

Groundbreaking Development in Future of P3s in California

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Although public private partnerships (P3s) have had a lengthy and successful history internationally, use in the in the United States and especially in California, is in its infancy. Severe fiscal constraints on state and local governments, however, make P3s a more attractive alternative for financing, building and operating public projects.

The Federal Highway Administration has defined P3s as follows:

[A] contractual agreement formed between public and private sector partners, which allow more private sector participation than is traditional. The agreements usually involve a government agency contracting with a private company to renovate, construct, operate, maintain, and/or manage a facility or system, the private party will be given additional decision rights in determining how the task will be completed.¹

Expanding the private sector role allows the public agencies to capitalize on the strengths of the private sector and use its technical, management and financial resources in new ways to achieve certain public agency objectives. In return for accepting expanded responsibilities and risks, the private sector is given more control and participation.

As with many ideas that require a fundamental change in a "traditional approach", the idea of P3s in California has not been without its critics. Recent case law addressed certain critics who opposed the Presidio Parkway Project in San Francisco, California.

Appellate court clears way for Presidio Parkway Project to move forward as a Public-Private Partnership

On August 8, 2011, the 1st District Court of Appeal broke new ground when it published a decision holding that Phase 2 of the Presidio Parkway Project can move forward as a P3. The Presidio Parkway Project is the first project to reach award under California's new P3 statute, Streets and Highways Code section 143. The project was challenged on three separate grounds by the Professional Engineers in California Government (PECG), an engineers' union. The Court of Appeal affirmed the trial court's ruling approving the California Department of Transportation's (Caltrans) use of the new statute, and should encourage the consideration of P3s as a project delivery method in California.

The case, *Professional Engineers in California Government v. Department of Transportation*, is among the first brought by a union to stop a P3 project, an area that is

¹ U.S.D.O.T., FEDERAL HIGHWAY ADMINISTRATION, REPORT TO CONGRESS ON PUBLIC-PRIVATE PARTNERSHIPS (Dec. 2004).

growing in the United States as cities and states struggle financially to rebuild their crumbling infrastructure. PEGC brought suit challenging Caltrans' use of the new P3 authority for what is also known as the "Doyle Drive Replacement Project." The project will replace 1.6 miles of Doyle Drive, which serves as the southern approach to the Golden Gate Bridge.

The lawsuit alleged that Caltrans and the San Francisco County Transportation Authority (SFCTA) impermissibly used the new P3 authority. PEGC argued that, among other things, permitting third-party engineers to perform the engineering for the project in lieu of Caltrans employees violates the statute. Under the current arrangement, Hochtief Concessions and Meridiam Infrastructure will design, construct, operate and maintain the road for a term of 30 years after construction completion. PEGC also claimed that P3 projects in California must be funded solely by tolls or user fees.

The Court of Appeal affirmed the February 2011 decision by Judge Wynne Carvill of the Alameda County Superior Court, rejecting all of PEGC's arguments. First, the Court held that under section 143, Caltrans' employees or direct consultants are not mandated to perform all of the preliminary planning and design services associated with the project. Second, the project is "supplemental to existing facilities" and fits squarely within the definition of a transportation project pursuant to section 143(a)(6). Third, the Court explained that funding for P3 projects awarded under section 143 need not be confined to tolls or user fees, and that the legislation authorized a much broader use of innovative methods of financing, including availability payments.

While the Court of Appeal's ruling is obviously pivotal for the Presidio Parkway Project, it should also encourage the use of P3s as a project delivery method for other public projects in California. P3s create unique opportunities to bring the financial and management resources of the private sector to public infrastructure projects, while sharing risks and rewards. Increasingly, P3s are being considered by agencies throughout the state in an effort to rebuild our infrastructure in spite of budgetary challenges. The result in this case should pave the way for more innovative approaches to public infrastructure projects while also reducing many of the risks faced by California's public entities.