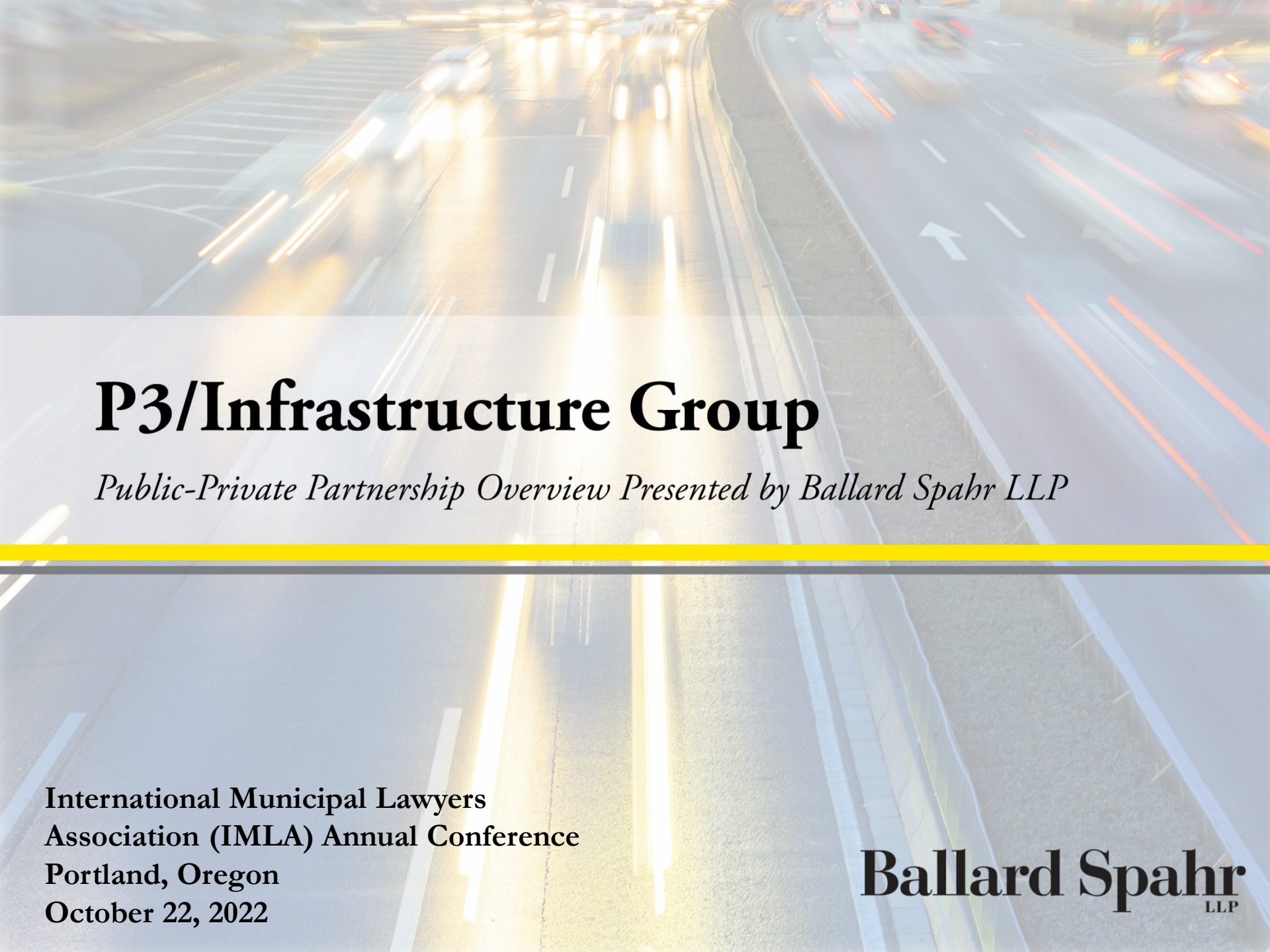


P3/Infrastructure Group

Public-Private Partnership Overview Presented by Ballard Spahr LLP

International Municipal Lawyers Association (IMLA) Annual Conference
Portland, Oregon
October 22, 2022

Ballard Spahr LLP



PUBLIC-PRIVATE PARTNERSHIP

(PPPs or P3s)

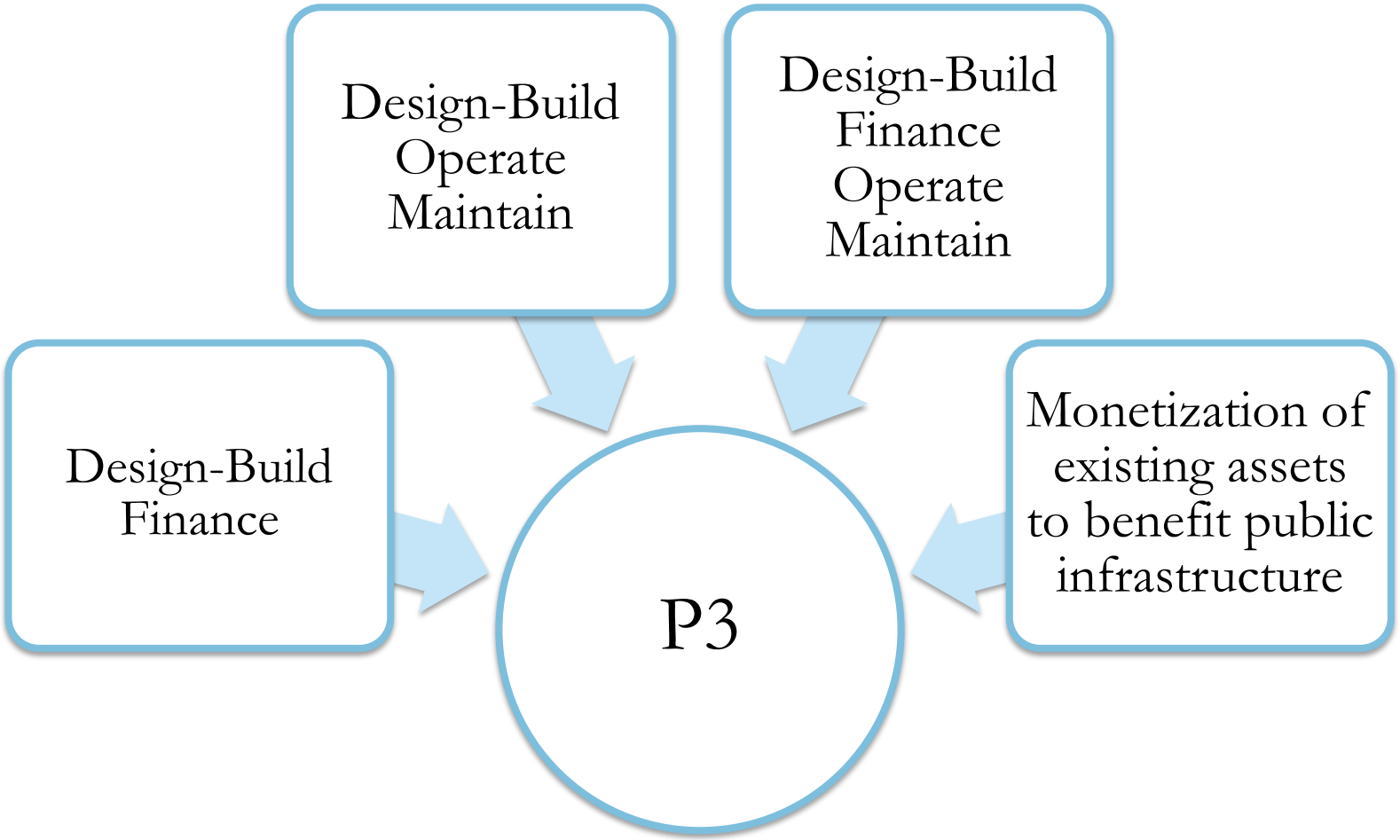
n. An innovative method of funding, delivering and procurement for infrastructure projects.

Introduction to P3s

A contractual agreement between a public agency and a private entity to achieve all, one or a combination of the following:

- Extract the value of an existing infrastructure asset.
- Design, construct, finance, and/or operate and maintain a new infrastructure project.
- Transfer risks, such as revenue, operations, environmental, labor, construction, to the entity best able to retain and manage them.

Types of P3 Projects



Examples of P3 Projects

Greenfield Projects

- Roads/Highways (I-95 HOT Lanes, U.S. 36 Managed Lanes)
- Transit (Purple Line, Denver Eagle)
- Social Infrastructure (Long Beach Courthouse, Civic Center)
- Universities (UC Merced, University of Kansas)

Brownfield Projects

- Utilities (Allentown Water, Ohio State Energy)
- Parking (Ohio State University, Harrisburg)
- Transportation (Chicago Skyway, Indiana Toll Road)

Risk Management

- Ultimately P3 is a risk allocation transfer (in particular in comparison to a typical turnkey construction contract)
- Risk should sit with the party best able to manage and mitigate
- Risks assumed by private sector must be "financeable" -i.e. acceptable to private sponsors and their lenders
- Private sponsors will attempt to quantify the $ cost and probability of the risk and build this into their bid (more risk = more $)
- Private sponsor "flows down" the risks assumed under project agreement to contractors
- Where public entity holds risk, private entity typically made whole via (a) compensation under project agreement; (b) time relief under project agreement; and (c) compensation following termination of project agreement

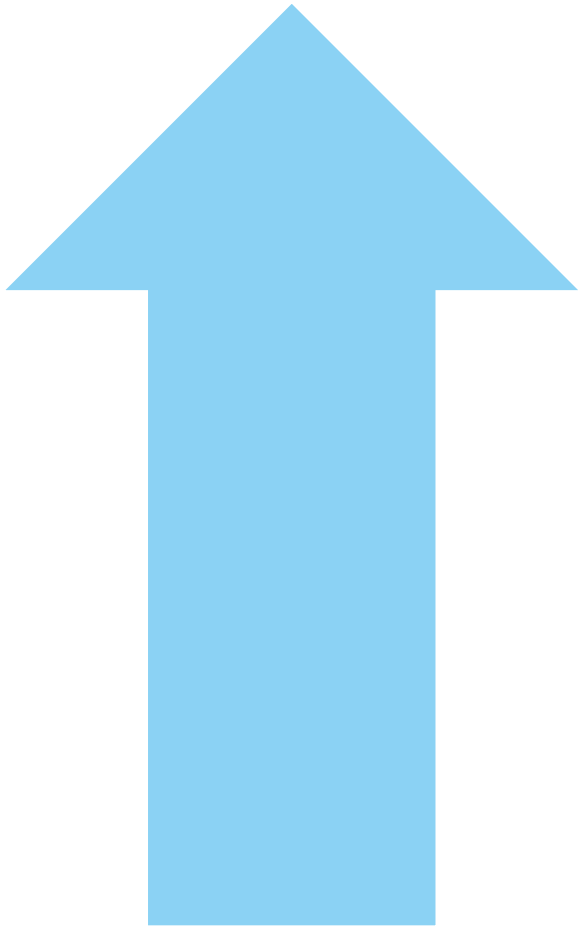
Types of P3 Risk

- **Political/Appropriations Risk** – risk the public entity will not be able to close the transaction and/or perform under the project agreement (best managed by public entity).
- **Site/Environmental** – risk of discovery of HazMat, geotechnical, anthro/paleo, endangered species condition on project site (party best in position to manage varies based upon prior assessment/private developer pre-let site access).
- **Regulatory/Permitting** – risk re: obtaining/maintaining necessary project permits (party best in position to manage varies based upon approval).
- **Force Majeure/Third Party Risk** – risk re: natural disaster, political strife, non-performance of non-affiliated third parties (often neither party in a position to manage).

Types of P3 Risk (cont.)

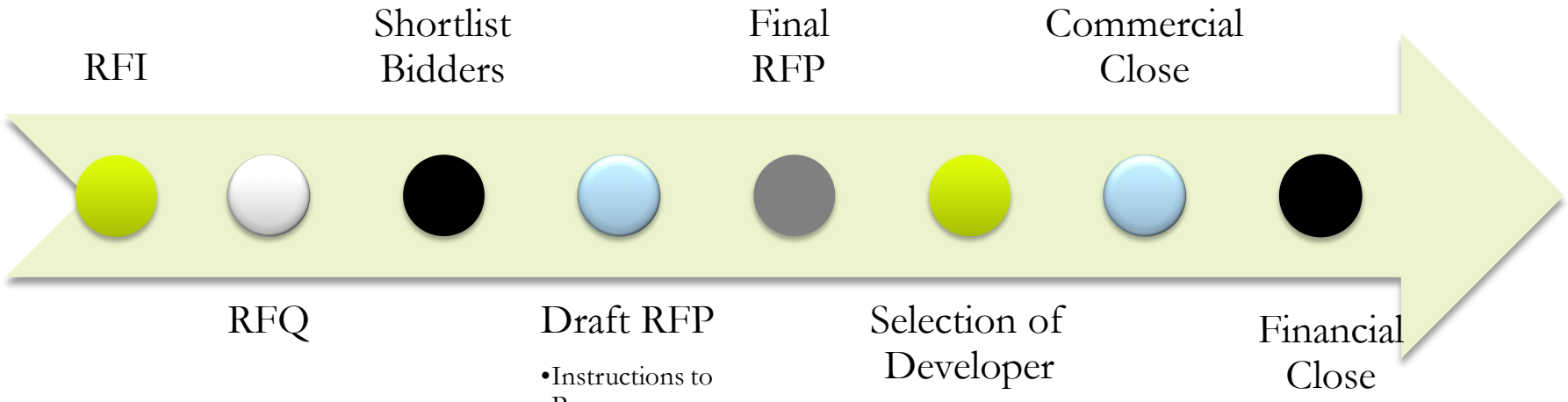
- **Financing Risk** – risk of non-availability/cost increases re: anticipated project financing (varies based upon circumstance).
- **Design/Construction** – risk of delays/cost overruns during D&C period (private developer in best position to manage).
- **O&M** – risk of disruptions/cost overruns during O&M period (private developer in best position to manage).

Additional Advantages of P3s

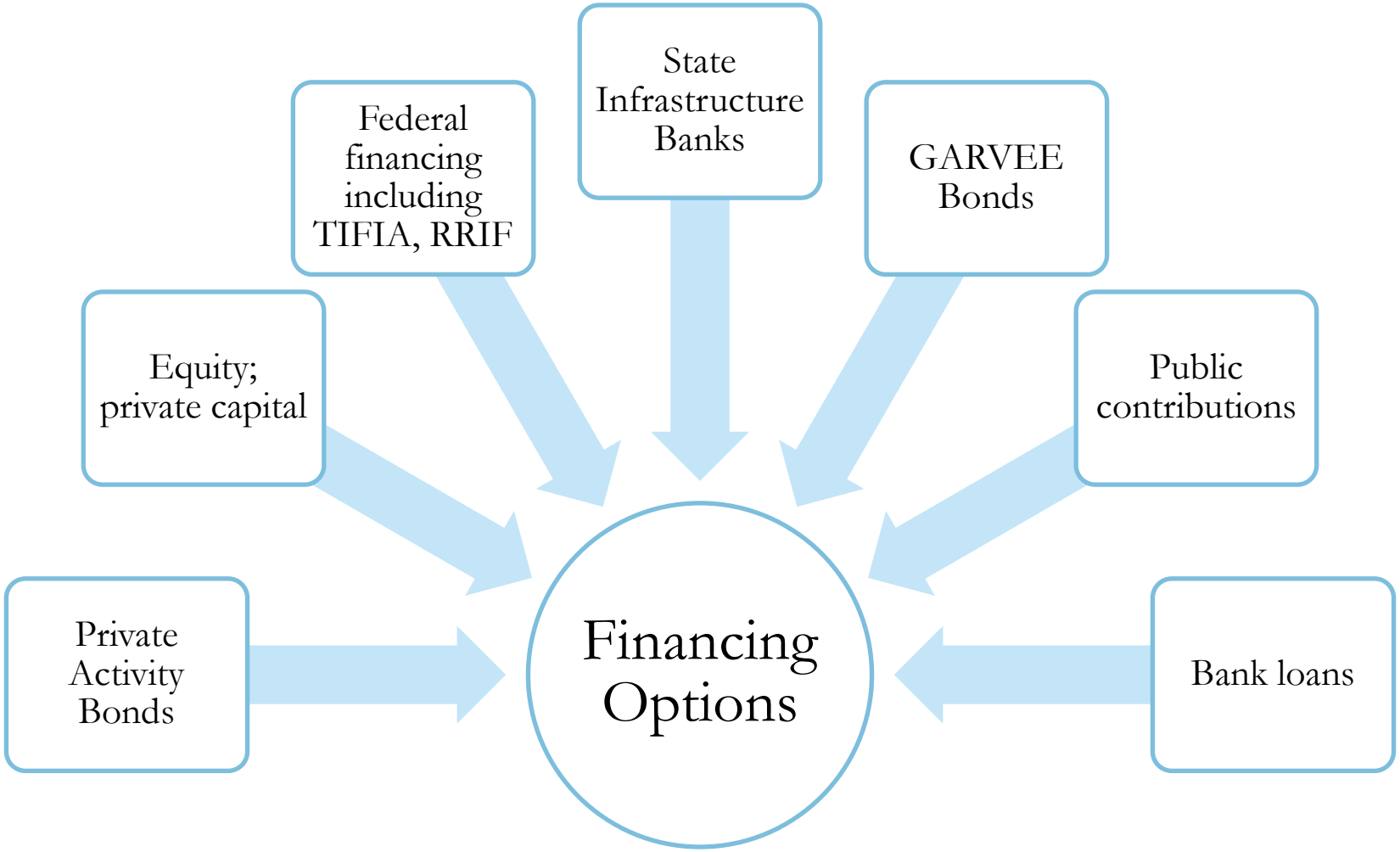


- Design-build construction- private sector innovative design solutions and reduced construction costs
- Operations and Maintenance Savings – reduced O&M costs
- Leverage both public and private sector debt sources
- Accelerates project delivery
- All while maintaining in many cases a degree of control re: rate setting, O&M standards etc., and a share in profits

Procurement Process



Financing Options



Sources of Private Developer Compensation/Funding

From least risky to riskiest from private developer standpoint (noting P3s often utilize one or more of the following):

- Public entity funding (guaranteed public entity construction phase funding contribution)
- Milestone/progress payments during construction (payments during construction phase at agreed upon milestones (i.e. 60% completion, substantial completion, etc.).
- Availability payments (guaranteed payments during project O&M phase from public owner provided requirements of project agreement are satisfied).
- Revenue (private developer rights to project revenue during O&M period).

Ballard Spahr LLP

Questions/Comments

John Wheatley - wheatleyj@ballardspahr.com

Steve Park - parks@ballardspahr.com

John Smolen - smolenj@ballardspahr.com