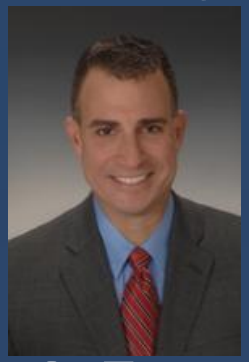
PLDW

PANNONE LOPES DEVEREAUX & WEST LLC

counselors at law

The Mechanics of P3 Construction: Deal Structure in Alternative Project Delivery for Municipal Projects



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International Municipal Lawyers Association, Mid-Year Seminar
April 17, 2016
Washington, D.C.

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What is a P3?

Contractual agreements between government agencies and private entities.

Both entities working together to provide a government service, typically infrastructure-related utilities.

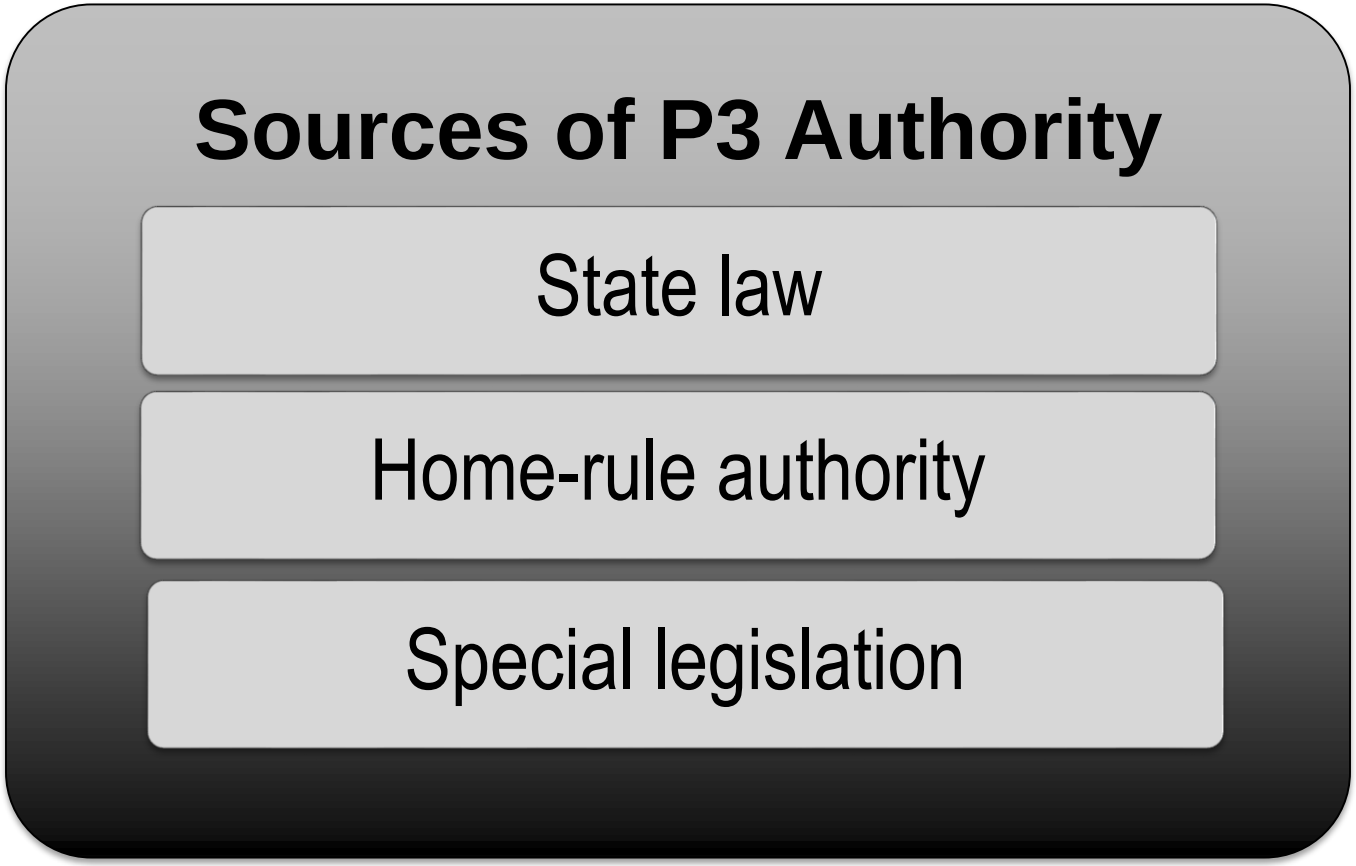


Forms of P3 Projects

- Contract operation
- Design-build
- Design-build-operate
- Design-build-finance-operate
- Construction Manager at Risk
- Concessions



P3 Legal Framework



P3 Legal Framework Cont.

- Need for Legal Authorization
  - Best Value vs. Lowest Cost
  - Aggregation of Services

Benefits and Advantages of P3s

- Delivery of a product, service or project:
  - More efficiently
  - More cost-effectively
  - With improved service
- “Best value” procurements, instead of traditional low bid
- Guarantees from private entity
- Provides governments increased access to capital



Risk Allocation between Parties

- Avoid allocating risk to a party that cannot manage that risk
- To increase efficiency, allocate risks to party in best position to handle them
  - For example, risk associated with regulatory agencies placed with governmental entity



Structuring A Successful P3: Procurement Process

- Solicitation Documents:
  - Request for Information
  - Request for Qualifications
  - Request for Proposals
- Proposal Evaluation
- Selection



Structuring A Successful P3: Contract Terms

- No contracts of adhesion
- Balance of risk and responsibility between parties
- Pricing Terms:
  - upfront payments, fixed price guarantees, cost-plus pricing, guaranteed maximum pricing, variable cost formulas, escalators
- Performance Terms:
  - guaranteed construction schedules, acceptance standards, construction guarantees, operational guarantees, performance incentives
- Security of Performance:
  - Operations, performance or payment bonds, letters of credit, parent guarantees, insurance
- Breach and Remedies:
  - Events requiring opportunity to cure, liquidated damages, uncontrollable circumstance

Structuring the Design-Build Solicitation and Contract

- **Determine Form of Agreement**
- **Define and Outline Contractor Tasks**
  - Design
  - Construction
  - Finance
  - Operation
  - Ownership and Conveyance

Component Areas – “The 6 P’s for Success”

- Price
- Performance
- Protection
- Possession
- Period
- Project acceptance



Price

- Lump Sum
- Cost-plus
- Guaranteed Maximum Price
- Unit Price



Performance

- **DB and Operations Phase Standards**
- **Design Specifications**
- **Performance Guarantees**
- **Compliance**
  - Environmental
  - Enhanced Standards

Protection

- **Insurance**
- **Bonds**
  - Performance
  - Completion
  - Labor & Materials
- **Guarantees**
  - Parent
  - Corporate

Possession

- **Public Land Conveyance**
- **Ground Lease**
- **Private Purchase and Ownership**
- **End of Term Transfer or Buyback**
  - Fixed Price
  - Fair Market Value
  - Book Value
  - Independent 3P Valuation

Period

- **Contract Term**
  - Design-Build Period
  - Operations [Service] Period
  - Post-term Obligations
- **Renewal Periods**
  - Sole or mutual options
  - Same or renegotiated terms
- **Closeout Valuation and Life Assessment**

Project Acceptance

- Risk of acceptance on Design-Builder
- What if the project fails to meet performance standards?
- What if the project fails to meet design requirements, but still functions?
- Guaranteed scheduled acceptance date
- Delay liquidated damages

Provisions for the Contract

- **Essential Provisions**
  - Provision of Services – fully define scope
  - MBE/MWBE
  - Parent Corporation Guarantees
  - Performance/labor & Materials Bonds
  - Dispute resolution/litigation/arbitration
  - Choice of Law/jurisdiction/Service of Process
  - Construction Schedule-Liquidated damages
  - Return of Facilities
  - Sinking funds
  - Warranties/Risk Allocation

Provisions for the Contract, cont'd

- **Essential Provisions**
  - Teaming agreements
  - Owner approval of subcontractors
  - Design review and/or approval
  - Delay liquidated damages
  - Insurance
  - Owner notice for start-up/commissioning
  - CX plan

Structuring a Successful P3: Financing Sources

- Municipal Bonds
  - GO, revenue bonds
  - Taxable vs. tax-exempt
  - State revolving funds (if applicable)
- Grants
  - Federal/state
- Private financing
  - Guaranty



P3 Project Example

New Tappan Zee Bridge Project, NY

- Special Legislation to allow DB
  - "Infrastructure Investment Act," (2011 N.Y. Laws ch. 56).
- Financing with:
  - Infrastructure Finance and Innovation Act ("TIFIA") loan
  - Clean Water State Revolving Fund loan
  - Issuance of traditional state bonds
  - Revenue from an increase in tolls
  - Potential Infrastructure Fund contain monies obtained from legal settlements banks



P3 Project Example

Rockland County Sewer District No. 1, NY

- 1st municipal wastewater design/build or design/build/operate project in NY
- Special Legislation to allow D-B-O
  - Chapter 665 of the New York State Session Laws of 2002
- 1.5-million-gallons-per-day Advanced Wastewater Treatment Plant



P3 Project Example: DBO

Advanced Wastewater Treatment Plant | Rockland County, NY

Requirements

- Environmentally friendly and aesthetically pleasing
- High performance standards
- Protect sole source aquifer
- 1.5 mgd facility
- Services only 5,000 residents but paid for countywide



Price and Financing

- Design/Build/Operate
- $45 million
- Substantial savings
- Price increased due to high performance standards
- State revolving funds

Performance

- Treat to near drinking water standards
- Performance standards for effluent, sludge, odor
- Recharge sole source aquifer

P3 Project Example

Nassau Veterans Memorial Coliseum in Long Island, NY

- $229 million investment by private developer to renovate existing arena and surrounding area

- Lease arrangement with
  - 34-year initial term
  - 49-year full term



P3 Project Example Continued

Nassau Veterans Memorial Coliseum in Long Island, NY

- Arrangement includes rent Payments of:
  - $195 million in rent initial term
  - $325 million+ in guaranteed minimum rent over full term
- Will generate $10.9 billion in economic activity



P3 Project Example

P3 Authorization in West Virginia

- **W. Va. Code § 17-28-1, et seq. - Authorization of P3s for transportation facilities:**
  - **Highways, roads, bridges, tunnels, overpasses, buildings and structures airports**
  - **Requires performance and payment bonds**

- **W. Va. Code §§ 17-27-1, et seq. - Authorizes P3s for the DOT for construction of any transportation facility:**
  - **Any public inland waterway port facility, road, bridge, tunnel, overpass or existing airport used for the transportation**
  - **And structures, equipment, facilities or improvements to such facilities.**



P3 Project Example

P3's in West Virginia

- **Coalfields Expressway**
  - Division of Highways' first P3 project under Senate Bill 190
  - 3.3-mile section of the Coalfields Expressway connecting Mullens to existing sections, opening the expressway from I-64/I-77 to Mullens (nearly 19 miles).

- **West Virginia University**
  - The five projects include:
    - mixed-use housing projects, multi-purpose retail and food development, study and classroom spaces, and a baseball stadium
  - Project will contribute more than $81 million to local and state tax revenues during their 40-year lifespan



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