

Public-Private Partnerships

Legal and Practical Issues with the Procurement and Delivery of Innovative, Local-Servicing Projects, Including Case Studies

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1

Audience Poll

1. Do you have prior experience with a P3 project(s)?

Y / N

2. What size of P3 project are you most likely to work on?

- A. Below \$25M
- B. \$25M to \$50M
- C. \$50M to \$150M
- D. \$150M to \$250M
- E. Above \$250M

3. What topic within the P3 subject matter most interests you?

- A. Legal Authority for Contracting
- B. P3 Transaction Structure
- C. How to P3: Executing the Procurement
- D. P3 Financing

2



2

Common Misconceptions

- “P3s are funding sources”, “The Developer pays for everything in a P3”
 - P3s are not funding sources. The user fees or tax dollars used to pay for a P3 exist (or don’t exist) regardless of whether a P3 is used.
- “All risks should be transferred to the private entity”
 - Some risks are generally better managed by the public owner, such as the use of eminent domain necessary to acquire the project right-of-way, securing most environmental approvals, and other major planning requirements. **It is important to note that risk transfer is not without cost.**
- “P3s are appropriate for every project”
 - P3s may provide best value for money for certain projects over the long term. However, in order to be efficient, the project must be of sufficient size.
- “P3s involve transfer of public assets to the private sector”
 - The private sector partner does not obtain any real property interest in the asset under a concession or availability payment P3. Under a lease-based P3 structure, the public owner also ultimately owns the asset.

3



3

Understand The “Four P’s” Before the P3

1. What is the **Problem** to Solve?
2. What **Project** is Needed to Solve the Problem?
3. What are the **Priorities** of the Community?
4. What is the **Political** environment for such a venture?

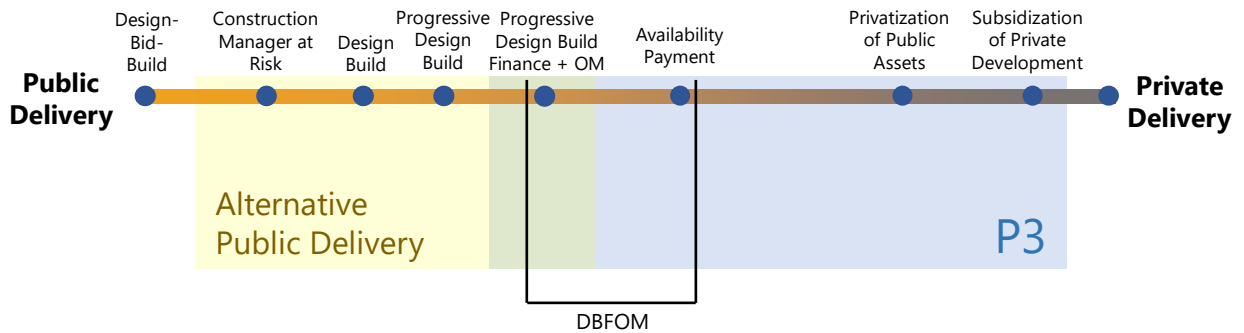
4P's

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Options for Delivering Public Infrastructure



5



Specific Alternative Procurement and Contracting Authority

- A. Leasing and Public Property
 - A. County Property
 - B. City Property
 - C. City or County Property
 - D. Integrated Project – “No Competitive Advantage”
- B. Design-Build
- C. Charter Cities and Counties
- D. Infrastructure Financing Act (Government Code Section 5956)
- E. Other Local Agency Alternative Procurement Statutes
 - A. Best Value Construction for Counties Pilot Program
 - B. Renewable Energy and Energy Efficient Projects
 - C. Construction Manager At-Risk (CMAR)
 - D. Project Specific Legislation

6



5 Stages of P3 Procurement

1. Feasibility & Preparation: “4Ps”
 - Understanding Needs and Building Consensus
2. Issue RFQ / RFP
 - Inviting Teams to submit qualifications and compete for the project
3. Exclusive Negotiations
 - Negotiating the final terms and conditions
4. Pre-Development Stage
 - Collaborate to gain environmental approvals, design completion and guaranteed maximum price
5. Development Stage
 - Construction Drawings and Construction

7



7

The Role of the RFP in a P3

1. Team Qualifications
 - Evaluate Team Members, Team Member Time commitments, and overall team commitment to the project
2. Creating Value
 - How will the Team create value?
3. Contracting
 - Include sample Pre-Development and Development contracts in RFP and ask the team to comment on them
4. Bidding
 - Assume a construction hard cost per square foot based on recent market comparables, then ask the teams to bid their fees, project contingencies and related soft costs.
5. Be Careful of Concept Drawings and Architectural Renderings
6. Construction Risk and Financial Guarantees
 - Review the financial statements of each Development Team to ensure that they have the financial capacity to meet the necessary project obligations.

8



8

Why Utilize a P3?

1. Cost and Schedule Performance Guarantee
2. Turnkey Delivery & Pay for Performance
(No Payment Until Occupancy)
3. Budget Management and Staffing Resources
4. Streamlined/Expedited Procurement & Early Project Financing
5. Low-Cost Tax-Exempt Financing (Issued by a Third Party)



9



9

P3 Financing Mechanisms

- Lease-Leaseback Financing
 - Requires a Counterparty:
 - Special Purpose Entity
 - Joint Exercise of Powers Authority
 - Nonprofit Corporation (formed by public agency or private entity)
 - Requires a Leased Asset:
 - Financed facility; capitalized interest
 - Other property owned by the public agency
- Conduit Financing
 - Joint Exercise of Powers Authority as conduit issuer of bonds
- 63-20 Financing
 - Not-For-Profit third-party issuer
- Private Debt and Equity
 - Bank debt and equity investor



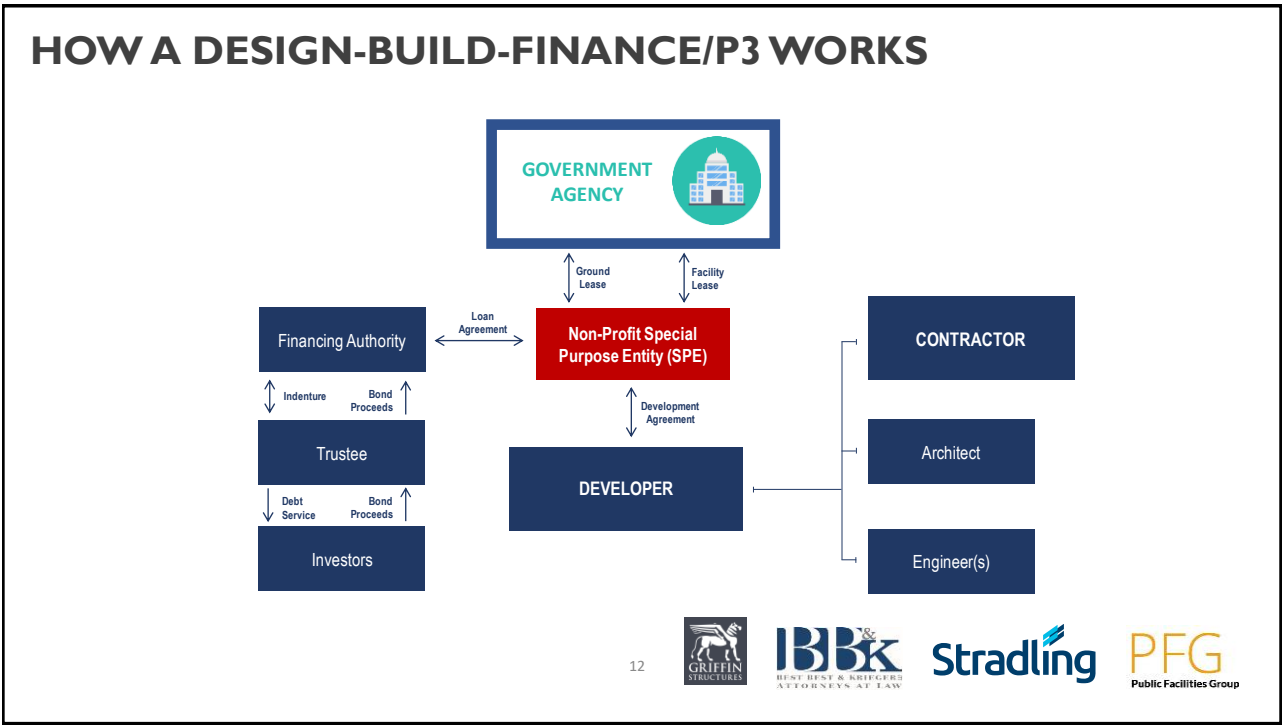
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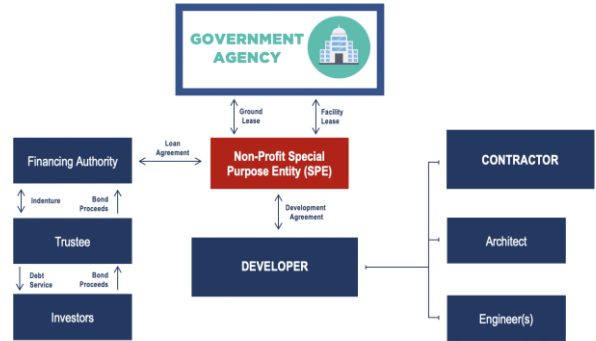
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HOW A DESIGN-BUILD-FINANCE/P3 WORKS

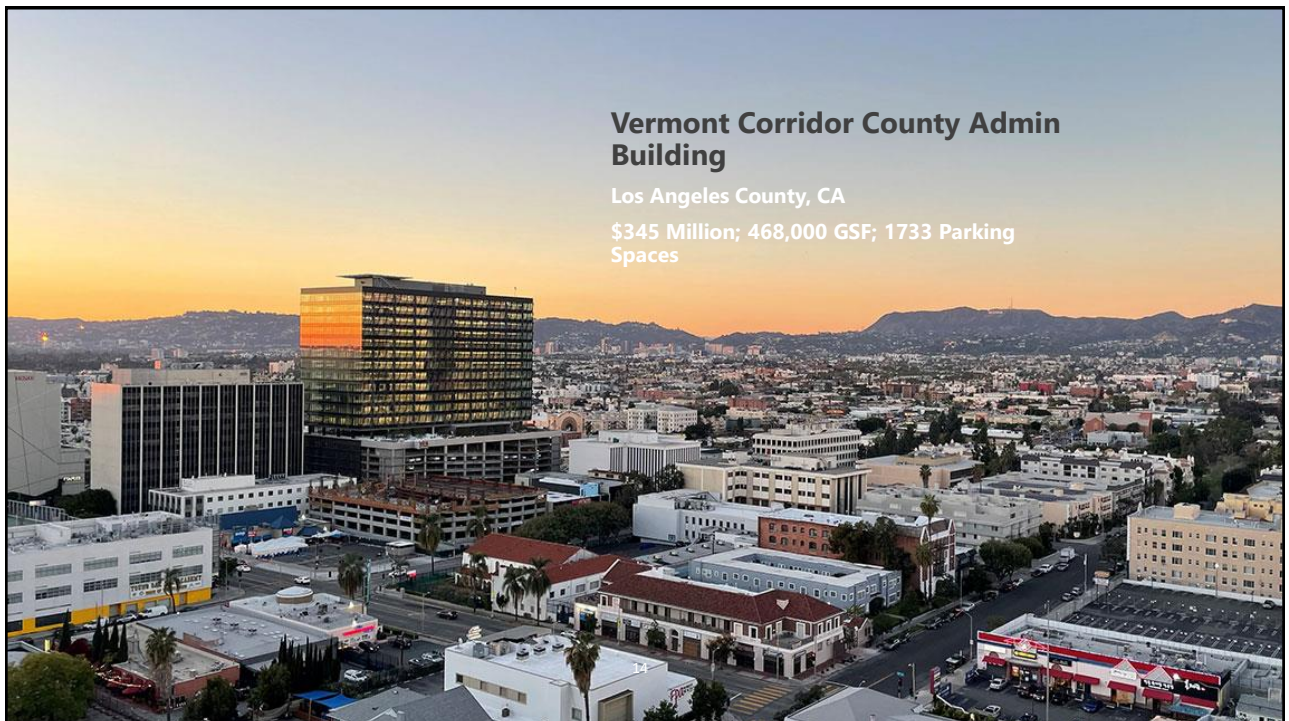
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|-----------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Land Owner | Government Agency |
| Facility Owner | Special Purpose Entity (SPE) <i>controlled by Gov't designees on SPE board</i> |
| Developer | Selected by Government Agency |
| Financing | <ol style="list-style-type: none"> 1.) 100% privately issued tax-exempt securities 2.) 100% privately issued taxable securities 3.) Conventional debt & private equity investment 4.) Custom hybrid financing structures |
| Gov't Control | <ol style="list-style-type: none"> 1.) Option to Purchase / Debt Prepayment 2.) Ownership reversion at the end of the lease 3.) All O&M decision-making during the lease |
| O&M | By Gov't Agency or contracted out per Gov't discretion |



13

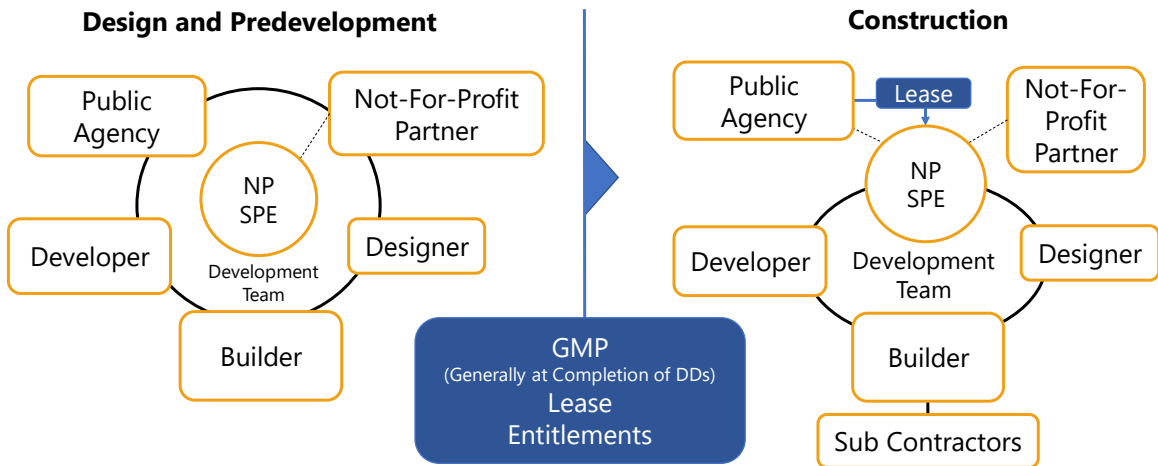


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14

6th and Vermont Development Process



15



15

Tax Considerations and Avoiding Surprises!

Private Use Considerations (Governmental Bonds):

63-20 Tax-Exempt Financings

- 63-20 Nonprofit Corporation as issuer of the bonds
- IRS requirements to qualify as a 63-20 Corporation

501(c)(3) Bonds

- Financed project is operated by a 501(c)(3) nonprofit corporation
- Due diligence and opinions of counsel to the corporation
- Public agency serves as issuer of conduit bond financing
- TEFRA hearing required



16



16

Ten Items to KNOW for Project Readiness

| | |
|-------------------------|-----------------------------------------------------------|
| Know what you want | Initial program, schematic design and cost estimate |
| Know your site | Site control, due diligence, constraints, debt, etc. |
| Know what you can do | Available revenues to commit and gaps you need to fill |
| Know approvals required | Local, state, and federal |
| Know your team | Elected/staff champion, owner's rep, financial, legal |
| Know how to procure | Internal evaluations of existing policies |
| Know how to phase | Design, build, finance, and O&M |
| Know how to partner | Review of alternative structures and approaches |
| Know how to negotiate | Approaches to negotiation and risk, term sheets, remedies |
| Know what to expect | Negotiation, approval, financing, and implementation |

17



17

Questions and Answers

18



18