



HUSCH BLACKWELL

2022 PUBLIC-PRIVATE PARTNERSHIP TRENDS REPORT

March 2022

Table of Contents

Methodology & Overview.....	1	P3 Goes to School.....	6
Introduction.....	2	P3 Gets Wired.....	8
Infrastructure Investment and Jobs Act ...	3	P3 Legal Issues & Trends	10
The P3 Pipeline.....	4	The Varieties of P3.....	16

2021 P3 Project Cohort

The following projects reached financial close between January 1, 2021 and December 31, 2021, and all were included for consideration in our research for this report.¹

- 1 Alice, TX Water Desalination Project**
Alice, TX
- 2 Atlanta BeltLine Communications Network**
Atlanta, GA
- 3 Brandenburg, KY Wastewater Treatment Plant**
Brandenburg, KY
- 4 Brookville, MD Smart Energy Bus Depot**
Brookville, MD
- 5 Dolphin Station Development**
Miami, FL
- 6 Fargo-Moorhead Area Flood Diversion**
Fargo, ND
- 7 Fresno State Central Heating and Cooling Plant**
Fresno, CA
- 8 Georgetown University Energy System**
Washington, DC
- 9 Illinois Institute of Technology Campus Utility System**
Joliet, IL
- 10 LSU Health Sciences Center Student Housing**
New Orleans, LA
- 11 Lynn University Residence Hall**
Boca Raton, FL
- 12 Morgan State Thurgood Marshall Project**
Baltimore, MD
- 13 Nashville International Airport Authority Development**
Nashville, TN
- 14 New Jersey Institute of Technology Mixed-Use Student Housing**
Newark, NJ
- 15 New York State Thruway Service Centers**
Albany, NY
- 16 North Carolina Highway Broadband Project**
Raleigh, NC
- 17 Rome Yard Mixed-Use Development**
Tampa, FL
- 18 Texas A&M Innovation Plaza Development**
Houston, TX
- 19 U.S. Army Housing Portfolio²**
Washington, DC
- 20 University of North Dakota Mixed-Use Development**
Grand Forks, ND
- 21 University of Southern Maine Student Housing**
Portland, ME
- 22 University of Washington Bothell Student Housing**
Bothell, WA
- 23 Vanderbilt University Mixed-Use Student Housing**
Nashville, TN
- 24 Worcester County (MD) Broadband Project**
Snow Hill, MD
- 25 30th Street Station Development**
Philadelphia, PA

¹Please use this number key in conjunction with the data on page 5 to view the geographic distribution of these projects.

²This is a multi-site project by the U.S. Department of Defense; project sites include Fort Campbell (KY), Fort Drum (NY), Fort Hood (TX), Fort Knox (KY), and Schofield Barracks (HI).

Methodology & Overview

Over the past five years, Husch Blackwell's Public-Private Partnership (P3) team has reviewed documentation from nearly 100 U.S. greenfield P3 project agreements. In this, our fifth-annual Public-Private Partnership Trends Report, we have augmented our research with data drawn from multiple sources, both public and proprietary. Each year, our database of projects grows as we add newly closed agreements.

With the ink still fresh on once-in-a-lifetime infrastructure legislation, we anticipate that 2021 will come to be seen as an inflection point for infrastructure projects in the U.S. Many of the trends that have been in play—the rise of hybrid P3 models, the broadening scope of vertical P3s—continued to dominate the landscape; however, the new infrastructure legislation provides an added context for greenfield projects: there are now complex public policy goals that projects need to address. How do projects consider environmental issues? Labor and the costs of labor? The so-called digital divide? Impacts on underprivileged communities?

There are real funding gaps in traditional infrastructure—roads, bridges, ports, flood diversion, etc.—that need to be addressed, but the very understanding and definition of infrastructure has evolved to include other project categories that reflect complex, long-term commitments to address climate change, clean air and water, and smart-city infrastructure, among others areas. As infrastructure evolves, so too does the P3 industry, and our report attempts to capture some of these changes, while providing a framework for looking at the future. We hope you find our 2022 Public-Private Partnership Report helpful in thinking through what is possible through P3 project delivery approaches.



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Note: The editors would like to thank Christian Del Castillo, Katesha Long and Yasmin Stiggons for their contributions to this report.

Introduction

Infrastructure took center stage during 2021 as the Biden administration pushed through a historic piece of legislation—the Infrastructure Investment and Jobs Act—that will commit approximately \$550 billion of new spending on a variety of infrastructure projects.

As the pandemic continued to wreak havoc on worldwide public health, the United States government moved decisively to ramp up federal spending to support infrastructure across a variety of project types. This was easily the most notable development in 2021 for the public-private partnership (P3) community; however, the new law will be implemented against an unpredictable backdrop of economic, financial, and geopolitical factors.

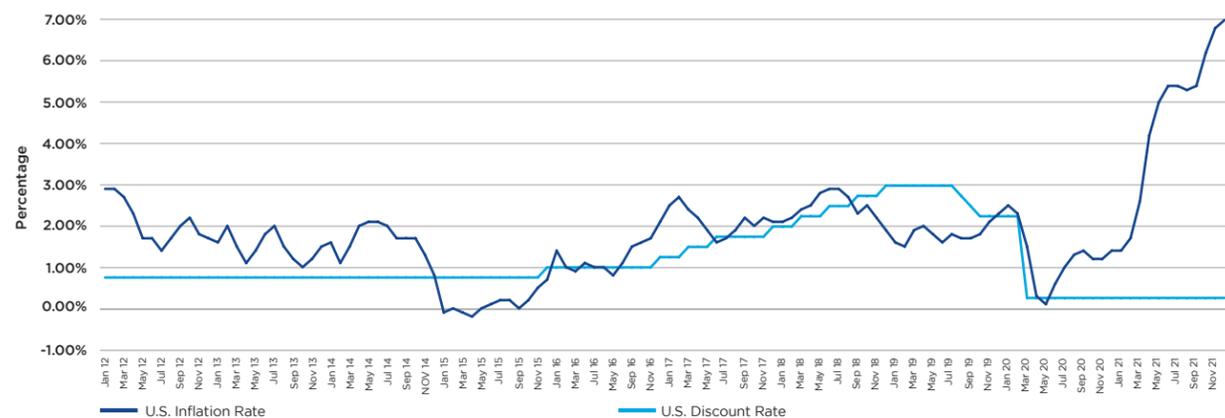
For the first time in a generation, core inflation rates have soared in developed countries, and the supply-chain challenges that emerged during the pandemic have yet to be resolved, exacerbated by labor and equipment shortages and geopolitical tensions. Available funding for projects will inevitably rise, but so too will input costs, at least in the short-to-intermediate term.

Additionally, macroeconomic data present a muddled picture. While historically low interest rates, coupled with quantitative easing, have perhaps stoked hotter-than-expected inflation, it has also led to record or near-record bond issuance from state and local governments. The muni market issued \$475.3 billion of debt in 2021, down 1.9% from 2020's record high; however, new-money issuance grew last year by 14.4%.

The new federal infrastructure legislation will no doubt create high levels of demand as planners look to move projects off the drawing board and to put shovels into the ground—there appear to be few constraints as far as cash is concerned. The supply side, however, is a different story. With so much money chasing scarce resources and talent, we anticipate that public-private partnerships will receive ample attention from the government sector, despite—or, perhaps, because of—the infusion of funds from Washington.

The Flatlining Fed

U.S. policymakers have severely fallen behind the curve, as inflation soared in 2021 while the Fed failed to tighten credit. The year ended with a 675 basis-point spread between the discount rate and inflation, the largest such spread since 1950, when the discount rate data series began.



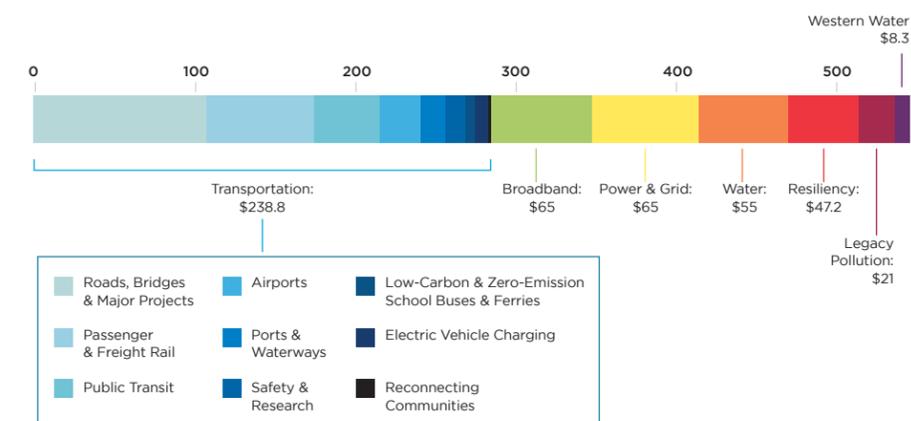
Source: <https://www.usinflationcalculator.com/inflation/current-inflation-rates/>; International Monetary Fund, Interest Rates, Discount Rate for United States [INTDSRUSM193N], retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/INTDSRUSM193N>, February 12, 2022

The Infrastructure Investment & Jobs Act

The Infrastructure Investment & Jobs Act (IIJA) contains a complex mix of formula-based funding and competitive grants across six main project categories.

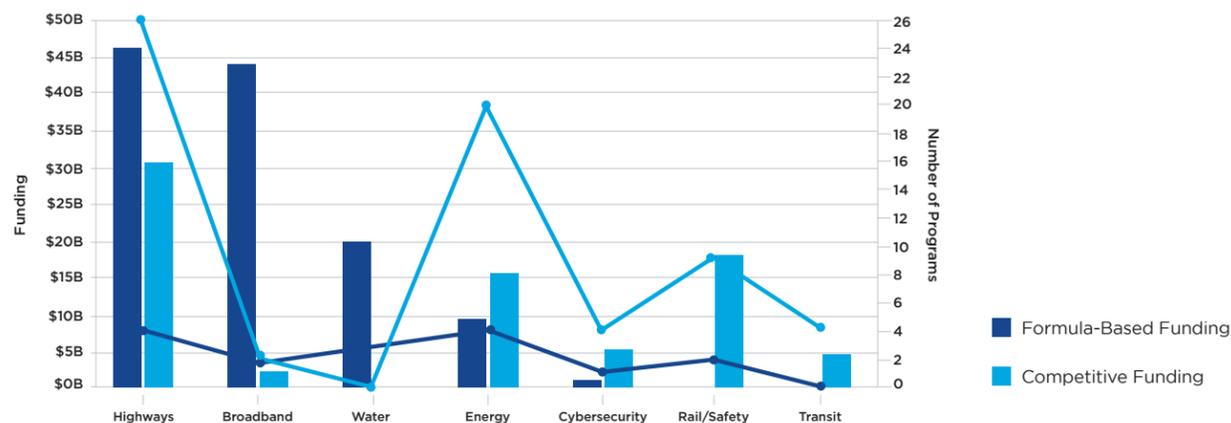
The new infrastructure law focuses new spending primarily in six project areas. Most of the funds will be allocated according to formula-based approach; however, there will be approximately \$80 billion available to state and local governments in the form of competitive grants over the next five years. Most of these grant opportunities are embedded in the programs established by the law and fall predominately in the areas of cybersecurity, rail, and safety.

Above-Baseline Spending in Infrastructure Investment and Jobs Act (in billions)



Source: Brookings Institute, <https://www.brookings.edu/blog/the-avenue/2021/11/09/america-has-an-infrastructure-bill-what-happens-next/>

Five-Year IIJA Grant Funding Available to States

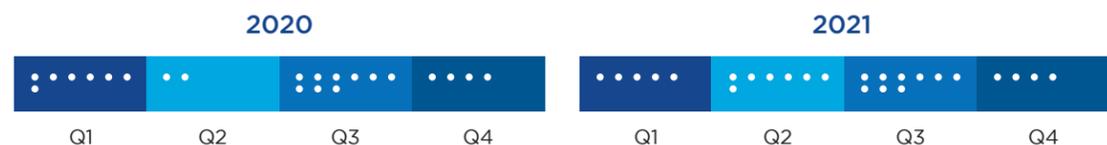


Source: Federal Funds Information for States, via Government Technology, <https://www.govtech.com/biz/data/states-will-need-to-compete-for-39-percent-of-iija-funding>

The P3 Pipeline

Projects reaching financial close increased; however, the pipeline of early-stage projects ticked down year over year.

U.S. P3 Projects Reaching Financial Close, 2020-21



Source: Inframation

Grantors Reaching Financial Close in 2021

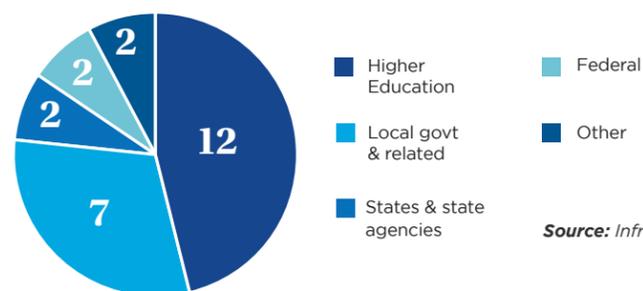
- Amtrak
- Atlanta BeltLine Inc. (ABI)
- City of Tampa, Florida
- Fresno State University
- Georgetown University
- Illinois Institute of Technology
- Louisiana State University
- Lynn University
- Metro Nashville Airport Authority
- Miami-Dade County, Florida
- Montgomery County, Maryland
- Morgan State University
- New Jersey Institute of Technology
- New York State Thruway Authority
- North Carolina Department of Transportation (NCDOT)
- Texas A&M University System
- The City of Brandenburg, Kentucky, Meade County
- Town of Alice, Texas
- University of North Dakota
- University of Southern Maine
- University of Washington
- US Army Corps of Engineers (USACE)
- US Department of Defense
- Vanderbilt University
- Worcester County, Maryland

As our team anticipated in last year's report, the number of U.S. P3 projects reaching financial close in 2021 increased year over year 13.6 percent from 22 to 25. This was powered in part by a robust pipeline of early-stage projects, relatively favorable financing conditions, and a general feeling that Covid countermeasures were allowing for a return to something approaching normalcy.

Also as anticipated, the cohort of 2021 projects reaching financial close received a big boost from institutions of higher education. Of the 40 projects in the pre-launch phase at the end of 2020, 17 were related to higher ed; these projects are now progressing, and some have reached a close. Nearly half of the grantors reaching a close in 2021 are higher ed institutions (see Pages 6-7 for a report on higher ed P3s).

We also continue to see greater diversification of project types among the projects reaching financial close. Surface transportation projects posted one of the lowest project counts ever. Our 2021 research cohort did not contain any projects aimed at roads and highways, the traditional sweet spot of U.S. P3s, as grantors focused surface transportation projects on mass transit, electric vehicle infrastructure, and other ancillary areas like rest areas and visitor centers.

2021 U.S. P3 Projects Reaching Financial Close, by Grantor Type



Source: Inframation

One grantor new to the P3 space is the U.S. Army Corps of Engineers (USACE). During 4Q2021, USACE closed financing on a \$2.75 billion flood diversion project for the Red River in North Dakota and Minnesota, the first such P3 in North America. The project could be indicative of the kind of project aims and structures to be seen as the IIJA ramps up.

The project involved the creation of a complex regional or interlocal authority to undertake the project, pulling in tax revenues across several jurisdictions. The tax revenue is central to the project and is anticipated to kick in over \$1 billion.

We anticipate greater use of regional and interlocal bodies to solve infrastructure challenges, despite their inherent complexity and the time it takes to work through details such that each jurisdiction is satisfied that its interests are safeguarded and that project benefits flow in an equitable manner.

The project is an important one for the P3 community, as it will serve as a proof of concept and a template for other USACE-led projects under its P3 Pilot Program, introduced in 2018.

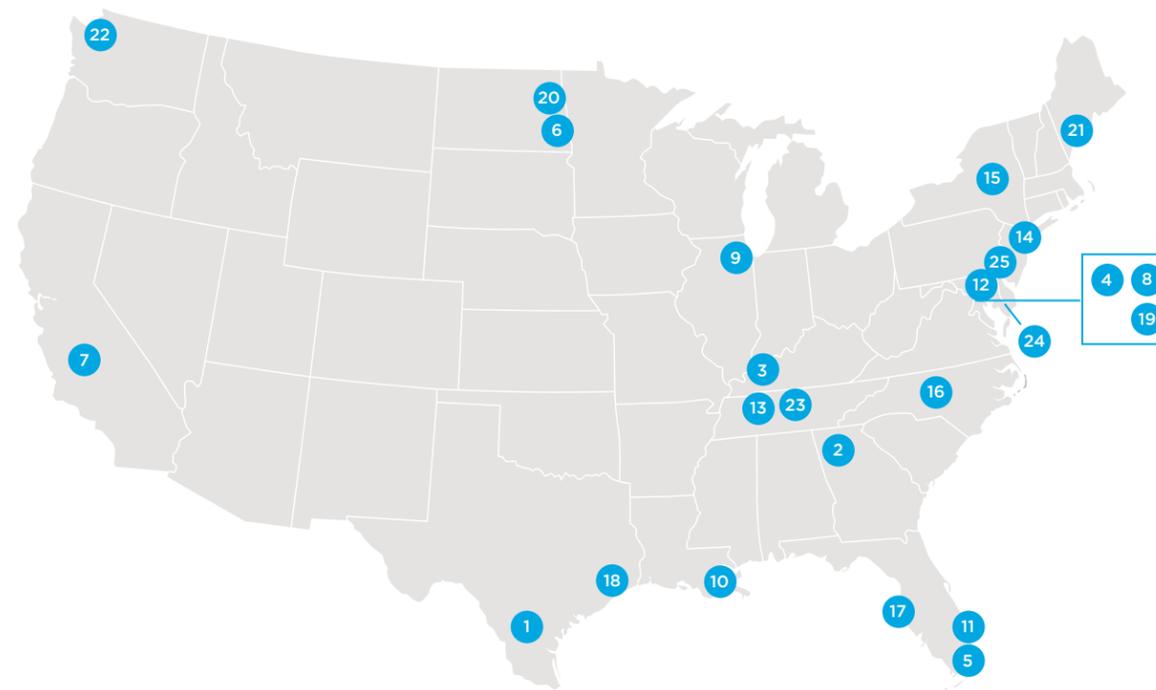
Active U.S. P3 Projects by Lifecycle Phase

Twenty-three of the 77 live projects have selected a preferred proponent.



Source: Inframation

Location of 2021 P3 Projects Reaching Financial Close



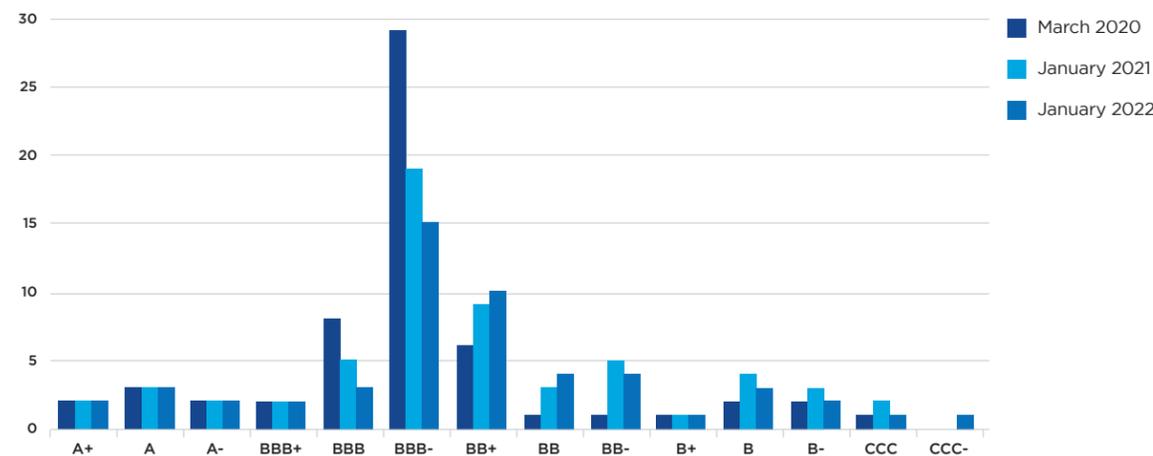
P3 Goes To School

Institutions of higher education are increasingly turning to P3 agreements for large projects, and the project types are far broader than just dormitories and classrooms.

We indicated in last year’s report that the higher ed segment had exhibited strength, despite the pandemic. This year’s report shows consolidation of that trend, as higher ed again dominates P3 projects reaching a financial close. Much like last year, nine of the 12 higher ed projects in our 2021 cohort were related to student housing. From 2019 to 2021, 22 of the 27 higher ed projects reaching financial close were aimed at student housing or housing-anchored mixed-use facilities.

There has been concern throughout the P3 community regarding housing-anchored projects and their exposure to demand-risk payment mechanisms. The chart below illustrates a perceptible deterioration in the creditworthiness in certain debt issues tied to these projects since the onset of the pandemic, particularly at the bottom end of investment grade; however, demand risk was a concern even before the pandemic and was a key factor that led to the unraveling of the University of Oklahoma’s \$251.7 million Cross Village housing project. The bond issues supporting the project defaulted in August 2020. In a complex deal, the university later bought the project outright for \$180 million, sticking bondholders with substantial losses.

Privatized Student Housing Rating Distribution

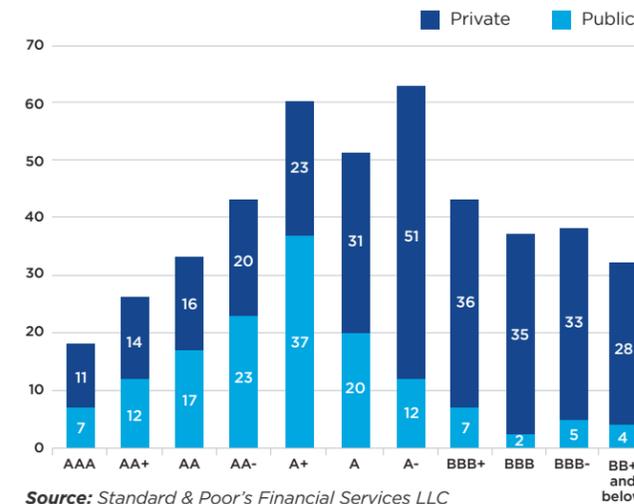


Source: Standard & Poor’s Financial Services LLC

There were several lessons to be learned from the Cross Village project. First, the \$20 million fee paid upfront by the concessionaire lacked an obvious clawback mechanism. Another problem area concerned the business relationship between the grantor and the private partner; OU was supposed to lease space over the term of the agreement, but purportedly, Oklahoma state law prevented it from entering into leases for longer than one year. P3 agreements typically run decades. When OU refused to re-up leases at prior terms, the economics of the agreement no longer made sense.

Covid-19 had destabilized on-campus operations, and no one was quite sure what the demand for housing would look like in the future. Encouragingly, as higher ed institutions have implemented a variety of pandemic countermeasures and edged back toward in-person learning, the industry’s overall financial profile is seen to be improving. S&P Global, a rating agency, reported a decline in year-over-year higher ed credit downgrades (from 18 to seven) in 2021, and despite the pandemic, only seven percent of rated institutions have debt issues below investment grade.

U.S. Higher Education Rating Distribution As of Dec. 31, 2021



Source: Standard & Poor’s Financial Services LLC

With the industry on surer footing, institutions are pursuing a variety of non-housing goals. For instance, energy-related

P3s have surged forward since the closing of Ohio State’s first-of-its-kind agreement in 2017. Three such projects—at Fresno State, Georgetown, and Illinois Tech—closed last year. Campus energy P3s tend to share many of the same deal characteristics, including institutional control and ownership of the assets, utilizing and/or refurbishing existing assets, upfront payments to the institutions by the concessionaire, a combination of bank and bond financing, and a complex “utility fee” paid periodically to the concessionaire to cover ongoing maintenance of the asset.

Fresno State Central Heating and Cooling Plant	Georgetown University Energy System	Illinois Institute of Technology Campus Utility System
<p><i>Closing Date: Feb. 26, 2021</i></p> <p>This project is reportedly the first use of Green Bond certification for a higher education P3, a financing instrument where interest rates are tied to energy use-reduction goals. The private partner will receive \$10.5m per year in availability payments beginning in 2024. The CSU system will provide \$20.4m for the first four years for availability payments, after which Fresno State will assume full responsibility.</p>	<p><i>Closing Date: July 2, 2021</i></p> <p>A 50-year agreement for the enhancement, operation and upkeep of the school’s electrical, heating and cooling and domestic water systems. The deal contains an upfront payment to the school. Previously, the school entered into a 15-year PPA to source clean energy. Capital stack includes Rule 144A offering of \$580 million of convertible debt, as well as a combination of term borrowing and revolving bank debt.</p>	<p><i>Closing Date: July 23, 2021</i></p> <p>A 40-year agreement to redevelop, operate, and manage and redevelop the school’s campus utility system, including new trigeneration system.</p>

We anticipate more of these energy P3 agreements to be developed in the near future. Of the 18 higher ed projects that we reviewed in the pipeline—that is, in the pre-launch or launch phase—several were in the energy sector, including projects at the University of Florida, University of Louisville, Northwestern University, and the University of Nebraska Medical Center.

P3 Gets Wired

Prior to 2020, one barely needed two hands to count the number of telecommunications-related P3s in the United States—that is rapidly changing.

While P3 was fast becoming a politically viable model for project delivery across an ever-expanding array of categories—including student dormitories, county courthouses, and waterworks, among others—the telecommunications industry hardly figured in the tally; however, around the same time that the Covid-19 pandemic erupted onto the scene, telecom P3 agreements took off, and none too soon as many vital services in the areas of healthcare and education moved online. Of the 77 live P3 projects at the end of 2021, 16 were related to telecoms; another three projects were in the pre-launch phase. This robust pipeline contrasts the meager telecom project closings in 2021, when only two projects reached the financial finish line.

The Infrastructure Investment and Jobs Act adds broadband as a project type to which tax-exempt private activity bonds (PABs) can be applied, potentially opening up broadband to a huge pool of private capital to augment the federal government’s investment. Given the pace of newly announced broadband projects prior to the legislation’s passage, this additional spur to investment should kick off an active cycle of broadband investment.

The new legislation targets underserved communities and seeks to direct investment to improve broadband service in these areas. The use of PABs is only allowed for “qualified” broadband projects, and while additional guidance from the government will be forthcoming to clarify further which projects qualify, as a general rule, proposed projects must provide data service that is far faster than what was in place before the project. For the targeted communities, this will be a low bar, as existing services are slow or nonexistent.

Of the \$1.2 trillion of new spending, \$65 billion is targeted at broadband initiatives, and over \$40 billion of that will go directly to the states for their use; however, PAB capacity is limited per state. P3s will be an important tool in project delivery for broadband, marrying private financing with the new public dollars for maximum impact.

Further, the new legislation amends the treatment of tax-exempt bonds under the Internal Revenue Code. For certain categories of projects, some or all PABs are now exempt from volume cap requirements under the Code. For privately owned broadband projects, 75% of PABs are exempt from cap requirements, and PABs for publicly owned broadband projects are completely exempt. This is a potentially important distinction for the use of P3 in broadband projects. In a traditional P3 the public partner usually owns the asset at the end of an agreement. The cap exemption, theoretically, would apply to these projects, putting more capital within reach of state and local governments.

With such a volume of financing seemingly available, one might be tempted to ask, “Why bother with P3s at all?”

To answer this question, one must consider the full life-cycle risks and costs of infrastructure projects. Public entities can offload risks associated with the construction, maintenance, and operation of the asset through P3 agreements, thus bending the cost curve back in favor of the P3 model, assuming that P3 agreements properly balance the risks and rewards over their entire terms, most of which can last decades. Additionally, partnerships with the private sector can provide access to expertise and innovation that would otherwise be unattainable.

In the traditional P3 model it is not uncommon to see side-by-side private equity investments by concessionaires and developers in a project’s capital stack, alongside public and private debt financing. While such investments have the potential to lower the cost of debt financing, they are also the most expensive tranche of project finance, as private equity investors generally expect higher returns on investment. As the P3 model has evolved, public-side participants are more and more utilizing “hybrid” P3s; that is, agreements that take advantage of the P3 procurement process but ultimately land on public financing where the cost of money is cheaper.

In other words, rather than thinking of P3 in the traditional terms—as a trade-off between the higher cost of money and risk transfers—public entities are adapting the P3 model, solving for the cost-of-money problem by eschewing private equity financing, but still incorporating P3’s demonstrated advantages as a procurement method and project delivery model.

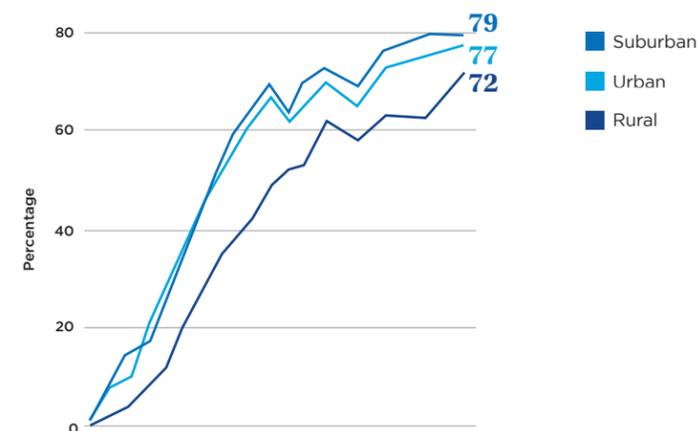
Since the onset of the Covid-19 pandemic, we have seen greater interest in building out broadband networks, even without the recently signed infrastructure legislation; however, that legislation will greatly increase the options available to government entities in how to approach the financing and operation of broadband projects. Often, the business case for broadband networks in rural areas and underserved census tracts is less strong than that for more affluent markets; if this were not the case, we wouldn’t need targeted government funds, and these networks would already be in existence. In addition to giving state and local governments more tools to expand internet access, the infrastructure legislation has the potential to coax more private-sector partners to get off the sidelines and into the game, and we believe P3s and hybrid P3s can play a valuable role in extending the reach of available capital.

What Starts as P3 Doesn’t Have to Finish as P3

One broadband project that recently reached financial close demonstrates the flexibility of a hybrid P3 approach. The North Carolina Department of Transportation (NCDOT) commenced a procurement process in April 2020 for an initiative that would bring broadband services to rural areas of the state; however, even before formally issuing its Request for Proposal, NCDOT was reconsidering its procurement options and ultimately put in place a multitrack procurement that solicited proposals across a range of project delivery models, from full P3s (DBFOM) to traditional design-build projects. This allowed the grantor to view side by side how the different project models addressed cost and risk. Ultimately, NCDOT chose not to use a P3 at all, but rather separated the design-build aspects of the project from the ongoing operations and maintenance of the network; however, the side-by-side comparison was likely a valuable tool in helping NCDOT land on the option with which it felt most comfortable.

Percentage of U.S. Adults with Home Broadband Access

Survey conducted Jan. 25-Feb. 8, 2021



Source: PEW Research Center

P3 Legal Issues & Trends

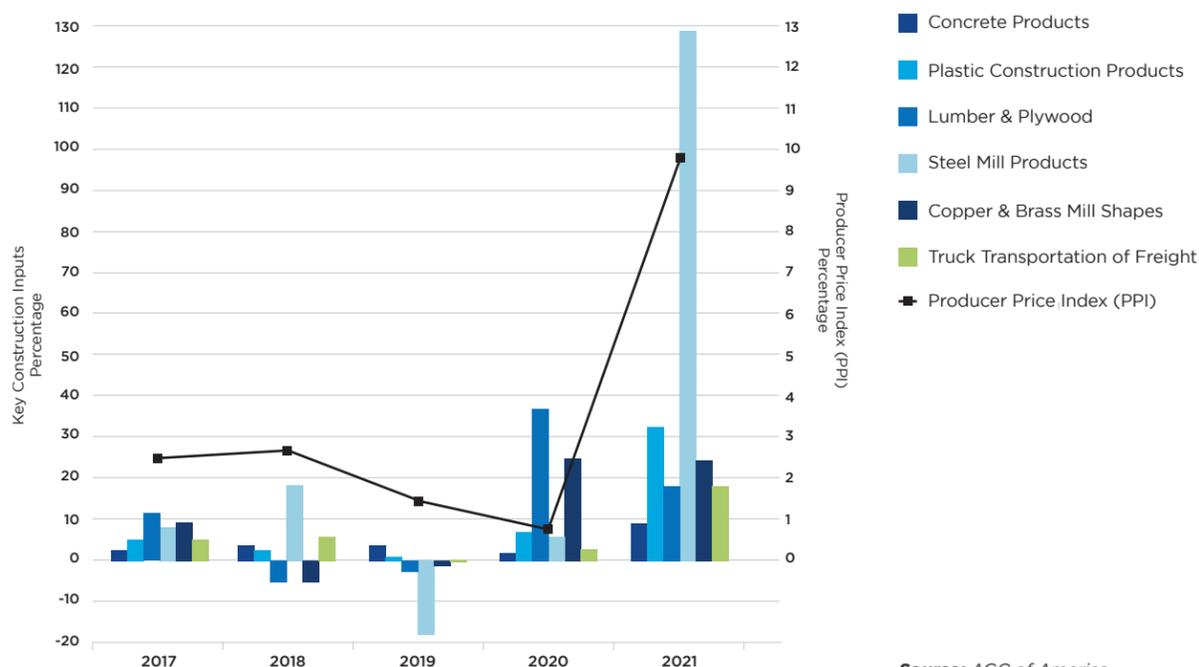
Public-private partnerships attempt to strike a delicate balance over a long period of time, often several decades. Success in the long run depends on how well the initial agreement addresses potential project risks. Below, we explore some of the emergent trends in recent P3 agreements that grantors and private businesses need to consider.

Inflation Risk

Inflation has emerged as an important risk factor for the first time in a generation. Given that high rates of inflation are relatively new, only some P3 agreements contain provisions relating to inflation risk. The Fargo-Moorhead flood diversion project offers an interesting window on how some projects got caught in this in-between period. The project reached financial close in October 2021, and while inflation had already broken out of its recent pattern, mainstream economists at the Fed and elsewhere still disarmingly termed it as “transitory.”

The project agreement did consider price volatility and the need to update its “Base Case Financial Model” as it related to change orders, but it explicitly excluded taking into account financial impacts resulting from inflation; however, the agreement did account for inflation risk with regards to its “Base Benchmarked Insurance Cost,” which for multiple “Insurance Review Periods” throughout the broader term of the agreement was defined as the greater of a defined price and the “Actual Benchmarked Insurance Cost” indexed annually using the consumer price index from the project substantial completion date. In this way, each insurance review period adjusted the insurance cost according to inflation.

Annual Percentage Change in Key Construction Inputs



Source: AGC of America

Interest Rate Risk

In many P3 agreements, grantors frequently assume the interest rate risk between the benchmark rates and base rate at financial close for a specified period (the interest rate protection period), though the approach varies from project to project. This practice provides the concessionaire an incentive to achieve financial close before the date the interest rate risk transfers to the concessionaire. If interest rates increase during the interest rate protection period, the agency will be responsible for any increased costs to the developer resulting from the increase.

In the case of the Fargo-Moorhead diversion project, the agreement allowed for updates to be made to the “Base Maximum Annual Payments,” in part, by updating the preliminary financial model for base interest rates as of the bond pricing date or bank debt pricing date. By doing so, the agreement ensured that any substantial change in interest rate would be reflected in the annual payments.

Sustainability/Environmental Standards

In any P3 project, there will likely be tension between high sustainability design standards and maximizing the economic viability of the project. Many government agencies increasingly see sustainability standards as a key component to any P3 partnership. By extension, adding sustainable design and maintenance elements to a project bid may make the bid more attractive. Sustainability standards come in different forms depending on the type of project, but some of the most common are certification programs such as LEED, WELL or similar third-party verifiers. In the case of the Fargo-Moorhead flood diversion project, the project agreement established a “Resilience Program” which was aimed at implementing the Institute for Sustainable Infrastructure Envision framework on the project. The project agreement then incorporated a “Resilience Program Plan” as part of its Technical Requirements for the project.

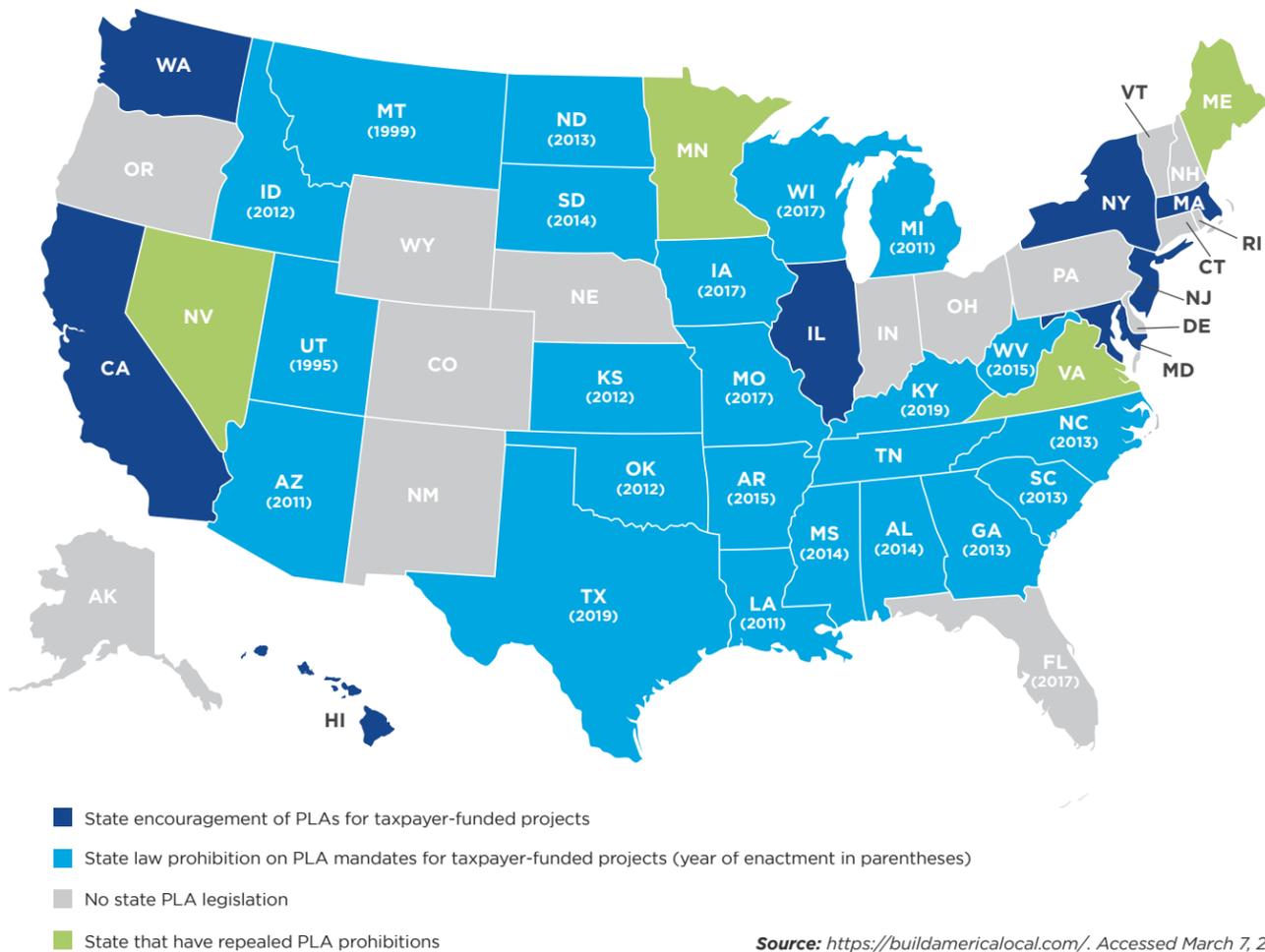
When negotiating or preparing P3 agreements regarding sustainability, it is important to consider the monitoring, maintenance, and enforcement of sustainability standards. As mentioned, in many cases, such standards are typically verified by third parties, so P3 agreements should account for the third-party verifiers, the frequency of such verifications, and in the case of a failure to meet such standards, the process for ensuring the standards are met and whether such failures would ever rise to the level of default.

Project Labor Agreements

A project labor agreement (PLA), also known as a community workforce agreement, is a pre-hiring agreement negotiated by unions and contractors to set terms and conditions of employment. PLAs will often include dispute resolution procedures and no-strike provisions, as well as timing and budget provisions. While they are not always used in P3s, PLAs are common, especially in states and cities requiring or encouraging them, which will often require them as part of a broader community benefits program. For example, as part of its contract requirements for any public/private funded improvement on county-owned land valued over \$250,000, Miami-Dade County (FL) requires that a percentage of the workforce performing construction trades work and labor under the contract be a resident of the Designated Target Area the project is located in.

Additionally, PLAs can serve to streamline the negotiation process and ensure project delivery, especially among union workers, though there is some criticism that PLAs can be anti-competitive and discourage non-union workers from bidding and working on projects, in turn potentially raising project costs. With many states in recent years banning their state agencies from requiring PLAs, P3 project managers should also be mindful of these countervailing balances when deciding whether to utilize a PLA in their project.

Status of State-Level PLA Legislation



Source: <https://buildamericalocal.com/>. Accessed March 7, 2022.

At the federal level, a recently issued executive order requires that all large-scale federal projects (with a total estimated cost of \$35 million or more) use PLAs, unless exempted. While the actual provisions allowed or required in a PLA generally depend on the regulating government agency, it is common that these agreements bind all contractors and subcontractors who successfully bid on the project, even if that means superseding other existing collective bargaining agreements. Additionally, these agreements will generally touch on productivity, quality of work, safety, and health standards applicable to the project. All of this needs to be carefully considered in light of greater federal participation in P3 (as evidenced by the Corps of Engineers' involvement with the Fargo-Moorhead project), as well as the newly passed infrastructure law.

Community Benefits Agreements

A community benefits agreement (CBA), while voluntary for developers, is a tool being used by governments and communities looking to build sustained benefits in exchange for hosting a P3 project. While developers entering a CBA are legally bound to the agreement, so too are the community coalitions that generally offer public approval or acquiescence and the state or local governments that offer tax abatements, subsidies, or entitlements in exchange for agreed upon community benefits. As more P3s enter CBAs, those that do not may face increased community pushback in the absence of negotiated community benefits. The most common CBA commitments for developers are typically monetary, but can also include non-monetary benefits, such as establishing community facilities and services, agreements to pay workers a living wage, legal assistance, or affordable housing units, among others.

In some cases, counties or cities will pre-emptively mandate certain community benefits for any public-private project, often in a form that resembles a project labor agreement. For example, Miami-Dade County (FL) has several small business, wage, and workforce requirements that aim at providing good, reasonable paying work for as many county residents as possible that applies to any public/private funded improvements on county-owned land. These projects are generally only exempt from the program requirements if the county-owned land does not exceed certain value thresholds or if the developer is a community-based 501(c)(3) not-for-profit organization. Otherwise, Miami-Dade County requires that developers pay certain county-scheduled wages and benefits to all laborers and that a percentage of the workforce performing construction trades work and labor under the contract be residents of the Designated Target Area the project is located in and/or from a designated county employment register, and in some cases, that 51 percent of all construction labor hours be performed by Miami-Dade County residents. Employees for larger value projects are also required to be given OSHA safety training.

Force Majeure

One constant in all P3 projects is the level of uncertainty and potential for unforeseen events to occur that were not caused by parties to the agreement. To address unexpected events, it is fairly standard for P3 agreements to contain *force majeure* clauses. Such clauses dictate when a party may be excused from performing specific contractual obligations due to a significant, unavoidable event which prevents the party from performing such obligations. Before any obligations are excused, the *force majeure* clause usually requires the affected party to promptly notify the other party of the *force majeure* event, consult with the other party in good faith and utilize reasonable efforts to come up with ways to mitigate the effects of the event and further performance of the agreement.

While *force majeure* clauses are often invoked to excuse the performance of minor contractual obligations, these clauses can also be used by parties to terminate agreements entirely. For example, in the Fargo-Moorhead Metropolitan Area Flood Risk Management Project, if an affected party is unable to comply with their material obligations for more than 180 days and, during that time period, the parties cannot agree to mitigation efforts that facilitate performance of the agreement, either party is entitled to begin the process to terminate the agreement.

Dispute Resolution

Due to the high costs associated with P3 projects and the length of the projects, it is extremely common for P3 project agreements to contain detailed dispute resolution provisions to help reduce additional costs and prevent lengthy delays. Generally, these dispute resolution provisions describe a variety of steps and processes to be completed by the parties before they are permitted to proceed with litigation as a means to resolve any dispute. Common alternative dispute resolution methods include review/resolution boards, mediation, and arbitration. Whether decisions reached through dispute resolution methods are binding on the parties is addressed in the agreements and varies from agreement to agreement.

While many P3 project agreements allow the prevailing party in any dispute resolution actions to recover their attorneys' fees and costs from the other party, some agreements take a different route. An example of this can be seen in the Fargo-Moorhead flood diversion project agreement which explicitly states that each party is responsible for their attorneys' fees and costs for any dispute and prevents the parties from seeking or accepting awards of said fees and costs. This is in contrast to the Brandenburg Project Agreement which provides that the non-prevailing party shall pay the cost of any binding dispute resolution procedure and reasonable attorneys' fees as determined by the adjudicator.

Work Changes

As a result of the complexities and lengthy duration of P3 projects, it comes as no surprise that many projects experience at least one significant change in their original construction plans. P3 project agreements generally include a provision detailing how change orders are to be addressed in the event a construction change ends up being necessary. A change order is essentially work that is added or eliminated from the original scope of work and usually must be consented to by all parties. Parties requesting a change order are commonly required to explain the proposed change in ample detail, including information such as the reasoning behind the change request, potential consequential changes that may stem from the proposed change, any additional costs, and possible impacts on the timeline for completing construction.

When addressing changes in work, P3 project agreements may outline situations when requested change orders will be automatically effective. For example, the change order provision in the City of Brandenburg New Wastewater Treatment Plant Project Agreement provides that the design-builder is permitted to make minor design and construction changes which do not change the contract price, substantial completion date, or final completion date and that do not materially or adversely affect the project design, material quality, performance, or quality of work. For change orders that do not become effective automatically, project agreements specify the process for submitting change orders and seeking approval by the other parties.

Lender's Rights

Given the large scale of most P3 projects, lenders are often involved. As a result of this, parties will consider lenders in their risk allocation considerations and include certain provisions in the agreements to protect the rights of lenders and mitigate some of the risks associated with the projects. Commercial lenders carefully assess the project risks and consider how such risks have been allocated between the parties to the agreement. One way P3 projects frequently protect the rights of lenders is by limiting what the parties can do with the property prior to the discharge of the lien. In the Miami-Dade Dolphin Station Development Agreement the landlord agreed not to accept voluntary surrender or termination of the lease while the leasehold mortgage remains a lien on the tenant's leasehold estate. Furthermore, no sale or transfer of the landlord's fee simple interest in the land or any portion of said interest to the tenant shall terminate the lease while the lien on the leasehold mortgage or mezzanine financing remains undischarged.

Refinancing Gains

A significant number of agreements are refinanced at some point given the lengthy duration of most P3 projects. Projects financed using loans regularly include language to address the allocation of any refinancing gains. The majority of agreements require the parties to share qualifying gains. The Fargo-Moorhead Metropolitan Area Flood Risk Management Project Agreement provides an example as to how refinancing gains may be allocated in P3 project agreements. Here, both parties are required to agree upon an amount of refinancing gain resulting from a qualifying refinancing and agree on the basis for payment of the Metro Flood Diversion Authority's share. Additionally, the Metro Flood Diversion Authority is entitled to receive 50% of any refinancing gain from a qualifying refinancing and is permitted to choose to receive their share as a single payment less than or equal to any distribution made near the date of the refinancing, a reduction in the availability payment, or a combination of two.

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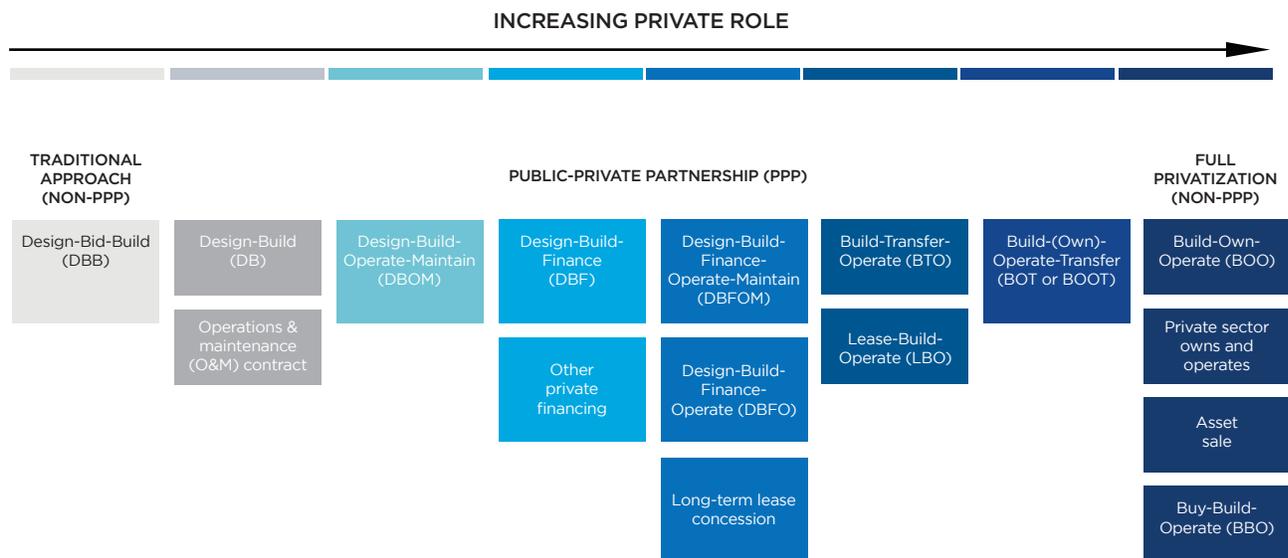
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The Varieties of P3

For some industry observers, the finance element is the key defining feature of a P3. Without private debt or equity financing, they argue, there is no P3. Taking that bright-line approach does provide apples-to-apples data sets for analysis; however, viewing P3 in this narrow way misses bigger-picture concepts that are important to delivering projects.

Project Delivery Models Along a Continuum of Private Sector Involvement



Source: National Conference of State Legislatures

In reality, there are exigencies in the procurement process for large infrastructure projects that are hard to capture in a spreadsheet. Some processes begin as P3s and remain as such throughout the timeline; others might end as more traditional design-build procurements; and still others begin as P3s, shift to other models, and then return to P3 due to a variety of circumstances. The lesson is that procurement is a far more fluid process than our models sometimes allow for, and as an approach, P3 is far more robust than simply a financing mechanism, as demonstrated in the graphic above.

About Husch Blackwell's P3 Team

Husch Blackwell knows the P3 industry inside and out. We help private businesses and public agencies form partnerships and share the resources, risks and rewards of P3 projects. We guide clients through the negotiations, coordination and closings of contracts involving design-build, finance, operations, maintenance and transfer covenants. Our team has extensive experience and deep understanding of how to manage the legal, political and commercial complexities of P3s. Our representative projects include:

- | | |
|--|---|
|  Higher ed facilities |  Courthouses and social infrastructure |
|  Professional sports facilities |  Broadband |
|  Airport renovation/expansion |  Energy districts |
|  Water/wastewater facilities |  Transit-based mixed-use development |

Recent Work Highlights

Counsel to Garney
Construction, Developer
and Eventual Controlling
Shareholder

***San Antonio Water System
(SAWS) Vista Ridge Water
Supply Project - \$3.4 billion***

- Best Utilities Project, 2017 P3 Awards
- Water Deal of the Year, 2017 Global Water Intelligence
- North American Deal of the Year, 2016 Project Finance International
- North America Water Deal of the Year, 2016 IJGlobal Awards

Counsel to Edgemoor
Infrastructure & Real Estate,
Developer

***University of Kansas Central
District - \$350 million***

- Finalist, Best Social Infrastructure Project, 2016 P3 Awards

Counsel to Confluence
Companies, Developer

Colorado School of Mines

- 320+ bed housing facility with structured parking, retail and residential life programming space
- Lease/lease-back structure with ownership reverting to the university at end of term



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