The Need for Model Legislation on Private Investment in Public Infrastructure Projects

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Long before the infrastructure investment bill was signed into law on November 15, 2021, it was evident to most world travelers that America's infrastructure was crumbling. "Infrastructure" refers to the permanent facilities on which commerce moves and people travel, including public roads, bridges, airports, seaports, public waterways, and broadband technology.[1] Public investment in America's infrastructure as a share of the gross domestic product (GDP) has fallen by more than 40 percent since the 1960s.[2] As a result, the United States now ranks thirteenth globally in the assessment of overall quality of infrastructure.[3]

Amid its well-documented public infrastructure crisis, the practicality of financial guarantees to motivate necessary private investment and backing is severely lacking. This article explores: (1) the need for infrastructure modernization to promote economic growth; (2) the states that have scored the worst under comprehensive assessments; and (3) the legal roadblocks that prevent private entities, investors, developers, and contractors from buying in, specifically focusing on the reliance of the government on public-private partnerships (P3s) to finance infrastructure projects and applicable construction laws.

P3s: Critical to Sustainable Growth

P3s are creatures of contract and are therefore variable depending on the type of project, industry involved, and the needs and overall goals of the public agency and private developer. Additionally, the definition of P3s vary from state to state, depending on the enabling legislation. While these definitions can vary, in 1999, the U.S. General Accounting Office (GAO) published the following definition of P3s after a study into the federal government's use of P3s; this definition captures the spirit and common goals of P3 relationships.[4]

> Under a public-private partnership, sometimes referred to as a public-private venture, a contractual arrangement is formed between public- and private-sector partners. These arrangements typically involve a government agency contracting with a private partner to renovate, construct, operate, maintain or manage a facility or system, in whole or in part, that provides a public service.
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> Under these arrangements, the agency may retain ownership of the public facility or system, but the private party generally invests its capital in designing and developing the properties. Typically, each partner shares in income resulting from the partnership. Such a venture, although a contractual arrangement, differs from standard service contracting in that the private-sector partner usually makes a substantial cash, at-risk, equity investment in the project, and the public sector gains access to new revenue or service delivery capacity without having to pay the private-sector partner.

While the federal government and many states have passed legislation enabling the use of P3s to finance infrastructure projects, these statutes have taken starkly different approaches and, in many states, the laws relating to P3s and even the permissibility of a P3 structure lack necessary clarity. Some P3-enabling statutes are robust, while others remain silent regarding all details of the P3 agreements, including important protections for the public arm of the P3 and downstream contractors and suppliers, such as bonding requirements, prevailing wage requirements, and lien rights.

P3s are advantageous because they allow the public to transfer risk to the private sector while simultaneously benefitting from the subsequent enhancement of the public interest once a project is complete. However, any time the private sector accepts additional risk, the private sector requires additional financial incentives to do so;[5] and in the rare event where the private sector does not, the private parties are left in vulnerable positions where they are at risk of funding a public project without just compensation.

P3s are especially reliant on the public agency conducting thorough diligence of the private developer to ensure that the infrastructure project is properly funded at the outset. Additionally, the controlling contracts must set out the rights and obligations of the private arm of the P3 to ensure that downstream contractors, suppliers, and laborers have security for payment. Absent responsible and effective lawyering of these contracts, however, project players can be left vulnerable in most jurisdictions. Moreover, even when the controlling contracts are thorough and protective at the outset, there is still uncertainty for downstream contractors and suppliers as to whether their claims are secured in the event of a dispute, and also uncertainty as to which construction laws—the laws governing public projects or the laws governing private projects—will govern disputes.

Nationwide, states have found themselves facing sizeable budgetary shortfalls amid a stock of aging infrastructure. The American Society of Civil Engineers (ASCE) described the importance of infrastructure as follows.

> Infrastructure supports nearly every aspect of life. Our pipes deliver drinking water to homes and hospitals. Airports, railroads, and inland waterways transport goods from farms and manufacturing plants to store shelves. The roads that crisscross the country allow us to get to work and school safely, and the network of transmission and distribution lines keeps the lights on and our electronics charged. Dams enable consistent water supply in arid climates, and levees hold back floodwaters to protect rain-soaked communities.[6]

Since the ASCE began issuing the Report Card in 1998, the grades have struggled to rise from the Ds. For the first time in 20 years, the grade is a C−, which shows progress; however, much work remains, and the costs to modernize continue to climb exponentially.[7] The current amount estimated as the cost to improve is $4.59 trillion; in 2013, the figure was $3.6 trillion.[8]

Governments have long understood that investments in essential infrastructure support economic growth. When dirt roads transformed into roads and train transport transformed into planes, economic growth followed. The recent national investment in infrastructure is a start, but in order to reach its full potential, P3s must serve as a critical cog in order to achieve sustainable growth.[9] However, to effectively implement P3s and incentivize developers, contractors, and suppliers to continue bidding on these projects without building in a premium to account for the risks involved, federal and state legislation must be more consistent and address the hybrid public-private nature of these projects.

The Current State of P3 Legislation in the United States

P3 Enabling Statutes Vary by Jurisdiction

The majority of states and the federal government have enacted legislation permitting P3s to be used to finance, develop, and construct at least some types of infrastructure projects. However, the statutory requirements for entering into a P3 and the scope of the enabling legislation vary significantly across jurisdictions.[10] Unfortunately, there are still several states where no enabling legislation has been passed at all.

The U.S. Department of Transportation Federal Highway Administration (FHA), which maintains a 50-state survey describing the statutory framework for implementing transportation-related P3 projects in each state, has classified the enabling legislation in each state as having broad, limited, or no statutory framework for transportation-related P3 projects.[11] Specifically, FHA represents that 23 states plus the District of Columbia have passed broad P3 statutes that do not limit the use of P3 procurements to certain types of projects or sponsoring agencies.[12] Sixteen states plus Puerto Rico have passed limited P3 statutes that permit P3s to be used by specific types of projects or sponsoring agencies.[13] Eleven states have not passed any statutes permitting P3s for transportation construction projects.[14]

The requirements for entering into P3s vary from state to state. In most states, the governing P3 statutes merely permit agencies to enter into P3 agreements but provide no parameters for ensuring that the procurement diligence to be performed by the public arm of the P3 is

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diversity, equity, and inclusion initiatives. The article by Kelly Bundy and Nick Holmes, *Dusting Off Your Firm's Diversity and Inclusion Plan: 10 Key Steps to Build a Framework for Success*, provides a path for establishing an effective plan for bringing those initiatives to fruition. Among other great tips in their article, I particularly agree with the last one: "Just do it! Don't let perfection be the enemy of progress." Meaningful growth and change require both time and commitment. A firm may stumble in the process of developing and achieving its diversity and inclusion goals. When causes as worthy as diversity, equity, and inclusion are at stake, it is better that firms take action and learn from setbacks as they occur, as opposed to further delaying the road to progress for fear of encountering some hurdles along the way.

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responsibly performed or that the P3 contracts contain adequate payment protections for downstream contractors and suppliers.

Examples of More Extensive State Statutory Frameworks

A number of states require a level of specificity in P3 contracts that both protect downstream contractors and suppliers from nonpayment and incentivize all parties to enter into the agreements. States such as these should be considered for establishment of a model P3 framework and/or application to federal statutes.

Arizona

Arizona's P3 statute requires that the public agency consider, among other things, the general reputation, qualifications, industry experience, and financial capacity of the private partner and the safety record of the private partner.[15] Additionally, the statute indicates that in any P3 agreement, the department may include provisions that, *inter alia*, address how the partners will share management of the risks of the project; specify how the partners will share the costs of development of the project; allocate financial responsibility for cost overruns; establish the damages to be assessed for nonperformance; "[r]equire a private partner to provide performance and payment bonds, parent company guarantees, letters of credit or other acceptable forms of security or a combination of any of these, the penal sum or amount of which may be less than one hundred per cent of the value of the contract involved based on the department's determination, made on a facility-by-facility basis, of what is required to adequately protect this state"[16]; and "[s]pecify remedies available and dispute resolution procedures, including the right of the private partner to institute legal proceedings to obtain an enforceable judgment or award against the department in the event of a default by the department and procedures for use of dispute review boards, mediation, facilitated negotiation, arbitration and other alternative dispute resolution procedures."[17]

Virginia

The enabling statute in Virginia is also robust. The Commonwealth of Virginia's Office of P3s (VAP3) reports to the Commonwealth's secretary of transportation. The mission of VAP3 is to identify, develop, procure, and implement a statewide program for project delivery under the 1995 Public-Private Partnership Transportation Act (PPTA). The Virginia Department of Transportation's self-proclaimed "world-class" P3 program is a good model for other states for innovative financing ideas, competitive procurement, and risk management to deliver significant infrastructure improvements successfully.[18]

On March 25, 1995, the Governor of Virginia signed the Public-Private Transportation Act (PPTA) into law. The comprehensive project agreements released by the state provide that the concessionaire is solely responsible for obtaining and repaying all financing at its own cost and risk and without recourse to the state, the Commonwealth Transportation Board (CTB), or any other agency, instrumentality, or political subdivision of the state. In addition, the state is obligated to share in beneficial interest rate movements that the concessionaire is obligated to pay; however, the state is not liable for payment of the principal sum incurred in connection with the project.

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In 2015, the Virginia Legislature enacted legislation to tweak the state's P3 laws. Among other things, Virginia H.B. 1886 required the public agency to produce a finding of public interest. The Virginia Transportation Public-Private Partnership Committee (created by the bill) is required to ensure a P3 project meets the finding of public interest throughout the P3 process before a contract is executed with the private sector.[19]

Florida

Florida is another progressive state with regard to P3 projects and has a comprehensive statute that authorizes P3s for transportation projects. The statute, among other things, authorizes the state Department of Transportation (DOT), with legislative approval, to enter into agreements with private entities to build, operate, own, or finance transportation facilities. The law establishes evaluation criteria for such projects, prohibits noncompete clauses, and exempts private entities from certain taxes.

The law also allows the DOT to lease existing toll facilities (except the Florida Turnpike System) through P3s with legislative approval; the DOT also may develop new toll facilities or increase capacity on existing toll facilities through P3s. The law allows a private entity to impose tolls or fares (subject to DOT regulation and specific limits). It allows for availability payments or shadow tolls subject to annual appropriation by the legislature. The law limits P3 terms to no more than 50 years; however, the secretary of transportation may authorize a term of up to 75 years, and the state legislature may approve a term exceeding 75 years. It also limits the total obligations for all projects under this section to no more than 15 percent of total federal and state funding for the State Transportation Trust Fund in any given year and allows for solicited and unsolicited proposals.[20] In addition, Florida courts have held that the state of Florida has waived its right to sovereign immunity in contracting with private entities.[21]

Texas

In Texas, P3 legislation authorizes the use of a wide range of P3 structures for the delivery of road, highway, and rail projects. Many delivery options are allowed, such as design-build (DB), design-bid-build (DBB), and design-build-finance-operations-maintenance (DBFOM). Each has been used by the state's Strategic Project Division to deliver high-value projects over the years. The use of availability payments is not permitted. Texas has developed legislation, per chapter 223 of the Texas Transportation Code, allowing the state and regional governments to enter into flexible comprehensive development agreements (CDA) with a private entity. By design, CDAs are adaptable to the particularities of a project. They allow for delivery options such as DB, DBB, and DBFOM, based on project circumstances. Further, to procure work under CDAs, the state can issue RFPs but can also receive and accept unsolicited proposals. Finally, flexibility is retained regarding transfer of the transportation asset, which can also occur after the end of construction.[22] Since Texas enacted its flexible P3-enabling legislation, the state has closed P3 transactions worth approximately $12 billion.[23] The adaptable nature of CDAs in Texas has been an important feature of the state's P3 program.

Availability Payment Structure v. Future Revenue Streams

Florida and Pennsylvania are examples of states that have begun to move towards an availability payment structure for transportation projects, rather than relying on future revenue streams associated with the project.[24] In summary, in exchange for design, construction, long-term maintenance, and/or operations of an infrastructure project, the state will pay the private partner an "availability payment," backed by future public funding and dependent on the private sector meeting predefined benchmarks of performance.[25] Florida's I-4 Ultimate P3 and Pennsylvania's Rapid Bridge Replacement P3 are both examples of an availability payment approach, both of which are lauded among the P3 community.[26]

The availability payment model may help expand the feasibility of P3s in nontransportation infrastructure projects. The determination of risk transfer surrounding revenue risk or user risk can be alleviated with the introduction of availability payments. In the absence of a user-based revenue stream, when the revenue stream is not appropriate to be accessed by the private sector, or when the risk of future use is too prohibitive for the private sector to accept, the public sector partner can build a P3 agreement around payments from future public sector funding.

Federal Trends

At the federal level, the trend toward P3 made progress in 2016 via the Transportation Infrastructure Finance and Innovation Act (TIFIA), the Fixing America's Surface Transportation (FAST) Act, and the Water Infrastructure Finance and Innovation Act (WIFIA). In addition, there were a set of amendments to WIFIA as well as the Water Infrastructure Improvements for the Nation (WIIN) Act.[27]

The most significant impact in the P3 arena since 2016 has been the Infrastructure Investment and Jobs Act, signed by President Biden on November 15, 2021 and becoming Public Law No. 117-58, and which includes approximately $450 billion in spending to renew existing programs and approximately $550 billion in new federal spending allocated.[28]

The Infrastructure Investment and Jobs Act legislation will invest $110 billion of new funds for roads, bridges, and major projects, and reauthorize the surface transportation program for the next five years.[29] The legislation includes several authorizing bills, including the Surface Transportation Reauthorization Act of 2021,[30] Surface Transportation Investment Act,[31] Drinking Water and Wastewater Infrastructure Act,[32] and the Energy Infrastructure Act,[33] among others.

In addition, the bill provides supplemental appropriations for many of these authorized programs, both

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Forum colleagues deal with each other. To be certain, we zealously represent the interests of our respective clients. Still, our Forum relationship provides for a higher level of civility, even when the relationship between our clients may be quite uncivil. This level of enhanced professionalism often results in lawyers being able to diffuse some of the emotion; avoid bickering over petty, insignificant issues; and work toward a solution to the benefit of our clients.

Perhaps the "value" of the Forum network to in-house counsel doesn't always show up on the balance sheet—or does it?

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existing and new.[34] The Infrastructure Investment and Jobs Act also specifically contemplates the use of P3s for transportation projects, conditioning the receipt of federal funds on the public arm of the P3s' conducting a review of the project, including compliance of the private partner with the terms of the P3 agreement, and certifying that the private partner has met the terms of the partnership. Receipt would also be conditioned on conducting a value for money analysis and evaluating the life-cycle cost and project delivery schedule, the costs of using public funding versus private financing, a forecast of revenue expected to be generated by the project, and a description of key assumptions made in developing the analysis.[35]

The Infrastructure Investment and Jobs Act includes various programs that leverage additional private sector investment in infrastructure programs to create jobs and strengthen the economy. Examples include allowing private parties to issue tax-free bonds, which utilizes private sector efficiency and decision-making. The act expands eligible uses for private activity bonds and increases the current cap of tax-exempt highway or surface freight transfer facility bonds from $15 billion to $30 billion, as proposed by the bipartisan BUILD Act.[36]

The initiative evinces the clear need for infrastructure as well as the guarantee that funding coupled with private protections will be provided. The current P3 laws have significantly improved the legal framework governing the cooperation of the public and private sectors, enabling the performance of a larger array of projects, facilitating the participation of private investors, and permitting a significant financial contribution of the public partners in projects where essential. However, current laws have still missed critical opportunities for financial guidance and reliance. In addition, this area of the law is extremely fragmented with department-specific regulations and differing state legislation and rules; these complexities support the need for model legislation for greater private sector participation.

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Case Law Demonstrates the Shortcomings with Current P3 Legislation

The case law on P3s is relatively immature. However, legal challenges to P3 agreements have consistently demonstrated shortcomings with the current legislation.

It Is Not Always Clear Whether Federal or State Law Applies, and Often a Particular Statute Only Applies Due to Contractual Options

One aspect of P3 legislation that has been exposed by legal challenges is inherent confusion as to the applicability of state or federal law. Further, the parties often have to specifically opt into a particular law via contract selection because the statutory framework and common law for P3s are so remedial.

For instance, in *Star Operations, Inc. v. Dig Tech, Inc.*, the Court of Appeals of Texas, Third District, addressed a claim arising out of a lower-tier subcontract related to a highway construction project where the Texas Department of Transportation (TxDOT) entered into a facility concession agreement (FCA) with a private developer, SH 130 Concession Company (SH Concession), to finance and perform the construction of certain toll roads in the Austin area, and which granted the developer the concession to lease portions of the roads and toll them for 50 years after the project's completion, as permitted by Texas Transportation Code §§ 223.201– .209.[37] SH Concession entered into a design-build agreement with Central Texas Highway Constructors (Central Texas HC), who then, in turn, entered into certain lower-tiered subcontracting agreements.[38] Central Texas HC required its subcontractors to furnish performance and payment bonds for the project.[39]

In addressing an appeal regarding whether a bond claim complied with the applicable notice requirements, the court first had to decide whether the Miller Act or the McGregor Act (Texas's Little Miller Act) governed the bond.[40] The court determined that the Miller Act did not apply to the project, even though the project received federal funds for the purpose of creating a roadway for public use; the court reasoned that the Miller Act did not apply because neither the United States nor an agency of the United States nor a person acting as the agent of the United States contracted for the work at issue.[41] Instead, the court applied the McGregor Act "to create a method to ensure that subcontractors and suppliers on public-works projects are paid for their labor and materials because they generally may not place liens against public buildings or other public works."[42]

However, the McGregor Act would not have been applicable had Central Texas HC not passed down the obligation to its subcontractors because the only payment bond required under the McGregor Act is the bond that the governmental entity requires the prime contractor to obtain where the governmental entity is the obligee. In contrast, the prime contractor is the principal and

One major problem: P3 statutory frameworks have not been tailored to a hybrid public-private contractual relationship and project purpose.

obligor.[43] In *Star Operations, Inc.*, the prime contractor was the obligee, and the subcontractor was the principal and obligor on the bond.[44]

In addressing the contractual modification to the statutory requirements, the court stated:

> The McGregor Act contemplates projects that are more simply structured than the project at issue here. The Act requires a governmental entity that makes a public-work contract with a prime contractor to require the contractor to execute payment and performance bonds in favor of the governmental entity before work begins. Tex. Gov't Code § 2253.021(a). The performance bond protects the state or governmental entity, *id.* § 2253.021(b), while the payment bond protects "payment bond beneficiaries who have a direct contractual relationship with the prime contractor or a subcontractor to supply public work labor or material," *id.* § 2253.021(c)(1). The Act does not mandate that subcontractors on a public-work project obtain payment bonds. In this case, the SH 130 Segments 5 and 6 construction project was governed by a comprehensive development agreement (CDA) involving multiple contracts, including the Facility Concession Agreement entered into by TxDOT and SH 130 Concession Company. *See generally* Tex. Transp. Code §§ 223.201–.209 (authorizing TxDOT to enter into CDAs). As part of that agreement, TxDOT required SH 130 Concession Company to obtain payment and performance bonds. SH 130 Concession Company, a developer on the project, then entered into an agreement with Central Texas for Central Texas to design and build the SH 130 Segments 5 and 6. Central Texas, in turn, entered into subcontracts with various subcontractors and suppliers, including Star. Central Texas contractually required Star to obtain its own payment and performance bonds. Given the complex structure of the CDA and its chain of contracts under which each subcontractor is contractually required to obtain its own payment bonds, essentially stepping into the shoes of a prime contractor vis-à-vis its lower-tier subcontractor, Dig Tech's notice to Central Texas, Star, and Great American comports with the overarching purpose of the McGregor Act.[45]

This is one of the major problems with current P3 statutes. Legislatures have not tailored the statutory framework to a hybrid public-private contractual relationship and project purpose. Instead, traditional laws such as the Miller Act, state Little Miller Acts, procurement laws, and state lien laws, which were developed for projects that are wholly private or wholly public, find challenges getting applied to more complicated P3 relationships and expose gaps in the applicability of the laws to the arrangements.

A Project Can Be a Public Project for One Requirement, but a Private Project for Another

Other examples exist demonstrating a lack of clarity on whether a construction project being developed by a P3 is subject to laws governing private projects or public projects. Application of state mechanic's lien laws to payment disputes involving P3 projects highlights this dilemma.

In *Augusta Apartments v. Landau Building Co.*, the Supreme Court of Appeals of West Virginia upheld a judgment on a private mechanic's lien filed by a contractor against the private portion of a project developed as part of a P3 known as "The Square at Falling Run."[46] This ruling was consistent with *J.S. Sweet Co. v. White County Bridge Commission*, which technically was not a P3 relationship but is analogous. *J.S. Sweet Co.* involved a mechanic's lien filed against a toll bridge owned and operated by a commission solely created for that purpose, and tolls provided all of the revenue for the commission and the operation of the bridge.[47] The Court of Appeals of Indiana, First District, stated:

> In arguing that the bridge is either private or public property, the parties discuss characteristics of both the bridge and the Commission that support their respective positions. For example, in support of its conclusion that the bridge is public property, the Commission asserts that it is an agency created by federal statute, is exempt from federal and state income taxes, and that the Commission has the power of eminent domain. On the other hand, Sweet asserts that the bridge is private property because the Commission pays property taxes, the bridge is financially supported solely by tolls, receives no federal or state tax money, and the Commission, not any government entity, holds title to the bridge. Having carefully weighed each of these relevant characteristics, we conclude that the bridge does not fall neatly into either the public or the private category. . . . As we conclude that the bridge constitutes neither a state [n]or federal public work subject to the respective statutory protections provided to those working on public projects, we hold that Sweet must be afforded the protection of a state mechanic's lien pursuant to I.C. § 32-8-3-1. Consequently, we reverse the trial court's grant of

summary judgment finding that the bridge was not subject to such a lien. . . .[48]

Comparatively, in *Matter of George Washington Bridge Bus Station Development Venture, LLC v. Associated Specialty Contracting, Inc.*, the Appellate Division of the State of New York, First Department, upheld the discharging of a mechanic's lien filed by a subcontractor against the George Washington Bridge Bus Station, which was property owned by the Port Authority of New York and New Jersey (the Port Authority) and developed and leased by the George Washington Bridge Bus Station Development Venture, LLC in connection with a P3 agreement.[49] In particular, the court held: "It is well-settled that a private mechanic's lien may not attach to privately-leased, but publicly-owned, land, the owner of the subject property, is a 'public corporation' within the contemplation of the Lien Law, the George Washington Bridge Bus Station constituted a 'public improvement' within the meaning of the Lien Law, despite petitioner's private leasehold interest in the property."[50]

Public-Private Partnerships in States That Do Not Have Enabling Statutes

Other issues arise when infrastructure projects are constructed utilizing a P3 framework in states that have not specifically enacted legislation authorizing P3s for such purpose.

For instance, New York is one of the states that has not enacted legislation enabling the use of P3s for infrastructure projects. However, a number of P3s have been and are being constructed within its borders by the Port Authority, such as the Goethals Bridge, the George Washington Bridge Bus Terminal, and LaGuardia Airport; the Port Authority can undertake these projects because it is not subject to New York State procurement laws as a compact between New York, New Jersey, and the federal government, and by the FHA, such as the Tappan Zee Bridge replacement.

The projects involving the Port Authority, in particular, designate New York State law as applicable to disputes. This can create strange results, as previously demonstrated with respect to lien rights, but also with respect to other statutes that define the players in a construction project (e.g., owners, contractors, subcontractors, etc.) because the hybrid public-private nature of the projects complicates the status of these definitions.

In the context of Article 3-A of the New York Lien Law, which contains rules and regulations for the handling of money on construction projects within the State of New York, all funds received on a construction project that are intended for construction must be used to pay contractors and suppliers and other statutorily defined players before being used for other purposes. When confronted with claims such as these involving P3s, courts have been forced to engage in fact-sensitive analyses as to whether various players are owners or contractors and whether certain sources of money are trust funds due to various aspects of the project that are either public or private or both;[51] this onerous interpretation exercise could be eliminated if the legislature amended the statute to include definitions for the players on a P3 project.

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Model Legislation Needed for Widespread Adoption and Reform

Legislation throughout the United States must be more consistent and descriptive for P3s to serve as a viable solution to fixing the nation's deteriorating infrastructure and need for substantial funding.

The Bipartisan Policy Center, a nonprofit organization, proposed model legislation in December 2015. The model's key components include "(i) allowing partnerships for a wide range of projects beyond traditional infrastructure work (e.g., broadband infrastructure, ferry transportation); (ii) creating a state office dedicated to providing public-private partnership assistance to state and local agencies; (iii) standardizing and promoting best practices; and (iv) incorporating a process for public engagement."[52]

The FHA has also published recommendations for the inclusion of 28 critical elements in state P3 enabling legislation for highway projects, including that the statutory scheme allows both solicited and unsolicited proposals, does not require prior legislative approval of P3 proposals or subject such proposals to a local veto, does not limit the method of procurement for P3 project delivery, explicitly exempts P3 projects from the state's procurement laws, and protects the confidentiality of the P3 proposals prior to execution of the P3 agreement.[53]

These models and recommendations, among others, are ripe for the Forum to review and issue an opinion as to whether the Model Code and recommendations can be endorsed by the Forum, or, alternatively, for the Forum to author a different Model Code, or even further, champion the creation of a Uniform Law by the National Conference of Commissioners on Uniform State Laws.

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8. *Id.*

9. Fact Sheets, The White House, President Biden Announces Support for the Bipartisan Infrastructure Framework (June 24, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/fact-sheet-president-biden-announces-support-for-the-bipartisan-infrastructure-framework/ (the proposed $1.2 trillion Bipartisan Infrastructure Framework, which is part of President Biden's Build Back Better vision, contemplates that the infrastructure projects will be funded in part by P3s); Fact Sheets, The White House, Building a Stronger America: President Donald J. Trump's American Infrastructure Initiative (Feb. 12, 2018), https://trumpwhitehouse.archives.gov/briefings-statements/building-stronger-america-president-donald-j-trumps-american-infrastructure-initiative/ (P3s were central to President Trump's proposed American Infrastructure Initiative); Fact Sheet, The White House, Building a 21st Century Infrastructure: Increasing Public and Private Collaboration with the Build America Investment Initiative (July 17, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/07/17/fact-sheet-building-21st-century-infrastructure-increasing-public-and-pr (under President Obama, the Transportation Department formed the Build America Bureau, the mission of which includes promoting public-private partnerships for building and rebuilding assets like highways and bridges); *see also, supra* note 4.

10. Nat'l Conf. State Legislators, Public-Private Partnerships for Transportation Categorization and Analysis of State Statutes, Jan. 2016 (2017), https://www.ncsl.org/research/transportation/public-private-partnerships-for-transportation-categorization-and-analysis-of-state-statutes-january-2016.aspx

11. *State P3 Legislation*, U.S. Dep't of Transp. Fed. Highway Admin., Ctr. for Innovative Fin. Support, https://www.fhwa.dot.gov/ipd/p3/legislation/.

12. *Id.* These states are Alabama, Arizona, Colorado, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, Ohio, Oregon, Pennsylvania, South Carolina, Virginia, Washington, and West Virginia. *See, generally*, Ala. Code §§ 23-1-40, 23-1-81, 23-2-140 to -163; Ariz. Rev. Stat. §§ 28-7701 to -7710 A; Colo. Rev. Stat. §§ 32-9-128.5, 43-1-1201 to -1209, 43-2-219, 43-3-202.5, 43-4-413 to -414, 43-4-801 to -812; Del. Code Ann. tit. 2, §§ 2001 to 2012; Fla. Stat. Ann. §§ 334.30, 337.251, 338.22 to .2511, 343.962, 343.875, 348.0004, 287.05712, 255.065; Ga. Code Ann. §§ 48-5-41, 48-5-421.1, 32-10-76, 32-2-41(b)(6), 32-2-78 to -80, 36-91-110 to -118; 630 Ill. Rev. Stat. 15/5; Ind. Code Ann. §§ 5-23-1-1 to 5-23-7-2, 8-15.5-1-1 to 8-15.5-13-8, 8-15.7-1-1 to 8-15.7-16-8; Ky. Rev. Stat. § 45A.077; La. Rev. Stat. Ann. §§ 48:250, 48:1660.1, 48:2020 to 2037, 48:2071 to 2074, 48:2077, 48:2084 to 2084.15; Me. Rev. Stat. Ann. tit. 23, § 4251; Md. Code Ann., State Fin. & Proc. §§ 10a-101 to 10a-403; Md. Code Regs. §§ 11.07.06.01 to 14; Mass. Gen. Laws Ann. ch. 6C, §§1 to 74; Mich. Comp. Laws Ann. § 124.401 to 426, 125.1871 to 125.1883; Mo. Rev. Stat. §§ 227.600 to 669; N.H. Rev. Stat. Ann. §§ 228:107 to 228:115; Ohio Rev. Code Ann. §§ 5501.71 to 5501.75; Or. Rev. Stat. §§ 184.631, 367.800 to .826, 383.001 to .075; 74 Pa. Cons. Stat. §§ 9101 to 9124; S.C. Code Ann. §§ 57-5-1310 to -1495, 57-3-200; Va. Code § 33.2-1800; Wash. Rev. Code §§ 47.29.010 to .900; D.C. Code §§ 2-271.01 to 2-275.01, 2-356.01; W. Va. Code §§ 17-28-1 to -12; P.R. Laws Ann. tit. 9, §§ 2001 to 2021, tit. 27, §§ 2601 to 2623.

13. *Id.* These states are Alaska, Arkansas, California, Connecticut, Iowa, Minnesota, Mississippi, Nevada, North Carolina, Oklahoma, Puerto Rico, Rhode Island, Tennessee, Texas, Utah, Vermont, and Wisconsin. *See, generally,* Alaska Stat. §§ 19.75.011 to .990; Cal. Gov. Code §§ 5956 to 5956.10; Conn. Gen. Stat. §§ 4-255 to 4-263, S.B. 920 (2021); Ill. Rev.

Stat. ch. 20, § 2705/2705-450; 620 Ill. Rev. Stat. 75/2-35; 605 Ill. Rev. Stat. 5/10-802, 130/1 to 130/999; Minn. Stat. Ann. §§ 160.84 to 98; Miss. Code Ann. §§ 65-43-1 to -85; Mo. Rev. Stat. §§ 238.300 to 367; N.J. S.B. 865 (2018); Nev. Rev. Stat. §§ 338.161 to 167, 338.161 to 168, ch. 277A; N.C. Gen. Stat. §§ 136-18, 136-89.180 to .198; Ohio Rev. Code Ann. §§ 5501.71 to 5501.75; Okla. Code Ann. tit. 74, §§ 5151 to 5158; Tenn. Code §§ 54-3-101 to 54-3-113, 54-6-101 to 54-6-121; Tex. Transp. Code Ann. §§ 222.001 to .107, 366.401 to .409; Utah Code Ann. §§ 63G-6-503, 63G-6a-103, 63G-6a-702, 63G-6a-703, 63G-6a-707, 72-6-118, 72-2-120; Vt. Stat. Ann. tit. 19, § 26; Wis. Stat. Ann. § 84.01(30).

14. The states without P3 legislation are Hawaii, Idaho, Kansas, Montana, Nebraska, New Jersey, New Mexico, New York, North Dakota, South Dakota, and Wyoming.

15. Ariz. Rev. Stat. § 28-7704.01.

16. *Id.* § 28-7705(A)(14).

17. *Id.* § 28-7705(A)(16).

18. Va. Dep't of Transp., Off. of Pub.-Priv. P'ships, http://www.p3virginia.org/on-the-horizon/ (last accessed Oct. 5, 2021).

19. Commw. of Va., Implementation Manual and Guidelines, Virginia P3s (Nov. 2014), https://www.virginiadot.org/office_of_transportation_public-private_partnerships/resources/UPDATED_PPTA_Implementation_Manual_11-07-14_FOR_POSTING_TO_WEBSITE_-_changes_accepted.pdf.

20. Fla. Stat. § 334.30 (2021).

21. *See* Pan Am Tobacco Corp. v. Dep't of Corr., 461 So. 2d 4 (Fla. 1984); Fla. Dep't of Env't Prot. v. Contractpoint Fla. Parks, LLC, 986 So. 2d 1260 (Fla. 2008).

22. Don Toner Jr., *Design-Build: The Texas Story* (2012 AASHTO Conf., Portland, Or., May 2, 2012), https://bit.ly/3sqeyxF (accessed Sept. 18, 2015).

23. *Successful Practices for P3s*, U.S. Dep't of Transp., (Mar. 2016), https://www.transportation.gov/sites/dot.gov/files/docs/P3_Successful_Practices_Final_BAH.PDF (accessed Jan. 12, 2022).

24. *Building-Up*, *supra* note 5.

25. *Id*.

26. *Id*.

27. WIIN Act, Pub. L. No. 114-322, 130 Stat. 1628 (2016), www.govtrack.us/congress/votes/114-2016/s163.

28. H.R. 3684, 117th Cong.,135 Stat. 429 (Nov. 15, 2021), https://www.congress.gov/bill/117th-congress/house-bill/3684/text.

29. Fact Sheet, The White House, Bipartisan Infrastructure Investment and Jobs Act (Nov. 6, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/.

30. S. 1931, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/1931?q=%7B%22search%22%3A%5B%22s.+1931%22%5D%7D&s=2&r=1.

31. S. 2016, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/2016?q=%7B%22search%22%3A%5B%22s.+2016%22%5D%7D&s=1&r=1.

32. S. 914, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/914?q=%7B%22search%22%3A%5B%22s.+914%22%5D%7D&s=4&r=1.

33. S. 2377, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/2377?q=%7B%22search%22%3A%5B%22s.+2377%22%5D%7D&s=3&r=1.

34. *See* scattered sections within H.R. 3684, 117th Cong.,135 Stat. 429 (Nov. 15, 2021), https://www.congress.gov/bill/117th-congress/house-bill/3684.

35. *Id.*

36. S.881, 117th Cong. (2021–22), https://www.congress.gov/bill/117th-congress/senate-bill/881?s=1&r=1.

37. No. 03-15-00423-CV, 2017 Tex. App. LEXIS 6976, at *1–2 (July 27, 2017).

38. *Id.* at *2–3.

39. *Id.* at *3.

40. *Id.* at *23–48.

41. *Id.* at *26–28.

42. *Id.* at *32.

43. *Id.* at *42.

44. *Id.*

45. *Id.* at *42–44.

46. No. 11-0438, 2011 W. Va. LEXIS 498, at *10 (Oct. 21, 2011); *see also* Nat'l City Bank v. Landau Bldg. Co., No. 11-0437, 2011 W. Va. LEXIS 622, at *11 (Oct. 21, 2011).

47. J.S. Sweet Co. v. White Cty. Bridge Comm'n, 714 N.E.2d 219, 223 (Ind. Ct. App. 1999).

48. *Id.* at 223–24.

49. 2017 N.Y. Slip Op. 02913, ¶ 1, 149 A.D.3d 525, 525 (App. Div. 1st Dept. 2017).

50. *Id.* at 525–26 (citing Matter of Paerdegat Boat & Racquet Club v. Zarrelli, 57 N.Y.2d 966, 968 (1982), *rev'g on concurring in part, dissenting in part op. of Hopkins, J.*, 83 A.D.2d 444, 452 (N.Y. 1981); Avon Elec. Supplies v. Voltaic Elec. Co., 203 A.D.2d 404, 405 (N.Y. 1994); T.N.T. Coatings v. Cnty. of Nassau, 114 A.D.2d 1027, 1028 (N.Y. 1985), *leave denied*, 67 N.Y.2d 608, (N.Y. 1986); N.Y. Lien Law § 2(8); N.Y. Gen. Constr. Law § 66(1), (4); *see* Matter of World Trade Ctr. Bombing Litig., 93 N.Y.2d 1, 10 (1999); Matter of Carland Constr. Co. v. Infilco Degremont, 152 A.D.2d 694, 695 (N.Y. 1989)).

51. Tutor Perini Bldg. Corp. v. N.Y.C. Reg'l Ctr., LLC, 2021 U.S. Dist. LEXIS 47964, at *41–53 (S.D.N.Y. Mar. 15, 2021); *see also* Gilbane Bldg. Co. v. N.Y. Wheel LLC, 2020 N.Y. Slip Op. 50087(U), ¶ 2, 120 N.Y.S.3d 723 (2020).

52. Bipartisan Pol'y Ctr., Public-Private Partnership (P3) Model State Legislation at 3 (Dec. 2015).

53. Nossaman, Guthner, Knox & Elliot, LLP, *Overview of Key Elements and Sample Provisions of State PPP Enabling Legislation for Highway Projects* (Oct. 2005), https://www.fhwa.dot.gov/ipd/pdfs/p3/legis_key_elements.pdf; *see also* Michael L. Sterlin, Michael P. Giordano & Jayne Czik, *Contracting in the Public Sector—The Trend Towards Public-Private Partnerships—A Practical Guide* 7–8 (2012 Annual Meeting of ABA F. on Constr. Indus., Las Vegas, Nev., Apr. 26–28, 2021), https://www.americanbar.org/content/dam/aba/directories/construction_industry_knowledge_base/vegas_2012_workshop_b.pdf.