Market Update: US Public Private Partnership (P3) Sector

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This Article analyzes the current state of the US public private partnership sector, including significant legislative and judicial developments. It also describes major projects currently in procurement or in the pipeline.

2013 was an important year for the US public private partnership (P3 or PPP) sector. While total deal volume was not as high as market observers had hoped, and the US still lags behind many other countries in terms of deal flow, the US P3 sector is demonstrating increased maturity (especially in the transportation sector) as it moves from one-off transactions to a steadier and more predictable deal flow. This trend has continued in the early part of 2014, with several significant P3 transactions in active procurement, including:

- The I-4 Ultimate project in Florida.
- The Portsmouth Bypass project in Ohio.
- The Purple Line rail project in Maryland.
- The Rapid Bridge Replacement project in Pennsylvania.

This Article:

- Analyzes the current state of the US P3 sector.
- Describes major P3 projects currently in procurement or otherwise under consideration.
- Discusses selected significant legislative and judicial developments in this sector.

MATURATION OF THE US P3 SECTOR

More projects are being structured as P3s in the US than ever before, with several significant projects reaching financial close in the past year, including:

- The North Tarrant Expressway (Segments 3A and 3B) in Texas.
- The Goethals Bridge Replacement project in New York.
- The Ohio Bridges East End Crossing project in Indiana.

The need for significant investment to build, update and maintain infrastructure in the US, coupled with a squeeze on public funding, is causing more state and local politicians to turn to the private sector. Beyond financing, P3s can also increase efficiency, decrease project costs and accelerate project delivery schedules.

As a result, more states are adopting or considering P3 enabling legislation. As of April 15, 2014, 34 states and Puerto Rico have adopted some form of P3 enabling legislation.

MORE SOCIAL INFRASTRUCTURE PROJECTS

With the increasing maturity of the US P3 sector, the types of projects being developed using P3s is also evolving. Historically, P3s in the US have been largely limited to transportation projects. The availability of federal support (for example, Transportation Infrastructure Finance and Innovation Act (TIFIA) financing) and the ability to issue tax-exempt bonds make these projects easier to finance. In addition, the need to improve crumbling roads and bridges and to build new transportation infrastructure to reduce congestion make investment in this area a more pressing and obvious need.

However, public authorities are increasingly using P3s to develop their social infrastructure. Several states have adopted broad P3 enabling legislation or are amending their existing P3 legislation to allow for more of these types of projects. There are several social infrastructure projects in active procurement or under consideration, including:

- The Long Beach Civic Center in California.
- The Consolidated Justice Facility project in Indianapolis, Indiana.
- Miami-Dade Water and Sewer Department's water treatment plant expansion.
- The Multnomah County Courthouse in Oregon.
- Prince George County's Storm Water project in Maryland.

There are several Congressional bills under consideration which, if enacted, have the potential to greatly increase social infrastructure P3 activity, including the Water Infrastructure Finance and Innovation Authority Act (WIFIA) (*S.335, 113th Cong. (2013)*). In addition, the Performance Based Building Coalition, an industry group, has proposed the creation of a new category of tax-exempt bonds to finance social infrastructure projects.

INCREASING USE OF AVAILABILITY PAYMENTS

With the maturing of this sector, the structure of P3 projects is also evolving. Availability payments have become an increasingly common method for structuring the private sector party's compensation under P3 agreements. Projects using this approach include:

- The I-4 managed lanes project in Florida.
- The East End Crossing, Illiana Expressway and I-69 (Section 5) projects in Indiana.
- Project Neon (I-15) in Nevada.
- The Rapid Bridge Replacement project in Pennsylvania.

Under this structure, the private sector consortium receives periodic payments from the public sector party during the operation and maintenance phase so long as the asset or facility is "available" for use. To ensure this, the P3 documents will contain detailed provisions regarding performance standards and what it means for the asset or facility to be "available," with the related payments being reduced or suspended in the event of non-performance. Because these projects depend on payments from public agencies, availability payment P3s are also subject to annual appropriation risk.

Availability payment P3s are nevertheless attractive to private sector parties because:

- The private sector party does not bear demand or revenue risk. Toll or other user fee based projects rely on the revenues generated by the asset or facility to repay related debt and to provide the private sector party with its expected return. There are numerous cases where such revenue projections have proved to be incorrect (for example, the Indiana Toll Roads project, see *Indiana*).
- Since debt repayment and equity returns are not dependent on tolls or user fees, the private sector party does not have to be concerned about the level of such charges, or whether there will be enough political support to impose or increase them (for example, the Midtown Tunnel project in Virginia, see *Virginia*).

Availability payment P3s are also attractive to public sector parties because:

- They decide whether or not to impose tolls or other user fees, and retain control over the amounts charged, if any.
- Since the private sector party is not assuming demand or revenue risk, the public sector party does not need to compensate them for such risk.

Availability payments are also being used beyond the transportation sector. The Long Beach Courthouse, which reached financial close in 2010, was the first availability payment social infrastructure P3 in the US. While no other social infrastructure availability P3s have closed since, this structure is being proposed for Indiana's Consolidated Justice project and California's Long Beach Civic Center (see *Indianapolis Consolidated Justice Facility Project* and *Long Beach Civic Center*).

The remainder of this article discusses, on a state-by-state basis, recent activity in the P3 sector, including projects under active procurement or consideration.

ARIZONA

Arizona adopted a P3 law in 2010 (*Ariz. Rev. Stat. §§ 28-7701* to *7710*). However, the statute did not have the toll enforcement mechanisms required for the successful funding and operation of a P3 project. In April 2012, Arizona Governor Jan Brewer signed HB 2491, creating a new toll collection and enforcement authority within the Arizona Department of Transportation (ADOT) (*48 Leg., 1st Reg. Sess.* (Az. 2007)). There is one major P3 in active development in Arizona, with other projects under consideration.

SOUTH MOUNTAIN FREEWAY

In July 2013, the ADOT announced that it had received an unsolicited P3 proposal for the construction of the South Mountain Freeway. It was submitted by a consortium comprising of Kiewit, Sundt Construction and Parsons Corporation. The project, which has an estimated cost of $1.9 billion, would complete the Loop 202 from I-10 (Maricopa Freeway) to I-10 (Papago Freeway), a distance of approximately 22 miles, in the Phoenix metropolitan area. The project consists of eight-lanes with three general purpose lanes and one high-occupancy vehicle (HOV) lane in each direction. In early February 2014, the ADOT issued an RFI for the project. Responses were due by February 25, 2014. On February 27, 2014, 55 companies attended the ADOT's project briefing.

The Environmental Impact Study (EIS) for the project is underway and is expected to be finalized in the summer. If the project proceeds, the ADOT contemplates the issuance of an RFP by the end of July. The preferred bidder would be selected in the first or second quarter of 2015, with financial close in the second or third quarter of 2015.

OTHER PROJECTS

The ADOT is also considering a P3 as one of the options for a new or expanded SR 189 in Nogales near the US-Mexico border. SR 189 is used as a bypass route for commercial truck traffic to and from Mexico. A significant increase in such traffic is expected in 2015 when the Mariposa Port of Entry's $225 million modernization project is completed. Although the road is short (at approximately three miles), the ADOT contemplates that the project could be relatively expensive given the terrain and the high population density in the area. Costs are estimated at between $50 million and $215 million. The ADOT and the Federal Highway Administration (FHWA) are undertaking an engineering and environmental study to examine alternatives ways to handle the projected traffic increase in traffic on SR 189. No traffic and revenue study has done yet.

In late March 2014, the ADOT indicated that it is considering a P3 for a proposed high Speed passenger rail system between Phoenix and Tucson. A high-level feasibility study is currently being conducted by the ADOT, which it plans to finalize by the end of 2014. Depending on the route, the costs of the project are estimated at between $3.6 billion and $7.9 billion.

CALIFORNIA

California continues to be a leader in the P3 sector with some of the most innovative structures and projects (for example, the Long Beach Courthouse and the Presidio Parkway projects). Its P3 statutes authorize:

- The California Department of Transportation (Caltrans) and regional transportation agencies to enter into P3 agreements to develop and maintain transportation projects.
- Local government agencies to use private sector capital to develop specified projects if certain conditions are met.
- The state judiciary to plan, construct, acquire and operate its court facilities using P3s.

LONG BEACH CIVIC CENTER

The City of Long Beach is moving ahead with its proposed Civic Center. It issued a Request for Proposals (RFP) for the project on February 28, 2014. This project is structured as a design-build-finance-operate-maintain (DBFOM). The RFP contemplates a two-component project:

- A new Civic Center, including a new City Hall, a main library, the revitalization of a related park and possibly a new headquarters for the Port of Long Beach.
- The development of any excess property, which the private proposers believe would contribute to the revitalization of the area.

The costs of the project have been estimated at approximately $200 million. Proposals are due in early June 2014, with a contemplated selection of a preferred proposer by early July. The schedule is more aggressive than originally contemplated by the city because a seismic study has indicated that the existing city hall is at risk of a structural failure. Three bidders were shortlisted in November 2013, but one bidder dropped out in March 2014 because of the proposed project schedule.

LONG BEACH COURTHOUSE REFINANCING

Long Beach Judicial Partners, a consortium led by Meridiam, a global investor and asset manager specializing in public and community infrastructure, successfully refinanced in December 2013 the Long Beach Courthouse P3. The consortium issued $518.5 million of 6.88% Senior Secured Notes, due December 31, 2047, in the private placement market. The project, one of the first social infrastructure P3s in the US, involves the DBFOM of a new courthouse in Long Beach, with a 35-year post-construction operation period. The refinancing was groundbreaking because it is the first US P3 greenfield project to be refinanced and the significant participation of the institutional lender market. About 35 institutional investors purchased the notes.

LOS ANGELES METROPOLITAN TRANSPORTATION AUTHORITY

The Los Angeles Metropolitan Transportation Authority (LA Metro) is authorized to use P3s to develop projects in California (*Cal. Sts. & High. Code § 143(a)*).

Accelerated Regional Transportation Improvements Project

LA Metro has been considering its Accelerated Regional Transportation Improvements (ARTI) projects for some time. Under past iterations, ARTI involved several separate projects, with a combined estimated cost of about $768 million, to be structured in part using availability payments. However, a possible new approach to the ARTI projects is under consideration and an update is expected from LA Metro shortly.

Other Projects

In February 2014, LA Metro announced that it could begin industry outreach later in 2014 in connection with its potential High Desert Corridor P3 project, a 63-mile corridor from SR 14 in Los Angeles County to SR 18 in San Bernardino. Caltrans is reported to be developing an environmental report relating to the project for circulation this summer. The costs of the project have been estimated at $2.5 billion.

In the fall of 2013, LA Metro indicated that it was proceeding with a study on the viability of the Sepulveda Pass Transit Corridor project as a P3 project. This project, which would connect the San Fernando Valley with the Westside region of Los Angeles, is being considered as a possible DBFOM. According to one study, this project (if it involved both roads and railway lines) could cost between $10 billion and $13 billion.

LA Metro is also considering a P3 structure for:

- The SR 710 North Tunnel Extension project. This project would involve the construction of a tunnel to complete a 4.5 mile gap connecting I-10 to I-210 on Valley Boulevard in Los Angeles. This project, which has an estimated cost of $4.1 billion, is still in the preliminary planning stage.
- Its upgrade of the I-710 south freight corridor. In March 2014, LA Metro is considering two alternative approaches to this project, one being the construction of a new freight corridor separate from the freeway (at an estimated cost of $6 billion), and the other being to make changes and upgrades to the existing freeway, including to separate truck and car traffic (at an estimated cost of $3 billion). An update from LA Metro is expected in May 2014.

CALIFORNIA DEPARTMENT OF TRANSPORTATION

Caltrans, together with the Santa Clara Valley Transportation Authority (VTA), is currently considering options for the SR 156 West Corridor project in Monterey County, including a possible P3. The road is heavily used by tourists traveling from the Bay Area to the Monterey Peninsula, resulting in heavy congestion and safety concerns on weekends. The project would convert the existing two-lane highway into a four-lane expressway. In December 2013, Caltrans and the VTA held an industry meeting and related one-on-one meetings with interested agencies and engineering and construction firms to discuss the project and gain input from the private sector on possible ways to move it forward. Total project costs have been estimated at approximately $265 million.

UPLAND WATER AND WASTEWATER PROJECT

At the end of January 2014, the task force appointed by the Upland City Council to consider ways to strengthen the city's finances recommended that Upland consider engaging a private sector operator to lease or manage its water and wastewater systems.

COLORADO

Colorado has adopted P3 enabling legislation, but it is limited to surface transportation projects (*Colo. Rev. Stat. Ann. §§ 43-4-801* to *813*). This legislation authorizes the Colorado Department of Transportation (CDOT)'s High Performance Transportation Enterprise (HPTE) to pursue any available means of financing for a surface transportation infrastructure project that will allow the efficient completion of the project. The HPTE was created in 2009 to facilitate P3s at the state level and to provide P3 guidance to local and regional entities. While P3 legislation has been in place for years, it has not been used extensively. The CDOT signed its first P3 agreement in February 2014 (see *US 36 Project*).

Other Colorado agencies are also authorized to enter into P3s but under different authority. For example, regional transportation districts (RTDs) are authorized to enter into DBFOM agreements under the Regional Transportation District Act (*Colo. Rev. Stat. Ann. §§ 32-9-101 to 164*.)

US 36 PROJECT

At the end of February 2014, a consortium led by Plenary Group reached financial close on Phase II of the US 36 Express Lanes project. The total project costs are approximately $120 million, financed in part with TIFIA loans and public activity bonds (PABs). The 50-year DBFOM concession requires the construction of an express lane and the reconstruction of two general-purpose lanes in each direction for:

- High occupancy vehicles.
- Tolled single occupancy vehicles.
- Bus rapid transit.

The consortium will also operate and maintain Phase 1 of the project (which is currently under construction by another team). The project is being shepherded by HPTE.

The private consortium accepted toll revenue risk on the project, an increasingly rare occurrence in the US (see *Increasing Use of Availability Payments*).

I-70

After a meeting of the Colorado Transportation Commission (CTC) on February 19, 2014, a spokesperson indicated that it is highly likely that the CTC will pursue a P3 for the proposed I-70 East Viaduct project, possibly using an availability payment structure. The project, which has an estimated cost of about $1.2 billion, covers 12.5 miles of highly congested roadway in the Denver metro area, some of which is along a viaduct. One possible plan under consideration (the Partial Cover Lowered Alternative) would entail removing the viaduct, adding lanes in each direction and rebuilding the highway below grade, with a park or other public space above part of the new roadway. This project is in its early stages and no procurement schedule has been released.

OTHER PROJECTS

Other possible P3 transactions that are in the pre-launch stage in Colorado include:

- The C-470 Corridor Ring Roads project ($275 million).
- The Colorado High Speed Rail project ($9.8 billion).
- The I-70 Mountain Corridor Roads project ($4 billion).

FLORIDA

Florida has been a leader in the P3 sector with some of the most significant P3 transactions in the US, including the I-595 Corridor Roadway Improvements and the Port of Miami Tunnel and Access Improvements projects. Florida's initial P3 legislation was limited to transportation projects. On May 3, 2013, the Florida legislature passed House Bill 85, which expands Florida's existing P3 statute to allow P3s to be used in other sectors. The law, which became effective July 1, 2013, allows any responsible public entity (including counties, municipalities, school boards, regional entities and state subdivisions) to use the P3 structure to develop any project that serves a public purpose. It also creates the Public-Private Partnership Guidelines Task Force to develop uniform procedures for implementing P3s.

Projects that satisfy the public purpose requirement include any:

- Ferry or mass transit facility.
- Vehicle parking facility.
- Airport or seaport facility.
- Rail facility or project.
- Fuel supply facility.
- Medical or nursing care facility.
- Recreational facility.
- Sporting or cultural facility.
- Educational facility or other building or facility that is used or will be used by a public educational institution.

(See *Fla. Stat. § 255.60, Fla. Stat. § 287.05712, Fla. Stat. § 334.30* and *Fla. Stat. § 336.71*.)

I-4 ULTIMATE PROJECT

On February 12, 2014, the Florida Department of Transportation (FDOT) received technical proposals from its four shortlisted teams in connection with the I-4 Ultimate Project. Financial proposals were submitted on March 13, 2014. The project will add two lanes on I-4 in each direction over a 21-mile stretch, and will require 15 new interchanges and 56 new bridges, as well as the replacement of 70 existing bridges. The preferred bidder is scheduled to be announced in late April 2014.

The project, which has an estimated cost of $2.1 billion, will be developed on a DBFOM basis.

SR 54/SR 56 PROJECT (PASCO COUNTY)

On January 13, 2014, the FDOT selected a consortium comprising of International Infrastructure Partners, OHL, Guggenheim and Parsons Binckerhoff as the winning bidder to design, build, operate and maintain (DBOM) the SR 54/SR 56 toll project. The consortium was the sole team to submit a bid in response to the RFP, having originally submitted an unsolicited bid for the project in June 2013. The project calls for the design, construction, operation and maintenance of a 33-mile toll road (including elevated roadway) connecting New Port Richey/US-19 to Zephyrhills/US-301 through east, west and central Pasco County. The FDOT will lease the required rights-of-way to the consortium. Once completed, the project will have a significant impact on Tampa Bay motorists. It has been strongly endorsed by the Tampa Bay Area Regional Transportation Authority and has the potential to accelerate the development of several planned communities along the corridor.

The timetable for the project is uncertain. The next step is for the FDOT and the consortium to negotiate the details of the lease agreement.

ORLANDO MAGLEV PROJECT

In December 2013, the FDOT issued an RFP in connection with the lease of rights-of-way and other property to build a "fixed guide way" maglev rail system in Orlando. The RFP was in response to an unsolicited proposal from American Maglev Technology (AMT) to build a maglev transportation system, with an initial 15-mile link between Orlando International Airport and the Orange County Convention Center. AMT has indicated its desire to construct an additional 25-mile stretch, in two phases. It has been reported that AMT would team with Grupo ACS for the project. AMT has proposed to privately finance the project, which has a total estimated price tag of $800 million. The required right-of-way is owned by the FDOT, the Orlando Orange County Expressway Authority and other public entities. The due date for submitting proposals is April 18, 2014, with the selection of the preferred bidder on May 19.

MIAMI-DADE WATER AND SEWER DEPARTMENT

In mid-February 2014, the Miami-Dade Water and Sewer Department (WASD) received responses from 31 bidders to its Request for Expressions of Interest (REOI) regarding its capital improvement plan (CIP) for its water and sewer projects. The total costs of the projects are estimated at $6.2 billion. The REOI sought input from private sector parties regarding the feasibility of using P3 arrangements that may benefit all stakeholders and also assist in implementing the projects in a more cost-effective and efficient manner considering life cycle costs. WASD has indicated that it could take up to six months to evaluate the responses to the REOI. In March 2014, WASD stated that it has selected the South Miami Heights water treatment plant as the first of its projects under its capital plan, possibly to be procured on a DBFOM basis.

UNIVERSITY OF FLORIDA AND SEMINOLE STATE COLLEGE

The University of Florida continues to explore the potential benefits of monetizing its parking facilities. It hired Morgan Stanley as its financial advisor in December 2013 and has indicated its desire to retain a parking consultant. The university has approximately 24,000 parking spaces, which generated about $11.5 million in 2012-13.

Last fall Seminole State College also indicated its desire to pursue P3s for the expansion of its Altamonte Springs campus and construction of a wellness center. No timetable has been set for these projects.

INDIANA

Indiana has in place broad P3 legislation which authorizes the Indiana Finance Authority (IFA) to enter into P3 agreements with private entities (see *Ind. Code Ann. §§ 8-15.5-1-1* to *8-15.5-13-8*). Under this legislation, the IFA can enter into agreements with a private sector party to, among other things, plan, design, acquire, construct, improve, expand, lease, operate, repair, manage, maintain or finance toll road projects. The Indiana Department of Transportation (IDOT) is also authorized to enter into P3 agreements to develop, finance or operate transportation projects, including toll ways, roads, bridges and some rail projects (see *Ind. Code Ann. §§ 8-15.7-1-1* to *8-15.7-16-8*). Cities and other local jurisdictions are also allowed to enter into P3 agreements (see *Ind. Code Ann. § 5-23-1-3*).

Indiana has become a leader in the P3 sector, despite the problems faced by its first P3 project, the $3.8 billion Indiana Toll Road project. Vehicle traffic has been lower than projected, resulting in considerably lower revenues than expected. The project debt is currently being restructured.

In March 2013, the IFA reached financial close on the $1.2 billion East End Ohio River Crossing project. This project uses an availability payment structure and is being financed in large part by PABs issued by the IFA. The success of this project (including attractive pricing in the bond market) has encouraged other similar procurements including the I-69 project (see *I-69 (Section 5)*) and the Illiana Expressway project (see *Illiana Expressway Project*).

I-69 (SECTION 5)

In February 2014, the IFA selected I-69 Development Partners, a consortium led by Isolux Infrastructure Netherlands, as the preferred bidder for its I-69 Section 5 project. The selection is subject to review by the Indiana Budget Committee, before a final decision is made by the governor. The project, which is structured as an availability payment DBFOM, requires the upgrade of 21 miles of existing SR 37 from Bloomington to Martinsville and the construction of new interchanges and overpasses, at an estimated cost of $325 million. The project is an important part of the new 142-mile I-69 between Evansville and Indianapolis. Commercial close was reached on April 8, 2014 and financial close is expected in late June 2014. Construction is scheduled to start later in the year, with substantial completion anticipated for late fall 2016.

INDIANAPOLIS CONSOLIDATED JUSTICE FACILITY PROJECT

In February 2014, the City of Indianapolis received five responses to its December 2013 Request for Qualifications (RFQ) for its consolidated justice facility project, which has an estimated cost of $500 million. The RFQ contemplates a DBFOM structure with availability payments and consists of:

- A 3,480-bed detention facility.
- A 750-bed minimum security, transitional community corrections facility.

- A 32-courtroom courthouse.
- A law office building.
- A juvenile court and 100-bed juvenile detention center.
- A sheriff's office.
- Surface and structured parking facilities.
- Central facilities for maintenance and warehousing.

Three bidders were shortlisted on March 4, 2014. A final RFP is expected to be issued in April 2014, with bids due in August 2014 and the selection of the preferred bidder in September 2014. Indianapolis is evaluating potential sites for the project.

ILLIANA EXPRESSWAY PROJECT

A joint project with Illinois and Indiana, the proposed Illiana Expressway is a limited access toll road from I-65 near Crown Point, Indiana to I-55 near Joliet, Illinois, running a total of 47 miles. The Illinois section is a 35-mile, east-west, four-lane limited access toll road from I-55 to the Indiana state line. The Indiana section is approximately 11.7 miles and runs from the Illinois state line and to I-65 north of Lowell, Indiana. It includes a project on I-65 requiring the construction of 12.23 miles of additional non-toll lanes. The project also involves a crossing over the Kankakee River and the addition of certain auxiliary lanes.

Both states initiated the procurement process for their part of the project in 2013.

Illinois Section

Illinois has P3 enabling legislation in place (*605 Ill Comp. Stat. 5/5 to 605 Ill Comp. Stat. 5/90*). However, this project is being procured under legislation specific to the project, the Public Private Agreements for the Illiana Expressway Act (see *605 Ill. Comp. Stat. 130/1 to 605 Ill. Comp. Stat. 130/135*).

The Illinois Department of Transportation (IDOT) issued an RFQ in November 2013 to develop, design, build, finance, operate and maintain its section of the Illiana Expressway Project. It is seeking an availability payments P3 contract in which the state and taxpayers take the traffic and revenue risk. In January 2014, the IDOT announced the shortlist of bidders. The costs of the Illinois section have been estimated at $1 billion.

Indiana Section

In early March 2014, the INDOT and IFA shortlisted four bidding teams for the Indiana section of the Illiana Expressway project. The INDOT is expected to issue the final RFP in May. This section of the project is also structured as an availability payment P3. The state wants to conclude a deal by November 2014. The costs of the Indiana section have been estimated at $300 million.

MARYLAND

On April 9, 2013, Maryland Governor Martin O'Malley signed House Bill 560 which extensively revised Maryland's P3 statute As revised, the statute:

- Streamlines the process of establishing P3s.
- Creates a mechanism for submitting solicited and unsolicited proposals.
- Establishes a review process and associated reporting requirements for oversight of P3s.

(*Md. Code Ann., State Fin. & Proc. §§ 10A-101 to 10A-403.*)

The state has involved the private sector before in the development of its infrastructure, but that involvement was more limited than in a typical P3.

PURPLE LINE

Days after the adoption of Maryland's new P3 legislation, the Maryland Transit Administration (MTA) issued a Request for Information (RFI) for the development and financing of the Maryland National Capital Purple Line and Baltimore Red Line. In early January 2014, the Maryland Department of Transportation (MDOT) and the MTA announced that four teams have been shortlisted for the Purple Line light rail project. The project, which is being procured on a DBFOM basis, involves a 16-mile rail link between Bethesda in Montgomery County and New Carrolton in Prince George's County, providing connections to Metrorail, MARC Train, Amtrak and local bus routes. The MTA will continue to set and collect fares, while making availability payments to the private sector consortium under a concession of between 30 to 40 years. A final RFP is expected in June 2014, with proposals to be submitted in the fall of 2014. The total cost of the project is estimated to be in the range of $2 billion, with between $400 million to $900 million coming from the private sector.

RED LINE

The MTA is also considering the use of a P3 on a portion of its proposed Red Line transit project. The project involves a 14.1-mile east-west light rail transit line on or adjacent to existing roadways. It includes two tunnels, one that will run for four miles under Baltimore's central business district, as well as 19 stations, parking facilities and a maintenance facility. The estimated cost is $2.5 billion.

In May 2013, the MTA received 38 responses to its RFI for this project. An industry forum hosted by the MTA on June 10, 2013 in Baltimore attracted about 400 private sector attendees. In September 2013, the MTA indicated that the project would be primarily built using a design-bid-build approach, but some aspects of the project may be procured as a P3 using availability payments.

CAPACITY RECOVERY AT COX CREEK DREDGED MATERIAL CONTAINMENT FACILITY

The MDOT and the Maryland Port Administration (MPA) are considering using a P3 to recover dredged material placement capacity in the Cox Creek Dredged Material Containment Facility (Cox Creek DMCF). The MPA is responsible for managing the dredging of approximately 1.5 million cubic yards of material per year in Baltimore Harbor to ensure reliable navigational channels for vessels using the Port of Baltimore. The dredged materials must be placed in approved dredged material containment facilities (DCMF) or beneficially used.

The MDOT and MPA are considering retaining a private sector consortium under a P3 structure to recover dredged material placement capacity in the Cox Creek DMCF, having concluded that the material can be removed and converted into marketable lightweight aggregate (LWA). The MPA anticipates that the private sector consortium would sell the LWA for use in construction or other projects in the commercial marketplace. The private sector consortium would be responsible for all or a portion of the initial financing of the project, with the MDOT/MPA making periodic payments during the life of the P3 agreement for ongoing removal of material and recovery of capacity in the Cox Creek DMCF. An RFI regarding the project was issued in December 2013. It was reported that 9 responses were received by the January 24, 2014 deadline.

PRINCE GEORGE'S COUNTY STORM WATER PROJECT

Prince George's County has entered into negotiations with Corvias Solutions in connection with its storm water P3 program. The program, which has the support of the Environmental Protection Agency and the Maryland Department of Environment, calls for the retrofit of an initial 2,000 acres of impervious surfaces to reduce pollution runoff into the Chesapeake Bay. The private sector consortium would be expected to fund a minimum of 40% of the program's estimated $100 million costs up front. It would also maintain these retrofit projects for 30 years under a DBFM agreement. The program is proposed to be funded through a storm water fee paid by residential and business property owners. If successful, Prince George's County may expand the program further.

NEVADA

Nevada enacted P3 enabling legislation in 2011 (*Nev. Rev. Stat. §§ 338.161* to *338.168*). The legislation allows certain public agencies to enter into an agreement with a private sector party to develop, construct, improve, finance, maintain or operate transportation facilities excluding toll road construction.

PROJECT NEON (I-15)

In July 2013, the Nevada Department of Transportation (NDOT) issued an RFQ for teams interested in bidding on its project to expand 3.7 miles of I-15 from south of the Sahara Avenue/I-15 interchange to I-15/US-95/I-515 interchange (known as the Spaghetti Bowl), with a view to reduce congestion by accommodating expected traffic growth and separating local traffic from regional traffic passing through Las Vegas. The project, structured as a DBFM, will use an availability payment structure. In January 2014, the NDOT issued a draft RFP.

In December 2013, the Legislature's Interim Finance Committee approved the NDOT's request to issue $100 million in bonds to support the right-of-ways acquisition. A final RFP is scheduled for May 2014, with technical and financial proposals due in October and November, respectively. The preferred proposer is scheduled for selection in December, with commercial close in February 2015 and financial close in April 2015. This would be the first highway transportation project procured under the state's P3 law.

NEW YORK

New York has not yet adopted P3 enabling legislation, although bills are currently pending. However, certain state entities are permitted to develop projects using a design-build structure under the Infrastructure Investment Act (*2011 N.Y. Laws ch. 56, pt. F*). The Port Authority of New York and New Jersey (PANYNJ) is also authorized under federal authority to structure its projects as P3s.

LAGUARDIA AIRPORT CENTRAL TERMINAL BUILDING REPLACEMENT PROJECT

The PANYNJ continues to move ahead with its P3 for the LaGuardia Airport Central Terminal Building Replacement Project. A draft RFP was issued to the four shortlisted teams in August 2013. The project is the PANYNJ's second airport P3, following the Terminal 4 Project at John F. Kennedy airport (which was designed and built and is still operated by a consortium led by the Schiphol Group).

The winning bidder for this project will:

- Design and construct a new terminal and other related facilities.
- Provide private sector financing for a portion of the project's costs.
- Operate and maintain the existing facilities during the construction period (and demolish and remove the existing facilities when construction is complete).
- Operate and maintain the new facilities for a specified term.

The costs of the projects have been estimated at between $1.9 billion and $2.6 billion. The PANYNJ is not seeking an upfront payment from the winning bidder. Instead, according to the RFQ, it is looking for:

- An equity investment of $200 million.
- Annual ground rent payments.
- A negotiated share of the net revenues.

Proposals are due from the shortlisted teams in April 2014, with the preferred proposer being selected in June 2014. Unlike the Luís Muñoz Marín International Airport P3 in Puerto Rico, which reached financial close in February 2013, the LaGuardia project is not being developed under the Federal Aviation Administration's (FAA) Airport Privatization Pilot Program.

GOETHALS BRIDGE REPLACEMENT PROJECT

The $1.5 billion Goethals Bridge P3 project, sponsored by the PANYNJ, reached financial close in November 2013. The project entails replacing the existing bridge, which connects Staten Island to New Jersey, with a new bridge with:

- Two general purpose lanes.
- One managed use lane.
- Bike and pedestrian access.
- Capacity for a potential future mass transit.

The existing bridge would be demolished. The private sector consortium awarded the 40-year DBFM agreement was constituted by Macquarie Infrastructure Partners III and Kiewit. The consortium will receive availability payments from the PANYNJ post-construction.

NORTH CAROLINA

In August 2013, Governor Pat McCrory signed into law HB 857 amending its procurement legislation to authorize state agencies and local municipalities to develop projects using P3s (*N.C. Gen. Stat. Ann. § 143-128*). The North Carolina Department of Transportation (NCDOT) is also authorized to enter into P3 contracts to design, build, finance, operate and maintain transportation infrastructure projects and to finance these projects through tolls and other financing methods authorized by law (*N.C. Gen. Stat. Ann. § 136-18(39)*).

I-77 HOT LANES P3

The NCDOT issued a final RFP to its four shortlisted bidders for the I-77 HOT Lanes P3 on August 8, 2013. It recently selected the consortium comprising of Cintra/Ferrovial Agroman, F.A. Southeast, W.C. English and The Louis Berger Group as the winning team. The RFP calls for a 50-year toll concession of 27 miles of High Occupancy/Toll (HOT) lanes on I-77. The concessionaire will design, construct, finance, operate and maintain the project. The project is divided into three portions:

- The Southern Section (I-3311-C), requiring two HOT lanes in each direction.
- The Central Section (I-5405), requiring the conversion of the existing high occupancy vehicle (HOV) lanes to HOT lanes, providing two HOT lanes in each direction.
- The Northern Section (I-4750AA) requiring one HOT lane in each direction.

The winning bidder will bear revenue and demand risks. The project will not remove any existing general purpose lanes. Once completed, motorists can still use the existing general purpose lanes at no cost. The project has an estimated cost of $200 million to $600 million, depending on which sections are covered by the P3 procurement.

Commercial close is scheduled for June, with financial close in the fourth quarter of 2014.

OHIO

Ohio has a P3 statute that gives broad authority to the Ohio Department of Transportation (ODOT) to undertake a P3 procurement to develop, finance, maintain or operate transportation facilities (*Ohio Rev. Code Ann. §§ 5501.71(A)* and *5501.83*).

No projects have been completed under this statute, but several projects are currently in development.

THE BRENT SPENCE BRIDGE IMPROVEMENT PROJECT

The State of Ohio and the Commonwealth of Kentucky are jointly moving ahead with their plans for the Brent Spence Bridge Replacement/Rehabilitation Project that calls for improvements to a 7.8-mile corridor of I-75. Delivery structures are under discussion between Ohio and Kentucky based on a value-for-money study. The states are operating under a bi-state agreement, which establishes their respective roles and responsibilities and calls for the creation of a Bi-state Management Team (BSMT) to jointly oversee the project. As well as a major rehabilitation of the existing Brent Spence Bridge, the project contemplates the construction of a new Ohio River crossing adjacent to the existing structure. The total cost of the project is estimated at $3.56 billion.

Ohio and Kentucky are considering a DBFOM P3 approach with availability payments. Certain sections of the project may be maintained by Kentucky outside of the DBFOM concession, in order to facilitate governmental purpose tax-exempt financing. On December 31, 2013, an initial Financial Plan was submitted to the FHWA in connection with the project. The plan identified toll revenues as the primary source of funding for the project. No P3 procurement schedule has yet been proposed. Tolling on the bridge requires the passage of authorizing legislation by Kentucky and possibly Ohio. A recent P3 bill in Kentucky, which was not signed into law by the Governor, omitted such authorization (see *H.B. 407, 222nd Gen. Assemb., 14 Reg. Sess. (Ky. 2014)*).

ROUTE 823 PORTSMOUTH BYPASS PROJECT

The ODOT has invited a short list of three teams to submit proposals in connection with the Portsmouth Bypass project. This project involves the development and long-term maintenance of approximately 16-mile, four-lane limited access highway (to be designated SR 823) around the City of Portsmouth in southern Ohio, bypassing approximately 26 miles of US 52 and US 23. It includes construction of five new interchanges. The cost of the project has been estimated at $605 million.

OREGON

Oregon has several statutes regulating P3s in the state (see, for example, *Or. Rev. Stat. Ann. § 279C*).

Multnomah County announced in December that it had appointed Day CPM as its technical, planning, financial and procurement advisor in connection with a possible P3 for a new county courthouse. Partnerships BC was retained by Multnomah County earlier in 2013 to assist with the business case analysis. The current courthouse was built in the 1920s and is structurally and functionally obsolete, as well as vulnerable to seismic activity. The costs of the project are estimated at $250 million.

PENNSYLVANIA

Pennsylvania adopted broad P3 legislation in 2012 (see Act 88 of 2012) (*74 Pa. Stat. Ann. §§ 9101* to *9124*). The State's implementation manual was approved on January 9, 2013.

RAPID BRIDGE REPLACEMENT PROJECT

In March 2014, the Pennsylvania Department of Transport (PennDOT) announced its shortlist of four teams for its Rapid Bridge Replacement project. The initial RFP (issued in December 2013) notes that nearly 4,500 (18%) of the Pennsylvania's bridges are structurally deficient and the average age of Pennsylvania's bridges is more than 50 years. The program contemplates accelerating the replacement of at least 500 geographically disbursed bridges across Pennsylvania in less than five years.

The private sector consortium will be responsible for the design, build, finance and maintenance of the bridges in exchange for receiving availability payments over an anticipated term of between 25 and 35 years. The PennDOT is in the process of identifying a subset of approximately 50 to 100 of the eligible bridges that will require replacement on an expedited basis in 2015. The final RFP is scheduled for June 2014, with proposals due in September. The preferred proposer is scheduled to be announced in October 2014, followed by commercial close in December 2014.

AMTRAK STATION IMPROVEMENT PROJECT (KEYSTONE CORRIDOR)

On February 20, 2014, the PennDOT, through its Office of Public Private Partnerships (OPPP), issued an RFI for an 11-station improvement project along the nearly 350-mile long Keystone Corridor that links Philadelphia and Pittsburgh. The PennDOT is considering a DBFOM P3 structure, but has indicated its willingness to consider other approaches. The RFI notes that while the existing conditions vary from station to station, there are many operations and facility needs to be universally addressed at most, if not all, the stations, including routine maintenance, lighting, security and security technology. The PennDOT also noted that most stations are in need of capital improvements and that many of the stations have potential for commercial development. Responses to the RFI were due by March 17, 1014.

DUAL TRANSIT FACILITY

On April 4, 2014, the PennDOT, through the OPPP, issued an RFI in connection with a new full service Commercial Driver/Vehicle Services Center (CDVSC) and a new Capital Area Transit (CAT) Administration, Operation, and Maintenance facility with commercial business operations in the Greater Harrisburg area. The RFI seeks input regarding the design, construction, testing, operation, maintenance and security of the new CDVSC and CAT Facility. The PennDOT is considering using a DBFOM structure with availability payments. Responses are due by May 2, 2014.

The RFI contemplates the issuance of an RFQ in the third quarter of 2014, followed by an RFP by year-end. Contact award would be made in early 2015, with commercial close in mid-2015.

TEXAS

Texas has in place P3 legislation, the Texas Public Private Infrastructure Act (*Tex. Gov't Code, ch. 2267*). Texas has implemented several P3 projects, including the North Tarrant Express Segments 3A and 3B project that reached financial close in September 2013. The financing includes $247 million in PABs and $531 million in TIFIA loans.

Under the terms of the agreement for this project, the private sector party will design, build, operate and maintain Segment 3A and the Texas Department of Transportation (TxDOT) will build Segment 3B, before turning it over to the private sector party who will operate and maintain it.

However, Texas has been moving away from broad P3 projects with many of the projects in its pipeline being structured as design-builds, with a separate operations and maintenance agreement.

SH-183 MANAGED LANES PROJECT

The TxDOT issued a final RFP for the development of SH 183 in November 2013. Proposals are due by April 14, 2014. The RFP contemplates a development agreement in connection with tolled managed lanes, general-purpose lanes and associated facilities along a 14-mile segment of SH-183 from SH-121 to I-35E/proposed Trinity Parkway in Dallas and Tarrant Counties.

The project is structured as a DBFOM, where TxDOT retains toll risk and payments for the design-build-finance services are to be made by TxDOT within five years of substantial completion. The operation and maintenance period would be 25 years, during which TxDOT will make certain availability payments to the private sector consortium. It is an unusual structure involving variable scope, short-term private financing and the bundling of long-term construction and lifecycle risks. The TxDOT will make available up to $850 million of public funds for the initial design and construction work. TxDOT is scheduled to announce its preferred bidder in May 2014.

PASSENGER RAIL PROJECTS

In February 2014, the TxDOT announced that it had commissioned the Texas-Oklahoma Passenger Rail Study to look at how passenger rail may play a role alleviating congestion on the 850-mile I-35 corridor between Oklahoma and South Texas. The study will look at three separate sections, namely the northern (Oklahoma City to Dallas/Fort Worth), the central (Dallas/ Fort Worth to San Antonio) and the southern (between San Antonio and either Laredo, McAllen and Harlingen or Corpus Christi). It will also consider different levels of rail service, namely conventional, higher speed and high speed. Funding for the study is being provided by the Federal Railroad Administration (FRA). The study is anticipated to be completed in the fall of 2014.

Texas Central Railway, a private company, is proposing to build a passenger rail line from Houston to Dallas using a P3 structure. In January 2014, US Secretary of Transportation Anthony Foxx stated that the FRA and TxDOT would partner with Texas Central Railway to perform two environmental studies for the project, which have an estimated price tag of $10 billion.

VIRGINIA

Virginia has broad P3 legislation in place:

- The Public-Private Education Facilities and Infrastructure Act of 2002, which allows private entities to acquire, design, construct, improve, renovate, expand, equip, maintain or operate qualifying projects, including schools, wastewater treatment plants and telecommunications infrastructure (*Va. Code Ann. §§ 56-575.1* to *56-575.18*).
- The Public-Private Transportation Act of 1995 (PPTA) which applies to transportation projects, including roads, rail, transit and aviation (*Va. Code Ann. §§ 56-556* to *56-575*).

Virginia is developing several projects under these statutes, including the $925 million I-95 HOT Lanes project (which reached financial close in August 2012) and the $2.1 billion Midtown Tunnel Project (which reached financial close in April 2012). The Midtown Tunnel Project has been the source of considerable controversy and legal challenges. However, in October 2013, the Virginia Supreme Court unanimously reversed a lower court's decision that had held that tolls on this project were unconstitutional (see *Elizabeth River Crossings Opco, LLC v. Meeks, 749 S.E.2d 176 (Va. 2013)*). The court determined that the tolls were not a tax, but instead a user fee, because they provide a benefit in exchange for payment. The court also found that the Virginia General Assembly had the legislative authority to delegate the power to set user fee rates to Virginia's Department of Transportation (VDOT).

NEW THIMBLE SHOAL CHANNEL TUNNEL PROJECT

In November 2013, the Chesapeake Bridge and Tunnel District (CBTD) received an unsolicited proposal from a consortium comprising of Skanska, Kiewit, Philip A Shucet, Weeks Marine and Parsons Brinckerhoff to design, build, finance and maintain a new parallel Thimble Shoal Channel Tunnel, which would connect Cape Charles and Virginia Beach. Under the PPTA, after receipt of an unsolicited proposal, the applicable agency must seek competing proposals.

The CBTD began accepting competing proposals on January 15, 2014 and will continue to do so until April 14, 2014. One estimate puts the costs of the project in the $644 million to $883 million range. Following the April 14 deadline, any competing proposals will be reviewed and CBTD will decide whether to advance the project. In March 2014, the CBDT issued an RFP for a financial advisor in connection with the project.

US 460 LYNCHBURG INTERCHANGE/ODD FELLOWS ROAD

In January 2014, the VDOT announced that it would invite competing proposals for the US 460 Lynchburg Interchange project, after receiving an unsolicited proposal for the project in July 2013 from a consortium comprised of English Construction, Parsons Brinkerhoff and Raymond James. Competing proposals are due in May 2014. The costs of the project have been estimated at $32 million to $70 million.

The unsolicited proposal covered the design, right-of-way acquisition, public utility relocations, construction and financing of two Lynchburg projects currently in the VDOT's draft 2013 Six-Year Improvement Program. In particular, it provides for:

- A new Interchange Extending Odd Fellows Road over Route 29/460.
- The widening of Greenview Drive from two to four lanes.

The unsolicited proposal also included access management, intersection safety and capacity improvements to Odd Fellows Road in Lynchburg. VDOT has not yet proposed a definitive schedule for the competing bids.

HAMPTON ROADS DISTRICT OFFICE CAMPUS

On April 15, 2014, the VDOT, in coordination with the OTP3 and the City of Suffolk, issued an RFP relating to the proposed development of a new office campus for the VDOT's Hampton Roads Construction District. The RFI seeks information that will help with the evaluation of potential options for the development, financing, procurement, delivery of the project, as well as possible site locations. These option included a possible DBF structure. Responses are due by June 16, 2014. The project, which would combine at one site three separate active facilities, entails:

- Seven occupied buildings/ten modular offices (plus contractor supplied space) housing approximately 350 personnel.
- Nine occupied buildings/one modular office housing approximately 90 operations support personnel.
- A full service traffic operations control center and traffic control facility.
- Two full service equipment shops and supply service warehousing.
- Truck and storage sheds.
- Chemical storage facility.
- Guard house and fueling facility.

The RFI contemplates an RFP release in early 2015, with commercial and financial close in the summer of 2015.

For the links to the documents referenced in this note, please visit our online version at **http://us.practicallaw.com/6-562-3585**

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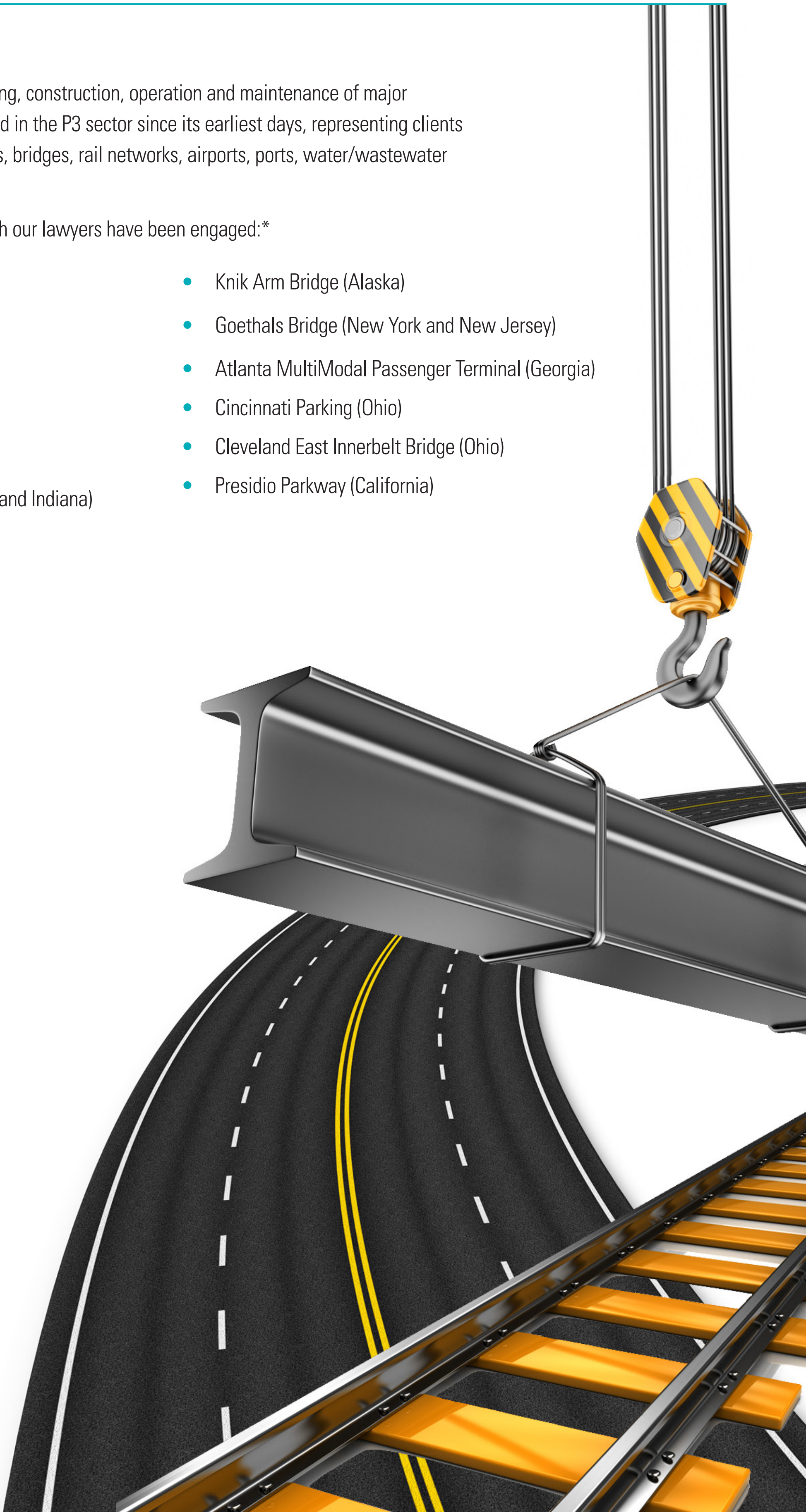
INFRASTRUCTURE AND P3 PRACTICE

Squire Sanders is a global leader in the procurement, financing, construction, operation and maintenance of major infrastructure assets. Our lawyers have been actively involved in the P3 sector since its earliest days, representing clients in groundbreaking transactions involving highways, toll roads, bridges, rail networks, airports, ports, water/wastewater facilities, hospital facilities and schools.

The following is a selected list of the US P3 projects on which our lawyers have been engaged:*

- Portsmouth Bypass (Ohio)
- I-4 Managed Lanes Project (Florida)
- Northwest Corridor P3 Project (Georgia)
- North Tarrant Express Segments 3A and 3B (Texas)
- PR-22 and PR-5 Toll Roads (Puerto Rico)
- Ohio River Bridges Project (East End Crossing) (Kentucky and Indiana)
- Knik Arm Bridge (Alaska)
- Goethals Bridge (New York and New Jersey)
- Atlanta MultiModal Passenger Terminal (Georgia)
- Cincinnati Parking (Ohio)
- Cleveland East Innerbelt Bridge (Ohio)
- Presidio Parkway (California)



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*Certain of these transactions were worked on by our lawyers prior to joining Squire Sanders.