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## **PUBLIC-PRIVATE PARTNERSHIPS**

**2015 NC/SC Joint Construction Law Conference:  
Change in Delivery**

**September 18, 2015**

## P3 | Introduction



What is a Public-Private Partnership?

- It means different things to different people
- There is no set structure
- Common thread is the provision of a public good with substantial, medium to long-term private sector participation

## P3 | Introduction



### What is a Public-Private Partnership?

- It is nothing more or less than a series of contracts – though usually fairly complex
- Perhaps best described as a project delivery method
- Significant limitations when contracting with public sector for the long term - educational process is important

## P3 | Overview



Are P3's new? - No

- Postal system of the Roman empire
- Concession agreements in France in the 15<sup>th</sup> century – bridges, river crossings, mills
- 19<sup>th</sup> century European rail system

## P3 | Overview



If not new, then why do they seem new?

- Reversion to public projects after WWI and WWII
- Role and size of State increases – interstate highway system, heavy investment in higher education

## P3 | Overview



If not new, then why do they seem new?

- Significant interest in privatization during 1980's
- Privatization results have been mixed – questions re value proposition

## P3 | Overview



If not new, then why do they seem new?

- Acute need for infrastructure improvements
- Lack of appetite to increase revenue (taxes, utility bills)
- Desire to shift risk and cost (and some measure of reward) to private sector, but remain accountable to electorate

## P3 | Overview



What is the sell?

- Government receives what it wants, where it wants, without encumbering debt capacity or staff resources
- Fee for service model attractive to decision-makers, as is risk sharing in era of smaller government
- Private sector incentivized for early/under budget

# P3 | Overview



## What are Public-Private Partnerships Used For?

- Depends on the sector: Higher Education – parking, housing, and energy



## P3 | Overview



### What are Public-Private Partnerships Used For?

- Depends on the sector:
  - Water and Sewer – concession agreements, long term leases and management contracts

## P3 | Overview

### What are Public-Private Partnerships Typically Used For?

- Depends on the sector:
  - Transportation – toll toads, availability payments



Beautiful pike with ORT in center, cash to the sides – but empty

## P3 | Overview

What are Public-Private Partnerships Typically Used For?

- General Governmental – runs the gamut



# P3 | Overview



How are they set up?

- Elements of a construction contract + elements of public finance + government law limitations
- The structure of a P3 can be as simple as a design-build procurement to as complicated as a design, build, operate, finance and maintain arrangement spanning 60 or more years

## P3 | Structure



- Structure is informed by programmatic goals
- P3 works best when aligning interests to achieve strategic goals
- At its worst when used as a short-term cost savings

# P3 | Structure



## Basics

- Private Sector Will Obtain Some Measure of Control
  - Long term ground/base lease of site
  - Management/Concession agreement

# P3 | Structure



## Basics

- Public Sector Will Retain Some Measure of Control
  - Long term agreements will address:
    - Construction
    - Stabilization
    - Operation
    - Termination

## P3 | Structure



Who is involved?

Design-build procurement

- Owner & Design-Builder

Design, build, operate, finance and maintain

- Owner
- Contractor/ Builder
- Engineer/Designer
- O&M Contractor
- Finance Partner

## P3 | Structure



How are they set up?

- Owner is usually Public entity or quasi-governmental entity

Joint Venture provides service(s)

- Design
- Construction
- Operations & maintenance

Who provides Financing?

## P3 | Structure



- Alignment of interests is critical.
- Too rich for the developer and public constituency will let you know
- Insufficient incentives for the private sector can doom project performance

## P3 | Structure



- Need for clear understanding of commitment and opportunity cost
- Need for clear understanding of roles and responsibilities
- Nothing is free – and opportunity cost is the expense and it is hard to quantify

# P3 | Structure



## Considerations

- Ownership – ground lease/license/usufruct
  - Fee subordination?
- Financing – cost of capital/equity investors

# P3 | Structure



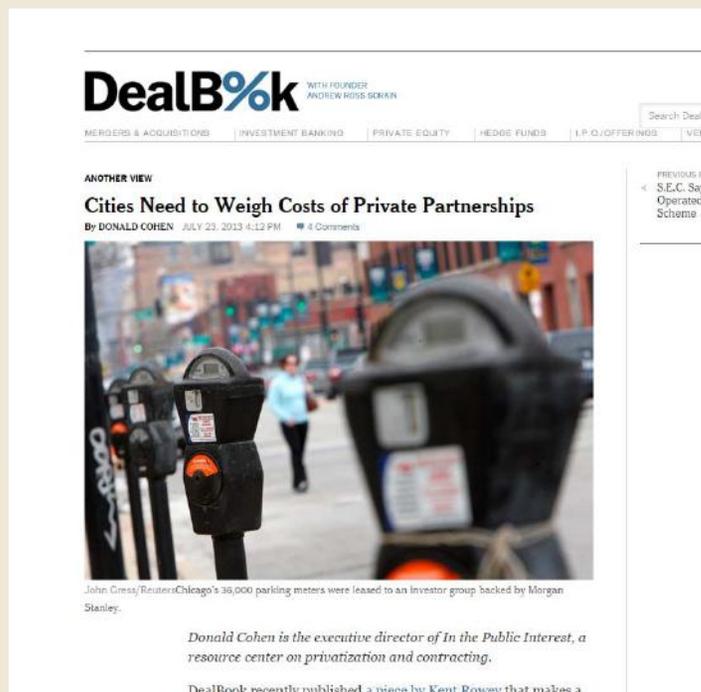
## Considerations

- Term – 40? 60? 100?
- Maintenance – repair and replace reserves
- Termination – fully depreciated asset? return to graded parcel ?

# P3 | Structure

What has been the experience?

- Results have been mixed - Contract design is critical



## P3 | Examples



### Student Housing

- University owns land on campus and desires student housing in that location but prefers to not issue approx. \$100m of debt to deliver project
- Engages in RFQ/RFP process

## P3 | Examples



### Student Housing

- Structure set forth in RFP
- Design, build, finance, operate and maintain procurement
- Structure is memorialized in master lease agreement with supplemental leases for each component

## P3 | Examples



### Student Housing

- Master and supplemental agreements cover:
  - Ground lease
  - Development agreement with detailed construction specs and requirements
  - Operating & maintenance standards
  - Revenue sharing arrangement
  - Termination

## P3 | Examples



### Student Housing

- Financial arrangement:
  - Market ground lease (State law requirement)
  - Developer responsible for operation, maintenance, and capital reserve
  - Escalating share of net income to University
  - Project reverts to University at end of term

# P3 | Examples



## Parking Garage

City plans several parking decks as part of redevelopment project. Is approached by group seeking for P3 for decks.

- Group proposes to build, operate and finance decks, if City will maintain them.

## P3 | Examples



### Parking Garage

- Group proposes long term (30+ years) arrangement
- City is able to repurpose existing City personnel to meet maintenance requirement.

# P3 | Examples



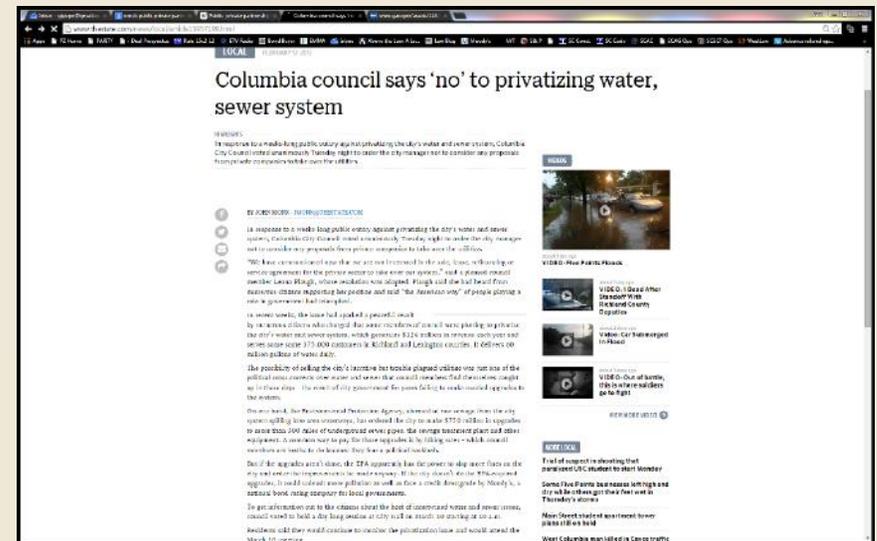
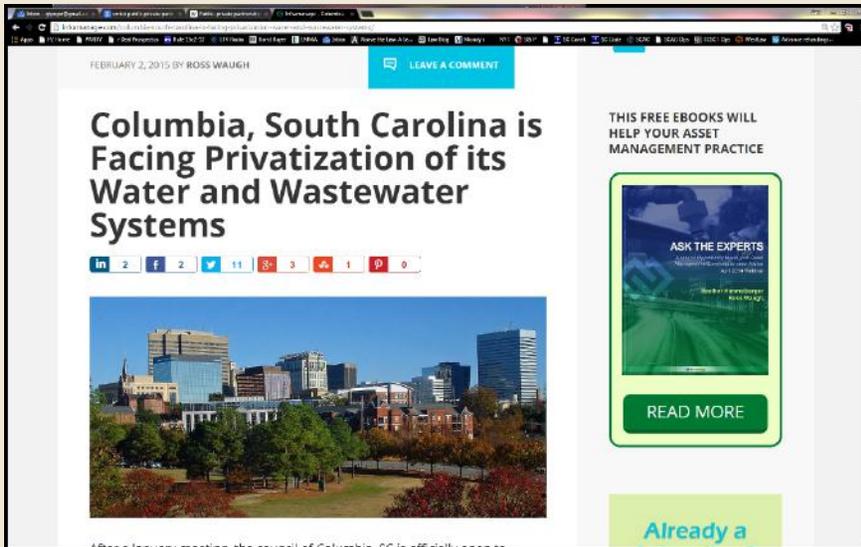
## Toll Roads

- Connector 2000
- California SR91
- Indiana Toll Road

# P3 | Political Process



To enter in a long term P3 contract will require action by a governmental body. This will involve politics.



## P3 | Ability to Contract



State government has plenary authority, while local government is more limited, despite home rule.

- In SC, no ability to joint venture
- Cannot make equity investment in private company [railroads]
- Term of contract – governmental v. proprietary

## P3 | Ability to Contract



Common commercial terms void as against public policy:

- Non-substitution provision for essential service
- Non-compete provision for essential service
- No Indemnification by public body

## P3 | Procurement



In South Carolina, Title 11, Chapter 35 of the South Carolina Code allows for design, build operate, finance and maintain procurements – or public-private partnerships

RFQ/RFP Process

# P3 | Procurement



Common public procurement requirements:

- Payment and performance bonds
- Expensive insurance requirements

## P3 | Conclusion



### Public Private Partnerships:

- Popular concept in era of smaller government
- Demands multidisciplinary team
- Devil is in the details



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