (“OMM”) project is typically the same as the OM model, however, OMMs have longer termed projects that provide private partners more time and opportunity to make their own capital investments and earn reasonable returns.<sup>39</sup> The OM and OMM models have been used for water and, to a more limited extent, the energy sector.

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *See generally id.*

<sup>37</sup> *See id.*

<sup>38</sup> NCPPP, *supra* note 29.

<sup>39</sup> *Id.*

### *E. Design-Build-Operate*

In a Design-Build-Operate (“DBO”) project, a single contract is awarded to a private contractor to design, construct, and operate a new project until a contractually-agreed output, while the public sector maintains ownership and finances the project.<sup>40</sup> Unlike most public and private sector contracts where the design, construction, and management would be considered separate projects contracted for individually, the DBO method streamlines the process with a simple design-build approach. By giving one private entity the responsibility of multiple stages of a project, the public sector reduces the risk of issues going unnoticed or overlooked.

## IV. HOW P3S ARE FINANCED

The availability of and access to funds is an important element in determining the success of government sponsored projects utilizing the P3 model. Given the limited funding provided by federal, state, and local governments to support public projects, financing not only becomes a major component of the P3 arrangement, it also becomes a major reason and motivator behind why public sector entities engage in P3 structured transactions.

There are a variety of models available for financing P3 infrastructure projects. One financing model is government funding. Government funding is typically used in DBO projects where a government or public authority will source projects through traditional procurement methods and contract with a private company to design, build, operate, and maintain the asset. Documentation for this arrangement revolves around a contract between the sponsoring public authority and the private company. In addition, the public authority consummates an operating agreement with the private company.<sup>41</sup>

There is also the “Corporate or On-Balance Sheet Financing” model.<sup>42</sup> Under this model, the private sector obtains financing based on its own

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<sup>40</sup> *Id.*

<sup>41</sup> See NCPPP, *supra* note 29.

<sup>42</sup> *Main Financing Mechanisms for Infrastructure Projects*, WORLD BANK GRP. PUBLIC-PRIVATE PARTNERSHIP IN INFRASTRUCTURE RES. CTR. (Feb. 16, 2016), <http://ppp.worldbank.org/public-private-partnership/financing/mechanisms> [hereinafter *Main Financing Mechanisms*].

credit-worthiness rather than the “invest-ability” of the project.<sup>43</sup> Private partners are able to go to capital and equity markets and seek investors through equity shareholders, debt from banks, or potentially third-party-issued bonds. This financing model is typically used in less complex and lower-value projects.<sup>44</sup>

The most widely used financing model is Project Finance.<sup>45</sup> Project Finance is the result of direct investment by private sector investors using the capital markets or limited-recourse lending to a specially created project vehicle to support infrastructure projects.<sup>46</sup> Generally, in the Project Finance model, the project sponsors and investors will establish a specially created project vehicle or a special purpose vehicle (“SPV”) to sign the P3 contract with the public sector party and act as the borrower for project capital.<sup>47</sup> The SPV is usually established as a separate legal entity to diminish liability for any parent company by financing large projects separate and apart from its parent’s balance sheets.

Generally, P3 projects are financed in a similar fashion as project finance arrangements. Lenders and investors in these arrangements use non-recourse financing or limited-recourse financing, which are reliant on the project’s generated cash flow to recompense debts and produce returns for investors. A project’s likelihood of generating cash flow is indeed a lender’s primary assessment factor to determine a project’s overall risk, thus the terms of the project’s underlying contract are essential to securing financing.<sup>48</sup>

Many P3 projects are funded with a mix of long-term debt finance and equity financing. According to the Progressive Policy Institute, long-term debt finance represents approximately 80 percent of the total funding required, while the other 20 percent of financing is represented by equity

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *See id.* This is referred to as a project’s bankability. A project is bankable when lenders are willing to finance the project. Banks will look to the cash flow of a project as the primary source of security for the loan. This is quite different from corporate financing, the more usual basis on which banks lend to businesses, where lenders rely on the value of the company’s assets. *See Bankability*, THE EPEC PPP GUIDE, [www.eib.org/epec/g2g/i-project-identification/12/123/index](http://www.eib.org/epec/g2g/i-project-identification/12/123/index) (last visited July 5, 2016).

investments, depending on each project's perceived risks.<sup>49</sup> Debt financing is primarily used because it is generally less risky than equity financing. However, lenders typically require some type of equity funding for P3 deals to bridge the gap between available monies and monies required to pay the debt. Consequently, investors and the primary contractors will generally provide the equity financing. In some instances, the government may help provide capital for the initial costs of the project through grants or other means. If the project's cash flow does not match the debt financing, the difference must typically be covered by a government guarantee.<sup>50</sup>

Other projects are funded through varying combinations of private equity, corporate financing, government funding, bonds, and private capital inflows or other unique sources. For example, infrastructure bonds, project facilities, equity, and guarantees are just a few of the financing sources that are used to facilitate a P3.<sup>51</sup> Ultimately, there is no one-size-fits-all solution to finance a P3 project, so the type and source of financing used in the P3 infrastructure project depends on the phase of the project cycle.

#### V. ADVANTAGES OF P3S IN GOVERNMENT CONTRACTING

P3s offer various potential advantages to the government. How advantageous a P3 will be is largely dependent upon the project itself, the structure of the P3, and the parties involved. One significant advantage of P3s is their flexibility. More specifically, P3s offer public sector decision-makers an opportunity to improve the delivery of services and the management of facilities.<sup>52</sup> P3s also help to mobilize private capital, which

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<sup>49</sup> Diana Carew, *How Public-Private Partnerships Can Get America Moving Again*, PROGRESSIVE POL'Y INST. 15 (May 2014), [http://www.progressivepolicy.org/wp-content/uploads/2014/05/2014.05-Carew\\_How-Public-Private-Partnerships-Can-Get-America-Moving-Again.pdf](http://www.progressivepolicy.org/wp-content/uploads/2014/05/2014.05-Carew_How-Public-Private-Partnerships-Can-Get-America-Moving-Again.pdf).

<sup>50</sup> *Id.*

<sup>51</sup> Infrastructure or project bonds are typically issued to support the operations phase of the project's life cycle. During this phase, the bonds are substantially de-risked and operations cash flows are more certain and allow the project to meet its debt service. See *The Future of P3s in the US: Financing the Funding Gap for Infrastructure*, FINANCIER WORLDWIDE (July 2013), <https://www.financierworldwide.com/the-future-of-p3s-in-the-us-financing-the-funding-gap-for-infrastructure/#.WK6JBHrL-Z> [hereinafter *Strategic Infrastructure Steps*].

<sup>52</sup> *Government Objectives: Benefits and Risks of PPPs*, WORLD BANK GRP. PUBLIC-PRIVATE P'SHIP IN INFRASTRUCTURE RES. CTR., <http://ppp.worldbank.org/public-private-partnership/overview/ppp-objectives> (last updated Oct. 31, 2016) [hereinafter *Benefits and Risks of PPPs*].

ultimately facilitates the development and accelerates the delivery of infrastructure projects.<sup>53</sup> Use of the P3 project delivery model may help to filter out economically underproductive projects. P3s may also result in reducing the delay in project implementation and the investment in technologies and process innovations, which, in turn, may reduce project life-cycle costs.<sup>54</sup>

Other advantages include, but are not limited to, risk transfer, cost reduction, and private sector incentives, which are discussed in depth below.

#### *A. Risk Transfer*

One significant beneficial characteristic of P3s is risk transfer. P3s allow the government to shift some or all risks associated with the project to the private sector party. The government typically retains control and oversight of the project during both the design and construction phase and the operations and ongoing maintenance phase. For projects which the government is responsible for some or all of the financing, the liabilities are typically limited and tailored.<sup>55</sup> The transfer of risks for projects are negotiated and bargained for, and provide long-term value-for-money propositions for the government.<sup>56</sup>

P3s “involve a range of different risks.”<sup>57</sup> These, as a general matter, are categorized as construction risk, financial risk, performance risk, demand risk, and residual risk.<sup>58</sup> Each of these risks is assessed and measured in accordance with the project’s existence in the project life cycle.<sup>59</sup> Construction risk is typically associated with “design problems, building cost overruns, and project delays.”<sup>60</sup> Financial risk “is related to variability in interest rates, exchange rates, and other factors affecting financing costs.”<sup>61</sup>

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<sup>53</sup> *Strategic Infrastructure Steps*, *supra* note 51; Plunkett & Minor, *supra* note 2, at 5.

<sup>54</sup> *Strategic Infrastructure Steps*, *supra* note 51.

<sup>55</sup> *Government Risk Management*, WORLD BANK GRP. PUBLIC-PRIVATE P’SHIP IN INFRASTRUCTURE RES. CTR., <http://ppp.worldbank.org/public-private-partnership/financing/government-risk-management> (last updated Oct. 31, 2016).

<sup>56</sup> *See id.*

<sup>57</sup> IMF, *supra* note 3, at 11.

<sup>58</sup> *Id.* at 11–12.

<sup>59</sup> *See id.*

<sup>60</sup> *Id.* at 11.

<sup>61</sup> *Id.*

Performance risk “is related to the availability of an asset, and the continuity and quality of service provision.”<sup>62</sup> Demand risk is the risk “related to the ongoing need for services.”<sup>63</sup> And finally, residual risk “is related to the future market price of an asset.”<sup>64</sup>

Although investors consider the risks involved with P3 projects as major, they nonetheless acknowledge that P3 investments can be economically beneficial. Different types of risk mitigating instruments such as partial risks guarantees, government exchange guarantees, currency hedging, first loss guarantees, political risk insurance, debt and equity insurance, viability gap financing, and local currency bonds, may be offered to attract investors and mitigate risks.<sup>65</sup>

A significant element to evaluate the risk and predict success under the P3 delivery model includes understanding how risk is allocated. Risk allocation requires dividing or sharing the risk and the responsibility for dealing with the risk’s consequences between the parties. Risk transfer allows the government to relieve itself of risks that are better managed by the private sector. As part of this risk transfer process, the government should assess the value of taking on a project’s risk. Based upon that valuation, it should determine the proper allocation of risks between itself and the private sector.<sup>66</sup> In this regard, governments ultimately make distinctions between project-specific risks and “[m]arket risk, which reflects underlying economic developments that affect all projects, is not diversifiable and therefore has to be properly priced.”<sup>67</sup>

Finally, it is important to note that a P3 structure includes not only the contractual relationship between the public and private sectors, but also the network of contracts between private sector parties, banks, insurance carriers, and others that serve to allocate risk among P3 participants.

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 11–12.

<sup>65</sup> According to the World Bank, partial risk guarantees, for example, typically cover outstanding principal and accrued interest and help to protect private lenders against the risk of a public entity failing to perform its obligations with respect to a private project and help to ensure payment in the event of the public entity’s default from nonperformance of contractual obligations undertaken by governments or their agencies in private sector projects. See *Partial Risk Guarantees (PRG)*, THE WORLD BANK, <http://web.worldbank.org/external/default/main?theSitePK=3985219&pagePK=64143534&contentMDK=20260268&menuPK=64143504&piPK=64143448> (last visited July 5, 2016).

<sup>66</sup> IMF, *supra* note 3, at 13–14.

<sup>67</sup> *Id.* at 13.



### *B. Cost Reduction*

The private sector generally carries the majority of responsibility for most P3 projects and, as a result, the government's administrative and other indirect costs are reduced and/or transferred completely to the private sector. This transfer of costs and increase in responsibility motivates the private sector to better manage and consider a project's overall costs rather than the costs for discrete portions of the project.

Costs are reduced at the state and local level due to P3 projects. The host government to a project might issue bonds to raise funds necessary for infrastructure projects.<sup>68</sup> When projects are financed by the private sector, the government can begin and finish necessary projects without making significant capital investments, thus reducing government debt and the addition of new debt.<sup>69</sup> Consequently, P3s financed by the private sector free up government budgets to fund or better prioritize the budget for other initiatives.<sup>70</sup>

Due to public sector budget constraints and the inability or lack of will of governments to raise taxes or incur additional debt to finance a project, P3s provide an additional avenue through which certain projects can be realized. P3s inherently make for better planning, management, operational, and cost efficiency. Because payments for P3 projects are usually spread out, due over time, or after the completion of various stages, a project's funding allocation can be properly planned in advance. The ability for the private sector to use its expertise in both financial and operational strategy reduces the financial burdens typically associated with expensive and long-term projects, and can ultimately offer better public services through improved operational efficiency.<sup>71</sup>

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<sup>68</sup> *Sources of Financing and Intercreditor Agreement*, WORLD BANK GRP. PUBLIC-PRIVATE P'SHIP IN INFRASTRUCTURE RES. CTR., <http://ppp.worldbank.org/public-private-partnership/financing/sources> (last updated Sept. 6, 2016).

<sup>69</sup> Puentes & Sabol, *supra* note 1, at 8.

<sup>70</sup> *Id.* at 2.

<sup>71</sup> *Id.* at 10–11.

### *C. Private Sector Incentives*

Because the private sector party typically incurs debt to finance the project, the private sector party is motivated to manage the project efficiently and correctly from the onset.<sup>72</sup> This finance-oriented mindset helps to avoid under-bidding, where a party purposely bids low to win the contract but then bills the government for additional charges to complete the project. Additionally, having the private sector party finance the deal allows for quicker completion of projects without the uncertainty of public funding whereas government grants, allocated budgets, or taxes may sometimes result in delays or cancellation of the project after commencement.<sup>73</sup>

Using a P3 causes the government to rely less on budget allocations for significant projects.<sup>74</sup> Typically, government-operated and managed projects require annual budget appropriations. This annual allocation of funds is not guaranteed and the amount allocated often fluctuates. Ongoing maintenance and operation of the project, to which some resources have already been donated, may lose priority over other issues and can eventually lose funding altogether.

## VI. DISADVANTAGES OF P3S IN GOVERNMENT CONTRACTING

Notwithstanding the various benefits inherent in P3s, there are also inherent risks in any long-term project, so the P3 model may not always be the best option for certain projects. P3s have been criticized for prioritizing profit maximization for the private sector party, loss of jobs of public employees, and the over-complexity of financing and deal structures.<sup>75</sup> Other potential disadvantages of using P3s include high financing and transaction costs, loss of project control and revenues, and a number of unforeseeable consequences.

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 7.

<sup>75</sup> Plunkett & Minor, *supra* note 2, at 5–6.

### *A. High Financing and Transaction Costs*

P3s do not necessarily rid the government of all costs associated with the project. For example, there may be higher transaction costs from due diligence associated with vetting different private sector candidates. There can also be additional costs associated with drafting and negotiating various P3 project agreements, although P3-enabling legislation and statutes have the power to standardize the language and disclosure requirements of P3 contracts.<sup>76</sup>

For the private sector party, a potential disadvantage to the P3 model could be the higher costs associated with financing the project.<sup>77</sup> However, high costs could very well be offset by overall cost savings stemming from private sector efficiencies. The P3 project could also be structured in a way that the government obtains initial financing while shifting only the operational, construction, and/or management risks to the private sector.<sup>78</sup> Additionally, in certain state and local jurisdictions and for certain projects, the government may issue the private sector tax-exempt bonds to help offset higher transaction costs.<sup>79</sup>

### *B. Loss of Project Control and Revenues*

The government loses control in the P3 arrangements where it assigns the private sector substantial control and day-to-day operational management of a project.<sup>80</sup> Furthermore, certain projects can be negotiated to allow for lump-sum payments to the government or certain revenue-sharing agreements on an ongoing basis, leaving the government with no rights to transfer revenues from the project.<sup>81</sup> However, such loss of control is often

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<sup>76</sup> *Id.* at 7.

<sup>77</sup> *Id.* at 5–6.

<sup>78</sup> U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., PUBLIC-PRIVATE PARTNERSHIP CONCESSIONS FOR HIGHWAY PROJECTS: A PRIMER 5, [https://www.fhwa.dot.gov/ipd/pdfs/p3/p3\\_concession\\_primer.pdf](https://www.fhwa.dot.gov/ipd/pdfs/p3/p3_concession_primer.pdf) (last visited July 5, 2016).

<sup>79</sup> *Public Private Partnerships: Issues and Considerations*, PRACTICAL L. CO. 2 (2013), [http://apps.americanbar.org/webupload/commupload/CL113000/sitesofinterest\\_files/PublicPrivatePartnershipIssuesandConsiderations.pdf](http://apps.americanbar.org/webupload/commupload/CL113000/sitesofinterest_files/PublicPrivatePartnershipIssuesandConsiderations.pdf).

<sup>80</sup> *Id.* at 3.

<sup>81</sup> *Id.* at 5.

balanced by the fact that the government no longer is responsible for the operation and ongoing maintenance of the project.<sup>82</sup>

### *C. Unforeseen Consequences*

P3s are often used for large-scale and long-term projects and thus there may be greater probability of unforeseen issues. Some issues that could arise over the life of the project include disputes over certain interpretations of the terms in the P3 project documents, the private sector party being acquired by another larger, unknown company, or the private sector party going out of business.<sup>83</sup> There is also the potential for a long-term P3 to “lock-in” certain government spending depending on the operational needs at the time the contract is negotiated.<sup>84</sup> This could be an issue for the public sector partner when shifting government priorities also calls for a change in funding allocations. Such unforeseen consequences could result in delays and/or additional losses to the government.

## VII. FACTORS TO DETERMINE WHETHER TO ENGAGE IN A P3

P3s should not be used for all projects, and significant due diligence should be conducted before deciding to use a P3 structure for a particular infrastructure project. Certain items the government should evaluate in its decision to use P3s include whether:<sup>85</sup>

- The project involves significant capital investment;
- The government has the necessary funds to operate and maintain the project on a long-term or ongoing basis;
- The project requires technical or highly specialized knowledge;
- The project provides a service or benefit that should be provided by the government. This analysis includes the nature and location,

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<sup>82</sup> Plunkett & Minor, *supra* note 2, at 5–6.

<sup>83</sup> *Maximizing State Benefits from Public-Private Partnerships*, LEGISLATIVE ANALYST’S OFFICE (Nov. 8, 2012), [http://www.lao.ca.gov/reports/2012/trns/partnerships/P3\\_110712.aspx](http://www.lao.ca.gov/reports/2012/trns/partnerships/P3_110712.aspx) [hereinafter *LAO*].

<sup>84</sup> *Id.*

<sup>85</sup> See generally *Value-for-Money Analysis—Practices and Challenges: How Governments Choose When to Use PPP to Deliver Public Infrastructure and Services*, WORLD BANK GLOBAL ROUND-TABLE (May 28, 2013), [http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/VFM\\_0.pdf](http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/VFM_0.pdf).

- political implications, and the public and community needs of the project;
- A private sector party can provide the same services or benefits more efficiently;
  - It is feasible to provide oversight and monitor the private sector party to ensure the project is completed on time and ongoing operations and maintenance are properly handled; and
  - The government would forgo any revenues it would have otherwise received from the project after overhead and expenses.<sup>86</sup>

A value-for-money analysis is often used to assist the government in determining whether a P3 structure is the correct vehicle to use for a particular project.<sup>87</sup> The value-for-money analysis measures the costs of a project using the traditional procurement method versus the P3 structure.<sup>88</sup> This determination is not always dependent upon which approach is cheaper, as the government must determine the costs over the life of the project and factor in any ongoing operational and maintenance costs. Additionally, this comparative analysis must account for all procurement options and the consequences of not starting the project at all.<sup>89</sup> Ultimately, the needs of the public or greater community for the particular project must outweigh the overall costs and consequences of starting and completing the project.<sup>90</sup>

#### VIII. P3S IN GOVERNMENT CONTRACTING TODAY

Indeed, P3s, as a model within the context of federal government contracting, are not a new phenomenon. Growing in significant popularity, P3s have become the “go-to” form of government contracting particularly in

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* The value-for-money analysis also includes the following: the allocation of risks between the government and the private sector party, including any applicable construction costs overruns, unexpected operational and maintenance costs, and any other unexpected costs over the life of the project; the net costs of the project over the life of the project; the net value of any payments the government would receive from the private sector party; the net value of the benefits provided to the public for the life of the project; the technical and specialized skills and efficiencies the private sector party can bring to the project; the ability of the government to start and complete the project without private sector financing and participation; and any residual value of the project after the life of the project.

<sup>88</sup> *Id.* at 9–10.

<sup>89</sup> *Id.* at 10 n.2.

<sup>90</sup> *Id.*

an environment of fiscal deficits.<sup>91</sup> The use of P3s as a means of improving government operations is an issue to which Congress has given serious attention.<sup>92</sup> For example, the congressionally-mandated Commercial Activities Panel, chaired by the comptroller general of the United States, issued a report in 2002 endorsing the use of P3s in government contracting.<sup>93</sup> This endorsement comes on the heels of recognizing the government's redefining role in managing public facilities, transportation, and infrastructure on land and in water. Additionally, Congress' interest in P3s is the result of the DoD's involvement over the last 20 years in P3 arrangements with contractors for the management and production of critical military items and assets as part of its depot-level maintenance program.<sup>94</sup>

Other examples of the DoD's use of P3s to expedite projects include Army projects focused on energy conservation, soldier family housing, and army-run hotels ("army lodges"), all of which have been acclaimed as successful ventures.<sup>95</sup> The Navy has also engaged P3 strategies to solve "infrastructure, real property, and energy problems."<sup>96</sup> Even the Air Force has found creative ways to successfully leverage Air Force assets to attract more than \$8.3 billion in private investment by authorizing "enhanced use leases" to the private sector for underused facilities on Air Force bases.<sup>97</sup>

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<sup>91</sup> See David M. Walker, *Improving the Sourcing Decisions of the Government*, COMMERCIAL ACTIVITIES PANEL 1 (Apr. 30, 2002), <http://www.gao.gov/assets/210/202027.pdf>. Section 832 of the Floyd Spence National Defense Authorization Act for fiscal year 2001 required the comptroller general to convene a panel of experts to study the policies and procedures governing the transfer of commercial activities for the federal government from government to contractor personnel. *Id.*

<sup>92</sup> See *Federal Funds Could Spark Transport P3s*, P3 BULLETIN (Mar. 16, 2015), <http://www.p3bulletin.com/news/view/87200>.

<sup>93</sup> See generally Walker, *supra* note 91.

<sup>94</sup> *Id.* See also 10 U.S.C. § 2460 (2016).

<sup>95</sup> John Smolen, *Congressional P3 Caucus Reconvenes to Consider P3 Solutions for Department of Defense Infrastructure*, NOSSAMAN LLP (Apr. 29, 2014), <http://www.infrainsightblog.com/2014/04/articles/policy/congressional-p3-caucus-reconvenes-to-consider-p3-solutions-for-department-of-defense-infrastructure/>.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

*A. P3 in Sustainment and Depot-Level Maintenance*

The DoD, over the last couple of decades, has been engaged in establishing a more fully integrated defense sustainment industrial base.<sup>98</sup> As a policy and statutory matter, the DoD promotes the use of P3s as a way to leverage private sector capabilities in the delivery of goods and services to the government. For example, the DoD mandates using P3s in defense sustainment and in depot-level maintenance communities.<sup>99</sup> More specifically, the DoD directs that all “sustainment strategies shall include the best use of public and private sector capabilities through government/industry partnering initiatives.”<sup>100</sup> In addition, the DoD states that “P3s for depot-level maintenance shall be employed whenever cost effective in providing improved support to the Warfighter, and to maximize the utilization of the government’s facilities, equipment, and personnel at DoD depot-level maintenance activities.”<sup>101</sup>

In the last ten years, the government has increasingly partnered with the private sector to sustain core depot-maintenance capabilities, use underutilized public facilities, and leverage private sector investment in military facilities.<sup>102</sup> In a 2003 GAO study (the “Study”) to address the extent to which the DoD is participating in P3s for depot maintenance, it was determined that partnerships between military depots and contractors were formed for a variety of reasons.<sup>103</sup> These reasons include, but are not limited

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<sup>98</sup> See Colonel Tom D. Miller, *21st Century Defense Initiative at Brookings: The Defense Sustainment Industrial Base—A Primer*, BROOKINGS INST. (June 30, 2010), [http://www.brookings.edu/~media/research/files/papers/2010/6/30-defense-industrial-base-miller/0630\\_defense\\_industrial\\_base\\_miller.pdf](http://www.brookings.edu/~media/research/files/papers/2010/6/30-defense-industrial-base-miller/0630_defense_industrial_base_miller.pdf) (describing, among other things, the defense sustainment industrial base as the “package of support functions required to maintain the readiness and operational capability of weapon systems, subsystems, software[,] and support systems”).

<sup>99</sup> See 10 U.S.C. § 2460 (2016). The term “depot-level maintenance and repair” means material maintenance or repair requiring the overhaul, upgrading, or rebuilding of parts, assemblies, or subassemblies, and the testing and reclamation of equipment as necessary, regardless of the source of funds for the maintenance or repair or the location at which the maintenance or repair is performed.

<sup>100</sup> See *Dep’t of Defense, DoD Directive No. 5000.01*, THE DEFENSE ACQUISITION SYSTEM (May 12, 2007), <http://www.dtic.mil/whs/directives/corres/pdf/500001p.pdf>.

<sup>101</sup> See *Dep’t of Defense, DoD Instruction No. 4151.21*, PUBLIC-PRIVATE PARTNERSHIPS FOR DEPOT-LEVEL MAINTENANCE (Apr. 25, 2007), <http://www.dtic.mil/whs/directives/corres/pdf/415121p.pdf>.

<sup>102</sup> See 10 U.S.C. § 2474 (2016).

<sup>103</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO-03-423, DEPOT MAINTENANCE: PUBLIC-PRIVATE PARTNERSHIPS HAVE INCREASED, BUT LONG-TERM GROWTH AND RESULTS ARE UNCERTAIN I

to, maximizing the use and capacity at depots, fostering collaboration between the military and private industry, contractors seeking depots for their unique capabilities and advantageous depot labor rates, and facilitation of workforce sharing.<sup>104</sup> Thus, presently, P3s are a key component of DoD product-support strategies to achieve affordable operational readiness for the warfighter.<sup>105</sup>

The DoD uses three basic types of P3 approaches to depot-level maintenance: (i) Workshare, (ii) Direct Sale, and (iii) Lease arrangements.<sup>106</sup> Other partnership approaches recognized by the DoD include Teaming and Government-Furnished Resources.<sup>107</sup>

*The Department of Defense Public-Private Partnering for Sustainment Guidebook* (the “Guidebook”) defines Workshare as a “partnership in which a government buying activity, in collaboration with a contractor and a depot maintenance activity, determines the best mix of work by capitalizing on each partner’s capabilities.”<sup>108</sup> The workload is then allocated to each partner. The contractor is funded through a contract, and the organic activity is funded through a project or work order (in the case of depot maintenance). The partnering agreement focuses on the roles and responsibilities of each partner and the partners work jointly to accomplish the overall requirement. Partners under a workshare agreement do not exchange funds, consequently ridding the need for specific legal authority over the agreement.<sup>109</sup>

The *Guidebook* defines Direct Sale as “an arrangement . . . whereby military and commercial entities enter into a contractual relationship for the use of depot maintenance facilities and employees to sell depot maintenance

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(2003), <http://www.gao.gov/assets/240/237827.pdf> [hereinafter GAO P3 STUDY]. The study that occurred from February 2002 through February 2003 involved the review of 90 of the 93 partnerships the DoD identified as ongoing during fiscal year 2002, along with visits to 14 of the DoD’s 20 major maintenance depots where partnerships were ongoing. *Id.*

<sup>104</sup> *Id.* at 45.

<sup>105</sup> See Dave Floyd & Tom Gorman, *Public-Private Partnerships, The Key to Retaining Government and Industry Capabilities*, DEFENSE AT&L (2013), [http://www.dau.mil/pubscats/ATL%20Docs/Jan\\_Feb\\_2013/Floyd\\_Gorman.pdf](http://www.dau.mil/pubscats/ATL%20Docs/Jan_Feb_2013/Floyd_Gorman.pdf).

<sup>106</sup> See *Dept of Defense: Public-Private Partnering for Sustainment Guidebook*, ACQUISITION CMTY. CONNECTION 3 (Feb. 1, 2012), [https://acc.dau.mil/adl/en-US/495747/file/62530/Public-Private%20Partnering%20for%20Sustainment%20Guidebook%20\(1%20Feb%2012\).pdf](https://acc.dau.mil/adl/en-US/495747/file/62530/Public-Private%20Partnering%20for%20Sustainment%20Guidebook%20(1%20Feb%2012).pdf) [hereinafter *Guidebook*].

<sup>107</sup> GAO P3 STUDY, *supra* note 103, at 48–49.

<sup>108</sup> *Guidebook*, *supra* note 106.

<sup>109</sup> *Id.*



articles and/or services to an outside (non-government) entity, usually a contractor.”<sup>110</sup> A direct sale agreement begins with a government contract that funds a commercial activity. In turn, after development of a partnership agreement with an appropriate implementing agreement, the contractor pays an organic depot maintenance activity (or other industrial-funded activity as authorized) for goods and services provided to the contractor. Depending on the legal authority applied, the funds may be paid to the United States Treasury or directly to the depot’s working capital fund. The contractor may also supply material to the depots in support of the partnership.

The purchase of articles or services by the commercial entity establishes a quasi-subcontractor relationship for the depot, which ensures (as authorized by law) that the depot be held accountable for willful misconduct or gross negligence, or from the failure of the government to comply with cost, schedule, or cost performance requirements in the contract agreement.<sup>111</sup>

A Lease under the *Guidebook* is an arrangement where the government grants the private sector entity access to and use of government facilities and equipment.<sup>112</sup> Although the depot maintenance performing its mission is priority, providing access and use of government facilities and equipment to the private sector results in more efficient use of government-owned facilities.<sup>113</sup> Furthermore, revenues or “in-kind” payments earned by such a lease arrangement strengthens the government’s financial position and assures use of equipment that typically goes unused for long periods of time.<sup>114</sup>

With respect to other partnership approaches recognized by the DoD, the 2003 GAO study on DoD’s use of P3s recognized “Teaming” as an arrangement whereby military and commercial entities enter into a

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<sup>110</sup> *Id.* at 4. See also GAO P3 STUDY, *supra* note 103, at 47. According to the GAO study examining, among other things, the frequency of partnership approaches used in the depot maintenance environment, direct sale is the most frequently used approach. *Id.*

<sup>111</sup> *Guidebook*, *supra* note 106, at 4 (“Primary legal authorities for direct sales agreements are found in 10 U.S.C. § 2474, which authorizes the payment from non-government entities to the working capital fund for articles and services produced. Additional authority for the ‘sale of articles and services’ is in 10 U.S.C. §§ 2208(j), 2563, 4543, 4544, 7300, and 22 U.S.C. § 2770 for specified circumstances.”).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (“In-kind” consideration includes the provision of property maintenance, protection, alteration, repair, improvement, and restoration; construction of new facilities; provision of facilities; and provision or payment of utility services.); see also 10 U.S.C. § 2667 (2016); 10 U.S.C. § 2474.

contractual relationship to assist one another in completing a project by a certain date.<sup>115</sup> Typically, the teaming agreement will lay out the deliverables and work relationship between the military and commercial entities.<sup>116</sup> Once a contract award is granted, these relationships are generally labeled contract/subcontractor relationships.<sup>117</sup>

Government-Furnished Resources, on the other hand, involve an arrangement whereby the government permits the use of its depot maintenance facilities and/ or its equipment and employees by the private sector at no charge.<sup>118</sup>

In addition to P3s for depot-level maintenance, the DoD instructs that Performance-Based Logistics implementation strategies shall consider P3s to satisfy the core logistic capabilities requirements of 10 U.S.C. § 2464 and the limitations on the performance of depot-level maintenance and material requirements contained in 10 U.S.C. § 2466.<sup>119</sup> As the DoD continues with its P3 mandates, senior officials and contractors have collectively identified at least 14 characteristics that they believe are important for partnership success: (i) long-term relationship and commitment, (ii) shared partnership vision and objectives, (iii) the right metrics and incentives, (iv) early acquisition of community involvement, (v) complementary skills and abilities, (vi) senior-level advocacy and support, (vii) sound business case analysis, (viii) mutual trust and shared risk, (ix) flexibility to change partnership scope, (x) balanced workload, (xi) independent review and oversight, (xii) enforcement of partnership decisions and requirements, (xiii) full coordination with all stakeholders, and (xiv) clearly documented objectives in partnering agreements.<sup>120</sup>

Some of the notable successful DoD P3s have centered on partnerships related to in-service weapon systems, weapon systems development, arsenals, and multi-element product support.<sup>121</sup> In August 2011, the United States Air Force's Ogden Air Logistics Complex ("Ogden"), which repairs F-16 fighter aircraft components, needed to repair a dual-mode transmitter

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<sup>115</sup> GAO P3 STUDY, *supra* note 103, at 48.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 49.

<sup>119</sup> *Guidebook*, *supra* note 106, at 9.

<sup>120</sup> GAO P3 STUDY, *supra* note 103, at 14.

<sup>121</sup> *Guidebook*, *supra* note 106, at 21–23.

and thus formed a Direct-Sale partnership with Lockheed Martin to complete the work.<sup>122</sup> The partnership was expected, among other things, to bring additional workload to Ogden beyond its support of the F-16 fleet at no additional cost to the Air Force.<sup>123</sup> In a 2015 study, the GAO found that the P3s used at Ogden have also been used by other services and commodities in depot-level maintenance activities of components for aircrafts such as the Navy's F/A-18 and its fire control radar.<sup>124</sup>

Another notable DoD P3 is the Warner Robins Air Logistics Center/Lockheed Martin partnership relating to the Sniper Advanced Targeting Pod, which included the use of a Workshare method and resulted in Lockheed Martin assisting in depot activation. It also enabled the depot to begin performing organic maintenance.<sup>125</sup> Other partnerships that the DoD has successfully used include: one with Lockheed Martin and Pratt & Whitney in the development of the F-35 Lightning II Joint Strike Fighter, another with General Dynamics and Honeywell in the M1 Abrams modernization, and yet another with BAE Systems in the development of mine-resistant, ambush-protected ("MRAP") technology and composite armor production in support of, and used in Iraq and Afghanistan in the protection of, the warfighter.<sup>126</sup>

### *B. Corps of Engineers*

Dealing with significant budget shortcomings as it takes on the country's civil works programs, and given the availability of private capital, the United States Army Corps of Engineers (the "Corps") has considered improving overall efficiency and reducing its financial burdens through use

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<sup>122</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-249R, DEPOT MAINTENANCE: STATUS OF THE P3 FOR REPAIR OF THE DUAL-MODE TRANSMITTER IN THE F-16 FIRE-CONTROL RADAR (2015).

<sup>123</sup> *Id.* (In examining the benefits of the Ogden partnership with Lockheed Martin, the Air Force concluded, as part of a 2011 business-case analysis that the partnership work would help to maximize the use of the repair complex while also ensuring skill proficiency among artisans who repair the dual-mode transmitter. In addition, the Air Force concluded that the P3 would result in additional work in the repair complex, with the potential to generate \$1.47 million of revenue per year with a reduction in the cost of operations and maintenance.).

<sup>124</sup> *Id.* (delineating that the Navy established a P3 for the repair of the F/A-18 fire control radar in 2002).

<sup>125</sup> See generally *id.*

<sup>126</sup> *Id.*

of P3s.<sup>127</sup> In fact, as it is responsible for the nation's water infrastructure, the Corps is exploring the possibility of partnering with the private sector for completing and delivering the more than \$60 billion backlog of outstanding projects involving America's waterways and ports.<sup>128</sup> This is a view expressed by the Army's chief of engineers and the Corps' commanding general, Lieutenant General Thomas Bostick, who understands the nature of the nation's aging infrastructure and the need to outsource such repair projects to private commercial entities.<sup>129</sup> Because the use of P3s would likely allow the Corps to address funding gaps and deliver projects at a faster and more efficient rate, the Corps would potentially be able to

deliver/build/recapitalize more infrastructure for the public through leveraging private sector investments for optimal project delivery; develop a culture of innovation for global competitiveness through a highly partnered environment; improve value for money in infrastructure projects by creating incentives for best practice design, timely completion, and efficient operation via sharing project risk with the private sector; and improve the sustainability of infrastructure.<sup>130</sup>

Driving these objectives and the Corps' movement toward the use of P3s is legislation that is derived from the concerns raised by Illinois congressional delegates who sponsored bipartisan legislation in April 2013. That legislation, the Water Infrastructure Now P3 Act<sup>131</sup> ("WINPPA"),

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<sup>127</sup> See *Budget Constraints and the Corps' Consideration of P3s: Where Is the Money Going to Come From?*, U.S. ARMY CORPS OF ENGINEERS (Dec. 2008), <http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/2008-P-1.pdf>.

<sup>128</sup> See Lisa Ferdinando, *Corps of Engineers Explores Public-Private Partnerships*, ARMY NEWS SERV. (July 10, 2014), [http://www.army.mil/article/129756/Corps\\_of\\_Engineers\\_explores\\_public\\_private\\_partnerships](http://www.army.mil/article/129756/Corps_of_Engineers_explores_public_private_partnerships) (outdated and deteriorating locks and dams along the Mississippi and Illinois rivers have contributed to a backlog of projects for the U.S. Army Corps of Engineers (the "Corps"), amounting to the \$60 billion in unfunded, but necessary, upgrades); see also Ashley Rezin, *Major Infrastructure Needs Along Mississippi & Illinois Rivers Prompt Bipartisan Legislation*, PROGRESS ILLINOIS (July 5, 2016), <http://progressillinois.com/posts/content/2013/03/26/major-infrastructure-needs-along-mississippi-and-illinois-rivers-prompt-bip>.

<sup>129</sup> *Id.*

<sup>130</sup> See Ernest A. Drott, *Presentation at the 4th Annual P3 Conference of the New Jersey Alliance for Action: USACE Water Infrastructure Public Private Partnerships* (July 23, 2014), <http://aiai-infra.info/members-only/wp-content/uploads/2014/09/Alt-Fin-P3-AIAI.pdf>.

<sup>131</sup> The Water Infrastructure Now P3 Act, S. 566/H.R. 1153, 113th Cong. (2013) (sponsored by U.S. Senator Dick Durbin (D-IL) and Mark Kirk (R-IL), the Act was assigned to the Senate Environment and Public Works Committee. It was also sponsored by U.S. Representatives Cheri Bustos and Rodney Davis (R, IL-13), and assigned to the House Transportation and Infrastructure subcommittee for Water Resources and Environment. Both bills, which died and were not enacted, would have directed the chief of engineers to establish a pilot program to evaluate the cost effectiveness and project delivery efficiency

would encourage private investment to improve the nation's water infrastructure. Recognizing that the Mississippi and Illinois rivers are critical to the economic well-being of the region, the need for expansion and modernization of the 80- to 90-year-old crumbling locks and dams of the rivers<sup>132</sup> that help transport goods and products worldwide has become paramount. Thus, minimizing the significant backlog in the completion of projects along the rivers served as the impetus for the proposal of WINPPA.<sup>133</sup> The WINPPA envisioned creating a five-year pilot program aimed at establishing partnerships between the Corps and private investors. The purpose of the pilot program is to explore alternative financing methods for modernizing infrastructure along the nation's inland waterways, including the Mississippi and Illinois rivers, for exports of products such as steel, oil, coal, and agricultural exports, including corn and mulch.<sup>134</sup> While the WINPPA was never enacted, it served as the impetus for the promulgation of the Water Resources Reform and Development Act ("WRRDA") of 2014.<sup>135</sup>

WRRDA is the primary legislation by which Congress authorizes the Corps of Engineers' key civil works missions, including navigation, flood risk management, and environmental restoration, paving the way for federal, state, and local projects that maintain the United States' ports, levees, dams, and harbors by authorizing \$12.3 billion for such projects. The authorities provided in WRRDA assist the Corps in developing and maintaining the nation's waterways and harbors, reducing damages from storm events, and restoring the environment. WRRDA, among other things, establishes a P3 pilot program permitting private sector investment and participation in the financing, design, and/or construction of the Corps' water infrastructure projects.<sup>136</sup>

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of allowing non-federal interests to carry out authorized flood damage reduction, hurricane and storm damage reduction, and navigation projects.).

<sup>132</sup> See Rezin, *supra* note 128. Also note, a lock is a chamber in which water levels can be adjusted to transport boats between river and canal waterways with different levels. A dam is a barrier that manages water flow.

<sup>133</sup> The Water Infrastructure Now P3 Act, S. 566/H.R. 1153, 113th Cong. (2013).

<sup>134</sup> *Id.*

<sup>135</sup> See Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, 128 Stat. 1193.

<sup>136</sup> *Id.*

The nation has a predicted need for investment of \$600 billion and \$1 trillion in the coming decades to build up and improve our water and sewer infrastructure, making any P3 pilot program of significant importance. “Given the magnitude of capital needed and the critical nature of these projects, P3s seem to be an ideal structure for accomplishing the work, particularly given the current financial pressures faced by the government and its agencies.”<sup>137</sup>

The Corps have been allowed to explore different methods of financing and delivery modalities under WRRDA, through the Water Infrastructure Finance and Innovation Act (“WIFIA”).<sup>138</sup> With this authorization, the Corps’ main objective is to determine the best practices of persuading private partner participation in their projects. WIFIA is adapted from the Department of Transportation’s Infrastructure Finance and Innovation Act<sup>139</sup> and provides “low-interest federal loans and loan guarantees for major water infrastructure projects.”<sup>140</sup> WRRDA also creates a separate 15-project pilot program—the Water Infrastructure P3 Program for the Army Corps of Engineers—to assess the use of P3s to accelerate the most critical water infrastructure projects. If WRRDA and its programs prove successful, it makes sense to expand such financing programs and encourage the use of P3s to fund projects addressing other sectors of the nation’s infrastructure.

### *C. Transportation and Infrastructure*

In addition to the use of P3s in the DoD and Corps, there are a number of P3-related projects that fall under the purview of the Department of Transportation. Just a few of the transportation infrastructure projects benefiting from the P3 model include: the Indiana Toll Road; Chicago

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<sup>137</sup> Laura Fried-Studlo, *Water Bill to Boost Public-Private Partnerships*, GRAVEL2GRAVEL CONSTRUCTION & REAL EST. L. BLOG (June 10, 2014), <http://www.gravel2gavel.com/2014/06/water-bill-to-boost-public-private-partnerships.html>.

<sup>138</sup> See Water Infrastructure Finance and Innovation Act of 2014, Pub. L. No. 113-121, 128 Stat. 1332.

<sup>139</sup> *Id.*

<sup>140</sup> TIFIA is a successful federal program that has supported major P3 transportation projects. Like TIFIA, WIFIA encourages P3s by making low-cost federal loans available to projects that include private partners, as long as the project is publicly sponsored and the local public agency supports it. By lowering the cost of public debt, these low-interest loans give projects more capacity to bring in equity or private debt.

Skyway; I-595 improvements near Fort Lauderdale, Florida; Capital Beltway (I-495) HOT (high occupancy toll) lanes project in northern Virginia; Hudson-Bergen Light Rail in New Jersey; Port of Miami Tunnel in Miami; Ohio River Bridges East project connecting the east end of Louisville, Kentucky, near Prospect, to southern Indiana near Utica; and the Goethals Bridge Replacement Project connecting Staten Island, New York, to Elizabeth, New Jersey.<sup>141</sup> These projects, more importantly, also benefit from Department of Transportation Infrastructure Finance & Innovation Act (“TIFIA”), which is a federal government loan for the implementation of infrastructure projects.<sup>142</sup>

The \$2 billion North Tarrant Express A is a leading and recent example in the use of the P3 model for transportation infrastructure development. North Tarrant Express A is a design/build/finance/operate project to manage lanes and upgrade existing facilities on 13 miles of interstate in the Dallas-Fort Worth Metro area.<sup>143</sup> This project is financed by \$650 million in TIFIA loans, \$427 million in private equity, \$400 million in private activity bonds, and \$573 million in state funds.<sup>144</sup>

Notwithstanding these projects and others, “private investment in U.S. highways and transit has been modest in comparison to spending by all levels of [the federal] government.”<sup>145</sup> A 2014 panel on P3s composed of members of the Committee on Transportation and Infrastructure of the House of Representatives found that “using P3s for the delivery of surface transportation projects in the United States is a fairly recent trend.”<sup>146</sup> The 2014 panel also acknowledged P3s’ importance to both the development and delivery of transportation and infrastructure projects.<sup>147</sup> The panel found that the successful P3 projects share several factors, including “leveraging the

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<sup>141</sup> Robert Poole, Jr., *Annual Privatization Report 2014 Surface Transportation*, REASON FOUND. 5 (2014), <http://reason.org/files/apr-2014-surface-transportation.pdf>.

<sup>142</sup> See ROBERT KIRK & WILLIAM MALLETT, CONG. RESEARCH SERV., R42877, FUNDING AND FINANCING HIGHWAYS AND PUBLIC TRANSPORTATION 22–24 (2013), <https://www.asphaltpavement.org/michele/CRS%20report.pdf>.

<sup>143</sup> *Build America Transportation Investment Center (BATIC): North Tarrant Express Segments 1 & 2A*, U.S. DEP’T. TRANSP. (July 5, 2016), <https://www.transportation.gov/policy-initiatives/build-america/north-tarrant-express-segments-1-2a-dallas-fort-worth-tx>.

<sup>144</sup> *Id.*

<sup>145</sup> KIRK & MALLETT, *supra* note 142, at 23.

<sup>146</sup> TRANSPORTATION & INFRASTRUCTURE REPORT, *supra* note 5, at 24.

<sup>147</sup> *Id.*

strengths of the public and private sectors, appropriate risk transfer, transparent and flexible contracts, and alignment of policy goals.”<sup>148</sup> Internationally, P3s have been used more frequently, but have also yielded mixed results.<sup>149</sup>

Despite a United States municipal bond market of \$3.7 trillion, a significant amount of which is allocated for infrastructure financing, the infrastructure needs of the nation are well into the billions.<sup>150</sup> The panel suggested the following steps to improve P3s:

- establish a Transportation Procurement Office (“TPO”) to work with agencies to implement P3 best practices, including sample model contracts. The TPO would issue best practices for standardizing state P3 authorities, including fair and balanced assumptions made in the calculations, consistency on unsolicited bids, non-compete clauses, and other substantive elements;
- limit project delays and budget overruns;
- guarantee “more accountable expenditure of taxpayer dollars over the life cycle of the project”;
- direct the TPO to develop and implement performance standards for project delivery for P3 projects falling under the committee’s jurisdiction;
- require the DOT to have its state equivalents compile and submit annual reports on projects that receive federal funds;
- require the DOT to make state transportation annual reports available to the public and give Congress information on project performance data and national trends;
- facilitate the DOT’s progress in the Moving Ahead for Progress in the 21st Century Act (MAP-21) (P.L. 112-141) to encourage “simplification and standardization of P3 contracts”;
- encourage the DOT to collaborate with and support other federal, state, and local agencies to share information about P3s;
- encourage collaboration by states to realize common infrastructure objectives; and

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*



- form P3s early in projects to, among other things, form community consensus.<sup>151</sup>

Given the nation's infrastructure need to pave the way for greater P3 use in surface transportation projects, President Obama signed into law the Fixing America's Surface Transportation Act ("FAST").<sup>152</sup> This legislation, which became law on December 4, 2015, calls for spending \$305 billion over fiscal years 2016 through 2020 for highways, highway and motor vehicle safety, public transportation, motor carrier safety, hazardous materials safety, rail, and research, technology, and statistics programs.

#### *D. Homeland Security*

The emergence of P3s in homeland security can be traced back to the 19th century, where the recovery from various disasters resulted in a collaborative effort between federal, state, and local governments with the private sector.<sup>153</sup> The Great Chicago Fire of 1871, the 1906 San Francisco Earthquake, and the Great Mississippi Flood of 1927 saw significant interaction and exchange of funding from the private to the public sector in support of post-disaster reconstruction.<sup>154</sup> The Federal Emergency Management Agency ("FEMA"), created during the Carter Administration, in responding to tragic events such as September 11, 2001, terrorist attacks, Hurricane Katrina, and the Deepwater Horizon oil spill, has contributed to enhancing the prominent and expansive role the P3 model has played in securing the homeland.

In the case of the 9/11 attacks, Verizon Wireless played a key role in rebuilding the communications network infrastructure to re-open the New

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<sup>151</sup> *Id.* at 13.

<sup>152</sup> Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312.

<sup>153</sup> Nathan E. Busch & Austen D. Givens, *Public-Private Partnerships in Homeland Security: Opportunities and Challenges*, HOMELAND SEC. AFFAIRS (Oct. 2012), <https://www.hsaj.org/articles/233>.

<sup>154</sup> Steve Bowen & Elizabeth Witham, *Financing Recovery from Catastrophic Events: Final Report*, HOMELAND SEC. INST. (Mar. 30, 2007), [https://recoverydiva.files.wordpress.com/2013/06/financing\\_recovery\\_hsi-2007.pdf](https://recoverydiva.files.wordpress.com/2013/06/financing_recovery_hsi-2007.pdf).

York Stock Exchange.<sup>155</sup> In response to Hurricane Katrina, Walmart played a significant role in providing relief supplies to Gulf residents.<sup>156</sup>

The vital nature of P3s and how they contribute to securing the homeland is proven when studies show that the private sector manages and controls almost 85 percent of the nation's critical infrastructure.<sup>157</sup> Thus, it is apparent that the security of the nation's critical infrastructure, especially in relation to national security, requires an effective partnership framework that fosters integrated, collaborative engagement and interaction among public and private sector partners.

In furtherance of this view, Presidential Policy Directive 21 (PPD-21)<sup>158</sup> and the National Infrastructure Protection Plan (NIPP) 2013<sup>159</sup> provide the overarching framework using, among other things, the P3 model for a structured partnership approach between the government and the private sector for the protection, security, and resilience of critical infrastructure. Through the Department of Homeland Security (DHS) and its Office of Infrastructure Protection (OIP),<sup>160</sup> along with the Critical Infrastructure

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<sup>155</sup> Dave Lenckus, *Verizon Quickly Restored Service After Terrorist Attacks*, BUS. INS. (Apr. 6, 2003), <http://www.businessinsurance.com/article/20030406/AWARDS03/100012615>.

<sup>156</sup> Steven Horwitz, *Wal-Mart to the Rescue: Private Enterprise's Response to Hurricane Katrina*, INDEP. REV. (2009), [https://www.independent.org/pdf/tir/tir\\_13\\_04\\_3\\_horwitz.pdf](https://www.independent.org/pdf/tir/tir_13_04_3_horwitz.pdf).

<sup>157</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-39, CRITICAL INFRASTRUCTURE PROTECTION: PROGRESS COORDINATING GOVERNMENT AND PRIVATE SECTOR EFFORTS VARIES BY SECTORS' CHARACTERISTICS (2006), <http://www.gao.gov/products/GAO-07-39>.

<sup>158</sup> *Presidential Policy Directive—Critical Infrastructure Security and Resilience: PPD-21*, THE WHITE HOUSE (Feb. 12, 2013), <https://www.whitehouse.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil> [hereinafter *PPD-21*] (PPD-21, titled "Critical Infrastructure Security and Resilience," directs that the federal government shall work with critical infrastructure owners and operators (including the private sector entities) . . . "to take proactive steps to manage risk and strengthen the security and resilience of the Nation's critical infrastructure, considering all hazards that could have a debilitating impact on national security, economic stability, public health and safety, or any combination thereof. These efforts shall seek to reduce vulnerabilities, minimize consequences, identify and disrupt threats, and hasten response and recovery efforts related to critical infrastructure.").

<sup>159</sup> *National Infrastructure Protection Plan: NIPP 2013 Partnering for Critical Infrastructure Security and Resilience*, U.S. DEP'T OF HOMELAND SEC. (July 6, 2016), <http://www.dhs.gov/national-infrastructure-protection-plan> (outlining the ways in which government and private sector participants in the critical infrastructure community work together to manage risks and achieve security and resilience outcomes).

<sup>160</sup> See Busch & Givens, *supra* note 153 (stating that OIP, within DHS, works on threat and vulnerability analyses, national and local coordination with businesses and government agencies, and risk mitigation).

Partnership Advisory Council (CIPAC),<sup>161</sup> the federal government engages in P3s relying on firms like SAIC, Booz Allen Hamilton, Northrop Grumman, Lockheed Martin, Microsoft, Bank of America, and VISA.<sup>162</sup> These private companies work to enhance critical infrastructure protection with a primary focus on “cyber security, port security, emergency management, chemicals, commercial facilities, critical manufacturing, dams, emergency services, and nuclear reactor sectors, materials, and waste.”<sup>163</sup> Indeed, in recent times, P3s have become a high priority, resulting in equipping DHS with initiatives to create greater relations between the federal government and the business community.<sup>164</sup>

## IX. FACILITATING OTHER USES OF P3S

### A. *White House Initiative to Expand P3s*

During the Obama Administration an attempt was made to stimulate growth in transportation and other related infrastructure projects by launching of a government-wide initiative—the Build America Investment Initiative.<sup>165</sup> This initiative was announced in furtherance of the administration’s policy and “. . . the policy of the Federal Government for all agencies to facilitate, as appropriate, *greater public and private partnership* and collaboration, including with international investors and companies, to develop, improve, and maintain infrastructure across the country where and when economically and environmentally beneficial and in the public interest.”<sup>166</sup>

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<sup>161</sup> *Id.* CIPAC is the organizational framework, which includes such companies as Verizon, the Boeing Company, Google, and government agencies such as the United States Department of Justice, Department of Commerce, and Environmental Protection Agency, through which the federal government and private sector representatives exchange and coordinate critical infrastructure information. *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> See *FACT SHEET: Building a 21st Century Infrastructure: Increasing Public and Private Collaboration with the Build America Investment Initiative*, THE WHITE HOUSE (July 17, 2014), <https://www.whitehouse.gov/the-press-office/2014/07/17/fact-sheet-building-21st-century-infrastructure-increasing-public-and-pr>.

<sup>166</sup> See *Presidential Memorandum—Expanding Public-Private Collaboration on Infrastructure Development and Financing*, THE WHITE HOUSE (July 17, 2014), <https://www.whitehouse.gov/the-press-office/2014/07/17/presidential-memorandum-expanding-public-private-collaboration-infrastru>.

Among other things, the initiative, as further memorialized by Presidential Memorandum, created an Infrastructure Finance Working Group (“Working Group”) that would “. . . assess the ways in which public-private collaborations can best support economically transformative investments, improve project delivery, expand economic opportunity, increase resilience and sustainability, advance regional infrastructure development plans, and encourage innovation in the infrastructure sector.”<sup>167</sup>

Infrastructure, however, is not the only sector where the White House has seen opportunity to leverage P3s. In March 2015, President Obama announced his plan to rebuild and fortify the American manufacturing industry through public-private investments of \$500 million.<sup>168</sup> With the DoD leading various competitions focused on innovative technologies that could benefit the manufacturing industry, the Obama administration’s plan increased small manufacturer’s capabilities.<sup>169</sup>

The Obama administration’s steadfast focus on leveraging P3s extended even into the areas of social reform and creating access to high-speed broadband for all citizens at all economic levels. Recognizing that “. . . a lack of [I]nternet access is a denial of access to basic education and employment resources,”<sup>170</sup> in 27 cities across the nation, citizens will now have the opportunity to be connected to high-speed broadband through a pilot project titled the ConnectHome initiative.<sup>171</sup>

In furtherance of the Obama administration’s initiative, P3s are figuring prominently in the current administration’s plan to repair and modernize United States infrastructure as a priority including, roads, bridges, airports

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<sup>167</sup> *Id.*

<sup>168</sup> *FACT SHEET: President Obama Launches Competition for New Textiles-Focused Manufacturing Innovation Institute; New White House Supply Chain Innovation Initiative; and Funding to Support Small Manufacturers*, THE WHITE HOUSE (Mar. 18, 2015), <https://www.whitehouse.gov/the-press-office/2015/03/18/fact-sheet-president-obama-launches-competition-new-textiles-focused-man>.

<sup>169</sup> *Id.* (“The president launched the ninth manufacturing hub competition in Cleveland, Ohio, and announced measures to strengthen the small manufacturers that power America’s supply chains . . . . The first institute awarded is in Youngstown, Ohio. Only in its third year, it is already drawing investment to Ohio—including a \$32 million job-creating investment in the region from GE—and advancing research that will help accelerate the speed of 3-D printing in metals by a factor of 10.”).

<sup>170</sup> REALESTATERAMA, *Booker, Menendez Praise White House Announcement of ConnectHome Program to Expand Broadband Access* (July 16, 2015), <http://newjersey.realestaterama.com/2015/07/16/booker-menendez-praise-white-house-announcement-of-connecthome-program-to-expand-broadband-access-ID01808.html>.

<sup>171</sup> *Id.*

and water systems. This plan, which is a key part of the current administration's economic proposal, includes spending \$1 trillion over 10 years and purports to open the door to significant private sector investment under the auspices of P3s.<sup>172</sup> Private investment and the formation of P3s in this context recognizes the need to address limited government resources while also transferring project risk. The Trump administration intends to incentivize private sector investment in infrastructure and spur development and construction by providing tax credits which will ultimately lower the cost of financing projects. The extent to which the current administration will be successful in facilitating P3 projects for significant infrastructure projects remains to be seen as President Trump provides more details of his plan during the latter part of 2017. This approach is consistent with many states' practice of enacting laws to authorize private investment infrastructure projects and a full range of P3s.<sup>173</sup>

### *B. Congressional P3 Action*

Congress has been more recently engaged in seeking ways in which P3s may serve to facilitate greater infrastructure development within the government. For example, the Congressional P3 Caucus, a bipartisan congressional caucus, has been established to explore how to expand the role of P3s in transportation infrastructure as well as defense, energy, technology, and water.<sup>174</sup> Representative Mike Rogers (R-Alabama), co-chair of the caucus, cites raising awareness of infrastructure issues and examining P3s across the country as an objective of the caucus and as a response to the challenge resulting from the "severe crisis" in infrastructure funding in this country.<sup>175</sup>

Consistent with the caucus's objectives, members of the House, led by caucus co-chair Representative John Delaney (D-Maryland), co-introduced the Partnership to Build America Act (H.R. 2084) (the "PBAA").<sup>176</sup> If

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<sup>172</sup> Doug Peterson & Jane Garvey, *What Trump's Infrastructure Plan Gets Right*, US NEWS & WORLD REPORT (Jan. 26, 2017), <https://www.usnews.com/opinion/economic-intelligence/articles/2017-01-26/donald-trump-can-improve-infrastructure-through-private-investment>.

<sup>173</sup> *Id.*

<sup>174</sup> Smolen, *supra* note 95.

<sup>175</sup> *Id.*

<sup>176</sup> Partnership to Build America Act of 2013, H.R. 2084, 113th Cong. (2013–14).

passed, the PBAA would finance \$750 billion in infrastructure investment using no appropriated funds.

The goal of the PBAA in stimulating P3s is to finance rebuilding the United States transportation, energy, communications, water, and education infrastructure through the creation of an infrastructure fund using repatriated corporate earnings, as well as through using P3s. The legislation would lead to the creation of the American Infrastructure Fund (“AIF”), which would be funded by “the sale of \$50 billion worth of infrastructure bonds having a 50-year term at a fixed interest rate of 1 percent, and would not be guaranteed by the U.S. government.”<sup>177</sup> The AIF would “provide loans or guarantees to state or local governments to finance qualified infrastructure projects and the states or local governments would be required to pay back the loans at a market rate determined by the AIF, to ensure they have ‘skin in the game.’<sup>178</sup> Additionally, the AIF would invest in equity securities for projects in partnership with states or local governments.”

The PBAA requires, among other things, 25 percent of AIF funded projects be P3s. Of that 25 percent, it is required that at least 20 percent of P3 funding is received from private investments. The potential benefits of the PBAA are that it would

create a large-scale infrastructure financing capability with zero federal appropriations; lead to significant jobs in the short term and help U.S. competitiveness in the long-term; allow for repatriation while ensuring U.S. corporations’ tax savings are truly invested in the U.S. economy to grow quality jobs; push the project selection decisions down to state and local governments who have skin in the game; and encourage and create a framework for growth in P3s.

#### X. P3S IN STATE AND LOCAL GOVERNMENT CONTRACTING

State and local governments have seen the benefits of P3s as well and are taking a more serious look at P3s as a means of delivering critical infrastructure development and other essential services to citizens. A recent report stated that the three primary forces driving the emerging P3 market in

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<sup>177</sup> CONGRESSMAN JOHN DELANEY, *Information on the Partnership to Build America Act (H.R. 2084)*, <http://delaney.house.gov/infrastructure/information-on-congressman-delaneys-infrastructure-bill> (last visited July 6, 2016).

<sup>178</sup> *Id.*

the states are: “the rapid deterioration of nearly all types of infrastructure in every state, investment shortfalls for building and rebuilding vital public systems, and a growing population’s increasing burden upon existing systems.”<sup>179</sup> State and local governments who are closer to their constituents witness and feel the urgency for rebuilding. And though our federalist system places the lion’s share of the burden on them to repair crumbling infrastructure, states have broad leeway to adopt innovative solutions.

Acknowledging state and local government concerns, on August 10 and 11, 2007, during the American Bar Association’s 2007 Annual Meeting, the council of the Section of Public Contract Law and the Council of the Section of State and Local Government Law approved the 2007 Model Code for Public Infrastructure Procurement (“2007 MC PIP”) and urged its consideration by units of state and local government that have responsibility for the provision of infrastructure services and facilities.<sup>180</sup>

Many states have gone on to enact their own P3 infrastructure statutes.<sup>181</sup> In passing its own P3 infrastructure statute, the California legislature candidly acknowledged the problems facing the state and the need to swiftly embrace P3 agreements:

Local governmental agencies have experienced a significant decrease in available tax revenues to fund necessary infrastructure improvements. If local governmental agencies are going to maintain the quality of life that this infrastructure provides, they must find new funding sources. One source of new money is private sector investment capital utilized to design, construct, maintain, rebuild, repair, and operate infrastructure facilities. Unless private sector investment capital becomes available to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities, some local governmental agencies will be unable to

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<sup>179</sup> Dan McNichol, *The United States: The World’s Largest Emerging P3 Market: Rebuilding America’s Infrastructure*, AIG, at 6 (Apr. 2013), <http://www.aig.com/content/dam/aig/america-canada/us/documents/business/casualty/aig-whitepaper-brochure.pdf>.

<sup>180</sup> The 2007 MC PIP is an abridgment of the 2000 ABA Model Procurement Code for State and Local Governments (“2000 MPC”). The 2007 MC PIP was designed to specifically address the procurement and policy issues that arise when design, construction, operation, maintenance, and/or finance are merged into single procurements for public infrastructure. It was the hope of the ABA that the 2007 MC PIP provided a mechanism for local jurisdictions, which had not already adopted the ABA 2000 MPC and which were unable or unwilling to undertake a major revision of their overall procurement procedures at the time. See *2007 Model Code for Public Infrastructure Procurement*, AM. BAR ASS’N (Aug. 2007), <http://apps.americanbar.org/dch/committee.cfm?com=PC500500>.

<sup>181</sup> INNOVATIVE PROGRAM DELIVERY, *State P3 Legislation*, [https://www.fhwa.dot.gov/ipd/p3/state\\_legislation/](https://www.fhwa.dot.gov/ipd/p3/state_legislation/) (last visited July 6, 2016).

replace deteriorating infrastructure. Further, some local governmental agencies will be unable to expand and build new infrastructure facilities to serve the increasing population.<sup>182</sup>

In realizing the benefits of P3s, states are turning to the private sector. To this end, “thirty-three states have passed a variety of P3 laws, but many are only related to specific projects.”<sup>183</sup> Arizona, for example, has adopted a broad P3 transportation statute allowing its Department of Transportation to enter into P3 agreements relating to facilities used for the safe transport of people, information, or goods.<sup>184</sup> The legislature authorizes the department to enter into multiple forms of agreements that the department concludes will serve the public interest.<sup>185</sup>

Florida is another state that has broad P3 legislation authorizing the Department of Transportation to “enter into agreements with private entities, or a consortia thereof, for the building, operation, ownership, or financing of transportation facilities.”<sup>186</sup>

Alaska, on the other hand, does not have a comprehensive P3 infrastructure statute and is an example of a state that has enacted only a project-specific P3 statute.<sup>187</sup> The Knik Arm Bridge and Toll Authority Act allows the Authority to enter into P3 agreements relating to the operation of the Knik Arm Bridge in Alaska and its appurtenant facilities.<sup>188</sup>

The state of Nevada has enacted a broader P3 statute than Alaska’s, but still limited in scope. The statute allows the state government to enter into P3 agreements to develop transportation facilities, but does not allow the state to enter into P3s to develop “a toll bridge or toll road.”<sup>189</sup>

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<sup>182</sup> CAL. GOV’T CODE § 5956 (West 2005).

<sup>183</sup> Igor Kossov, *Urgency to Use P3 Grows, But Lack of Law Is An Obstacle*, LAW360 (Nov. 21, 2014), <http://www.law360.com/articles/598175/urgency-to-use-p3-grows-but-lack-of-law-is-an-obstacle>.

<sup>184</sup> ARIZ. REV. STAT. ANN. § 28-7703(1)-(8) (2009).

<sup>185</sup> *Id.*

<sup>186</sup> FLA. STAT. ANN. § 334.30 (West 1991).

<sup>187</sup> ALASKA STAT. §§ 19.75.111 to 990 (2003).

<sup>188</sup> *Id.*

<sup>189</sup> NEV. REV. STAT. § 338.161 (2003) (“transportation facility means a road, railroad, bridge, tunnel, overpass, airport, mass transit facility, parking facility for vehicles[,] or similar commercial facility used for the support of or the transportation of persons or goods, including, without limitation, any other property that is needed to operate the facility. The term does not include a toll bridge or toll road.”) (internal quotations omitted).



Pennsylvania is another leading state utilizing P3s to engage the private sector in the development of infrastructure.<sup>190</sup> This includes utilizing P3s to replace bridges, develop ports, and build CNG fueling stations. For example, the Pennsylvania Department of Transportation is involved in working with a private sector consortium for the replacement of 600 structurally deficient bridges. In addition to this \$1.1 billion project, the governor, working through the Philadelphia Regional Port Authority, is developing plans for facilities that would support and service the automobile industry and an import-export facility for crude oil.<sup>191</sup> What distinguishes Pennsylvania's P3 legislation from that which exists in many other states is its allowance for private sector submission of unsolicited proposals for P3 projects.

Many experts believe some states' hesitation to adopt broader P3 statutes stems from concern that the interests of profit-driven private developers may not always align with those of the public. Notwithstanding these concerns, some communities have embraced the P3 model as the vehicle for realistic change when budgets continue to get cut and infrastructure continues to deteriorate. For example, the small rural town of Westminster, Maryland, utilized P3s and private investment to overcome the disadvantage of poor Internet access and connectivity. In exchange for internet access, the private partner was afforded exclusivity based on a fixed period or a certain volume of Internet subscriptions.<sup>192</sup> It also created an opportunity to engage in a P3 arrangement that resulted in a private partner investing in next-generation access. The Urbana-Champaign, Illinois, area is another local use of P3s in the development of Internet infrastructure.<sup>193</sup> The benefits of P3s have been realized by even the nation's capital. In November 2015, Mayor Muriel Bowser officially launched the District's Office of Public-Private Partnerships.<sup>194</sup> As residential development in the District expands, so does the need for infrastructural improvement.<sup>195</sup> Mayor Bowser

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<sup>190</sup> 74 PA. CONS. STAT. § 91 (2016).

<sup>191</sup> Dan Packel, 3 *Vital P3s in Pa's Push For Private-Sector Alliances*, LAW360 (May 23, 2016), <http://www.law360.com/articles/799131/3-vital-p3s-in-pa-s-push-for-private-sector-alliances>.

<sup>192</sup> L. Gonzalez, *Public Private Partnerships: A Reality Check*, COMMUNITY BROADBAND NETWORKS (May 26, 2015), <http://muninetworks.org/content/public-private-partnerships-reality-check>.

<sup>193</sup> *Id.*

<sup>194</sup> *Mayor Bowser Launches Office of Public-Private Partnerships with Key Leadership Announcements*, D.C. GOV'T (Nov. 24, 2015), <http://mayor.dc.gov/release/mayor-bowser-launches-office-public-private-partnerships-key-leadership-announcements>.

<sup>195</sup> *Id.*

acknowledged this need and promotes the new Office as a vehicle to bridge the gap between the public's need for infrastructural development and the capability of the private sector to take part in it.<sup>196</sup>

To protect their citizens, state legislatures have implemented various provisions to maintain some degree of reserved control throughout the P3 process. Arizona, for example, has identified eight factors that must be considered before an agency can even enter into a P3 agreement. They include:

(1) the ability of the eligible facility to improve safety, reduce congestion, increase capacity, and promote economic growth; (2) the proposed cost and financial plan for the eligible facility; (3) the general reputation, qualifications, industry experience, and financial capacity of the private partner; (4) the proposed design, operation, and feasibility of the eligible facility; (5) comments from users, local citizens, and affected jurisdictions; (6) benefits to the public; (7) the safety record of the private partner; and (8) other criteria that the department deems appropriate.<sup>197</sup>

Once a project is complete, many fear that private developers will take advantage of the public by increasing tolls on highways being developed pursuant to P3 agreements. After all, although P3s “can offer alternative project delivery methods or financing mechanisms,” the National Conference of State Legislatures (“NCSL”) has said, “revenues to repay the private investment must come from the same sources of public financing—tolls, fees, or taxes.”<sup>198</sup> State legislatures have passed a number of regulations to protect the public from such exploitation. Arkansas, for example, allows the state Highway Commission “to fix and enforce the schedule or rate of tolls to be collected on any privately owned toll bridge located on any road embraced in the state highway system.”<sup>199</sup> Arkansas expressly commands that the interest of the owner and the public should be balanced, so the owner receives “a fair return on the value of his or her property, and the public shall not be required to pay more than is required to net such return.”<sup>200</sup>

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<sup>196</sup> *Id.*

<sup>197</sup> ARIZ. REV. STAT. § 28-7704.01(1)-(8) (LexisNexis 2012).

<sup>198</sup> WASHINGTON STATE LEGISLATURE, *Public Private Partnerships in Transportation* 224, [http://leg.wa.gov/JTC/trm/Documents/TRM\\_2015%20Update/11%20-%20Public%20Private%20Partnerships.pdf](http://leg.wa.gov/JTC/trm/Documents/TRM_2015%20Update/11%20-%20Public%20Private%20Partnerships.pdf).

<sup>199</sup> ARK. CODE ANN. § 27-86-211(a) (West 2012).

<sup>200</sup> *Id.* § 27-86-211(b); *see also id.* § 27-86-211(c) (“[T]he state should protect the interests of the public against those who operate toll bridges that injure the state as a whole by charging tolls to pay

California requires that lease agreements “establish specific toll or user fee rates” and any proposed increase in tolls or rates not set forth in the lease agreement “shall first be approved by the department or regional transportation agency, as appropriate, after at least one public hearing conducted at a location near the proposed or existing facility.”<sup>201</sup> California also ensures minimum standards for public welfare by mandating that P3 agreements relating to the state highway system “meet all requirements for noise mitigation, landscaping, pollution control, and safety that otherwise would apply if the department were designing, building, and operating the facility.”<sup>202</sup>

Another point of disagreement among some of the states is whether agencies and departments are allowed to entertain unsolicited proposals. Unsolicited proposals can be controversial, because the generally recognized purpose of P3s is to rely on the private sector only when there is an urgent need for such projects. However, Colorado allows its department of transportation to solicit and entertain unsolicited proposals.<sup>203</sup> Many other states also allow their agencies to accept both solicited and unsolicited proposals. These states include: Arizona,<sup>204</sup> California,<sup>205</sup> Delaware,<sup>206</sup> Florida,<sup>207</sup> Louisiana,<sup>208</sup> Maine,<sup>209</sup> Minnesota,<sup>210</sup> Mississippi,<sup>211</sup> Missouri,<sup>212</sup>

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interest and dividends on watered bonds and stock. One of the purposes of this section is to grant protection to the state and the public.”).

<sup>201</sup> CAL. STS. & HIGH. CODE § 143 (West 2011).

<sup>202</sup> *Id.*

<sup>203</sup> COLO. REV. STAT. ANN. § 43-1-1202(1)(b)-(c) (West 1995).

<sup>204</sup> ARIZ. REV. STAT. ANN. §§ 28-7701 to -7710 (2009).

<sup>205</sup> CAL. STS. & HIGH. CODE § 143 (West 2011); CAL. GOV'T CODE §§ 5956. to 5956.10 (West 1996).

<sup>206</sup> DEL. CODE ANN. tit. 2, §§ 2001 to 2012 (West 2001).

<sup>207</sup> FLA. STAT. ANN. §§ 334.30, 337.251, 343.875, 348.0004 (West 2002).

<sup>208</sup> LA. REV. STAT. ANN. §§ 48:2071 to :2074, :2077, :2084 to :2084.15 (2001).

<sup>209</sup> ME. REV. STAT. ANN. tit. 23, § 4251 (2009).

<sup>210</sup> MINN. STAT. ANN. §§ 160.84 to .98 (West 2008).

<sup>211</sup> MISS. CODE ANN. §§ 65-43-1 to 65-43-85 (West 2010).

<sup>212</sup> MO. REV. STAT. §§ 227.600 to .669 (2011).

Utah,<sup>213</sup> Oregon,<sup>214</sup> Virginia,<sup>215</sup> and Washington.<sup>216</sup> Georgia and Indiana do not allow their state agencies to accept unsolicited proposals.<sup>217</sup>

#### XI. CONCLUSION: P3S IN GOVERNMENT CONTRACTING TOMORROW

The use of P3s in government contracting is a concept that is well established. With new financial pressures on federal, state, and local agencies, many agencies have a renewed focus on P3s as a means to reduce operating budgets and minimize deficits by turning operations and maintenance responsibilities over to private sector companies. As federal, state, and local governments look to ensure efficiencies in the delivery of goods and services, and the intersection between the public sector and private contractors is facilitated through P3 initiatives, there will be increased opportunities for government contractors.

It is anticipated that P3 projects will ultimately result in a new trillion-dollar government marketplace,<sup>218</sup> with the impact primarily in the area of defense, as well as transportation and infrastructure development. Indeed, P3s are sweeping the country, not only changing government contracting practices and the way in which the government does business, but also addressing socioeconomic concerns, resulting in a fuller and more engaged and interactive life for citizens. Despite being a mainstay, P3s have also become an increasingly important and promising tool for leveraging private funds to meet investment and funding needs. P3s are indeed becoming an important component in the toolkit of developing partnerships for the efficient delivery of goods and services to the government.<sup>219</sup>

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<sup>213</sup> UTAH CODE ANN. §§ 63G-6-503, 72-6-201206 (West 2010).

<sup>214</sup> OR. REV. STAT. §§ 367.80026, 383.001075 (2016).

<sup>215</sup> VA. CODE ANN. §§ 56-55 to 56-75 (2002).

<sup>216</sup> WASH. REV. CODE ANN. §§ 47.29.010-.290 (West 2006).

<sup>217</sup> See GA. CODE ANN. §§ 32-2-78-80 (West 2010); IND. CODE ANN. §§ 5-23-1-1 to 5-23-7-2, 8-15.5-1-1 to 8-15.5-13-8, 8-15.7-1-1 to 8-15.7-16-8 (West 2011).

<sup>218</sup> *P3 Revolution: The Impact of Public-Private Partnerships (P3s) on Government*, ONVIA, <http://www.onvia.com/business-resources/webinars/p3-revolution-impact-public-private-partnerships-government-contracting>.

<sup>219</sup> Napoleon & Vilmenay, *supra* note 2.

