The Practitioner's Guide to

Colorado Construction Law

Fourth Edition

Volume 3

Robert E. Benson
J. Kevin Bridston
Timothy M. Gordon
Managing Editors

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1290 Broadway, Suite 1700
Denver, Colorado 80203
Phone: (303) 860-0608
E-mail: clebooks@cobar.org
Website: www.cle.cobar.org

Daniel A. Sweetser, Esq.
Executive Director
CBA-CLE

Kathryn Noble, Esq.
Senior Legal Editor
CBA-CLE

Louise W. Seiler
Subject Index
LW Seiler Editorial Services

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PUBLIC-PRIVATE PARTNERSHIPS

Polly B. Jessen, Esq.
Chelsea M. Marx, Esq.
Viktor Zhong, J.D.
Tracy A. Davis, Esq.

SYNOPSIS

§ 32.1 • INTRODUCTION

Public-private partnerships, also known as P3s or PPPs, are contractual business ventures between a public agency or government and a private company that allocate responsibility for risks and duties for services between the two with a clear objective of delivery of an otherwise public service. P3s allow the private company to participate in some combination of design, construction, financing, operations, and maintenance.

P3s combine the skills and resources of both the public and private sectors, allowing the public agency to provide a public service or infrastructure with the help of private funding. The key for a successful P3 project is the proper allocation of risks and responsibilities. For example, in a transportation project, the public agency is better equipped to obtain federal environmental permits, while the private company should be responsible for defining the construction schedule. The degree to which the private sector assumes responsibility, including financial risk, differs from one application to another.

§ 32.2 • DEVELOPMENT OF PUBLIC-PRIVATE PARTNERSHIPS IN THE UNITED STATES

Although the United States has used basic forms of P3s for infrastructure development for over 200 years,[1] the use of P3s has dramatically increased in America and abroad over the past few decades.[2] Cities across the United States are increasingly developing partnerships with the private sector on a variety of projects in response to budgetary pressures and limitations of planning and zoning controls to achieve creative outcomes.[3]

§ 32.2.1—Federal Legislative and Policy Background

At the federal level, the resurgence in P3s has largely been driven by the U.S. Department of Transportation (U.S. DOT) and the Federal Highway Administration (FHWA).[4] The FHWA started hosting policy workshops about the use of P3s in the development of transportation facilities and services in 1991.[5] Any P3 project that receives federal assistance is subject to applicable federal requirements for public-private partnerships.[6] Thus, the federal requirements may vary depending on whether the P3 project involves federal assistance for highways, local public transit systems, or airport improvements, among others.[7] However, in the United States, it is imperative that state and local laws also provide for P3 delivery approaches.[8]

In 2014, President Obama issued a memorandum to the heads of all executive departments and agencies calling for the expansion of P3s to support infrastructure development and financing and to establish the role of the federal government in fostering collaboration between the public and private sectors across the country.[9] President Obama directed all federal agencies to encourage awareness and understanding about P3s among state, local, tribal, and territorial governments and to facilitate greater public and private collaboration to develop, improve, and maintain infrastructure across the county.[10] The U.S. DOT was given the lead role in the P3 expansion initiative given its oversight of infrastructure development and improvements and its existing P3 programs, like the Center for Innovative Finance Support established by the FHWA.[11]

In 2016, the U.S. DOT opened the Build America Bureau to expand P3s at the federal level and encourage P3s at the state and local level to complement government funding for transportation infrastructure projects.[12] The Build America Bureau encourages P3s for the "development and delivery of transportation improvements" across the country, providing information, expertise, and model resources to

local governments to assist in the formation of successful P3s.[13] The Build America Bureau and the FHWA each provide several P3 resources on their respective websites and regularly partner to create guidebooks, toolkits, and other training materials about P3s and best practices for the public and private sector.[14]

In 2021, the bipartisan Infrastructure Investment and Jobs Act (IIJA) included additional federal incentives to encourage the use of P3s, particularly in transportation infrastructure projects.[15] The IIJA encourages state and local entities to adopt the P3 delivery approach by doubling the amount available for tax-exempt bonds that support infrastructure projects partially funded by the private sector, or private activity bonds.[16] Additionally, the IIJA created additional P3 technical assistance program for state and local agencies, streamlined the environmental review process for infrastructure projects, and established congressional reporting requirements intended to help Congress continue to expand P3s through future legislation based on best practices.[17]

§ 32.2.2—P3 Project Case Studies

P3s have now been used in a wide variety of programs and projects internationally and in the United States.[18] They range from totally outsourcing contracts to private entities to dividing the risk allocation and financial allocation between the public agency and the private entity. Outsourced contracts are contracts where public agencies contract with private companies to complete a government facility or function. Research organizations such as the Urban Land Institute, the World Bank Group, and the Brookings Institution, among others, regularly study and publish resources about best practices, case studies, and other reference materials for public and private sector stakeholders.[19] Every P3 is uniquely tailored to fit the issues to be resolved, but important lessons can be derived from the study of industry best practice and innovative projects.[20] The US 36 Project and James F. Oyster Bilingual Elementary School project, discussed in more detail below, have each been featured in case studies and resource documents by both public agencies and research organizations.

An example of a successful P3 is the US 36 Project, a 50-year agreement between the Colorado Department of Transportation's (CDOT) High Performance Transportation Enterprise (HPTE), now doing business as the Colorado Transportation Investment Office,[21] and a private concessionaire to complete construction of an express lane in each direction between Denver and Boulder. The project included replacing and rehabilitating bridges, adding Bus Rapid Transit improvements and bus station improvements, installing Intelligent Transportation Systems for tolling single-occupancy vehicles in the HOV lane, installing a separate commuter bikeway for the remainder of the corridor, and operating and maintaining the entire US 36 corridor and I-25 express lanes between downtown Denver and Boulder.

The financing of US 36 is based on toll revenues, referred to as demand risk. The private concessionaire is required to use the toll revenues to fund the federal loans and the operation and maintenance of the project. If the toll revenues exceed the estimated costs, the concessionaire will share the excess revenues with CDOT. If the revenues are less than projected, the concessionaire continues to have the responsibility of operating and maintaining the managed lanes and repaying the loans on the project. At the conclusion of the 50-year agreement, the concessionaire is required to return US 36 to CDOT in a specified first-class condition.[22]

The US 36 Project is now in operation and has been highlighted as an example of a successful P3 project, despite some early challenges.[23] It was awarded P3 Project of the Year by the American Road and Transportation Builders Association and the Engineering News-Record Award of Merit. It was awarded the Grand Prize Award in 2017 by the American Association of State Highway and Transportation Officials (AASHTO), which is the top prize in the United States. However, as discussed more below, the P3 was controversial with the public and led to policy changes regarding the public involvement process for future

P3 process.[24] Additionally, in the summer of 2019, a retaining wall that was constructed as part of the US 36 Project failed, resulting in the collapse of a busy section of the highway.[25] CDOT oversaw the response to the collapse, attributed to extremely heavy rainfall both during construction in September 2013 and in late spring/early summer of 2019.[26] Two years after the collapse, the joint venture that constructed the roadway as well as two design firms that worked on the US 36 Project entered into a settlement agreement to reimburse CDOT for its costs without admitting liability.[27]

Another example of a successful P3 agreement is the James F. Oyster Bilingual Elementary School building in Washington, D.C. The 70-year-old school was overcrowded, crumbling, and not in compliance with federal laws. There was no capital to make the required improvements. The school system entered into an agreement with a real estate development company to construct a new state-of-the-art school and an adjacent apartment building on existing school property. The District of Columbia issued a tax-exempt bond package to be repaid entirely with revenue generated by the apartment building. The arrangement resulted in a new school building constructed at no cost to taxpayers.[28]

§ 32.3 • VARIETIES OF PUBLIC-PRIVATE PARTNERSHIPS

P3s have been used for educational facilities (as described above), transportation, water/wastewater services, real property development, public safety, public parks and facilities, Defense Department needs, and telecommunications.[29] Various models of P3s based on different allocation of risks and responsibilities have been used to successfully deliver projects. P3s typically allocate responsibility (and risk) between the private and public partners for design, construction, financing, maintenance, operation, and ownership. While P3s are tailored to fit the issues to be resolved, the following is a brief description of the basic structures utilized in the United States, and the typical advantages and disadvantages of each.

§ 32.3.1—Design-Build (DB)

Design-build contracts are considered by some to be a variation of public-private partnerships. Design-build is a method of project delivery in which one entity — the design-build team — works under a single contract with the public agency to provide design and construction services. Design-build contracts are addressed in § 1.3 of this Guide. The principal advantage of a design-build structure is the allocation of both design and construction risk to the design-build team. This contracting structure is typically elected when the public entity has little experience or capacity to construct a project of the type contemplated. Because this approach does not allow the owner to select the design-build team solely based on construction price, other contractual tools must be used to manage costs.

§ 32.3.2—Design-Build-Maintain (DBM)

The DBM model is similar to design-build, except that for some period of time the maintenance of the facility becomes the responsibility of the private sector partner, which consists of a designer (or architect) and a contractor. The public sector partner owns and operates the assets, while the private entity designs, constructs, and maintains the facility. The benefits of a DBM are similar to design-build, with the maintenance risk allocated to the private sector partner and the guarantee expanded to include maintenance. This structure is intended to incentivize the private sector partner to construct a high-quality project that minimizes long-term maintenance costs.

An example of a DBM P3 is the IH 35E Managed Lanes Development Agreement for Dallas and Denton Counties, Texas. The project was completed in 2018 and is now in operation. A copy of the agreement documents is found at http://ftp.dot.state.tx.us/pub/txdot-info/dal/i35e/executed/i35e_development_agreement.pdf.

Another example of DBM is the Loop 202 South Mountain Freeway project, the largest Arizona Department of Transportation (ADOT) project in Arizona history. Construction on the project began in 2016 and was completed in December 2019. The developer is now responsible for maintaining the freeway and ensuring the safety of the traveling public for 30 years. For more information regarding the project, see www.azdot.gov/projects/central-district-projects/loop-202-south-mountain-freeway/project-information-loop-202.

§ 32.3.3—Design-Build-Operate (DBO)

The DBO model is similar to the DBM model. A DBO involves a single contract awarded for the design, construction, and operation of a capital improvement. Maintenance responsibilities may remain with the public sector owner or be contracted out to a third party. Combining all three phases into a DBO approach maintains the continuity of private sector involvement and can facilitate private-sector financing of public projects supported by user fees generated during the operations phase.

An example of a DBO P3 is the Phoenix Lake Pleasant Water Treatment Plant. For more information regarding the project, which at the time it was built was the largest DBO contract in North America, see https://efc.sog.unc.edu/wp-content/uploads/sites/1172/2021/07/Phoenix_Final_WEB.pdf.

Title to the facility of a DBO project remains with the public sector. In several variations of the DBO model, including for example, Build-Operate-Transfer (BOT),[30] Build-Own-Operate (BOO),[31] and Buy-Build-Operate (BBO),[32] the private partner has the title to the facility for a defined period of time or indefinitely.

§ 32.3.4—Design-Build-Operate-Maintain (DBOM)

The DBOM model is an integrated partnership that combines the design and construction responsibilities of design-build procurements with operations and maintenance. These project components are procured from the private sector in a single contract, with financing secured by the public sector. The public agency maintains ownership and retains a significant level of oversight of the operations through terms defined in the contract. The advantages and disadvantages of DBOM are similar to those of DBM and DBO.

The Merced 2020 Project is a University of California expansion, which will redevelop existing space and improve access to the university. During construction, the university will make payments to the developer, and once the buildings are constructed, the university will make performance-based availability payments[33] to the developer to cover the remainder of capital costs (the developer contributed a minor cost to the project) and operation and maintenance of the major building systems. For more detail on the project and copies of the contract documents, see http://merced2020.ucmerced.edu/program.

§ 32.3.5—Design-Build-Finance-Operate-Maintain (DBFOM)

With the DBFOM model, the responsibilities for designing, building, financing, operating, and maintaining are bundled together and transferred to private sector partners. There are a variety of DBFOM arrangements in the United States, which vary especially in the degree to which financial responsibilities are actually transferred to the private sector. One common thread that cuts across all DBFOM projects is that they are either partly or wholly financed by debt-leveraging revenue streams dedicated to the project. Direct user fees (tolls) are the most common revenue source. However, others range from lease payments to shadow tolls,[34] availability payments, and vehicle registration fees. Future revenues are leveraged to issue bonds or other debt that provide funds for capital and project development costs. They are also often supplemented by public sector grants in the form of money or contributions in kind, such as right-of-way.

In many cases, private partners are required to make equity investments as well. Value for money can be attained through life-cycle costing.

An example of a DBFOM P3 are the I-95 Express Lanes in northern Virginia. A copy of the agreement documents is found at www.fhwa.dot.gov/ipd/project_profiles/va_i95.aspx.

Some recent examples of DBFOM include the State Highway 288 toll lanes project from Houston to the Gulf Coast in Texas; the Purple Line Project, a light-rail transit project in Maryland; and the Portsmouth Bypass in Ohio. For a detailed description of these and other projects, see www.transportation.gov/buildamerica/projects/financing-search.

Another example of DBFOM is the US 36 managed lane/bus rapid transit project, Phase 2, in Colorado. The US 36 Project is discussed in more detail in § 32.2.

§ 32.3.6—Progressive Contracting

Progressive contracting enables early and ongoing collaboration among owner, designer, and contractor to "de-risk" projects and facilitate effective project implementation. The owner engages a private sector partner (*e.g.*, a design-builder, contractor, developer, or concessionaire) early in project development so that the parties start working collaboratively in the preconstruction phase. This collaborative preconstruction phase may include project planning, scope definition, feasibility analysis, public/stakeholder engagement, assistance with environmental permitting and other approvals, design development, risk mitigation, preparation of contract documents and specifications for construction, and potentially early construction works. The parties will establish a better understanding of the project risks through collaborative efforts. Towards the end of this preconstruction phase, the parties will reach an agreement on project scope, technical specifications, risk allocation, and pricing for implementation of the project, including final design, construction, and possibly operations and maintenance.

A major trade-off of progressive contracting is the forgone competition for pricing as the owner negotiates the price with only one party. The owner should develop its own independent cost estimate for the project to facilitate pricing negotiation with the private partner in order to prevent overpricing. If a project is federally funded, an independent cost estimate is often required.[35] Furthermore, it is critical for the owner to preserve an "off-ramp" option, which allows the owner to terminate the contract and bid out the remaining portion of the work, if the owner cannot reach agreement with the concessionaire on any aspect of the project.

The progressive contracting approach can be incorporated into various delivery methods. See the Design-Build Institute of America's primer for progressive design-build[36] and the Association for the Improvement of American Infrastructure's guidebook for progressive P3.[37] The equestrian center, hotel, and parking garage project in Denver is an example of a progressive P3 project, which is discussed in more detail in § 32.6.5.

§ 32.3.7—Other Varieties of P3 Models

The list of various P3 models discussed above is not exhaustive but represents some of the most common models of P3s in the United States. Besides those, public sector entities have structured numerous innovative P3 models to effectively utilize their assets and the private sector's resources and expertise to provide facilities and services. For example, an area of innovation is to take advantage of private financing in building new facilities or renovating existing facilities, while in exchange allowing the private sector partner to profit from the project through lease payment from the public entity or third parties over time.[38]

Various P3 models have also been used successfully outside of the United States to deliver public projects. This World Bank web page introduces the common P3 models as seen around the world, https://ppp.worldbank.org/public-private-partnership/agreements/concessions-bots-dbos.

§ 32.4 • WHAT PROJECTS ARE P3 CANDIDATES

Use of the public-private partnership method of contracting is appropriate when a public facility or service is necessary or desirable, the government agency does not have adequate resources or expertise to provide the facility or service, and there is no public motivation to raise the necessary funds. For example, many roads built as part of the Interstate Highway System have long outlived their original design lives.[39] In addition, there must be legal authority to implement public-private partnerships. Thirteen states, the District of Columbia, and Puerto Rico have broad enabling P3 legislation; 20 states have enabling legislation for transportation P3s; and nine states have project-specific legislation for specific P3s.[40] Finally, the political will to support a public-private partnership is essential.

Although road projects have served as the most common example, other types of P3s are gaining popularity. For example, Kentucky entered into a P3 agreement for a statewide broadband network in 2016.[41] Miami-Dade County, Florida has a P3 program for waste and water projects.[42] Other projects include local projects in Washington, D.C.,[43] and university projects in several states.[44]

In October 2014, Pennsylvania entered into a P3 agreement to replace 558 bridges, the first U.S. project to bundle small projects into one large P3 agreement. See www.penndot.gov/ProjectAndPrograms/p3forpa/Pages/Rapid-Bridge-Replacement-Project.aspx for a description of the project and the procurement documents. In November 2020, Pennsylvania launched the Major Bridge P3 (MBP3), which bundles replacement or rehabilitation of multiple major bridges into one progressive P3 agreement.[45] The pre-development agreement of MBP3 includes six major bridges in the state and the parties reached financial close in November 2022.

P3 projects have also gained popularity in the airport space. The combination of airport infrastructure needs and diverse revenue streams (food/beverage and retail concessions, parking structures, etc.) creates opportunities for varied deal structures, particularly on DBFOM projects. For example, the Port Authority of New York and New Jersey undertook the redevelopment of LaGuardia Airport's Terminal B in partnership with a private consortium.[46] The $4 billion DBFOM project will result in the construction of a new Terminal B, its concourses, a new parking garage, and related roadways.[47] On the opposite coast, Los Angeles World Airports (which owns and operates Los Angeles International Airport (LAX)) is undertaking its own DBFOM project with what is known as the "LAMP" (short for Landside Access Modernization Program), which includes a 2.25-mile Automated People Mover and a Consolidated Rental Car Facility (ConRAC) that are currently under construction, an Intermodal Transportation Facility that was completed in October 2021, and roadway improvements.[48] More information on the LAMP can be found at www.lawa.org/connectinglax. Besides the one at the LAX, a growing number of ConRACs have recently been, or are currently being, delivered as P3s.[49]

Although the Development Agreement was ultimately terminated, Denver International Airport successfully procured and executed a P3 agreement for the redevelopment of Jeppesen Terminal. The deal structure for that agreement is discussed in more detail in § 32.6.4.

§ 32.5 • ISSUES INVOLVED IN P3 PROJECTS

§ 32.5.1—Allocation of Risks

Proper allocation of the risks involved is necessary for a successful P3 project. The basic principle is to allocate risks to the party with the ability to manage such risks most effectively. Certain risks are typically retained by the public sector, most commonly, changes by the public authority and interest rates pre-financial close. The private sector, on the other hand, takes on most of the project development and management risks, such as construction, financing, operation, project company ownership, and hand back.[50]

Usage or demand risk is the uncertain level of revenue generated by the project due to fluctuation of demand for the service. For example, a toll road carries risk that drivers will not use the road, reducing revenues generated from those expected or those that might have existed before the project. Such risk is retained by either the private or public sector, depending on the type and risk profile of project. It is common for toll roads, managed lanes, bridges, water and sewer projects, and gas and electricity P3s where the private sector bears the demand risk.[51] Whereas for projects that do not generate revenue or have limited revenue, the public sector typically retains the demand risk by compensating the private partner through availability payment. The parties also can structure a hybrid model where the public and private sectors share the demand risk. For example, the public sector guarantees an annual minimum revenue payment sufficient to cover debt service and allow for some level of equity return.[52]

Certain risks that are unknown or not fully knowable at the time of contract execution, for example, site condition, environmental, permitting, sociopolitical opposition, change in law, and force majeure, are carved out and addressed by relief events, delay events, and/or compensation events. If a qualifying event occurs, *i.e.*, an identified risk materializes, the parties will determine whether the concessionaire is entitled to relief (*e.g.*, schedule extension and/or monetary compensation). The parties may agree to share such risks through various mechanisms, for example, deductibles, compensation cap, and specific insurance requirements.[53]

A detailed understanding of the unique risk profile of a project is critical to the long-term success of a P3 project. A public entity needs to be rigorous in evaluating what risks it wants to allocate and why, and in assessing the economic impact of shifting risks to the developer, whereas a private concessionaire needs to fully understand and properly price the risks that it is taking on. The project agreement should accurately memorialize the agreed-upon risk allocation, including mechanisms for risk sharing.

§ 32.5.2—Environmental Legal Challenges

Most lawsuits attempting to block P3 projects are filed pursuant to the National Environmental Policy Act (NEPA) or state equivalents. These suits typically are filed prior to finalization of the contract documents. NEPA and state equivalents require project proponents to conduct a broad review of the environmental impacts of a proposed project prior to issuing a Record of Decision that allows a project to move forward.

The Purple Line Project in Maryland faced a typical legal challenge. The Purple Line Project is a 16-mile circumferential light-rail line connecting D.C.'s Maryland suburbs, including 21 stations and transfers at four Metro stations.[54] The project had been fraught with delays and challenges, including a challenge by citizens who claimed that it was going to run through an area that had become a park. A federal district court judge voided the environmental Record of Decision and ordered the agencies to do a Supplemental Environmental Impact Statement, which would have put the project's federal funding in jeopardy.[55] The D.C. Circuit Court of Appeals issued a stay of the decision and remanded it back to the district court, ruling

that the project could begin. Untimely, however, the P3 contractor terminated the contract and Maryland was required to find and contract with a new team to re-start the project.

The Central 70 Project, discussed in detail in § 32.6.3, is a CDOT reconstruction of I-70 from Brighton Boulevard to I-270, including the addition of an express lane in each direction. Several lawsuits were filed challenging the adequacy of the evaluation of impacts during the environmental process, including a challenge alleging that the project would violate air quality standards, that CDOT failed to consider contaminated soil issues and other Environmental Impact Statement issues, and, consequently, that the Federal Highway Administration improperly approved the project. Ultimately, CDOT was able to reach a settlement agreement with its challengers and move forward with the project.[56]

Given that environmental legal challenges are a major risk for P3 project, both the public entity and the private partner should thoroughly assess such risks early on in project planning and determine which party can take on the risks more cost-effectively and to what extent each party should take on such risks if the parties are sharing the risks. The project agreement should include contractual mechanisms to allocate responsibilities and costs between the two parties when an environmental legal challenge occurs and causes significant delay to a project, and to ensure the project will proceed once the legal challenge is resolved.

§ 32.5.3—Disputes and Claims

Disputes between the public agency and the developer or concessionaire regarding the terms of the agreement also may arise for P3s. Common disputes arise during design and construction over whether a particular event or circumstance can be considered a relief event, a delay event, and/or a compensation event for the P3 developer. While the private sector usually takes on the risk of construction schedule and costs, delays and cost overrun may be at least partially caused by relief and/or compensation events defined in the project agreement.

An example of such a dispute has occurred related to the Eagle P3 Project in Colorado, which project is discussed in more detail in § 32.6.2. In the fall of 2018, the project concessionaire filed a lawsuit against Regional Transportation District (RTD) based mainly on an alleged change in the interpretation and enforcement standards of a regulation that governs the highway-rail crossing warning system designed and developed by the concessionaire for the project. Under the concession agreement, a change in law is a relief event that would entitle the concessionaire to relief. The agreement defines a change in law broadly to include both changes to any law or regulations through formal legislative or rulemaking processes and changes in the interpretation of any law or regulations. The regulation in question in this case did not change within the relevant period, but the concessionaire argued that the regulator applied new or different legal standards in its enforcement of the regulation by imposing a metric that is not provided in the regulation for determining compliance. Based on that argument, the Concessionaire alleged that the federal and state regulators' refusal to grant full approval of the project for revenue service and their requirement of the concessionaire to place attendants at all crossings until the warning system is modified and determined to be in compliance with applicable laws constitute a change in law event. The concessionaire claimed that it is entitled to compensation for the costs of placing attendants at the crossings for over two years, as well as payments withheld by RTD, which allegedly amount to $111.5 million.[57] The court ruled against the concessionaire. The court concluded that the regulators properly exercised enforcement discretion as the actions were grounded in existing standards set forth in their rules, regulations, and enforcement policies and hence there was no change in law as defined in the concession agreement, and developing a compliant crossing warning system was reasonably within the concessionaire's control and consistent with the risk-allocation arrangement between the two parties, and therefore, it does not constitute a relief event.[58] On appeal, the appellate court sided with RTD as well.[59]

Due to the complexity of P3 projects, the parties tend to expend considerable efforts to investigate and resolve such claims. For example, the Purple Line project in Maryland accumulated a large number of claims for delays and cost overrun, which exceeded $800 million in total. These included costs related to the delay caused by lawsuits and so were not all related to the design and construction process. The partnership included three developers and equity partners, a design-build joint venture, a lead design firm, an operations and maintenance joint venture, and numerous subconsultants and subcontractors. The magnitude of claims and delays led the concessionaire to invoke the termination clause in the concession agreement, which provides that the concessionaire may seek contract termination if extended delays exceed 365 days or more to the project's critical path.[60] The parties eventually reached a $250 million settlement and the partnership resumed work under a revised concession agreement, although one of the three developers and equity partners, which is also the lead construction contractor, left the partnership as part of the settlement agreement and a new construction contractor had to be procured.[61]

To minimize disputes and claims, the parties should ensure the contract terms correctly reflect the agreed-upon allocation of risks and responsibilities. The parties should also thoroughly understand the possible consequences if risks materialize and craft contractual mechanisms that would incentivize the parties to find a mutually acceptable resolution.

§ 32.5.4—Public Relations and Outreach

A proactive public information campaign is essential to winning public and political approval of a public-private partnership project. In Colorado, the US 36 P3 project provides a good example of the problems that arise when there has been little public outreach prior to utilizing a non-traditional method of procurement. Although HPTE had been meeting with the local government officials along the US 36 corridor, the state officials, the Denver Regional Council of Governments (DRCOG), the Regional Transportation District (RTD), and the transportation editor of the *Denver Post*, there was a failure to conduct public outreach.

A perfect storm occurred when the *Denver Post* transportation editor who had been following the development of HPTE and development of the US 36 P3 project retired around the time negotiations were beginning with the selected P3 team. The result was misinformed reporting regarding the project, which resulted in an angry upheaval. The project involves the addition of a high-occupancy vehicle (HOV) lane that will be tolled if three or more individuals are not in the car. Many citizens incorrectly believed that all three lanes in each direction were going to be tolled. A public relations campaign that stressed that P3 was the only way that US 36 could be improved would have been invaluable.

Governor Hickenlooper instead issued an executive order directing HPTE to adopt additional transparency measures in public-private projects.[62] In response, HPTE adopted a detailed Open Records Policy for P3 projects on August 19, 2015.[63]

The duration of P3 contracts is another perception that must be addressed with the public. P3 contracts and leases typically last for a long period of time to allow the private entity enough time to repay any debt incurred to finance the project and to make a profit. Dispelling the public perception that the public agency has transferred public property to a private entity, and that the entity is producing the service only for profit and not in the best interest of the public is critical.

Even though P3 has gained popularity over the last few decades in the United States, public education remains necessary for new P3 projects. A major lesson learned in past P3 projects is to begin a public information campaign early and proactively.

§ 32.6 • DEVELOPMENT OF P3 PROJECTS IN COLORADO

§ 32.6.1—Legal Background

In 2007, the Colorado legislature adopted the Integrated Delivery Method for Public Projects Act, giving state agencies the authority to use alternative public project delivery methods, including a P3 method of procurement.[64] In 2009, the Colorado legislature passed SB 108, the Funding Advancements for Surface Transportation and Economic Recovery Act of 2009 (FASTER).[65] FASTER created the HPTE, which replaced the Colorado Tolling Enterprise that had been in existence since 2002. The new law gave HPTE many of the powers that had existed with the previous tolling enterprise, *e.g.*, the power to issue revenue bonds[66] and the power to enter into public-private partnerships for improvements to existing corridors in the state.[67]

FASTER created HPTE as a division of CDOT and expanded its innovative contracting powers. It eliminated the prior prohibition on using tolling facilities for anything other than improvements to the facility's existing capacity. FASTER charged HPTE to actively pursue public-private partnerships and any other innovative financing opportunities. The legislature created an HPTE director and a board consisting of three transportation commissioners and four gubernatorial appointees representing all areas of the state to carry out the mandates of the statute. HPTE subsequently created the Project Proposal Guidelines[68] to streamline the evaluation process for solicited and unsolicited proposals. The Guidelines also address how HPTE will work with private companies to protect proprietary information when providing both solicited and unsolicited proposals, an obvious concern to the private sector.[69]

In addition to HPTE, RTD has used the P3 process on several projects, including Denver Union Station, North Metro, and I-225 projects. The Federal Transit Administration accepted RTD's East corridor, Gold Line, and commuter rail maintenance facility projects, including the Eagle P3 Project, discussed more below, as part of its Public Private Partnership (Penta-P) program.[70]

In 2022, the Colorado General Assembly further expanded the use of P3s by state agencies by enacting SB 22-130. In enacting SB 22-130, the General Assembly declared that public-private partnerships are an "effective tool" and have a "proven track record of enabling public projects to be completed on time and at a lower cost than either public or private sectors are able to achieve alone."[71] The Colorado General Assembly further declared that public-private partnerships are needed to address some of the "state's most pressing and foundational needs."[72]

SB 22-130 tasked the executive director of the Department of Personnel and Administration (DPA) to "[c]reate requirements regarding the authority for state public entities to initiate requests for proposals or bids or to review any private partner-initiated proposals for public projects to be completed through public-private partnerships."[73] In 2022, SB 22-130, discussed above, established the Public-Private Partnership Collaboration Unit (P3 Unit) within the DPA.[74] The P3 Unit, discussed more below, is required to (i) coordinate with state entities to identify and prioritize public projects that are good candidates for the P3 model, (ii) facilitate collaboration by public and private sectors in connection with public projects, (iii) provide expertise and technical assistance regarding P3s to state public entities, and (iv) create best practices for the use of P3s in Colorado.[75] Finally, SB 22-130 created the Public-Private Partnership Subcommittee of the Colorado Economic Development Commission (P3 Subcommittee) to operate as an advisory board to the P3 Unit.[76] The P3 Subcommittee consists of the Director of the Unit and members appointed by the Colorado House of Representatives, the Colorado Senate, and the Governor's Office.[77]

The P3 Unit developed the Public-Private Partnership Collaboration Unit Management Manual (P3 Management Manual) to comply with the requirements of SB 22-130 and guide the development of P3 projects.[78] The first iteration of the P3 Management Manual sets forth high-level policies and procedures for the Unit to use in the development of P3 projects approved by DPA leadership and the P3 Subcommittee.[79] The guidelines set forth in the P3 Management Manual apply to any department, agency, or subdivision of the executive branch of the State of Colorado that do not have specific authority by statute to enter into P3s unilaterally (*e.g.*, the Front Range Passenger Rail District and HPTE).[80] However, the Unit may, at its sole discretion, waive or deviate from any or all guidelines in "any P3 related document when it is necessary and is in the best interests of the State."[81]

The P3 Management Manual includes high-level guidelines regarding project delivery and procurement, the process for unsolicited and solicited proposals for P3 projects, the evaluation and selection process, and contracting provisions.[82] The P3 Management Manual allows a broad range of P3 delivery mechanisms, including DBM, DBOM, and DBFOM.[83] An "Evaluation Team" comprised of DPA staff, outside consultants, and other professionals selected by the Unit's director will determine the type of delivery mechanism best suited to a P3 project in accordance with guidance from the P3 Subcommittee and the Capital Development Committee.[84] It also allows for flexibility in structuring a phased process for procurement that may consist of the issuance of a request for information (RFI), issuance of a request for qualifications (RFQ), issuance of an invitation to negotiate (ITN), or issuance of a request for proposal (RFP) based on project-specific needs.[85] In addition, the P3 Management Manual lists typical proposal evaluation criteria, including responsiveness, qualifications, pricing, project technical approach, financing plan and feasibility, project delivery timeline, and public support, among others.[86]

The P3 Management Manual includes specific requirements regarding solicited and unsolicited proposals. Private entities that submit unsolicited proposals will not be compensated for the costs incurred to submit the unsolicited proposals.[87] If an unsolicited proposal is rejected by the State, it is not subject to appeal.[88] The P3 Collaboration Unit provides required content for unsolicited proposals and details on the evaluation process for unsolicited proposals.[89] The P3 Management Manual also provides protection of the confidentiality of submitted proposals, solicited or unsolicited, to encourage private-sector participation.[90]

For further details related to development and procurement of state P3 projects, refer to C.R.S. §§ 24-94-101, *et seq.* and the P3 Unit website, https://dpa.colorado.gov/divisions-offices/p3-office.

§ 32.6.2—Eagle P3 Project

In Colorado, the Eagle P3 Project is a public-private partnership between RTD and a private-sector team selected through a competitive proposal process. Eagle P3 is part of RTD's FasTrack multi-billion-dollar program approved by voters in 2004 to expand transit across the Denver metro region.[91] The principal portion of the Eagle P3 Project connects Denver International Airport and Union Station in downtown Denver.

Eagle P3 is a partnership to design-build-operate-maintain-finance the East Corridor, Gold Line, and commuter rail maintenance facility projects under a single contract. The contract provides that RTD will retain all assets while shifting much of the risk of providing the projects to the private partner or concessionaire. In return, RTD makes lease payments to the private partner, allowing the agency to spread out large upfront costs over a longer period of time, much like a 30-year mortgage versus a 15-year mortgage. RTD makes annual service payments to the private concessionaire based on its performance of the contract requirements, including operation and maintenance of the project through December 31, 2044. This type of contract payment is referred to as availability payments.[92]

§ 32.6.3—Central 70 Project

The Central 70 Project is HPTE's second DBFOM project. Central 70, between I-25 and Chambers Road, is home to 1,200 businesses, providing the regional connection to Denver International Airport and carrying upwards of 200,000 vehicles per day. The Central 70 Project reconstructed a 10-mile stretch of I-70 east of downtown, added one new express lane in each direction, removed the 53-year-old viaduct, lowered the interstate between Brighton and Colorado boulevards, and placed a four-acre cover park over a portion of the lowered interstate. The P3 agreement is a performance-based availability payment contract. Construction began in 2018 and was completed in July 2023, with tolling of the express lanes starting on July 11, 2023.[93] *See* § 32.5.

§ 32.6.4—The Great Hall Project

One Colorado P3 project that suffered early difficulties was the Great Hall Project at Denver International Airport (DEN). In 2017, the City and County of Denver, which owns DEN, entered into a DBFOM P3 agreement with Great Hall Partners to develop and construct improvements to certain parts of the Jeppesen Terminal and, for the longer term, to maintain and operate portions of the Terminal, particularly resulting concessions spaces. DEN and Great Hall Partners were to share the costs of design and construction. Great Hall Partners would be repaid through a combination of (1) DEN payments and (2) retaining 20 percent of the concession revenues. DEN would remain in full control of the remainder of the facility — including the ticket lobbies, security screening areas, and public circulation. The contract term was 34 years — four years of design and construction, followed by 30 years of concessions operations and maintenance.[94]

Ultimately, disagreements between DEN and Great Hall Partners over project costs and delays led to DEN's termination of the agreement with Great Hall Partners in August 2019.[95] Following the termination, DEN determined that it would not proceed with the P3 delivery method and instead proceeded with a separate designer and a general contractor/construction management contract.[96] The restarted construction began in 2020.[97]

§ 32.6.5—Equestrian Center, Hotel, and Parking Garage

The City and County of Denver and the National Western Center Authority (NWCA) is currently in the process of developing a new equestrian center, a hotel, and a parking garage, using a progressive P3 model. The NWCA is now leading this project and has selected a preferred development partner to enter into a pre-development agreement for the project. The purpose of the predevelopment agreement is to progress project goals, continue due diligence, integrate community feedback, and advance design to a level of detail sufficient for negotiating and agreeing to a development agreement, which will be considered for approval by City Council.[98] The developer will be responsible for the development of the equestrian center, the hotel, and the parking garage, as well as hotel operations and event programming.

§ 32.6.6—P3 Government Offices in Colorado

In late 2018, the City and County of Denver established its Office of Performance Based Infrastructure (PBI Office). The goal of the PBI Office is to "improve the lives of Denver residents by leveraging private-sector financing and expertise to build, operate, and maintain City-owned projects when that approach would deliver the best value."[99] Through the PBI Office, the City will be able to "tap into the private sector's innovation capacity and transfer certain risks related to infrastructure development in cases when the private sector may be in a better position to manage such risks."[100] Denver's PBI Office was the second municipal office created to support P3s in the U.S.; the first was the Washington D.C. Office of Public-Private Partnership.[101]

Denver's PBI Office is currently working on a Landfill Gas to Energy project at Denver Arapahoe Disposal Site. More information about the PBI Office can be found at https://denvergov.org/Government/Agencies-Departments-Offices/Agencies-Departments-Offices-Directory/Performance-Based-Infrastructure-Office/About-PBIO.

As discussed above, Colorado established P3 Unit within the DPA to "plan, design, manage, develop, operate, implement and govern the use of P3 projects" to deliver public projects across Colorado.[102] The P3 Unit is also responsible for creating resources based on best practices and lessons learned to help the State standardize its approach to using P3s to deliver public projects.[103]

The legislature tasked the P3 Unit to prioritize funding and resources for public-private partnership projects in Colorado that will (i) increase behavioral health capacity, (ii) develop affordable housing, (iii) increase access to childcare services, (iv) develop renewable energy facilities, and (v) deploy more broadband throughout the state. More information on the P3 Unit and its past, current, and future projects can be found at https://dpa.colorado.gov/divisions-offices/p3-office.

§ 32.7 • FINANCING A P3 PROJECT

One of the great advantages of P3 projects is the opportunity for innovative financing. On the Eagle P3 and Colorado US 36 Project, the public agencies took advantage of Transportation Infrastructure Finance and Innovation Act (TIFIA) dollars from the USDOT. TIFIA loans (which are also available to private entities) are designed to fill market gaps and leverage substantial private co-investment by providing supplemental and subordinate capital. TIFIA provides either a secured loan with flexible repayment requirements, a full-faith-and-credit guarantee by the federal government to a non-federal lender, or a line of credit supplementing project revenue during the first 10 years of project operations that is available up to 10 years after substantial completion.[104] The amount of federal credit assistance may not exceed 33 percent of total reasonably anticipated eligible project costs. TIFIA projects are evaluated and selected by USDOT.

There are many other federal programs, such as Grant Anticipation Revenue Vehicles (GARVEEs), Private Activity Bonds (PABs), and Build America Bonds (BABs). However, one of the most valuable strengths of a P3 project is the incentive for different local, state, and U.S. agencies to join together in funding a mutually beneficial project.

NOTES

1. Mary Beth Corrigan, et al., *Ten Principles for Successful Public/Private Partnerships* (Washington, D.C.: ULI-the Urban Land Institute 2005) (citing the Erie Canal, completed in 1825, and the first Transcontinental Railroad, finished in 1869, as early examples of PPPs in America).

2. This chapter will focus on the types of P3s used in the United States. For a more extensive history of P3s internationally, see the World Bank, Public-Private Partnership Legal Resource Center, https://ppp.worldbank.org/public-private-partnership/.

3. Public-Private Partnership Legal Resource Center, *supra* n. 2.

4. FHWA, *Manual for Using Public-Private Partnerships on Highway Projects* (Sept. 2005), www.fhwa.dot.gov/ipd/pdfs/p3/manual_0905.pdf.

5. *Id*.

6. *Id.*

7. *See, e.g.*, 23 C.F.R. pt. 636 (2024); 49 C.F.R. pt. 80 (2024); 49 C.F.R. pt. 611 (2024); *see also* Nancy Smith, et al., *Public-Private Partnership (P3) Procurement: A Guide for Public Owners* (March 2019) (developed in coordination with the U.S. Department of Transportation Build America Bureau, the Federal Transit Administration, and the FHWA).

8. *Public-Private Partnership (P3) Procurement: A Guide for Public Owners*, *supra* n. 7 (identifying the analysis of state and local laws as the critical first step for any agency exploring a P3 project (Table 4)).

9. The White House, "Memorandum on Expanding Public-Private Collaboration on Infrastructure Development and Financing" (July 17, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/07/17/presidential-memorandum-expanding-public-private-collaboration-infrastru.

10. *Id*.

11. *Id.*; *see also* U.S. Department of Transportation, Federal Highway Administration, Center for Innovative Finance Support, How the Center Does Business, www.fhwa.dot.gov/ipd/how_business/.

12. U.S. Department of Transportation, Build America Bureau, History, www.transportation.gov/buildamerica/team/history/history.

13. U.S. Department of Transportation, Build America Bureau, Public-Private Partnerships (P3), www.transportation.gov/buildamerica/p3.

14. U.S. Department of Transportation, Build America Bureau, Public-Private Partnerships (P3) Library, www.transportation.gov/buildamerica/p3/library; U.S. Department of Transportation, Federal Highway Administration, Non-FHWA Resources, www.fhwa.dot.gov/ipd/p3/non_fhwa_resources/; *Public-Private Partnership (P3) Procurement: A Guide for Public Owners*, *supra* n. 7.

15. *See* Ben Nolan, "Public-Private Partnerships Are on the Rise. Here's How to Mitigate the Risks" (Berkley Research Group April 2024), www.thinkbrg.com/insights/publications/ts-nolan-p3-infrastructure-projects-mitigate-risks/.

16. *Id.*; *see also* Christian Michael Riley et al., "Federal Infrastructure Bill Paves the Way Toward More Transportation Infrastructure Public-Private Partnerships," *Troutman Pepper Insights* (March 29, 2023), www.troutman.com/insights/federal-infrastructure-bill-paves-the-way-toward-more-transportation-infrastructure-public-private-partnerships.html.

17. *Id.*

18. Bruno Werneck & Mário Saadi, *The Public-Private Partnership Law Review* 244-58 (3d ed. 2017).

19. ULI Americas, Public/Private Partnership Council (PPPC), https://americas.uli.org/publicprivate-partnership-council-pppc/; The World Bank, Public-Private Partnership Legal Resource Center, About PPPLRC and PPPs, https://ppp.worldbank.org/public-private-partnership/about-us/about-public-private-partnerships; *see, e.g.*, Patrick Sabol & Robert Puentes, "Private Capital, Public Good: Drivers of Successful Infrastructure Public-Private Partnerships," *Brookings* (Dec. 2014), https://brookings.edu/wp-content/uploads/2016/07/BMPP_PrivateCapitalPublicGood.pdf.

20. *See id.*

21. Colorado Department of Transportation, Colorado Transportation Investment Office, About CTIO, www.codot.gov/programs/ctio/about-us/about.

22. Demand-risk financing has become less popular because the private contractor takes the risk of overly optimistic revenue forecasts. An example of this is the Indiana Toll Road, where optimistic revenues caused the private partner to file for bankruptcy. *See* Jacqueline Palank, "Judge Approves Indiana Toll Road Bankruptcy-Exit Plan," *Wall St. J.*, Oct. 28, 2014.

23. *See Public-Private Partnership (P3) Procurement: A Guide for Public Owners*, *supra* n. 7; *see also* Bipartisan Policy Center, "Infrastructure Case Study: US-36 Express Lanes" (2019), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/03/BPC-Infrastructure-US-36-Express-Lanes.pdf; The George Mason University Center for Transportation Public-Private Partnership Policy, "Public-Private Partnerships (P3s) Found to Meet or Exceed Public Agency Objectives in a Study of Six Major Projects" (Aug. 16, 2017), https://p3policy.gmu.edu/wp-content/uploads/2017/11/GMU-Report-1.pdf.

24. *Public-Private Partnership (P3) Procurement: A Guide for Public Owners*, *supra* n. 7.

25. Jon Murray, "US 36 collapse settlement: Construction, design firms will pay $14 million after expanded section failed," *Denver7 News* (Aug. 6, 2021), www.denver7.com/news/local-news/us-36-collapse-settlement-construction-design-firms-will-pay-14-million-after-expanded-section-failed.

26. *Id.*

27. *Id.*

28. *See* ULI Development Case Studies: James F. Oyster Bilingual Elementary School and Henry Adams House, https://casestudies.uli.org/wp-content/uploads/2015/12/C033004.pdf.

29. National Council of Public-Private Partnerships, *For the Good of the People: Using Public-Private Partnerships to Meet America's Essential Needs, White Paper on Partnerships* (March 2013).

30. Under a BOT model, the private partner builds a facility to the specifications agreed to by the public agency, operates the facility for a specified time period under a contract or franchise agreement with the agency, and then transfers the facility to the agency at the end of the specified period of time. At the end of the franchise period, the public partner can assume operating responsibility for the facility, contract the operations to the original franchise holder, or award a new contract or franchise to a new private partner for operations. A build-transfer-operate model is similar to the BOT model except that the transfer to the public owner takes place at the time that construction is completed, rather than at the end of the franchise period.

31. Under a BOO model, the contractor constructs and operates a facility without transferring ownership to the public sector. Legal title to the facility remains in the private sector, and there is no obligation for the public sector to purchase the facility or take title. A BOO transaction may qualify for tax-exempt status as a service contract if all Internal Revenue Code requirements are satisfied. BOO P3 projects have been used on water treatment plants. The facilities are run by private companies, processing raw water provided by the public entity into filtered water, which is then returned to the public entity to provide to its customers.

32. BBO is a form of asset sale that includes a rehabilitation or expansion of an existing facility. The government sells the asset to the private sector entity, which then makes the improvements necessary to operate the facility in a profitable manner. This is similar to a BOO model, except it involves an existing facility.

33. An availability payment is compensation based on the concessionaire's performance in accordance with the specifications set out in the concession agreement, which is not tied to demand. *See* Jeffrey Parker & Associates, Inc., *Introduction to Public-Private Partnerships with Availability Payments* (2009).

34. A shadow toll is a fee paid by the public sector to the private concessionaire for each vehicle that uses a facility. In such a concession, there may not be tolls charged to users and the public sector is paying the shadow tolls from another source of revenue. Alternatively, the public sector can choose to collect tolls on a facility but pay the private sector a shadow toll based on traffic. The rationale to pay shadow tolls is typically to incentivize timely completion and good management of a project. See Federal Highway Administration, *Public-Private Partnership Concessions for Highway Projects: A Primer*, www.fhwa.dot.gov/ipd/p3/toolkit/publications/primers/primer_highway_concessions_p3/.

35. *See, e.g.*, 2 C.F.R. § 200.324 (requiring the recipient of federal funds to perform a cost or price analysis in connection with every procurement action in excess of the current Simplified Acquisition Threshold including contract modifications).

36. Design-Build Institute of America, *Progressive Design-Build – Design-Build Procured with a Progressive Design & Price*.

37. Association for the Improvement of American Infrastructure, *Progressive P3s*, https://aiai-infra.org/wp-content/uploads/AIAI_PDA_DIG_FINAL_07_27.pdf.

38. *See, e.g.*, U.S. Department of Housing and Urban Development, Neighborhood Stabilization Program Lease-Purchase Toolkit, www.hudexchange.info/programs/nsp/nsp-lease-purchase-toolkit/ (providing a sample lease-purchase policies and procedures manual for lease-purchase transactions, in which a private developer finances and builds a new facility that is then leased to a public entity for scheduled lease payments until the end of the lease term when the public agency purchases the facility back at the cost of any remaining unpaid balance in the lease). *See also* Arizona Department of Transportation, "ADOT's first P3 project moves forward in Flagstaff" (Feb. 2013), https://azdot.gov/adot-news/adots-first-p3-project-moves-forward-flagstaff (describing a developer finance–type agreement where the private developer acquired new facilities for ADOT's use as new offices while receiving ADOT's then existing property at a prime location for redevelopment).

39. Reason Foundation, *Restoring Trust in the Highway Trust Fund* (Aug. 3, 2010).

40. *See* Association for the Improvement of American Infrastructure, Shaping the Market Through Targeted Advocacy, https://aiai-infra.org/legislative-updates/.

41. *See* Ky. Rev. Stat. ch. 45A, § 77; KentuckyWired Fact Sheet, https://kentuckywired.ky.gov/SiteCollectionDocuments/KYW%20Fact%20Sheet%20-%204pg%20(5).pdf.

42. Miami-Dade County, *Request for Expression of Interest, Public-Private Partnerships (P3s) for Water and Sewer Capital Projects*, www.miamidade.gov/water/library/guidelines/expression-of-interest.pdf; *see* Fla. Stat. § 255.065 authorizing P3 for educational facilities, transportation facilities, water or wastewater management facilities and infrastructure, technology infrastructure, roads, highways, bridges, and other public infrastructure and government facilities.

43. *See* D.C. Law 20-228 (Dec. 29, 2014) ("Qualified Projects" under the law include education facilities, transportation facilities, cultural and recreational facilities, utility facilities, improvements to District-owned real estate, any building or other facility that is beneficial to the public interest and is developed or operated by or for a public entity, and any other facility, the construction of which shall be beneficial to the public interest as determined by the Office).

44. *See, e.g.*, University of Iowa, P3 Program in Support of Strategic Priorities, https://strategicplan.uiowa.edu/public-private-partnership-p3/p3-program-support-strategic-priorities; University System of Georgia, Public-Private Partnership Initiative, www.usg.edu/fiscal_affairs/p3#:~:text=The%20Public%2DPrivate%20Partnership%20(P3,delivered%20in%20August%20of%202016; Ohio State University, Energy Management, www.osu.edu/energymanagement/index.php?id=67; University of Kentucky, Public-Private Partnerships, https://evpfa.uky.edu/partnerships.

45. Pennsylvania Department of Transportation, *Major Bridge P3 Project*, www.penndot.pa.gov/ProjectAndPrograms/p3forpa/Pages/Major-Bridges.aspx.

46. LaGuardia Gateway Partners, www.laguardiab.com.

47. *Id.*

48. Los Angeles World Airports, Landside Access Modernization Program, www.lawa.org/connectinglax.

49. *See, e.g.*, Reno-Tahoe International Airport, "Reno-Tahoe International Airport's Ground Transportation Center Receives Official Greenlight for 2028 Delivery" (May 6, 2024), www.renoairport.com/newsroom/release-reno-tahoe-international-airports-ground-transportation-center-receives-official-greenlight-for-2028-delivery/; Port Authority of New York and New Jersey, "Plans for New State-of-the-Art Consolidated Rental Car Facility at Newark Liberty International Airport Moves Forward with Port Authority Board Approval" (July 26, 2018), www.panynj.gov/port-authority/en/press-room/press-release-archives/2018_press_releases/plans_for_new_state-of-the-artconsolidatedrentalcarfacilityatnew.html.

50. Association for the Improvement of American Infrastructure, *P3 Payment Mechanism Considerations for Public Officials*, https://aiai-infra.info/wp-content/uploads/MK007-P3-payment-mechanism.pdf.

51. *Id*.

52. *Id*.

53. *See* Build America Center, *Risk Allocation and Sharing in Transportation P3s: State of Practice Report*, Version 1 (Oct. 2023). This report provides a comprehensive summary of the risk-allocation mechanisms of U.S. P3s.

54. *See* www.purplelinemd.com/about-the-project/overview.

55. *Friends of the Capital Crescent Trail v. FTA*, 200 F. Supp. 3d 248 (D.D.C. 2016).

56. Colorado Department of Transportation News, Settlement reached on Central 708 Project (Dec. 20, 2018), www.codot.gov/news/2019/january/settlement-reached-on-central-70-project.

57. *Denver Transit Partners, LLC v. RTD* (Denver Dist. Ct. Feb. 10, 2024), https://wp-cpr.s3.amazonaws.com/uploads/2023/02/RTD-DTP-ruling.pdf.

58. *Id.*

59. *Denver Transit Partners, LLC v. RTD* (Colo. App. May 9, 2024), https://bloximages.newyork1.vip.townnews.com/coloradopolitics.com/content/tncms/assets/v3/editorial/7/af/7af759dc-10a1-11ef-aaac-87d5e3a547cf/66412bf10e600.pdf.pdf.

60. Maryland Department of Transportation, "Following MDOT/MTA Filing, Circuit Court Judge Grants 35-Day Restraining Order to Keep Purple Line Work on Track" (Aug. 11, 2020), www.mdot.maryland.gov/tso/pages/newsroomdetails.aspx?PageId=38&newsId=467.

61. Maryland Department of Transportation, "MDOT, Meridiam, Star America and Fluor Reach $250 Million Agreement to Settle All Purple Line Claims and Terminate Purple Line Litigation" (Nov. 24, 2020), www.mdot.maryland.gov/tso/pages/newsroomdetails.aspx?newsId=525&PageId=38.

62. Governor John W. Hickenlooper, Executive Order D 2014-010 (June 4, 2014).

63. *See* HPTE Resolution No. 178.

64. C.R.S. §§ 24-93-101, *et seq*.

65. C.R.S. §§ 43-1-1201, *et seq.*

66. SB 20-017 and C.R.S. § 43-4-807.

67. C.R.S. §§ 43-3-201, *et seq.*

68. Colorado High Performance Transportation Enterprise Project Proposal Guidelines (2013).

69. *See* Tim Gordon, "Keeping Your Public-Private Initiative Private," *Holland & Hart Constructive Developments*, July 2012, at 1.

70. *See* § 3011(c) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Pub. L. No. 109-59 (2005), 23 U.S.C. §§ 101, *et seq.*, as described in 72 Fed. Reg. 2583 (Jan. 19, 2007).

71. C.R.S. § 24-94-101.

72. *Id*.

73. C.R.S. § 24-94-103(1).

74. C.R.S. § 24-94-103.

75. *Id.*

76. C.R.S. § 24-46-102.

77. *See* C.R.S. § 24-94-102(4); *see also* Colorado Department of Personnel and Administration, P3 Office, About Us – P3 Office, https://dpa.colorado.gov/divisions-offices/p3-office/about-us-p3-office.

78. Colorado Department of Personnel and Administration, *Public-Private Partnership Collaboration Unit Management Manual* (2022), https://dpa.colorado.gov/sites/dpa/files/documents/Public-Private%20Partnership%20Collaboration%20Unit%20Management%20Manual.pdf.

79. *Id.*

80. *Id.* (Defining "State Public Entity" as "any department, agency, or subdivision of executive branch of state government; except that "State Public Entity" does not include state entities that have specific statutory authority to enter into public-private partnerships, including but not limited to the authority specified in § 23-3.1-301(1), 23-3.1-306.5, 24-33.5-510, 26-6.9-102, 32-22-105(1)(a)(VIII), 40-2-123, and 43-4-806 C.R.S.").

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. In 1992, Colorado voters approved an amendment to the Colorado Constitution, the Taxpayer Bill of Rights, which prohibits a governmental entity from raising tax rates or spending revenues without voter approval, unless the entity is an independent government-owned "enterprise." *See* Kim S. Rueben & Therese J. McGuire, Economic Policy Institute, *The Colorado Revenue Limit: The Economic Effects of TABOR* (March 21, 2006).

92. *See Introduction to Public-Private Partnerships with Availability Payments*, *supra* n. 33.

93. *See* Colorado Department of Transportation, Central 70 Project, www.codot.gov/projects/i70east.

94. *See* Jon Murray, "DIA's Terminal Renovation Contract Drops: 15,000 Pages Detail a 34-year Deal with a $1.8 Billion Cost," *Denver Post*, July 19, 2017, www.denverpost.com/2017/07/19/dia-terminal-renovation-contract/.

95. Jon Murray, "Denver Airport Fires Great Hall Construction Partners," *Denver Post*, Aug. 13, 2019, www.denverpost.com/2019/08/13/denver-airport-dia-construction-contract/.

96. DEN, Great Hall Project, www.flydenver.com/about-den/projects-and-infrastructure/great-hall-project/.

97. *Id.*

98. National Western Center, Equestrian Center, Hotel and Parking Garage, https://nationalwesterncenter.com/procurement/construction/equestrian-center/.

99. City of Denver Performance-Based Infrastructure Office, About Us, https://denvergov.org/Government/Agencies-Departments-Offices/Agencies-Departments-Offices-Directory/Performance-Based-Infrastructure-Office/About-PBIO.

100. *Id.*

101. *Id.*

102. Colorado Department of Personnel and Administration, P3 Office, https://dpa.colorado.gov/divisions-offices/p3-office.

103. C.R.S. § 24-94-103(2).

104. U.S. Department of Transportation, Build America Bureau, TIFIA Program Overview, www.transportation.gov/buildamerica/financing/tifia.