

An Overview of the Public-Private Partnership (P3) Procurement Guide

**Webinar 1: P3
Procurement Guide
Overview**

Webinar Series

- **Webinar 1: An Overview of the P3 Procurement Guide (today)**
- **Webinar 2: Preparing for a P3 Procurement**
 - Date: June 24 at 2:00pm Eastern
- **Webinar 3: Conducting a P3 Procurement**
 - Date: June 26 at 2:00pm Eastern



Webinar 1 Overview

1. Procurement Guide overview
2. Differences between P3 and other delivery methods and legal considerations
3. Goals, activities, and successful practices
4. Federal funding and financing
5. Strategies for environmental and regulatory approval
6. Questions and Answers



Presenter



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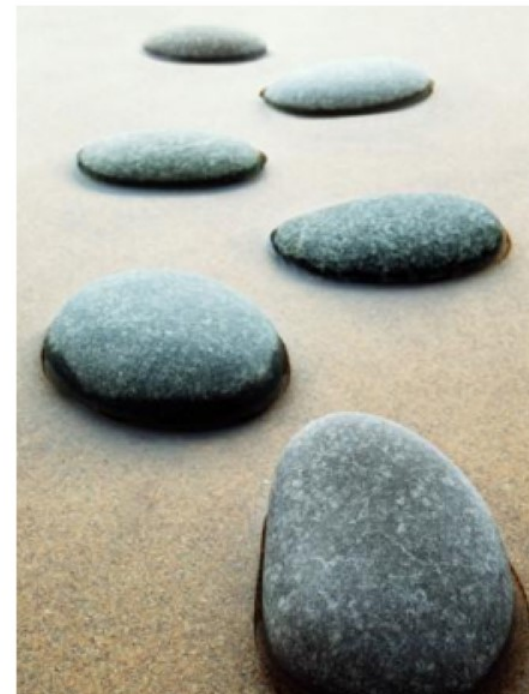
Part 1: Procurement Guide Overview

“How to read the Guide”

Guide Purpose and Background

- **Objective:** Advanced guidance for P3 project development
 - Describe the P3 procurement process
 - Provide resources for relevant topics
 - Can be viewed section-by-section
 - Successful practices
- **Target Audience:** State DOTs, MPOs, and other Federal, State and local agencies
- **Part of P3 Toolkit:**

<https://www.fhwa.dot.gov/ipd/p3/toolkit/>.



Detailed Project Case Studies

Example Project	Aspects					
	Mode	Type of Development	Project Concept	Development Stage at Procurement	Selection Process	Payment Mechanism
I-495 Capital Beltway High-Occupancy Toll Lanes, Virginia	Highway	Enhancements to existing facility	Defined based on unsolicited private sector proposal	Pre-development agreement	Formulaic approach	Revenue risk (toll concession)
Purple Line Light Rail Transit System, Maryland	Transit	New-build	Initiated by public sector	Well-defined project	Tradeoff approach	Availability payment
North Tarrant Express (NTE) Project, Texas	Highway	Reconstruction	Initiated by public sector	Well-defined project (initial segments); PDA (later segments)	Formulaic approach	Revenue risk (toll concession)
U.S. 36, Colorado	Highway	Enhancements to existing facility	Initiated by public sector	Well-defined project	Formulaic approach	Revenue risk (toll concession)

Additional Project Case Studies can be found on the [Build America Bureau Website](#)



Additional Projects used to Illustrate Procurement Concepts

Agency	Project	Description
Arizona Department of Transportation	South Mountain Freeway	Highway DBM project
California Department of Transportation	Presidio Parkway	Availability payment roadway
	SR-91	Express lanes toll concession
City of Los Angeles (Los Angeles World Airports)	Automated People Mover and Consolidated Rental Car Facility	Availability payment
Florida Department of Transportation	Port of Miami Tunnel	Availability payment tunnel
	I-595	Availability payment express lanes
	I-4 Ultimate	Availability payment express lanes
Indiana Finance Authority	East End Crossing	Availability payment toll bridge
Arizona Department of Transportation	South Mountain Freeway	Highway DBM project



Additional Projects used to Illustrate Procurement Concepts (continued)

Agency	Project	Description
New Jersey Transit Corporation	Hudson-Bergen light rail transit system	DBOM transit system (finance component was removed by change order)
Ohio Department of Transportation	Portsmouth Bypass	Availability payment roadway
Pennsylvania Department of Transportation	Rapid Bridge Replacement	Multiple bridge replacements with availability payments
Regional Transportation District (Denver)	Eagle	Commuter rail availability payment P3
Texas Department of Transportation	I-635 (LBJ TEXpress Lanes)	Express lanes toll concession
	SH 288	Express lanes toll concession
	Grand Parkway	Toll road DB project
Virginia Department of Transportation	Transform 66 Outside the Beltway	Express lanes toll concession
	Elizabeth River Tunnels	Connector toll concession



Guide is Structured by Procurement Phase

Webinar 2: Preparing for
a P3 Procurement
Chapter 3

Webinar 3: Conducting a
P3 Procurement
Chapters 4-7

- **Sequentially with procurement progress:**
 - Chapter 3: Pre-procurement Period
 - Chapter 4: Start of Procurement through RFQ Issuance
 - Chapter 5: Development and Issuance of RFP
 - Chapter 6: Issuance of Solicitation Package through Selection
 - Chapter 7: Commercial and Financial Close
- **Also includes:**
 - Chapter 2: Overview of Procurement Process
 - Chapter 8: Additional Considerations

Part 2: Differences between P3 and Other Delivery Methods and Laws Affecting P3 Procurements

**What would be good to know before
considering procuring a project as a P3?**



U.S. Department
of Transportation
**Federal Transit
Administration**



Why P3?

“A P3 procurement is defined as *Procurement of a contract for **development, operation and/or maintenance** of a facility that involves a component of **private financing**.*”

DBF, DBFM, DBFOM

- Use **private capital** to close funding gap
- **Allocate risk** to entity best able to manage/ mitigate
- Atypical, complex projects that can **benefit from expertise** of specialized firms



Key Aspects of P3 Project Delivery

- Determining Statement of Work
- Risk assessment, mitigation & allocation
- Performance specifications
- Developing terms and conditions



**High level of detail &
a large number of
variables!**



Key Aspects of P3 Project Delivery: (continued)

- Selection criteria determination
- Selection and negotiation
 - **US Common Practice:** best value selection process; post-selection negotiation due to project complexity.
- Financing considerations
- Contract administration



Account for financing & O&M in addition to project development



Topics for Legal Consideration

- Procurement
- Debt limitations
- ROW Acquisition
- Dispute resolution procedures
- Other considerations



Laws Affecting P3 Procurement



Do existing laws:

- Allow practices such as
 - a two-step best value procurement
 - payment of stipends
 - discussions and requests for revised proposals
 - pre-award negotiations?
- Impose restrictions affecting the agency's preferred approach to risk allocation?
- Impose constraints on the structure of the concession that may affect project feasibility?



Legislative Analysis (continued)



Debt limitations

- Do constitutional debt limitations apply to the transaction?

ROW Acquisition

- Uniform Act
- Timelines for property acquisition, “quick take” authority; ability to pay for utility relocations

Dispute resolution procedures

- Are there restrictions affecting the agency’s ability to use alternative dispute resolution procedures?



Legislative Analysis (continued)

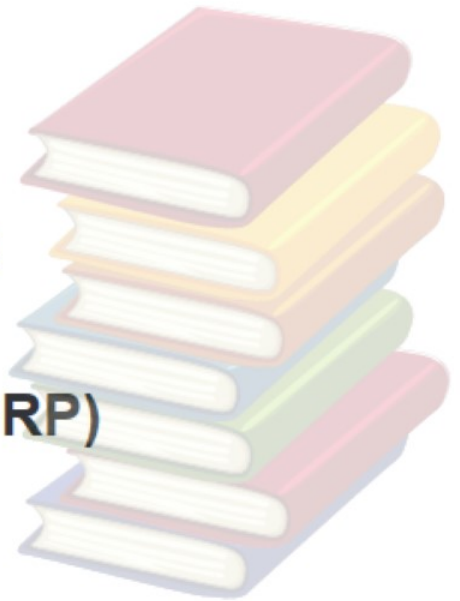


- **How might the project be affected by:**
 - Statutes of limitations (requiring an action to be brought within a specified time after the cause of action arises).
 - Statutes of repose (requiring an action to be brought within a specified time after completion of the project).
- **Does State law include other requirements affecting project feasibility;** for example, the possibility that a long-term concession might be considered a “possessory interest” subject to an ad valorem tax?



Additional Resources for Legislative Analysis

- **NCHRP Report 561:** Best-Value Procurement Methods for Highway Construction Projects
- **Transit Cooperative Research Program (TCRP) Legal Research Digest 40:** Issues Involving Surety for Public Transportation Projects
- **NCHRP Synthesis 481:** Current Practices to Set and Monitor DBE Goals on Design-Build Projects and Other Alternative Project Delivery Methods
- **NCHRP Legal Research Digest 68:** Liability of Design-Builders for Design, Construction, and Acquisition Claims



Test Your Knowledge

- **Which items below are important to analyze before initiating a P3 procurement:**
 - ☐ Laws affecting P3 procurements, particularly those affecting the structure of the concession and thus impacting project feasibility
 - ☐ Detailed risk profile of P3 compared to traditional delivery methods

Test Your Knowledge (Answers)

- Which items below are important to analyze before initiating a P3 procurement:
 - ✓ Laws affecting P3 procurements, particularly those affecting the structure of the concession and thus impacting project feasibility
 - ✓ Detailed risk profile of P3 compared to traditional delivery methods

Part 3: Goals, Activities and Successful Practices



U.S. Department
of Transportation
**Federal Transit
Administration**



P3 Procurement Phases





Pre-Procurement Goals and Activities

Goal: Structure a procurement team to provide overall project management

- Engage technical, legal and financial consultants
- Establish a communications strategy.
- Establish procedures ensuring confidentiality



Pre-Procurement Goals and Activities (continued)

Goal: Establish a project delivery strategy

- Aim to maximize flexibility to encourage innovation
- Define project goals, scope and term of concession
- Conduct initial risk assessment and allocation
- Perform agency due diligence (technical and financial)
- Develop a business case/conduct a Value for Money (VfM) analysis Consider early contractor outreach and involvement



Pre-Procurement Goals and Activities (continued)

Goal: Set the stage for stakeholder engagement and required approvals

- Advertise a Request for Information (RFI) soliciting market input and hold market sounding meeting with interested firms
- Organize Industry forum /workshop
- Identify applicable laws, procedures and requirement
- Develop strategies for environmental and regulatory approvals
- Consider Federal financing assistance (TIFIA and PABs)
- Begin to engage Federal Government/ State & Local Entities





Goals and Activities for Starting the Procurement

Goal: Structure the procurement process

- Conduct Procurement Strategy Workshop
- Develop evaluation structure and procedures
- Develop procedures to ensure full, fair and open procurement
- Develop Organizational Conflict of Interest policies



Goals and Activities for RFQ Development

Goal: Determine Request for Qualifications Terms and Basis for Shortlisting

- Determine RFQ terms and basis for shortlisting
- Develop and Issue RFQ
- Evaluate and shortlist bidders based on SOQ submitted



Goals and Activities for RFP Development (continued)

Goal: Develop Request for Proposals (RFP)

- Develop Draft RFP Procurement Terms
- Develop Draft RFP Contract Terms

Goal: Develop Final RFP

- Industry Review Process
- Develop Final RFP Procurement Terms
- Develop Final RFP Contract Terms
- Continued Project Due Diligence



Goals and Activities for the Selection Process

Goal: Revise RFP as Needed

- Conduct meetings with proposers
- Reconsider prior decisions as appropriate
- Issue addenda

Goal: Evaluate Alternative Technical Concepts (ATC) and Alternative Financial Concepts (AFC)

- Assess ATCs and AFCs
- Consider impact of proposed ATCs on the NEPA process





Goals and Activities for the Selection Process (continued)

Goal: Evaluate Proposals

- Evaluate proposals based on pre-determined evaluation process and guidelines
- Select preferred proposal
- Award (with or without negotiations)

Goal: Proposal Revisions (if applicable)

- Conduct competitive negotiations
- Revised proposal (also called BAFO)



Goals and Activities for Commercial and Financial Close

Goal: Commercial and Financial Close

- Negotiate changes to the P3 agreement (if any)
- Fulfil requirements of award and contract execution
- Commercial close
- Financial close



Successful Pre-Procurement Practices

- **Selection of Advisors:** Engage technical, legal, and financial advisors with US P3 project experience early!
- **Request for Information:** Request written responses; conduct informal market sounding or meetings) to obtain additional information.
- **Industry Forum/ One-on-one meeting:** Input from private sector on proposed procurement process
- **Federal Support:** Engage Federal government early especially for projects requesting TIFIA/PAB assistance



Successful Practices for Procurement Initiation

- **Establish procedures ensuring confidentiality of documents and information**
- **Two-step selection process:** RFQ followed by an RFP issued to the shortlisted proposers.
- **Industry Review process:** Prior to issuing the final RFP:
 - Obtain input and comments from the shortlisted proposers
 - Involves one-on-one meetings with proposers
 - Important for first projects and projects that include elements differing significantly from earlier projects.



Successful Practices for Pre-Selection/ Selection/Negotiation

- Provide opportunity to proposers to submit **Alternative Technical Concepts (ATCs)** during pre-selection
- **Best value selection process** to select preferred proposer
- **Reserve right to engage in discussions** with proposers in competitive range to request proposal revisions
- **Reserve right to hold negotiations** with the selected proposer prior to final award
- **Payment of stipend** to unsuccessful proposers

Other Successful Procurement Practices

- **Maintain leadership continuity**
 - Develop a transition plan from procurement to contract management.
- **Monitoring**
 - Develop protocols and assign responsibility for project oversight
 - Monitor contract requirements during design, construction and throughout operations



Test Your Knowledge

- Which of the following activities should the agency aim to complete prior to starting the RFP development process?
 - ☐ Develop evaluation structure and procedures
 - ☐ Develop procedures to ensure full, fair and open procurement
 - ☐ Develop Organizational Conflict of Interest policies
 - ☐ Develop Request for Qualifications and basis for shortlisting



Test Your Knowledge (Answers)

- Which of the following activities should the agency aim to complete prior to starting the RFP development process?
 - ✓ Develop evaluation structure and procedures
 - ✓ Develop procedures to ensure full, fair and open procurement
 - ✓ Develop Organizational Conflict of Interest policies
 - ✓ Develop Request for Qualifications and basis for shortlisting

Part 4: Federal Funding and Financing

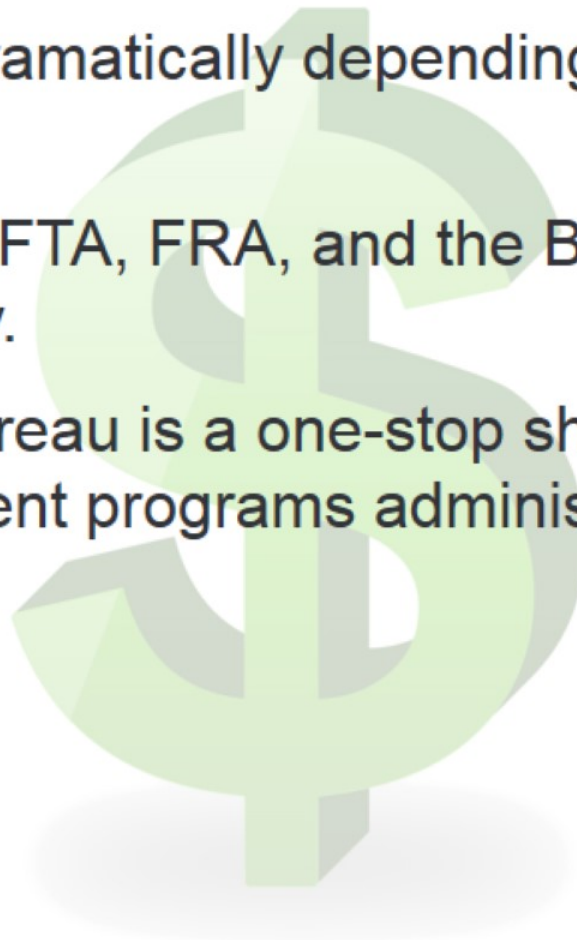
Topics

- Federal-aid Funding
- Federal Transit Administration Funding
- Transportation Infrastructure Finance and Innovating Act (TIFIA) Financing
- Private Activity Bonds



Federal Funding and Financing

- Process varies dramatically depending on the source of funds.
- Engages FHWA, FTA, FRA, and the Build America Bureau differently.
- Build America Bureau is a one-stop shop for loan and credit enhancement programs administered by the USDOT



Federal Financing: TIFIA

- FAST Act provided nearly \$1.5 billion in TIFIA subsidy authorization for FFY 2016-20
- Three types of loans: direct loans, loan guarantees, and standby letters of credit.
- For TIFIA assistance, the applicant must be able to:
 - Demonstrate the creditworthiness of the project
 - Identify the sources of funding to make any repayments of a TIFIA loan
 - Demonstrate extent to which project generates economic benefits, leverages private capital, and promotes innovative technologies.



Notable TIFIA Projects

- TxDOT North Tarrant Express: \$531 million loan
- VDOT Transform 66: \$1,299 million loan
- Florida DOT (FDOT) I-4 Ultimate: \$950 million loan
- Port Authority of New York and New Jersey
Goethals Bridge Replacement: \$474 million loan
- Capital Beltway: \$588.9 million loan
- Maryland Purple Line: \$874.6 million loan



Federal Financing: Private Activity Bonds (PABs)

- PABs were first authorized in 2005 in SAFETEA-LU
- To qualify for a PAB allocation, the activity must
 - include a project receiving Federal assistance under Title 23, U.S. Code or
 - be a freight transfer facility receiving funding under Title 23 or 49, U.S. Code
- NEPA decision must be obtained prior to PAB allocation
- U.S. DOT allocates authority to issue bonds; it otherwise has no role in the issuance of PABs



Part 5: Strategies for Environmental and Regulatory Approval

Strategies for Environmental and Regulatory Approval

Source: *SHRP 2* entitled “*Effect of Public-Private Partnerships and Nontraditional Procurement Processes on Highway Planning, Environmental Review and Collaborative Decision Making.*”



Potential Role of Private Partner in the NEPA process

- Public sponsor may ask the private concessionaire to provide studies that will inform the NEPA process.
 - Concessionaire's innovative ideas can be incorporated into the project.
- FHWA's Design-Build Rule permits award of P3 agreements prior to completion of the NEPA process, but requires deferral of final design and most other project activities until after completion of the NEPA process
- Concessionaires prefer completion of the NEPA process prior to contract award





NEPA Discussion of Funding/ Financing and Tolls

- NEPA document is not a funding document.
- Tolling/P3 discussion in the EIS:
 - Tolling changes the operational characteristics of highway
 - Discussion can help address potential sources of public opposition, avoiding controversies later
 - Failure to discuss tolling can lead a court to find an EIS legally flawed
 - Only tolled alternatives may be discussed in the EIS
 - Tolls/fares may be higher as a result of private financing



NEPA and P3: Other Considerations

- **Flexibility:** Proposers retain some flexibility since project is usually defined in broad terms
- **Mitigation:** Extensive mitigation requirements may make project less attractive to proposers
 - Public agency: ability to participate in mitigation measures governed by law; unrelated betterments not approvable without additional legal authority
 - Private sector: concerned with cost, schedule and revenue impact of required mitigation measures.
- **Permits:** Concessionaire may obtain permits requiring design detail, e.g.
 - Section 401 (discharge of pollutants, usually during construction) and 404 (dredge and fill) of the Clean Water Act, Section 10 of the Endangered Species Act (incidental takes of endangered species)



Test Your Knowledge

- For TIFIA assistance, the applicant must be able to demonstrate which of the following:
 - ☐ Demonstrate the creditworthiness of the project
 - ☐ Identify the sources of funding to make any repayments of a TIFIA loan
 - ☐ Demonstrate extent to which project generates economic benefits, leverages private capital, and promotes innovative technologies



Test Your Knowledge (Answers)

- For TIFIA assistance, the applicant must be able to demonstrate which of the following:
 - ✓ Demonstrate the creditworthiness of the project
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Questions?



FHWA P3 Toolkit

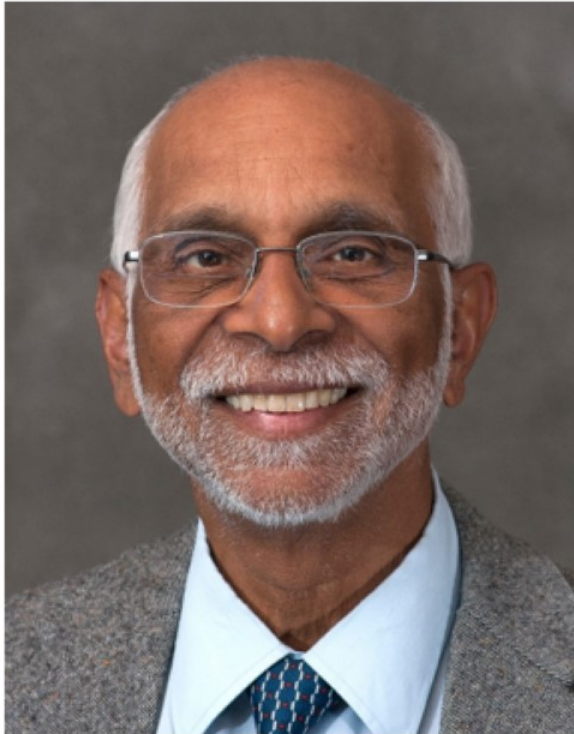
Fact Sheets	Primers	Guidebooks	Analytical Tools
<ul style="list-style-type: none">▪ FHWA P3 Toolkit▪ Risk Valuation & Allocation▪ Value for Money Analysis▪ Financial Structuring▪ Analytical Studies▪ Conducting Procurements▪ Monitoring & Oversight	<ul style="list-style-type: none">▪ Establishing a P3 Program▪ Risk Assessment▪ Value for Money Assessment▪ Financial Structuring & Assessment	<ul style="list-style-type: none">▪ Risk Assessment▪ Value for Money Assessment▪ Benefit-Cost Analysis for P3 Delivery▪ P3 Project Financing▪ Model Contracts▪ Successful P3 Practices▪ P3 Procurement	<p>P3-SCREEN</p> <ul style="list-style-type: none">▪ P3 viability evaluation prior to project development <p>P3-VALUE</p> <ul style="list-style-type: none">▪ Risk Assessment▪ Value for Money▪ Benefit-Cost Analysis▪ Financial Viability Assessment

Webinar recordings on are also available on the web.



Upcoming Webinars

- **Preparing for a P3 procurement:**
 - June 24, 2019 at 2:00pm Eastern
- **Conducting a P3 Procurement**
 - June 26, 2019 at 2:00pm Eastern



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