



Report On P3 Projects And Legislation In California

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Introduction

In recent years, one approach to infrastructure building on which state and local governments have increasingly relied is the public-private partnership (P3). P3s place a broad range of project responsibilities and risks onto private entities, some of which were traditionally borne by public agencies alone. Typically, a P3 agreement calls on the private partner to not only design and build a facility, but also to finance, operate and maintain it. In exchange, the private party may be entitled to tolls or user fees that the facility generates, or may receive direct payments from the government. In this article, we discuss the status of California law as it applies to P3s and examine a debate in progress surrounding a P3 project in Long Beach.

Statutory Authority

California statutory law authorizes the use of P3s for certain state and local government projects. As described below, P3s are authorized for Caltrans, the Judicial Branch, the High-Speed Rail Authority (HSRA) and local government agencies.

Caltrans

In 1989, the Legislature authorized Caltrans to use P3 arrangements on up to four projects. Caltrans subsequently entered into two P3 agreements, one to build toll lanes on State Route (SR) 91 in Orange County, and the second to build SR 125¹, which connects the Otay Mesa border-crossing area with the state highway system. Each contract required the private developer to design, build, finance, operate and maintain the facility.

Caltrans' P3 authority was amended in 2009 in California Streets & Highways Code Section 143. That year, the Legislature authorized Caltrans to enter into an unlimited

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¹ Ultimately, the SR 125 project became the subject of heavy criticism. The private partner failed to service its debt obligations, and filed for Chapter 11 bankruptcy protection, citing lower than projected usage of the toll road due to macroeconomic factors.



number of P3 agreements for various transport infrastructure projects through 2016. Such projects must achieve one or more objectives as determined by the California Transportation Commission. These objectives include improving travel times and reducing transportation delays; improving transportation operation or safety; providing quantifiable air quality benefits; and meeting a forecasted demand of transportation. All Caltrans P3 agreements must, also, undergo a 60-day review by the Legislature and the California Public Infrastructure Advisory Commission prior to being signed.

After passage of the 2009 statute, Caltrans entered into a P3 agreement for Phase II of the Presidio Parkway project in San Francisco. The agreement calls on the private partner to design, build and finance the second phase of a roadway replacing Doyle Drive, a 1.6-mile segment of Route 101 that provides southern access to the Golden Gate Bridge. The private entity is also responsible for operating and maintaining the structure for 30 years. In return, the state agreed to pay the private partner an estimated \$1.1 billion over the duration of the contract.

Judicial Branch

Existing law grants the Judicial Branch authority to enter into P3 contracts.² Such agreements are subject to legislative approval of performance standards adopted for the project by the Judicial Council and its staff in the Administrative Office of the Courts (AOC).

To date, the only P3 project commissioned by the Judicial Branch is the Long Beach Court Building. The new facility is the first social infrastructure project in the United States procured under the principles of Performance-Based Infrastructure (PBI) contracting. Total development cost is approximately \$490 million, with design-build cost of approximately \$343 million. Under the PBI agreement, the Judicial Council of California (JCC) will own the building, and the Superior Court of Los Angeles County will occupy approximately 80% of the space. The JCC will pay Long Beach Judicial Partners (a private consortium) an annual, performance-based service fee for 35 years. The PBI delivery method will leverage the private sector's access to financing, technological

² Government Code sections 70371.5 and 70391



expertise and management efficiency to quickly provide a premium facility to serve the Superior Court of Los Angeles County. The five-story, 545,000-square-foot building contains 31 courtrooms, in addition to court administration offices, Los Angeles County lease space and leasable retail space.

A study by the AOC compared various types of delivery methods, including design/bid/build and design/build for a court-only building using traditional state management and financing. Ultimately, the P3 delivery system proved the most cost-effective for construction and maintenance over the life of the Courthouse. The AOC discovered that the P3 system would likely save up to \$52 million when compared to a traditional state-funded project. The Courthouse opened on time and within budget in September 2013.

High-Speed Rail Authority (HSRA)

The Legislature approved establishment of the HSRA in 1996, and authorized the agency to enter into a P3 for development of a train system linking northern and southern California.³ While capital expenditures by HSRA require legislative consent, there is currently no statutorily-mandated process for formal review and approval of P3 projects. In any event, forecasts presented in HSRA's 2012 business plan suggest the agency will not enter into a P3 agreement until at least 2023.

Summary of State Public-Private Partnership (P3) Authority				
State Department	Type of Infrastructure	State Law	Brief Description	Projects To Date
Caltrans	Highways	Chapter 107, Statutes of 1989 (AB 680, Baker)	Allowed Caltrans to enter into up to four P3s.	State Route (SR) 91 and SR 125
Caltrans and regional transportation agencies	Highways, local roads, and transit	Chapter 2, Statutes of 2009 (SB 2X 4, Cogdill) ^a	Allows Caltrans and regional agencies to enter into an unlimited number of P3s through 2016.	Presidio Parkway
High-Speed Rail Authority (HSRA)	High-speed rail	Chapter 796, Statutes of 1996 (SB 1420, Kopp)	Allows HSRA to enter into P3 contracts for the proposed rail system.	High-speed train system
Administrative Office of the Courts (AOC)	Court facilities	Chapter 176, Statutes of 2007 (SB 82, Committee on Budget and Fiscal Review)	Establishes process for review of AOC P3 projects.	Long Beach Courthouse

^a Replaced the P3 authority previously provided to Caltrans under Chapter 107.

Source: Mac Taylor, Maximizing State Benefits From Public-Private Partnerships, Legislative Analyst's Office

³ Government Code sections 70371.5 and 70391

Local Government Agencies

California's Infrastructure Finance Act (IFA), adopted as AB 2660 (1996) (Aguiar) and published in California Government Code section 5956, authorizes local governments to utilize private sector investment capital for carrying out "fee-producing infrastructure facilities." A fee-producing facility is one whose operation is paid for by the persons benefited by or utilizing the facility. Also, the IFA applies to a host of governmental entities, including cities (general law and charter), counties (general law and charter), school districts, community college districts, public districts, county boards of education, joint powers authorities, transportation authorities, or any other public or municipal corporations.

Under the IFA's broad authority, a local government agency may contract with private parties to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair or operate fee-producing infrastructure facilities. The government agency may also elect to grant private parties with ownership or lease rights to such facilities for up to 35-year terms.

The IFA permits various sorts of projects, namely irrigation; drainage; energy or power production; water supply, treatment, and distribution; flood control; inland waterways; harbors; municipal improvements; commuter and light rail; highways or bridges; tunnels; airports and runways; purification of water; sewage treatment, disposal and water recycling; refuse disposal; and structures or buildings that will not be utilized primarily for sporting or entertainment events.

However, local governmental agencies may *not* use the statutory authority to design, construct, finance or operate state projects, including toll roads on state highways, state water projects, state park and recreation projects, and state-financed projects.

Case Law Relating to P3s

The status of P3s in California received a boost in *Professional Engineers in California Government v. Department of Transportation*, (2011) 189 Cal.App.4th 17. The P3 at issue in the case was Phase II of the Presidio Parkway Project (Project) described earlier. CalTrans, the implementing agency for the Project, awarded the P3 contract to Golden Link Partner G.P. The Project was to be financed by the State through fuel tax revenues. After a public hearing, the contract was submitted to the California Legislature and to the Public Infrastructure Advisory Commission (PIAC) for review and comment.

Soon after, Professional Engineers in California Government (PECG) filed an action to halt further implementation of the Project. PECG claimed the Project violated California Streets & Highways Code Section 143 (the statute authorizing Caltrans to enter into P3 agreements). Affirming the trial court, the Court of Appeals rejected PECG's claim for relief.

PECG contended, first, that Caltrans was not the "responsible agency" for the P3 as mandated by the statute, because private engineers, and not Caltrans employees, would conduct the work on the Project. The Court dismissed this argument, holding that while the statute required Caltrans to be responsible for performance of the work, it did not obligate Caltrans to use its own personnel for carrying out the work. The Court stated that under a commonsense reading of the statute, to be a "responsible agency" connotes only supervisory control.

Additionally, PECG claimed that the Project failed as a proper P3 under the statute, since it would not be funded through tolls or user fees. The Court also rejected this argument. While the statute states that P3 agreements must *authorize* the use of tolls and user fees, it does not *require* their use as a necessary funding source in every P3, said the Court.

Following the decision, PECG again appealed, but in November 2011 the California Supreme Court declined to hear the case.



Debate Surrounding the Long Beach Court Building P3

As discussed above, the Long Beach Court Building (Courthouse) is, at present, the only P3 project commissioned by the Judicial Branch. The value of constructing the Courthouse using a P3 approach has been the subject of considerable disagreement, particularly between two government agencies, the Judicial Council and Legislative Analyst's Office (LAO).

An LAO report titled *Maximizing State Benefits from Public-Private Partnerships*, dated November 8, 2012, states that the Courthouse was selected as a P3 candidate primarily due to the project's size and the surrounding area's market for the sort of property management staff that could operate a P3. The report claims, however, that the selection process did not include several "best practices" that the report identifies as having "been found to maximize the potential benefits of P3s and minimize its potential limitations." The report gives the example that the selection process did not evaluate whether the project was technically complex. It goes on to say that the project, in fact, "lacks unique or complex features that would likely benefit from innovative design and construction techniques." The report also critiques several assumptions used in an AOC-commissioned analysis demonstrating the cost savings to the State of using a P3 method relative to more traditional procurement options. The report concludes that the P3 approach was "problematic," "inappropriate," and, under a revised set of assumptions, more expensive to the State than a traditional approach.

A few weeks after the report was published, the Judicial Council offered its rebuttal in a letter to LAO. The letter states that the Judicial Council "worked closely with the Executive Branch and responded to concerns from the Joint Legislative Budget Committee and [LAO] as [the Judicial Council] developed the performance criteria and agreements that structured [the] project." The letter then challenges the LAO report's claim that the project "lacks unique or complex features" by maintaining that a Courthouse such as Long Beach contains various "inherently complicated and technically challenging" features, including "electronic systems for security, life safety, energy management, and communications," as well as "hundreds of detention cells with specialized equipment." These features, the letter argues, made the Courthouse "a good candidate for leveraging private sector expertise through a P3." The letter then



defends the assumptions used in the AOC-commissioned analysis, contending the analysis was “performed reasonably” and “consistent with industry practice.”

[New Protections for Subcontractors on Certain P3 Projects](#)

On August 13, 2013 California Gov. Jerry Brown signed AB 164, legislation that amends the Government Code related to infrastructure financing that authorizes local government agencies to use P3s to design, finance and maintain a variety of fee-producing infrastructure facilities. The new law requires inclusion of “payment bonds to secure the payment of claims of laborers, mechanics, and materials suppliers employed on the work under contract” and “performance bonds as security to ensure the completion of the construction of the facility.”

The new law extends California’s “Little Miller Act” which requires the prime contractor to furnish surety bonds on public construction projects in excess of \$25,000 in the amount of 100% of the contract to assure that the project will be completed, protecting taxpayer dollars, and that subcontractors and suppliers will be paid.

[Conclusion](#)

In a landscape of intense budgetary constraints and fiscal austerity, P3s offer government agencies in California and across the nation an alternative mechanism for financing vital infrastructure projects. Construction industry professionals collaborating with public entities may increasingly operate through P3 arrangements. These professionals must remain abreast of applicable state and local laws, including frequent changes thereto, and should seek the assistance of counsel throughout the P3 process.

[Peckar & Abramson’s P3 Expertise](#)

Our Public-Private Partnerships (P3) Group is adept at addressing the regulatory, contractual, transactional, financial and political issues that accompany P3s.

Peckar & Abramson attorneys are expertly familiar with all aspects of P3 projects. This enables our group to help clients successfully solve challenges associated with these complex and risky ventures.



Our P3 Group combines legal, political and business experience with meaningful relationships with government officials, financial institutions, concessionaires, contractors, architects and engineers to provide insights few other firms can offer. We feature a multidisciplinary approach with extensive domestic and international experience in P3 projects. Our attorneys skillfully help clients navigate political risk, in addition to addressing the interests of all stakeholders.

We can help with:

- All aspects of construction and public contract law, thanks to our diverse and experienced group of construction lawyers in key markets around the country, and relationships with leading firms around the world.
- All phases of a P3 project, from concept and permitting to bidding and project capture, and through construction, operation and maintenance.
- Government relations: In these projects, navigating the political landscape is crucial. With our help, clients develop the necessary support at all levels of local, state and federal government, from conception through operation.
- The creation and negotiation of contracts with government agencies and authorities, concessionaires, and design-builders.