

The Intricacies of the P3

A look at the public-private partnership legal practice in Colorado

BY DOUG CHARTIER
LAW WEEK COLORADO

With massive redevelopments of Denver International Airport, Union Station and Colorado's busiest highways grabbing headlines in recent years, it might seem that public-private partnerships are a novelty in the state. But P3s in Colorado are both new and not, and the attorneys who work in these megaprojects have developed their own approaches to the evolving model.

NOT YOUR TYPICAL DESIGN-BUILD

It's tricky to define exactly what a P3 project is. But generally, P3s are infrastructure developments that might be too huge — and perhaps too risky — for governments to finance and/or

manage effectively on their own. Enter the private developers, who bring ideas as well as capital to the project and strike a deal with the public entity to design, build and manage some portion of the infrastructure for a share of the revenue. The government ideally sees a benefit by shifting some of the risks, like potential cost overruns and project delays, onto the private firms.

A P3 deal can also be summed up as a massive risk allocation agreement with a term of several decades to a century. The Union Station redevelopment completed in 2014, an iconic example of a Denver P3, is a 99-year lease between the Regional Transportation Department and a private joint venture. The revenue sharing can get creative depending on how much risk each side agrees to take on. In the Union Station deal, the private partners keep all of the annual gross retail

revenue up to \$12 million; RTD gets a 7.5 percent cut of anything earned in excess.

Colorado has long had private investment in many of its major public assets — just not to the degree of a P3 seen today.

"P3 is new, but maybe not so new," said Greg Johnson, counsel at Squire Patton Boggs in Denver. As a finance attorney who's been involved in Colorado infrastructure projects for more than 30 years, Johnson has worked on the financing for Coors Field and Invesco Field at Mile High, currently known as Sports Authority Field. He said those projects contained elements of the P3 structure in the sense that private funding was brought into play. Larger infrastructure projects have brought in more private work and investment over time, leading to a P3 model that's seeing increasing use by

state and local governments.

"We've gone from a time when P3 was limited to auxiliary governmental functions," to now where Colorado's public entities are leveraging it for more core functions, Johnson said.

COLORADO AT THE FOREFRONT

It would make sense that Colorado is one of the more fertile areas for P3 legal practice — the model has its roots here. Constructed between 1989 and 1991, the E-470 toll way that travels around the eastern border of the Greater Denver Area is considered one of the first modern P3 projects in the U.S.

The state carries a friendly reputation among national P3 legal practices.

"I think Colorado is viewed in the industry as a very positive state (for P3s)," said Steve T. Park, who leads Ballard Spahr's P3/Infrastructure Group

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out of its Philadelphia office. Having worked on infrastructure and transportation projects in states including Georgia, Pennsylvania and Virginia, Park said that to the extent that one jurisdiction is easier to work with than others in terms of its statutory landscape and public entities, Colorado

ing the project to the public stakeholders, as well as city councils, mayors, governors and other political leaders. Thomas said that misconceptions can abound regarding the project or deal because the public and leaders are likely unfamiliar with how a P3 deal works.

decide what methodology will provide the best value for the money for them" before they issue a request for proposals. It's also helpful for the attorney to explain examples of similar past projects, she added.

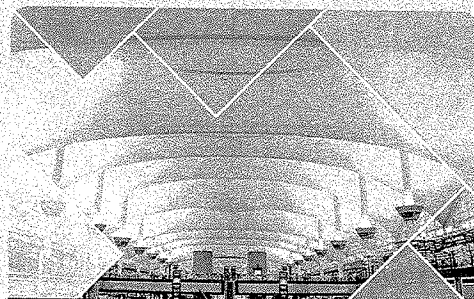
When representing the private side, Parks said, a lot of times it starts with

other such changes that might come down the road, Park said.

Another common issue is the management of hazardous materials, which can emerge once the developers start digging. Hazardous materials on a property are often chalked up as an unknown risk, but the question is

BILLION DOLLAR P3S

Here's a glance at two of Colorado's most recent — and most visible — P3 megaprojects in the works.



DIA GREAT HALL RENOVATION

The Deal: The City and County of Denver struck a 34-year, \$1.8 billion deal with a cadre of private firms to renovate its main terminal, or Great Hall.

What It Would Do: The project would reconfigure the Great Hall's security checkpoints and ticketing stations while adding more shopping and food outlets.

The Private Sector Players: Ferrovial Airports, a Spanish company that has performed major airport infrastructure work in the UK, would lead the private sector group to design and build those components and manage the retail/concessions. The other firms in the "Great Hall Partners" group include Saunders Construction and JLC Infrastructure, a joint venture between Magic Johnson Enterprises and Loop Capital.

Some Financials: The Great Hall renovation itself is projected to cost \$650 million, with the airport covering \$480 million of that. The other \$170 million would come from Great Hall Partners. Over the contract term, Great Hall Partners would receive \$1.2 billion from DIA in operating and maintenance costs and would take 20 percent of revenue from the new concessions.

Where It Sits: Denver City Council has to approve the DIA deal, and a vote is scheduled for Monday.

rates well.

Governor Hickenlooper has been a strong proponent of P3s as a development tool and was a keynote speaker at a March 2016 national P3 conference in Dallas. The Colorado Department of Transportation is often credited with sparking the current P3 trend in the state, and its High Performance Transportation Enterprise is dedicated to pursuing P3s.

TEACHING THE MODEL

Not every public entity is as receptive or familiar with how P3s work, however. Because the P3 model is literally foreign to much of the U.S., attorneys tend to spend a lot of time educating clients about it. Michael Thomas, a Denver-based partner in Kutak Rock's public finance group, said this is the case with a lot of his government clients that consider P3s as an option.

"In the beginning there wasn't really a lot of understanding of what you mean by a P3," Thomas said. The learning curve is steep because P3s have so many moving parts for public clients to consider, such as how much private control they want to give up or what ways they want to finance the asset they're building. The P3-focused lawyer has to be able to glean his or her client's expectations and then effectively outline the myriad options.

Then there's the matter of explain-

"As soon as you say 'I've got a public-private partnership,' the world changes and you need to explain everything," Thomas said. Even a plan to simply add a wholly optional toll lane to a highway can receive pushback by virtue of a private company being brought in on the public asset. But the public tends to ask good questions regarding their concerns and how the project might affect them or the public asset, Thomas added — they're just not used to the P3 model. Thomas said the US 36 Express Lanes project between Denver and Boulder was a good example of this: There was "lots of screaming and shouting" when it was underway in 2014, but now that the dust has cleared, motorists seem to like the results, he said.

WORKING FOR EACH 'P'

Many P3-focused lawyers, like Dorsey & Whitney partner Diana Parks, have experience working either side of the public-private divide. And there's "absolutely" a difference in how she approaches each type client, she said.

"When I represent the public client, the focus is ultimately on how they should structure the procurement to get the best value for themselves and the public stakeholder," Parks said. It also involves walking the public client through the risk matrix of the proposed project "to help them

the attorney working with the company to analyze whether the owner is reputable and able to reliably pull off the project as well as who the competing bidders are. The companies must choose their P3 targets carefully: They can spend upwards of \$10 million just pursuing the opportunity, tying up resources and management during that time, Parks said.

ANTICIPATING THE UNKNOWNNS

The sheer size of a P3 expands the scope of the risk analysis that attorneys have to perform on those deals, particularly given the long life of the contract. Costs can add up over the term of the P3, and seemingly small operations and management functions, like snow removal on a highway, can grow large. "Over the course of 50 winters, that could be millions and millions of dollars," Park said.

A lot else can happen over those decades, and that only multiplies the considerations P3 lawyers have to make in an agreement. Legislative and regulatory changes can dramatically alter the project's costs and liabilities. For example, what if the state legislature someday passes a new law requiring a certain type of highway structure to be reinforced with more steel?

The parties on a transportation P3 hopefully have clarified who would bear the cost — the government or a private firm — to comply with that and

who will be responsible for the mitigation. Developers and their lenders are loath to assume an unquantifiable risk, so typically one sees the public entity taking it on, Park said.

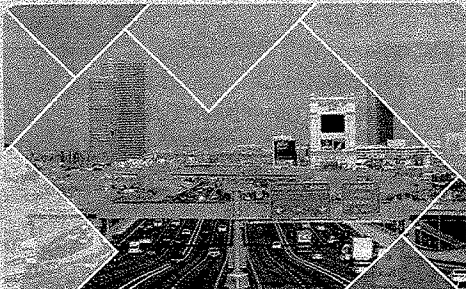
Perhaps the trickiest part of the P3 practice space is its youth. There isn't much precedent for attorneys to rely on when trying to predict the long-term success of a P3, and even many of the earliest P3 deals have yet to see the end of their contract life. But there are reference points to use if one looks to Europe and Canada, where P3s have long seen wide adoption prior to the U.S., particularly in transportation.

"A road in the U.S. is not that different from a road in Europe," Park said, adding that the P3 industry "feels pretty comfortable that they've caught most of the risks" in those types of projects from looking overseas.

Thomas said he sees P3s potentially playing a much bigger role nationally.

If the Trump administration delivers on its promises to support more infrastructure development, that could perhaps generate more large-scale projects nationwide, and hence more opportunities for private players to join in if governments go the P3 route — a place where "Colorado really is on the cutting edge right now," Thomas said. •

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I-70 EAST EXPANSION

The Deal: The Colorado Department of Transportation is seeking bids from the private sector to help reconstruct and widen a section of I-70, an endeavor CDOT estimates will cost \$1.17 billion.

What It Would Do: Slated to run 10 miles east from Brighton Boulevard in Denver to Chambers Road in Aurora, the Central 70 Project would lower a section of the highway and add express lanes.

The Private Sector Players: Four teams of finalists are bidding on the project: Front Range Mobility Group, Kiewit/Meridiam Partners, 5280 Connectors and I-70 Mile High Partners.

Some Financials: While CDOT has yet to award a contract, it has broken down the primary funding sources for the \$1.17 billion: \$850M from the Colorado Bridge Enterprise, \$180M from SB 09-228 funds, \$50M from the Denver Regional Council of Governments and \$37M from the City of Denver.

Where It Sits: The Central 70 Project is advancing but is currently facing several lawsuits. The complaints' allegations include that the project would generate environmental hazards, civil rights violations, and a storm water drainage area that could threaten an existing golf course.