

Preparing for a P3 Procurement

Webinar 2: Preparing for a P3 Procurement

Webinar Series

- Webinar 1: An Overview of the P3 Procurement Guide
June 17 recording will be available at:
https://www.fhwa.dot.gov/ipd/p3/p3_training/webinars.aspx
- **Webinar 2: Preparing for a P3 Procurement (today)**
- Webinar 3: Conducting a P3 Procurement (June 26, 2019)

Presentation Overview

1. Pre-procurement phase goals and activities
2. Structuring the procurement team
3. Setting the stage for successful project delivery
4. Due diligence and project activities
5. Transparency
6. Other considerations: unsolicited proposals, risks and risks associated with 3rd parties
7. Questions and Answers.



Presenter



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Part 1: Goals and Activities in the P3 Pre-Procurement Phase

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 or 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
- Conduct public /stakeholder engagement

Part 2: Structuring the Procurement Team

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Structuring the Procurement Team – P3 Leadership Levels

Responsibility	Level/ Office
Ultimately responsible for project's scope, environmental approvals and requisite involvement of regional partners and the Federal agencies.	Highest offices of a State DOT or other public entity
Responsible for review and approval at key decision points such as decision to move forward as a P3 project and approval of funds.	Typically, Board of Directors, a specialized P3 entity or an advisory panel
Responsible for day-to-day direction of the procurement process.	P3 Procurement Management Team



Procurement Team: Internal Staffing Considerations

- Project Management
- Technical/ Financial/ Legal
- Communications and public outreach
- Other specialized



Considerations for Staff Selection

- Project scope, phases and elements such as design-build, operate and maintain, toll operations/services, etc. to be included in the project.
- Initial risk allocation among the agency and the proposer/private partner, project subsidies and/or funding approach.
- Key elements of the Value for Money (VfM) analysis.
- Anticipated funding partners.
- Anticipated public involvement and outreach effort

Source: Adapted from CDOT High Performance Transportation Enterprise (HPTE) P3 Management Manual



Management of Procurement Team

Schedule Management

- Identify the phases, corresponding activities, timelines, dependencies, key decision points and activities on the critical path.
- Involves risk identification and management of activities that have potential to negatively impact procurement schedule.



Management of Procurement Team

(continued)

Cost Management

- Develop and manage costs for each phase of the procurement.
- Key considerations include cost of financing, cost of engaging specialized consultants, conducting a VfM analysis, payment of stipends.



Management of Procurement Team

(continued)

Staff and Consultant Management

- Establish and manage the various teams, including activities such as:
 - staffing
 - appointing team leads
 - delegating tasks
 - ensuring coordinated functioning of the teams



Management of Procurement Team

(continued)

Leadership Engagement

- Provide periodic briefing updates on the progress of the P3 project development.
- Make decisions regarding the need to “bump-up” key issues to leadership and decision-makers at scheduled or unscheduled points during the procurement.



Management of Procurement Team

(continued)

Industry/ Proposer Engagement

- Industry forum and one-on-one sessions.
- Communications and negotiations with the proposers through the RFQ and RFP process.
- Determining stipends for unsuccessful bidders.
- Other activities involved with engagement of proposers.



Management of Procurement Team

(continued)

Public Outreach

- Education of the public on the P3 approach.
- Conducting workshops and public hearings.
- Outreach to elected officials and other stakeholders.
- Other outreach to public and the media for a specific project.

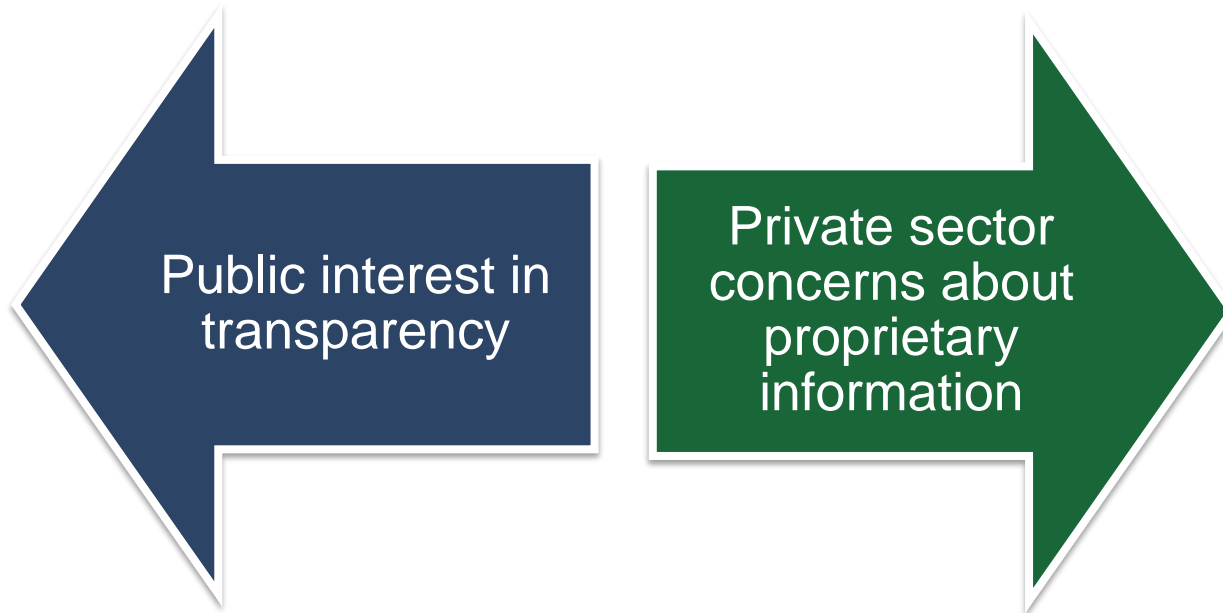


Securing External Advisor Support

- Consideration: staff capacity; volume of P3 projects; maturity/ experience of the organization with procuring P3s
- Financial, technical, and legal consultants; possibly a commercial advisor to help negotiate the deal
- Manage advisors
 - Set a term and amount for the contract
 - Staff to manage the contract and budget
 - Monitor the budget, work, and performance



Establishing Confidentiality and Organizational Conflict Policies



- Significant level of disclosure, e.g. posting information on project websites
- Concerns that ideas may be disclosed to competitors over the course of the procurement process



Organizational Conflict of Interest (OCI)

- If the OCI is not identified early, a ***problem may arise that cannot be cured***, and in some cases the validity of the procurement may be affected, ***requiring the entire procurement to be re-done*** (Sections 4.3, 4.4)
- Federal rules requiring measures to avoid OCIs, including perceived conflicts of interest



Organizational Conflict of Interest (continued)

- Situations raising potential OCI issues:
 - Agency consultants providing project recommendations while also seeking to join proposer teams – bias affecting consultant's advice
 - Proposer team members with information about the project not available to other proposers – unfair competitive advantage
 - Agency personnel and consultants involved in the procurement who have a financial interest or other business or personal relationship with a team member – appearance of bias

Uniform Guidance/"Super Circular", FTA's Best Practices Procurement Manual (BPPM), FHWA's Design-Build Rule and State law



Organizational Conflict of Interest (OCI)

– Mitigation/ Avoidance Strategies

- Identify existing agency consultants who will be precluded from participating on proposer teams
- Consider whether current or former agency consultants have access to information about the project that should be made available to proposers
- Adopt an OCI policy establishing rules applicable to proposers, consultants, and agency personnel involved



Test Your Knowledge

- It is advisable to begin discussions with the regional Federal office and state and local entities early, prior to starting procurement.
 - ☐ True
 - ☐ False
- Which strategies would you put in place to keep leadership involved in key decisions along the procurement process?
 - ☐ Provide periodic briefing updates
 - ☐ Make decisions to “bump-up” specific decisions

Test Your Knowledge (Answers)

- It is advisable to begin discussions with the regional Federal office and state and local entities early, prior to starting procurement.
 - ☒ True
 - ☐ False
- Which strategies would you put in place to keep leadership involved in key decisions along the procurement process?
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Part 3: Setting the Stage for Successful Project Delivery

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Setting the Stage for Successful Project Delivery



- Project Suitability: ***Is the project suitable for a P3?***
- Project Screening: ***Has a Value for Money (VfM) and financial viability assessment been completed?***
 - *FHWA P3 Toolkit Resources: “P3-SCREEN Analytical Tool”; “P3-VALUE 2.1 Analytical Tool” (includes a guidebook concerning VfM assessments)*
- Project Definition: ***Have project goals and scope been defined? Have scope and term of concession been determined?***
 - *SHRP2, “Effect of Public-Private Partnerships and Nontraditional Procurement Processes on Highway Planning, Environmental Review, and Collaborative Decision Making”*



Setting the Stage for Successful Project Delivery (continued)

- Project Risk: ***Has initial risk assessment and allocation been completed?***
 - *FHWA, “Guidebook for Risk Assessment in Public Private Partnerships”*
- ***Has legal compliance analysis been completed?***
 - Federal requirements concerning P3s; issues related to project planning and environmental analysis; State and local laws
- ***Was (formal/informal) market sounding done?***
 - Industry forum/ workshop, RFI, information memorandum, discussions with industry re potential use of TIFIA/PABs



Setting the Stage for Successful Project Delivery (continued)



- *Has internal/external communications strategy been established?*
- *Have measures been put into place maximizing flexibility for innovation?*
 - Performance specifications (and monetary (dis)incentives)
 - Selection criteria that consider technical quality and lifecycle costs
 - ATCs/ AFCs, incentives to reduce lifecycle costs
 - Integrating design, construction, O&M, financing in the concessionaire's scope.



Part 4: Agency Due Diligence and Project Activities

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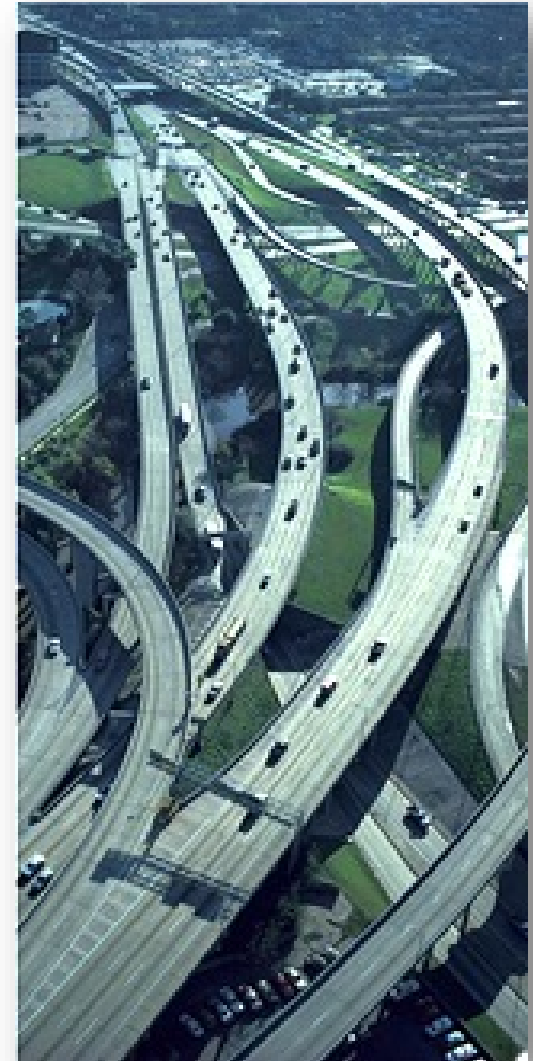
Agency Due Diligence

- Ensures that:
 - All relevant information is considered in making decisions
 - Equity investors, lenders and proposers have sufficient information



Project Activities

- Define project
- Develop traffic/ridership and revenue projections
- Assess site conditions
- Consult stakeholders
- Determine right-of-way strategies
- Federal engagement
- Early contractor involvement
- Document control



Project Definition

- Develop detailed project scope, draft technical provisions
- Review available data regarding project area and determine whether additional studies are needed
- Identify
 - Applicable standards
 - Data and reports
 - Any available preliminary design drawings
 - Service requirements
 - Handback requirements
 - ROW, utility and access information
 - Other technical considerations



Traffic/Ridership and Revenue Projections

- Agency's initial projections need to clearly articulate the methodology for data collection and modeling, major assumptions, and sensitivity testing, but are for information only
- Issues to consider: toll/ fare policy, limitations on toll/fare increases through concession term



Assessing Site Conditions



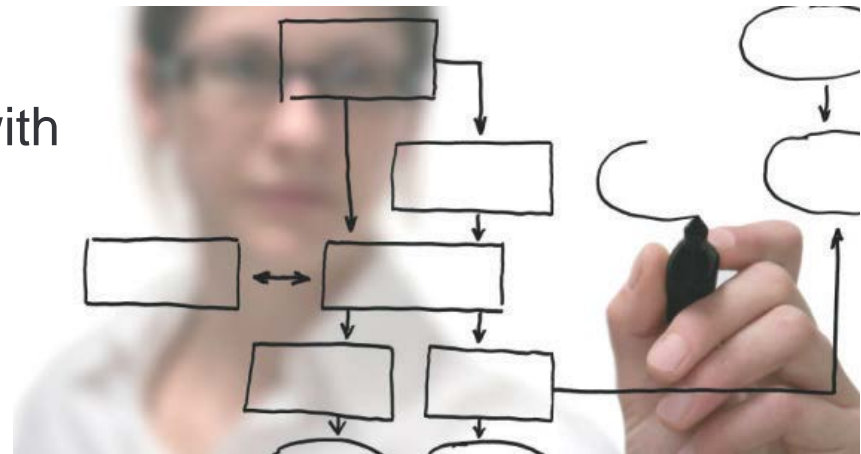
- Site conditions and utility risks can affect project costs, schedule and success
- Early geotechnical studies and subsurface utility engineering (SUE) can help mitigate these risks
- Proposers' input regarding data needed to efficiently price the project
- Determine extent to which proposers may rely on information provided

2015 NCHRP legal digest entitled “Liability of Design-Builders for Design, Construction, and Acquisition Claims.”



Consultation with Stakeholders, Utility Owners and Other Third Parties

- Identify the project stakeholders, affected utility owners and other third parties
- Assess level of risk associated with approvals required from project stakeholders and third parties (e.g., delays in actions/ approvals by third parties)
- Mitigation strategies include
 - early negotiation of agreements with utility owners / third parties
 - establishing “rules of the game” and including risk-sharing provisions in contract



Determining ROW Strategies

- Consider how to address ROW risk / responsibility
- Significant acquisition responsibility can be transferred to private sector, but power of eminent domain can only be exercised by the government
- Identify required parcels and set the stage for acquisition to commence after NEPA approval
- Contract provisions need to address Uniform Relocation Act restrictions
- Consult: ROW staff, consultants, condemnation counsel

Federal Participation/PABs Allocation

- Early and effective federal engagement is recommended (Florida's I-4 procurement was the first project to implement streamlined TIFIA procedure)
- FHWA's Special Experimental Project SEP-14 and SEP-15 – Experimental programs relevant to innovation that benefits P3 projects
- FTA's "Private Investment Project Procedures" (PIPP) (rule promulgated May 2018)

Early Contractor Involvement / PDA

- Successful example: Texas NTE
- No single way in which Project Development Agreements (PDAs) have been deployed: may involve qualifications-based or best value selection process
- ***FHWA and Build America Bureau, “Early Contractor Involvement of Private Developers in the Consideration of Long Term Public Private Partnership Concession Options: A Discussion Paper”***



Document Control

- Importance of document control
 - Different players involved in document development
 - Confidentiality is needed for certain types of communications
- Approaches:
 - Colorado DOT's Electronic Document Management System (EDMS) (ProjectWise) or HPTE's (Aconex)
 - Use data systems, standards and procedures
 - Provide secure locations to use systems
 - Train personnel
 - Upload data and regularly back up all documents



Test Your Knowledge

- Project activities during the early stages of the procurement include:
 - ☐ Defining project
 - ☐ Developing traffic/ridership and revenue projections
 - ☐ Assessing site conditions
 - ☐ Consulting stakeholders
 - ☐ Determining right-of-way strategies
 - ☐ Federal engagement
 - ☐ Document control

Test Your Knowledge (Answers)

- Project activities during the early stages of the procurement include:
 - ✓ Defining project
 - ✓ Developing traffic/ridership and revenue projections
 - ✓ Assessing site conditions
 - ✓ Consulting stakeholders
 - ✓ Determining right-of-way strategies
 - ✓ Federal engagement
 - ✓ Document control

Part 5: Transparency

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Public Transparency

- Different agencies subject to different procedures/rules for public disclosure of information



Public Interest in Transparency

- Information may be kept confidential during the procurement process
 - Preserves competitive tension
 - Ensures that proposers are willing to engage in open discussions
- Public interest in confidentiality
Is outweighed by public
interest in disclosure after award



Public Transparency (continued)

(49 U.S.C. § 116(e)(3)(A))

- Build America Bureau ensures transparency of a project receiving credit assistance by
 - Requiring VfM or a comparable analysis by sponsor
 - Requiring analysis and other key terms of P3 agreement to be made publicly available by the project sponsor at an appropriate time
 - Requiring sponsor to conduct a review of whether private partner is meeting terms of P3 agreement within 3 years of project completion
 - Providing a publicly available summary of the total level of Federal assistance in the project



Confidentiality Agreements

- Confidentiality and non-disclosure agreements may be required during procurement for:
 - Individuals involved in discussions with proposers
 - Participants in proposal evaluation
 - Outside consultants and observers
- Exemptions from public disclosure:
 - Aspects of financial proposals
 - Financial model
 - Cost and pricing data (potentially)



TxDOT Example

Proposers must provide executive summaries suitable for immediate disclosure

- Following selection of a proposer for negotiations (“conditional award”), its price proposal is subject to disclosure
- After final award, all portions of the proposals (including those of the unsuccessful proposers), except certain non-public financial statements, are subject to disclosure

FDOT Example

- Port of Miami Tunnel (POMT)
 - Sunshine Law request was made shortly after proposals were received, resulting in the public disclosure of technical proposals early in the evaluation process. Problematic for proposal revisions (aka BAFOs)

Test Your Knowledge

State whether true or false:

- Public interest in transparency ensures that proposers are willing to engage in open discussions and preserves competitive tension.
 - ☐ True
 - ☐ False

Test Your Knowledge (Answers)

State whether true or false:

- Public interest in transparency ensures that proposers are willing to engage in open discussions and preserves competitive tension.

☒ True

☐ False

Test Your Knowledge

- For projects receiving Federal credit assistance, what are the Build America Bureau's requirements to ensure transparency:
 - ☐ VfM or a comparable analysis by sponsor
 - ☐ Analysis and other key terms of P3 agreement to be made publicly available by the project sponsor at an appropriate time
 - ☐ Requirement for sponsor to conduct a review of whether private partner is meeting terms of P3 agreement within 3 years of project completion
 - ☐ Provision of a publicly available summary of the total level of Federal assistance in such project

Test Your Knowledge (Answers)

- For projects receiving Federal credit assistance, what are the Build America Bureau's requirements to ensure transparency:
 - ✓ ☐ VfM or a comparable analysis by sponsor
 - ✓ ☐ Analysis and other key terms of P3 agreement to be made publicly available by the project sponsor at an appropriate time
 - ✓ ☐ Requirement for sponsor to conduct a review of whether private partner is meeting terms of P3 agreement within 3 years of project completion
 - ✓ ☐ Provision of a publicly available summary of the total level of Federal assistance in such project

Part 6: Unsolicited Proposals, Protests and Third Party Risks

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Unsolicited Proposal Definition

“a written proposal for a new or innovative idea that is submitted to an agency on the initiative of the offeror for the purpose of obtaining a contract with the government, and that is not in response to an request for proposals, Broad Agency Announcement, . . . or any other Government-initiated solicitation or program.”

~48 C.F.R. § 2.101.

Unsolicited Proposal Rationale

Offers the opportunity to the private sector to identify projects that are good candidates for equity investment.

Allows the private sector to offer alternative and innovative approaches to construction, operations and financing to accelerate project delivery

Provides wide latitude to experienced private sector firms to innovate.

Provides opportunities to utilize existing public assets and facilities in non-traditional ways.

Unsolicited Proposal Example

- Virginia I-495
 - At the time the Virginia DOT received the proposal in 2002, it was not considering priced managed lanes on the right-of-way, and HOT lane implementation in the United States was still in its nascent stage
 - The innovative proposal provided a solution to the congestion problem as well as a mechanism to finance the roadway expansion while minimizing externalities such as land acquisition

Unsolicited Proposal Disadvantages

- Can be a burden on the public agency particularly if there are mandatory requirements to review and evaluate
- Significant staff and/or specialized consultant resources may be required
- Proposed project might displace agency priorities
- Proprietary information provided by proposer vs. public interest in transparency

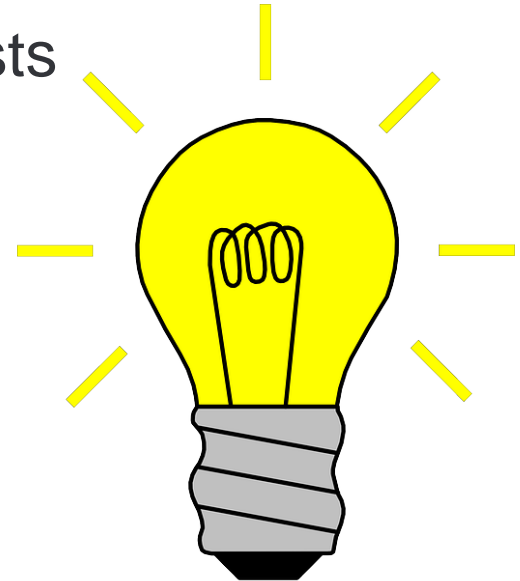
Protests

- State laws governing procurement protests vary from jurisdiction to jurisdiction
- Typical grounds for protest
 - Firm is not shortlisted/ selected for award
 - Proposer believes that solicitation terms are not clear, are unlawful, or favor one proposer
 - Agency fails to act according to its own procedures
- Protest procedures
 - Adopt procedures for each type of protest
 - Deadline to file protest before proposal due date (for shortlist and for RFP terms)



Risks Associated with Utility Relocations and Other Third Parties

- Failure to cooperate can quickly raise costs
- Agreements with utility owners and third parties
 - Ideally Master Agreements and Third Party Agreements would be finalized before award of P3 agreement
 - Cost liability of relocations determined with reference to State law
- P3 agreement provisions should identify
 - Existing utility/third party rights and agreements
 - Requirements that concessionaire must meet before it may call on agency for assistance or obtain relief





Questions?



Q&A Panel



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Jonathan Gifford

Professor, George Mason University



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

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



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