

PUBLIC-PRIVATE PARTNERSHIP (P3): Facilities and Infrastructure

This practice provides guidance to the public procurement professional who is considering a Public-Private Partnership (P3) as an appropriate solution to a stated need or requirement. This document defines P3s in the context of the construction of public facilities and infrastructure. The practice is also intended as a reference, to be shared with elected public officials, government executives, and private sector executives on the use of and procurement through P3 contracts.

STANDARD

P3s are procurements that combine design and build components under one contract between the public sector and the private sector. The involvement of Procurement is crucial to the success of a project that uses a P3. If considering a P3 contract, the entity should ensure specialized expertise (e.g., finance, real estate, technology) among the team assigned to the project. A certain amount of flexibility must be incorporated into P3 contracts to address how future issues will be approached, including a process for resolution. While the private partner may share in financing the project, the government will always be held responsible for the outcome of the project.

Definition

A public-private partnership (P3) is a broad term used to describe public facility and infrastructure contracts that minimally include components of design and build (e.g., construction, renovation, rehabilitation) in a single contract. Components of financing, operations, maintenance, or management may be included within this single contract. A P3 contract allocates risks to the party (the government or the contractor) best able to manage the risks and may assign a higher level of responsibility for means and methods to the private partner.

Element 1: P3s include Design (D) and Build (B) elements in a single contract for the construction of public facility or infrastructure projects.

Traditional construction contracting separates design elements from build elements into two distinct contracts. When design and build are combined into one contract, partnership characteristics may be exhibited (e.g., the transfer of more decision responsibility away from traditional government decision processes). Design-Build (DB) contracts constitute the foundation of a P3.

Adding the component of Maintenance (M) into the same contract increases the complexity of a contract and would be referred to as a “design-build-maintain” (DBM) P3. Operations (O) and Maintenance (M), separately or in combination, do not constitute a P3 unless combined with Design and Build.

Although ancillary services that support the facility or infrastructure project may be involved within a P3, for the purposes of this document, the actual P3 refers only to the facility or infrastructure project, including renovation, rehabilitation, and expansion of existing facilities as well as new facilities. Some examples of public facility and infrastructure projects that might use a P3 contract are:



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- Roads, highways, tunnels, and bridges
- Civic centers and arenas, sports stadiums, recreation sites and facilities
- Water/Wastewater systems
- Industrial parks
- Museums, theaters, libraries
- Housing projects, dormitories, detention centers
- Hotels, conference centers, parking garages
- Communications infrastructure

Element 2: The continuum of P3 contract types ranges from simple to complex.

P3 contracts range from simple to complex along a continuum that includes Design (D), Build (B), Finance (F), Operations (O), and Maintenance (M). Design-Build (DB), the foundation of P3 contracts, features the least number of components with private sector responsibility. As additional components (F, O, M) are added and the contract becomes more complex, the responsibility for means and methods moves toward the private sector (See Figure 1).

Figure 1: Responsibility in P3 Contracts

P3 Type

Activities	Design-Build (DB)	Design-Build-Maintain (DBM)	Design-Build-Finance (DBF)	Design-Build-Finance-Maintain (DBFM)	Design-Build-Finance-Operate (DBFO)	Design-Build-Finance-Operate-Maintain (DBFOM)
Planning	G	G	G	G	G	G
Design	C	C	C	C	C	C
Construction	C	C	C	C	C	C
Financing	G	G	C	C	C	C
Operations	G	G	G	G	C	C
Maintenance	G	C	G	C	G	C


Increasing Private Sector Responsibility
G = Government C = Contractor

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Element 3: Establish and apply entity principles and criteria for the use of a P3

Contracting principles should reflect the values and mission of the entity. The P3 agreement must provide better value, better quality, or exhibit practical advantages (e.g., access to private sector capital or acceleration of construction timeframes) that cannot be achieved solely by the public sector.

- The decision to use a P3 must be justified by a thorough analysis of all project delivery alternatives, with a decision process that must include and be transparent to the public.
- Core competencies of the public and private partners must be complementary, thus making the partnership necessary and stronger.
- The contract must include adequate safeguards to protect the public from additional costs or service disruptions in the event of material default or cancellation of the agreement by either party.

A P3 must not be used to avoid the normal budget process, voter approval, or legislative/governing board approval. If access to private capital is pursued as a means to avoid debt limits or requirements (e.g., voter approval), then public procurement professionals are obligated to raise concerns. Reporting of such concerns and justification (who is making the decision and why) should be documented in the public record.

Criteria for choosing a P3 may include:

- Public regulation of operational decisions regarding the use of facilities or infrastructure by a private partner (e.g., for a parking garage, the government would decide what percentage of parking spots are designated for employees versus shoppers).
- Public responsibility for determining the options, including the type of facility and infrastructure, that would best achieve the desired public function outcomes (e.g., library access could be achieved by designing and building one large library or several branches).

Element 4: A P3 contract follows the procurement cycle and requires Procurement to construct a formal plan for each stage.

Due to the complexity and importance of a P3, every stage of the procurement must be carefully planned. Procurement must use an increased degree of diligence and expertise to find a way to market the opportunity, seek full and open competition, and balance all the risks and responsibilities associated with the project. The formal plan should ensure all elements of the procurement cycle, from need to disposal, are addressed.

Element 5: Assess feasibility of the project as a P3.

A feasibility study reveals project requirements and alternative approaches for meeting the requirements. The requirements are the most fundamental and critical factor in the success of the contemplated project. The entity is responsible for planning decisions, but planning should not be accomplished in isolation. Determining needs, creating a business case with alternatives, and analyses of the alternatives should follow an open process that includes relevant stakeholders, including potential private sector partners. Procurement staff are crucial to many of the feasibility assessment tasks associated with P3s and can serve to form and unify the team of specialists and stakeholders.

The inclusion of the potential private sector partners throughout the feasibility assessment phase is critical. Holding pre-solicitation conversations can provide ample opportunity to transparently share information and prevent any misperceptions surrounding the process with potential





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partners. The chances of success of the contemplated project improve when conversations with prospective P3 contractors and stakeholders are collaborative and open to diverse perspectives and expertise (Campbell et al., 2014).

To make an informed decision regarding the type of procurement method for the design and construction of the facility or infrastructure, the entity must first assess and justify the need for the project and explain the desired outcome in detail. A description of the challenge or opportunity will provide clear connections between the project objective and possible solutions to achieve the end result.

Long-term funding is often the basis, and a primary limiting factor, for the public sector to proceed with major public facility or infrastructure projects. Regardless of how a project is specifically financed, the total cost of the project will ultimately impact the public sector revenue source (New York, 2013). During the assessment process, the entity must consider whether the proposed project will garner the necessary public and political support.

Procurement must be knowledgeable of and act in accordance with any law that authorizes or prevents the use of a P3 (Rall, Reed, & Farber, 2010). An assessment of how Federal, state, and local regulations may affect the contemplated project should be conducted. Some factors that need to be taken into account may include:

- Legislative processes (e.g., whether governing bodies must approve a P3 agreement or award)
- Voter approval (e.g., debt)
- Tolling authorities
- Rate setting requirements for system revenues
- Procurement process requirements
- Public ownership of the facility or infrastructure
- Restrictions on public debt
- Federal or state financing eligibility
- Tax exemption requirements
- Liability or insurance requirements
- Antitrust statutes
- Public budgeting requirements
- Collective bargaining agreements
- Open meetings and public records laws
- Environmental review processes

A broad analysis should be conducted during the assessment to identify internal and external factors that may support or endanger the project. A long-term project may be impacted by internal finances, resources, and capacity of the entity. A long-term project may be impacted by external factors, which may include:

- The interests of current politicians as carefully weighed against choices that should be left for the future.
- Changing interests of special interest groups and the public.
- Scrutiny by the public and the media.
- Changing user demographics.
- Social impacts the project will create.
- Shifts in the economy.
- New, disruptive technologies that may appear.
- Force majeure events.
- Defaults by any private partner.

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Element 6: Determine whether a P3 contract is the best alternative.

Procurement should develop a range of feasible alternatives for delivering the project. A business case should be used to compare, contrast, and explain alternatives to a P3. The business case can be used to outline timing of the project and support budgetary planning and funding requests. When private sector financing is being contemplated, a value for money (VfM) analysis should be conducted and contrasted with a public sector comparator (PSC) (Martin et al., 2013). These analyses may include preliminary projections of potential revenue sources (e.g., the number of drivers expected to use a toll road or the number of water system users who will pay for the charges). Early analyses may be updated during the selection and negotiation stages. Regardless of when the analyses are completed, analyses should be subjected to an independent and impartial review process.

Potential benefits to the use of a P3 contract may include:

- Accelerated project delivery timeframes and improved economic efficiency.
- Creation of economic development benefits or social impacts.
- Improved quality and savings.
- Increased public budget certainty.
- Operation and Maintenance components that act as an extended warranty of quality and workmanship.
- Improved asset conditions and higher residual values by contracting for Operation and Maintenance.
- Increased staff capacity to work on other activities.

Potential challenges to the use of a P3 contract may include:

- Offering projects that are of commercial interest to the private sector (especially when pursuing private financing).
- Gathering unified support (e.g., public, elected officials) for the project over an extended period of time.
- Providing a single public sector voice for negotiations, especially when multiple public entities are involved.
- Developing realistic assumptions and calculations for long-term contracts and projects, based on uncertain underlying variables, that ensure the public investment is fair.
- Determining how much flexibility to build into the agreement for issues that may arise during the term of the agreement (European PPP, 2014).
- Dealing with complexities that may increase preparation time and transaction costs.
- Gathering sufficient supplier references and resources as compared to traditional government contracting.

The private partner in a P3 contract often seeks certainty and advantage. This can lead to less flexibility for the entity than what is typically afforded through traditional procurements. Before moving forward with a P3 contract, the entity must ensure that sufficient staff capacity and expertise are available to manage the contract throughout the planned timeframe. The entity must develop a “Plan B” should the chosen alternative fail at any point.

Element 7: Plan for the solicitation.

Procurement should consider the impacts of the solicitation method, requirements, and criteria on full and open competition. Once a P3 contract is determined to be feasible, Procurement should develop a procurement plan with project objectives, critical success factors, evaluation criteria, procurement process steps, and milestones. Planning focuses on how to build and issue a solicitation for private partners. Full and open competition should be promoted whenever possible, recognizing that sometimes limited or no competition is justified.





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By defining critical success factors for the entity, the project will be more attractive to the private sector and lead to the selection of the best partner. These factors also will contribute to building public support while complying with the jurisdictional law and affirming values and guiding principles of public procurement.

Procurement should develop a formal communication plan for potential proposers that balances transparency and confidentiality. Consideration should be given to the impact on competition and on social values, especially for minority-owned, woman-owned, and small businesses.

Considerations may include:

- Should certain project aspects suitable for small to mid-sized firms be procured separately?
- Should requirements for subcontractor participation be included?
- Do applicable laws allow requirements for subcontractor participation?
- Is there sufficient availability of potential P3 contractors and subcontractors?
- Would an advertising plan attract more competition?
- Is there sufficient time for private partners to organize and respond?

During this phase of the planning process, procurement should:

- Be prepared to respond to public scrutiny and media inquiries.
- Appoint a project team and technical evaluation committee with relevant expertise (e.g., financial, design, real estate) to support the plan and scope the procurement.
- Be aware of the political environment and outside pressures that might impact the process.
- Keep the focus on achieving the business objectives of the prospective P3 contract and build relationships with stakeholders and constituencies.
- State the defined public need and desired outcomes.
- Utilize performance-based contracting principles to define requirements and standards that allow potential partners to propose their best approach.
- Be aware of election timelines or budgetary periods that may impact procurement milestones.
- Enlist prospective offerors to help define an evaluation framework that can be used to fairly compare disparate project approaches.

When a P3 project includes a financing component (DBE, DBFO, DBFM, DBFOM), the private sector partner may operate as a special purpose vehicle (SPV) or joint venture (JV). An SPV is a separate legal corporate entity created solely for the purpose of serving as the P3 private sector partner. An SPV may be comprised of a private bank or investor, an engineering and architectural firm, a construction firm, and an operations and maintenance firm, in addition to specific subcontractors.

The separate corporate structure focuses the activities of the SPV solely on the P3 project and limits the financial exposure of the parent companies of the SPV. In a joint venture (JV), each of the participants is responsible for profits, losses, and costs associated with the project. Both SPVs and JVs are separate arrangements outside the usual business interests of any one firm.

To plan for the solicitation when an SPV or JV is involved, the government should ask for a complete description of all the business and governance relationships between the private partners, as well as any legal/financial limitations (e.g., limited liability, limited capitalization).

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The financing packages offered by the proposers are a critical selection factor. An outside financial consultant may be hired to evaluate the proposed financing packages. The consultant must have no conflicts of interest with respect to the procurement nor any financial dealings with any of the firms that comprise the potential SPV. At a minimum, the proposal should:

- Identify each proposed source of financing (e.g., debt, equity, government grants, government loans, government loan guarantees, private activity bonds, tax increment financing, PILOTS (Payment In Lieu Of Taxes), tax abatements).
- Identify the method of payment preferred by the proposer (e.g., tolls, availability payments).
- Document firm commitments from each source of financing in the solicitation requirements.

Element 8: Conduct the solicitation and select a private partner.

When considering the most appropriate selection method for a P3, several factors should be considered, including the complexity of the project, overall risk, and project completion deadlines. A method that utilizes qualitative and quantitative factors in the evaluation process is recommended.

Request for Solutions or innovative approaches

An entity may choose to open a P3 dialog with the potential partner through a publicly advertised solicitation requesting information or solutions to the defined challenge. Responses will consist of unpriced proposals or technical solutions that can be used to assist in assessing the feasibility of a project and to determine whether the project should be procured as a P3.

Request for Proposals (RFP)

When using a Request for Proposals (RFP), the inclusion of qualitative and quantitative evaluation factors will help to ensure the successful selection of a qualified contractor(s). The RFP method should include mandatory requirements that are evaluated on a pass/fail basis.

Multi-Step Process

A Request for Qualifications (RFQu) is developed as a means of prequalifying prospective contractors. The first step of this process uses qualitative factors to prequalify offerors. The second step uses price as the primary determining factor. Finally, an evaluation team reviews and evaluates each response according to subjective evaluation criteria contained in the RFQu. The top-ranked firms are then invited to respond to either a Request for Proposals (RFP) or an Invitation for Bids (IFB).

Competitive Dialogue

Competitive Dialogue was introduced into the European Union public procurement system in 2004 to provide an improved and more flexible method for awarding complex contracts. The method allows for collaboration between buyers and suppliers, in order to allow suppliers to offer innovative solutions and ideas for public projects. Competitive Dialogue is now a firmly established method in Europe and is commonly used in awarding contracts for public projects. Discussions are held with selected suppliers in successive stages until a solution is identified. All participating suppliers are then requested to submit final proposals on the basis of the solution resulting from the competitive dialogue. When using this method, the entity ensures equality of treatment for all participating suppliers. No submission is made available to other proposers.



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Joint Solutions Procurement (JSP)

This multi-step method is similar to Competitive Dialogue. JSP is more commonly used in the procurement of high dollar, complex projects with a high degree of risk.

Steps in the JSP solicitation method:

1. A Request for Information (RFI) is issued. Suppliers responding to the RFI are eligible to participate in any subsequent discussions or solicitations related to the project.
2. Submissions are evaluated by an evaluation team. Rankings are based on the proposed solution and the ability of the supplier to meet the requirements of the project. Qualified suppliers are invited to make formal presentations, including sharing of technical data and proposed solutions.
3. A formal Request for Proposals (RFP) is then issued to the suppliers that have offered acceptable solutions. Negotiations are conducted and best and final offers are requested from suppliers responding to the RFP.

Unsolicited Proposals

Unsolicited proposals are sometimes received from a potential private partner. After receiving an unsolicited proposal, the entity should assess the proposal for feasibility and determine if the project is appropriate for a P3 contract. If the government elects to proceed, the procurement process is initiated. Although full and open competition is the primary method of procurement, if the unsolicited proposal is accepted, a sole source procurement method may be appropriate. Procurement must follow the existing policies that address submission, acceptance, and consideration of unsolicited proposals.

Element 9: Conduct detailed contract negotiation.

Together, the entity and the private partner develop detailed project plans in order to ensure successful outcomes of the project. The entity bears the ultimate responsibility for success.

Once the partner has been selected, the entity must plan the approach to negotiations and contract development. Good negotiations are key for ensuring successful outcomes that are in the best interest of the public.

With multiple proposers, negotiations prior to best and final offers and selection provide for competition and lead to more completely developed proposals. When allowed by the jurisdiction, negotiations with multiple proposers, though requiring more time and effort, are considered a P3 best practice.

Negotiation

Many aspects of the contract are subject to negotiation. The complexity and intensity of the negotiation may be elevated during the P3 process. Negotiations should address approval authorities, plus the level of communication and involvement of other stakeholders. Both parties should agree on the actions to be taken and who will be responsible for particular elements of the agreement. The relationships established during the negotiation phase will be reflected in the development and administration of the contract.

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Contract development

A P3 contract may include:

- Performance-based contracting principles.
- Milestones and key performance indicators (KPIs).
- Strong maintenance and safety standards for contracts involving operations or maintenance. Public satisfaction measures may be used to trigger changes to operational procedures.
- Processes for ensuring high quality.
- The identification of risk and who will manage the financial burden (e.g., cost overruns, delays).
- Accountability metrics to be used once the contract is put into place.
- Accommodations for changes in the public needs.
- The ability to adjust the physical attributes and operation of the project due to changing conditions.
- Contract language that allows for a high level of openness and communication between the partners.
- Language that outlines the process to be followed at the time of unexpected events with directions for resolution.
- A communications plan that describes how stakeholders, including the media and the general public, should be informed during all phases of the project.
- Provisions that outline the partner's rights and obligations regarding communications with stakeholders (e.g., public, newly elected officials, investors).
- An appropriate governance structure if multiple parties are involved with clear definitions of the "Contractor" and the "Buyer" or the "Owner."
- An extensive risk management plan.
- Updated and refined economic assumptions that may affect the project outcome.
- Provisions for reporting on progress and documenting key decisions by the contractor.
- Joint decision making process to be implemented during the project.
- How savings will be accrued and distributed.
- Contract transition and close out.

Contractor payment options for long-term P3s with a financing (F) component

Contractor payments for long-term P3s with a financing (F) component (DBFO, DBFM, DBFOM) usually involve one or more of the following and should be detailed in the contract:

- Tolls (fees collected directly by the private partner from users of the public facility or infrastructure). Tolls should be explained thoroughly in the contract. The contract should ensure that the government either has sole discretion over the establishment and increase of fees, or has final approval of fee increases proposed by the partner.
- Availability or periodic payments (e. g., monthly lump sum payments) made by the government to the private sector partner when the facility or infrastructure is open and available for use. The source of funding for availability payments may come from monies paid by users directly to the government or from other sources of funding (e. g., general fund).
- Bonus payments or fines tied to KPIs.
- Provisions to adjust or renegotiate payments to the private partner.
- Established maximum payments.

Contractor (private partner) payment guarantees should be calculated against the total price paid and align with public need, usage, and sources of revenue.



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Element 10: Administer the contract and conduct assessment.

Procurement should construct plans for administering the contract and assessing the project throughout the life of the facility or infrastructure. Following the award of a P3 contract, the contract administration team conducts progress meetings and administers the payment schedule, performance milestones, key performance indicators, change management, dispute elevation, and risk mitigation. The procurement cycle includes assessments that occur throughout the project and help to refine current or upcoming project phases. Lessons learned on one project should be internalized and applied to future procurements.

Background

Public-Private Partnerships, also known as P3s or PPPs, are viewed by many as a new and innovative trend in government contracting; a risk sharing relationship between government and industry; a product of leaner government following the 2007 recession. P3s may be innovative, but they are not new. The term Public-Private Partnership emerged in Europe and Asia in the 1990s and in the United States in the mid-2000s. The combination of elements common to P3s can be traced back to ancient Roman roads, feudal castles, 14th century water systems, and some early American public works projects.

Although most Public-Private Partnership definitions avoid the words procurement and contract, P3s are contracts and are best sourced and formed through full and open competition. P3s are not true partnerships as defined by common law and statutes.

P3s are often viewed as an alternative source of debt or equity funding. Recognizing the true cost to the government for private sector debt or equity is critical. Tapping private sector equity or debt must only be used when the benefits outweigh the costs, as compared to other budgeting or funding alternatives.

P3 contractors require a return on investment or debt in the form of shared revenue, availability payments, or concession payments. The total cost to the government may far exceed other forms of financing. This return on investment or debt to the private partner can burden a government for decades with payments, reduced bonding capacity, lower credit ratings, increased user fees, or costly consequences.

Examples

Atlanta Braves and SunTrust Park (DBFOM)

The Atlanta Braves and Cobb County Government, Georgia, established a public-private partnership for construction of SunTrust Park and are utilizing a design-build-finance-operate-maintenance (DBFOM) P3. The total budget for the project is \$672 million with \$300 million being funded by Cobb County and the Cumberland Community Improvement District. The partnership will continue through 2046, during which time the Braves will have exclusive rights to operate and manage the stadium. The County and the Braves will make equal annual contributions to a Capital Maintenance Fund for capital improvements and repairs for the stadium and parking areas. During the contract, the stadium will be owned by the Cobb-Marietta Coliseum and Exhibit Hall Authority. The Authority is a body corporate and politic created by the Georgia General Assembly in 1980. At the end of the contract, the Atlanta Braves have an option to purchase the stadium. If the Braves elect not to purchase the stadium, Cobb County would assume full ownership.

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The county awarded a contract to a project management firm to oversee and monitor the construction contract. The Braves hired the primary construction management firm. However, with so much public money being invested, the Board of Commissioners hired an independent firm to protect the interests of the county. The role of the firm is to review plans, construction timelines, and pay applications while providing assurance to the public that funds are being spent wisely. The project is scheduled for completion in early 2017. The Braves will open their 2017 season in the new stadium.

Pennsylvania Bridge Rehabilitation (DBM)

The state of Pennsylvania leads the nation in “structurally deficient” bridges. Addressing this problem, the Pennsylvania Department of Transportation (PennDOT) is utilizing a design-build-maintain (DBM) P3 to rehabilitate or replace over 500 of these bridges. The nearly \$900 million P3 contract calls for all construction work on the 500 bridges to be completed within three years, by the beginning of 2018, after which the contractor will maintain the bridges for another 20 years. Average annual PennDOT payments to the contractor will be \$65 million. By utilizing the DBM P3 approach, PennDOT estimates that they will reduce construction costs by 30 percent and advance construction times by 3 years.

The Port of Miami Tunnel (DBFOM)

The Port of Miami Tunnel (POMT) is an example of a design-build-finance-operate-maintain (DBFOM) P3 for transportation infrastructure. The Port of Miami is located on an island. Prior to the opening of the POMT, traffic entering and exiting the Port of Miami, particularly large trucks, were forced to use city surface streets, creating considerable traffic congestion. The motivating issue in the construction of the POMT was to divert this commercial traffic away from city streets. The idea of the POMT was first proposed in the 1980s, but the financing could never be secured.

The POMT P3 project began in 2009 and was completed in 2014. The total cost of design and construction was approximately \$600 million. The private sector partner arranged for a substantial proportion of the upfront capital for the design and construction phases and will be operating and maintaining the tunnel until 2044. The private sector partner receives availability payments not to exceed \$32.5 million per year over the term of the contract. No vehicle tolls, which might discourage use of the tunnel and subvert the purpose for construction, are being charged for use of the tunnel. However, the Florida Department of Transportation collects container and passenger fees that provide the revenue stream to finance the availability payments. The POMT opened in August 2014 and is an example of how private sector financing in the form of a DBFOM P3 can be used to advance the construction of a transportation asset when public funding is not available.

The Governor George Deukmejian Courthouse (DBFOM)

The Governor George Deukmejian Courthouse in Long Beach, California, is an example of a design-build-finance-operate-maintain (DBFOM) P3 for a government office building. The Judicial Council of California, Administrative Offices of the Courts, conducted a procurement to select a private sector partner that would design-build-finance-operate-maintain the \$492 million courthouse. The new courthouse comprises 531,000 square feet and accommodates 31 courtrooms.



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Long Beach Judicial Partnerships (LBJP), a consortium of several private sectors firms, is the contractor. All financing was provided by LBJP. The term of the P3 contract is 35 years. Construction began in 2011 and was completed in 2013. The contractor is compensated through availability payments.

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