

TRANSPORTATION RESEARCH BOARD

Navigating Environmental Compliance for Public-Private Partnerships

April 21, 2021

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#TRBwebinar



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REGISTERED CONTINUING EDUCATION PROGRAM

#TRBwebinar

Learning Objectives

1. Identify how P3 projects bridge transportation funding gaps
2. Discuss how to effectively integrate private sector involvement in the NEPA process

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Navigating Environmental Compliance for Public-Private Partnership Projects

David Miller
Nossaman LLP

April 21, 2021

Agenda

- Overview
- The Role of Public-Private Partnerships (P3)
- NEPA Compliance for P3 Projects
- Policy Trends
- Roundtable



Overview

- Funding gap for needed surface transportation improvements exceeds \$5 trillion – *American Society of Civil Engineers (2020)*
- Last Gas Tax increase – 1993
- Since 2008, over \$140 billion transferred to Highway Trust Fund (HTF) to address its solvency.
- CBO estimates HTF will run out of money in 2022.

Overview (cont.)

- Public-Private Partnerships (P3s) help bridge the gap.
- Public entities can benefit from private-sector expertise and innovation.
- Transfer of risk from the public agency to project developer.
- Trade off: earlier involvement of project developer, which can create issues for environmental compliance.



Using P3s to Help Bridge the Funding Gap

Andrée Blais
Partner, Nossaman LLP

Overview

- P3s defined
- Typical contractual structure; benefits of P3 delivery
- Private financing
 - How do P3 delivery methods bridge the funding gap?
 - How does the P3 Developer recoup its investment?
- Environmental review process and P3 delivery
 - Hard bid / committed financing P3 structures
 - Early contractor involvement or “progressive” P3 models
- Preserving integrity of environmental review process

Public-Private Partnership (P3) Definition

Many definitions:

- FHWA: Contractual agreements between a public agency and a private sector entity that allow for greater private sector participation in project delivery and financing
- P3 includes
 - Availability Payment (AP) Concessions
 - Revenue Concessions

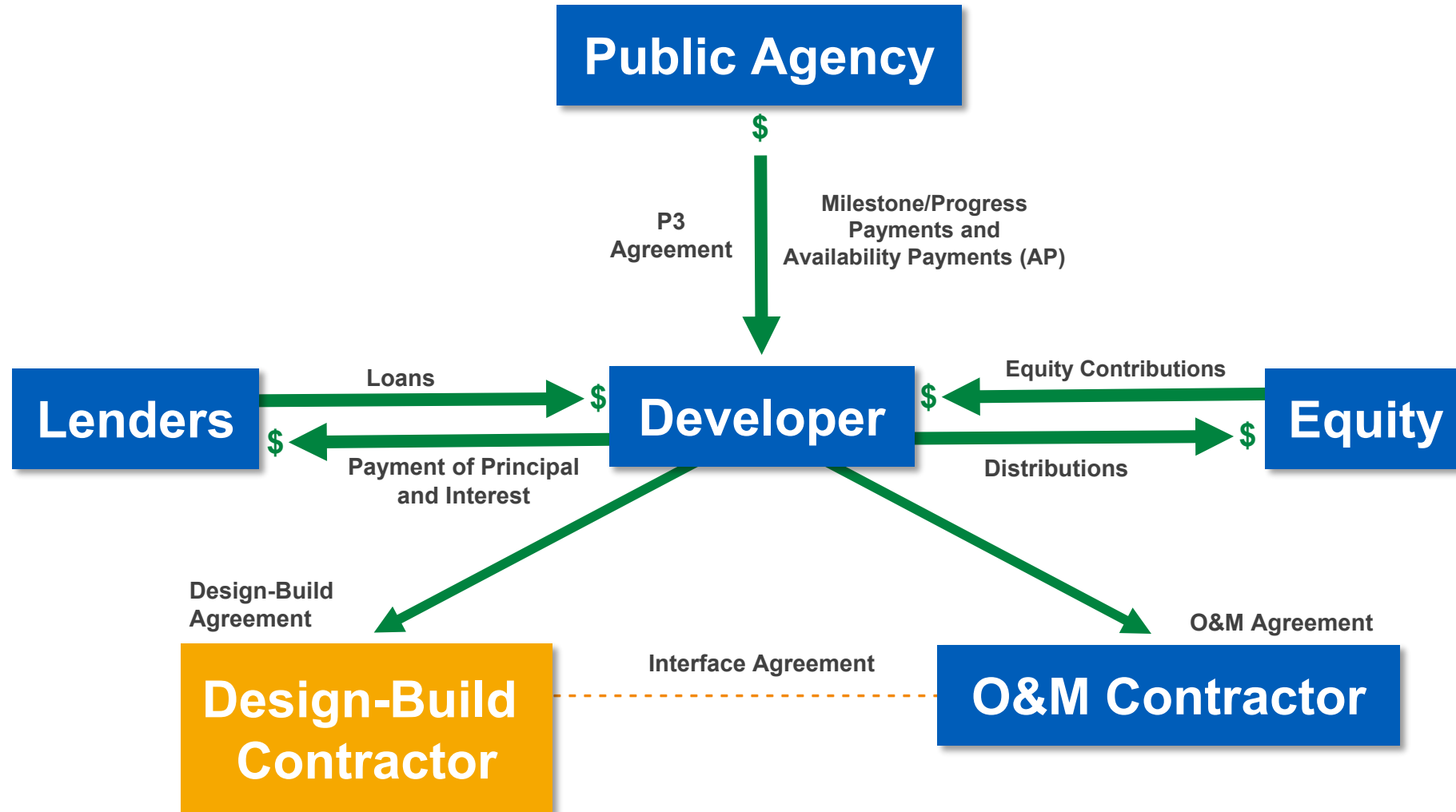


P3 Procurement and Contractual Structures

Typical Characteristics

- Developer/Concessionaire/Contractor/Single Purpose Vehicle (SPV)
- Typically procured on best value basis
- Single DBFOM contract (with additional project agreements)
- Long term O&M component
- Some or all financing for design and construction provided by private sector entity
- Proposal will include design detail, construction, financing and O&M pricing
- Significant risk transfer to Developer
- Whole of life efficiencies / management of interface risk

Typical Availability Payment P3 Contractual Structure



Benefits of P3

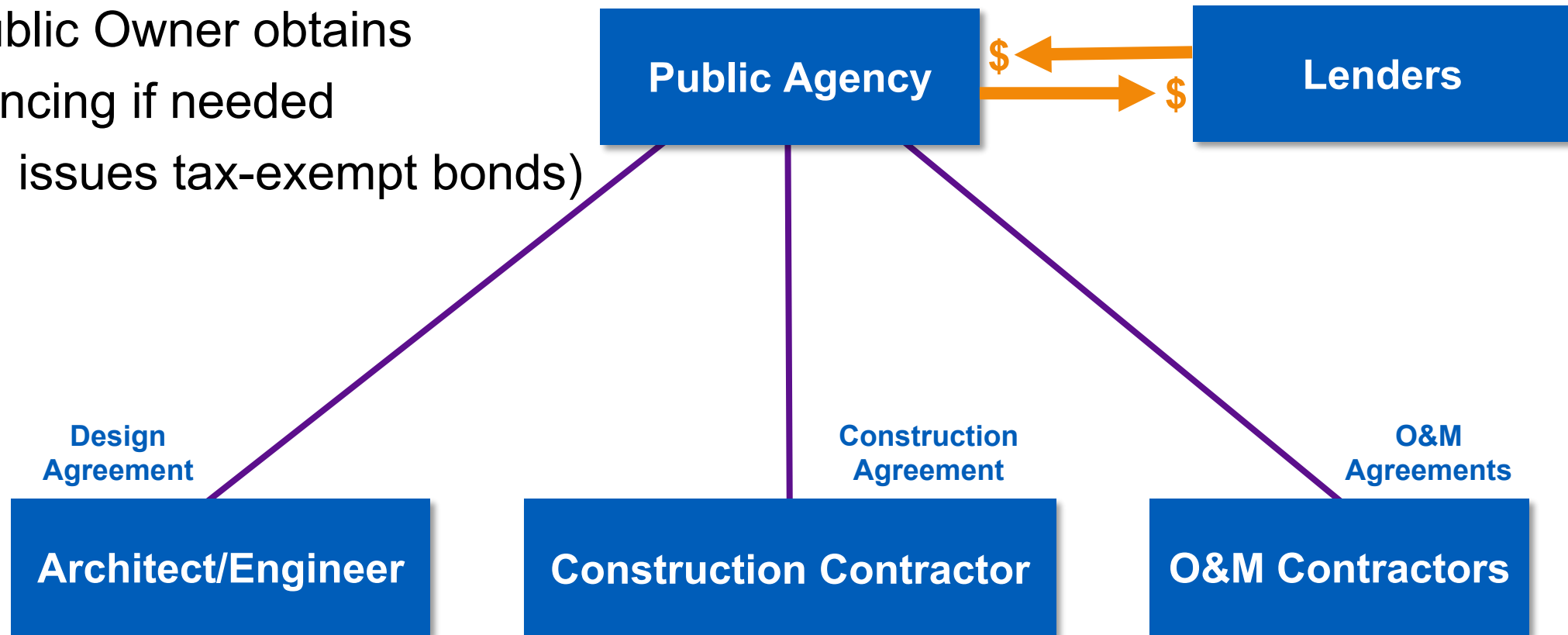
- Realize lifecycle cost efficiencies
 - Developer incentive to invest in initial design and construction of asset to optimize lifecycle costs
- Efficiently transfer risk
- Close funding gaps by accessing the private equity market and as a result deliver the project sooner
- Harness private sector innovation
- Incentivize on-time and on-budget project delivery
 - Private financing of design and construction, with APs / revenue only flowing upon substantial completion / commencement of operations



P3S AND PRIVATE FINANCING

How do P3 delivery methods bridge the funding gap?

- **Traditional financing**
- Public Owner obtains financing if needed (e.g. issues tax-exempt bonds)



How do P3 delivery methods bridge the funding gap?

- **P3 project financing – equity plus debt**
- Private entities provide all or a significant portion of the financing required for design and construction of the project
- Private financing:
 - Equity:
 - Private investors provide equity financing to Developer
 - Minimum equity ratio – “skin in the game”
 - Debt:
 - Bank loans/facilities
 - Bond financing
- Unlike traditional delivery methods, the Developer, and not the Owner, is the borrower
- Private financing is at risk (in whole or in part) for Developer defaults

How does the P3 Developer recoup its investment?

- AP Model
 - Owner pays Developer based on “project availability” with identified performance standards
 - APs encompass Developer’s:
 - Capital expenditures (CAPEX)
 - Operating expenditures (OPEX)
 - Financing costs
 - “Payments at risk to performance”
 - APs reduced if facility fails to meet contractual performance standards
- Owner still needs funding
 - To attract proposers and develop a “bankable” project, Owner must demonstrate that it has funds to cover APs through the life of the P3 contract

How does the P3 Developer recoup its investment?

- Concession / Revenue Model
 - Owner contributes limited public funds to project costs
 - User fees generated by project are primary project funding
 - Developer holds concession, with right to collect revenues during concession period
 - Developer conducts revenue studies to verify that projected revenues will cover costs including loan payments, with a fair profit
 - To protect public sector interest in case of robust revenue generation, P3 agreements may include revenue-sharing provisions

High-level Summary of how P3 Delivery Methods Bridge the Funding Gap

- Private sector entities provide financing for design and construction of the project
 - Accelerates project delivery
 - In some cases makes the difference between project/no project
- Availability Payment Model
 - Owner pays for the asset over time using public funding (general fund, tax revenues, grant funds, etc.)
- Concession / Revenue Model
 - Developer collects user fees to pay for the asset over time

Environmental review process and P3 delivery

- **Hard bid / committed financing P3 delivery**

- A more “conventional” P3 delivery model best suited to well-defined projects with project data sufficient for hard bidding
- Procurement for Developer often commences during environmental review process
- Competitive best value selection
- Selected Developer must achieve financial close (securing the financing necessary to proceed with design and construction) soon after selection
- Typically, environmental review process is completed before financial close
 - This reduces project risk that otherwise would concern lenders
 - Developer has no involvement in environmental review process
 - Owner bears risk of environmental litigation
- After financial close, Developer advances design consistent with environmental documents and eventually begins construction

Environmental review process and P3 delivery

- **Early contractor involvement P3 models**

- Known as predevelopment agreement (PDA) models; or progressive P3s
- Best suited to complex projects that are less defined, where early Developer engagement could provide significant benefits
- Developer involvement in environmental process
 - Objective to allow consideration of Developer concepts and input in environmental review process and to avoid unnecessary rework
 - Owner remains responsible for environmental analysis and decision-making
- Developer selection focused on qualifications and predevelopment services pricing, vs. hard bid price competition
- Developer performs predevelopment services to assess technical, environmental, and financial feasibility and helps Owner refine and define the project
- Developer's predevelopment work proceeds concurrently with environmental consultant's work

Environmental compliance and P3 delivery

- **Early contractor involvement P3 models (cont')**
 - Following initial work by Developer and after environmental analysis reaches appropriate level, Owner makes a feasibility determination
 - if project is considered feasible, Developer has limited right of negotiation for implementation agreement
 - If negotiations are successful and the parties execute the implementation agreement, Developer proceeds with financing
 - Again, lenders will require assurance that they are not affected by risks relating to environmental clearance

Benefits of PDA / Progressive P3 models

- **Benefits**

- Optimize alternatives development and encourage life-cycle efficiency in planning
- Facilitate innovative delivery, creative cost reduction, revenue enhancement and financing strategies before environmental review process precludes options
- Avoid analysis of financially infeasible scope



Preserving Integrity of Environmental Review Process When using PDA / Progressive P3 models

- Public sector must retain complete control over environmental review process, decision-making, and preparation of environmental review documentation
- Use of communications protocols and organizational conflict of interest policies help to ensure that Developer cannot compromise the integrity of the environmental review process
- FHWA/FTA constraints require coordination of environmental and design processes
 - Environmental analysis requires a certain level of engineering work
 - Final design may not begin until after completion of environmental review process
 - Developer's predevelopment work should be limited to preliminary engineering and other permitted tasks until completion of environmental review process
- Maintain Owner's ability to pursue other options

Thank you

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NEPA Compliance and Public-Private Partnership (P3) Project Delivery

Janet Myers

Senior Attorney Advisor

Federal Highway Administration

April 21, 2021

Disclaimers

- Presentation is from the perspective of projects administered under Title 23, United States Code (primarily highway and bridge projects); applicable requirements vary by Federal agency and program
- The views presented are mine, and do not necessarily represent the views of the U.S. Department of Transportation, its components, or other parts of the Federal Government

Statutory and Regulatory Setting

- President's Council on Environmental Quality (CEQ)
 - National Environmental Policy Act of 1969, as amended - [Pub. L. 91-190, 42 U.S.C. 4321-4347, January 1, 1970, as amended](#) (NEPA)
 - NEPA implementing regulations - [40 CFR Parts 1500-1508](#)
- Federal Highway Administration (FHWA)
 - DB contracting (relevant where P3 is designing and constructing the project)
 - [23 U.S.C. 112\(b\)\(3\)](#)
 - [23 CFR Part 636, Subpart A](#)
 - NEPA implementing and supplemental environmental review provisions (relevant where P3 is a project sponsor)
 - [23 U.S.C. 139](#)
 - [23 CFR Part 771](#)
- All include conflict of interest provisions designed to prevent bias and premature commitments to an alternative, with resulting impacts on P3s and DB contractors

FHWA DB: 23 CFR Part 636, Subpart A

- Protections against bias in NEPA due to potential DB contractor conflict of interest:
 - Prohibits final design and construction work during NEPA ([23 CFR 636.109\(b\)\(3\)](#))
 - Requires DB contract provisions on
 - Fair consideration of all alternatives (including “no-build”) and
 - Ability to terminate in the event a “no-build” alternative is chosen ([23 CFR 636.109\(b\)\(4\)](#) and [\(9\)](#))
 - Limits DB contractor role to providing technical information for consideration in NEPA, and prohibits DB contractor from preparing the NEPA document or having any decision-making responsibility relating to the NEPA process ([23 CFR 636.109\(b\)\(6\)](#) and [\(8\)](#))
 - Requires consultants used to prepare the NEPA document to be selected and exclusively directed and controlled by the contracting agency ([23 CFR 636.109\(b\)\(7\)](#))

FHWA NEPA: 23 CFR Part 771

- Includes implementing regulations for NEPA and 23 U.S.C. 139
- “Applicants” and “project sponsors” are entities seeking funding or other Administration action ([23 CFR 771.107](#))
 - “Applicant” excludes private entities
 - “Project sponsor” includes private entities
- Applicants authorized to procure consultants and help prepare NEPA documents ([23 CFR 771.107](#), [771.109\(c\)\(2\)](#) and [\(4\)-\(5\)](#))
- Role of project sponsor that is a private institution or firm limited to providing technical studies and commenting on environmental review documents ([23 CFR 771.109\(c\)\(6\)](#))

CEQ NEPA: 40 CFR Parts 1500-1508 (1978-2020)

Issues Addressed	
<ul style="list-style-type: none">• Lead Agency Responsibilities• Document Preparation• NEPA Consultant Procurement and Oversight• Consultant Disclosure Statements	<p>40 CFR 1506.5(c):</p> <ul style="list-style-type: none">• To avoid conflict of interest, lead agency must prepare or select and supervise contractor doing environmental impact statement• NEPA contractors must execute disclosure statement specifying they have no financial or other interest in the outcome of the project• If the document is prepared by a contractor, the lead agency must independently evaluate document prior to approving and take responsibility for document's scope and content

CEQ NEPA: 40 CFR Parts 1500-1508 (9/14/2020)

Issues Addressed	
<ul style="list-style-type: none">• Lead Agency Responsibilities• Document Preparation• NEPA Preparer Oversight• Disclosure Statements	<p>40 CFR 1506.5(a)-(b)</p> <ul style="list-style-type: none">• Agency, applicant, or contractor under the supervision of the agency may prepare environmental documents• Agency responsible for accuracy, scope and content, required to independently evaluate information submitted• Agency may direct an applicant or authorize a contractor to prepare an environmental document under the supervision of the agency• Environmental document must include the names and qualifications of the persons preparing environmental documents, and conducting the independent evaluation of any information submitted or environmental documents prepared by an applicant or contractor• Contractors or applicants preparing environmental assessments or environmental impact statements shall submit a disclosure statement to the lead agency that specifies any financial or other interest in the outcome of the action

Outcome Under Current Statutes and Regulations

- 2020 CEQ regulations allow, but do not require, expanded applicant/project sponsor involvement in NEPA
- Limitations in FHWA regulations in 23 CFR Part 636 and Part 771 continue to apply

DB Project Delivery Approaches

- At least three approaches have been used on DB projects under Title 23, including
 - DB contract award before NEPA is complete, DB contractor directly participates in public and interagency project meetings and other project activities
 - DB contract award before NEPA is complete, but DB contractor does not directly participate in public or interagency project meetings or other project activities
 - DB contract awarded after NEPA decision, no DB contractor involvement during NEPA
- Each attempts to balance risk of actual or perceived bias against efficiencies available through early participation by DB contractor

Early DB Contract Award, DB Contractor Directly Participates

- DB contractor directly involved in public and interagency project meetings and other project activities
- Potential advantages
 - May provide best opportunity for DB contractor to understand public and agency concerns, and vice versa
 - DB contractor role may be more transparent than in other approaches
 - May help avoid or minimize post-NEPA decision design changes and resulting NEPA reevaluations/supplemental NEPA documents
 - Early DB contract award may facilitate faster project implementation
- Potential disadvantages
 - May foster perception, especially by the public, that the project is being directed by the DB contractor in its self-interest
 - Maintaining required limitations on DB contractor role may be more difficult

Early DB Contract Award, DB Contractor in Background

- DB contractor does not directly participate in public or interagency project meetings or other project activities
 - All NEPA work done by a State DOT team and State DOT consultants
 - Design input provided to NEPA team by State DOT employee serving as the liaison from design team, which has DB contractor participation
- Potential advantages
 - May reduce risk of public perception that DB contractor is inappropriately influencing decisions
 - May help avoid or minimize post-NEPA decision design changes and resulting NEPA reevaluations/supplemental NEPA documents
 - Early DB contract award may facilitate faster project implementation
- Potential disadvantages
 - Communication between DB contractor and NEPA team is filtered, which may increase risk of incomplete information-sharing and misunderstandings

DB Contract Awarded After NEPA Decision

- DB contractor has no involvement in NEPA review and decision-making
- Potential advantages
 - No chance of DB contractor conflict of interest issues before the NEPA decision
- Potential disadvantages
 - NEPA evaluation may not adequately take constructability or other DB-related issues into account due to lack of DB contractor input
 - May increase number of post-NEPA decision design changes and resulting NEPA reevaluations/supplemental NEPA documents
 - May affect clarity or comprehensiveness of NEPA-phase mitigation commitments due to applicant's desire to maximize future DB contractor's flexibility

Other Considerations

- Actions that may decrease risk of perceived bias or premature commitment to an alternative due to P3/DB contractor involvement
 - Early, ongoing, and effective communication with the public and others about:
 - Benefits that will accrue to the public
 - Any impacts on project alternatives considered and project implementation
 - Early planning for how P3/DB involvement in the project will be managed to avoid actual or perceived bias
 - Transparency about role and responsibilities of the P3/DB contractor
 - Assuming, and preparing for, a higher level of public scrutiny because of P3/DB contractor involvement
 - Taking steps to address real or perceived potential for “skewing” data to fit desired P3/DB outcome
 - Avoid using P3/DB contract schedules/milestones to establish NEPA schedule

Policy Trends in P3's – What Does a Biden Administration Mean for P3s?

Eric Beightel
Senior Director and
Vice President

Environmental
Process and Policy
US Advisory Services
WSP USA



Beyond the Obvious – How Does a Focus on Environmental Justice and Equity Potentially Affect P3s?

- Environmental Justice and Equity
 - *Executive Orders*
 - *Interventions*
 - *Funding eligibilities*
- Updates to the NEPA regulations
 - *How will the update affect P3s?*
- Infrastructure Bill
- What does it all mean for P3s?

Administration Priority to Advance Racial Equity

- EO 13985 “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government” (Jan 20, 2021)
 - *Equity Assessments in Federal Agencies*
 - *Allocating Federal Resources to Advance Fairness and Opportunity*
- EO 14008 “Tackling the Climate Crisis at Home and Abroad” (Jan 27, 2021)
 - *Securing Environmental Justice and Spurring Economic Opportunity*
 - White House Environmental Justice Interagency Council
 - Seeks recommendations on how to direct federal investments that direct 40% of the benefits to disadvantaged communities

Policy in Practice – Houston I -45

- TXDOT (through NEPA Assignment) approves Record of Decision for North Houston Highway Improvement Project (Feb 4)
 - *Despite local opposition based on displacements and potential sound and air quality effects*
- FHWA Division requests TXDOT to “pause before initiating further solicitation efforts for the project”
- Pause requested based on concerns related to Title VI and related environmental justice concerns



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Policy in Practice – Rebuilding American Infrastructure with Sustainability and Equity (RAISE)

- Formerly TIGER and BUILD - \$1B discretionary grant program
- Prioritizing projects that “can demonstrate improvements to racial equity...”
- At least \$10M dedicated to Areas of Persistent Poverty
 - *Defined by appropriations*

DEPARTMENT OF TRANSPORTATION

Office of the Secretary of Transportation

Notice of Funding Opportunity for the Department of Transportation’s National Infrastructure Investments (i.e., the Rebuilding American Infrastructure with Sustainability and Equity (RAISE) Grant Program) under the Consolidated Appropriations Act, 2021

AGENCY: Office of the Secretary of Transportation, DOT

ACTION: Notice of Funding Opportunity

SUMMARY: The purpose of this notice is to solicit applications for Rebuilding American Infrastructure with Sustainability and Equity (RAISE) grants. Funds for the FY 2021 RAISE grant program are to be awarded on a competitive basis for surface transportation infrastructure projects that will have a significant local or regional impact. This program was formerly known as BUILD Transportation Grants

DATES: Applications must be submitted by 5:00 PM Eastern on July 12, 2021.

ADDRESSES: Applications must be submitted through Grants.gov.

FOR FURTHER INFORMATION CONTACT: For further information concerning this notice, please contact the RAISE grant program staff via e-mail at RAISEgrants@dot.gov, or call

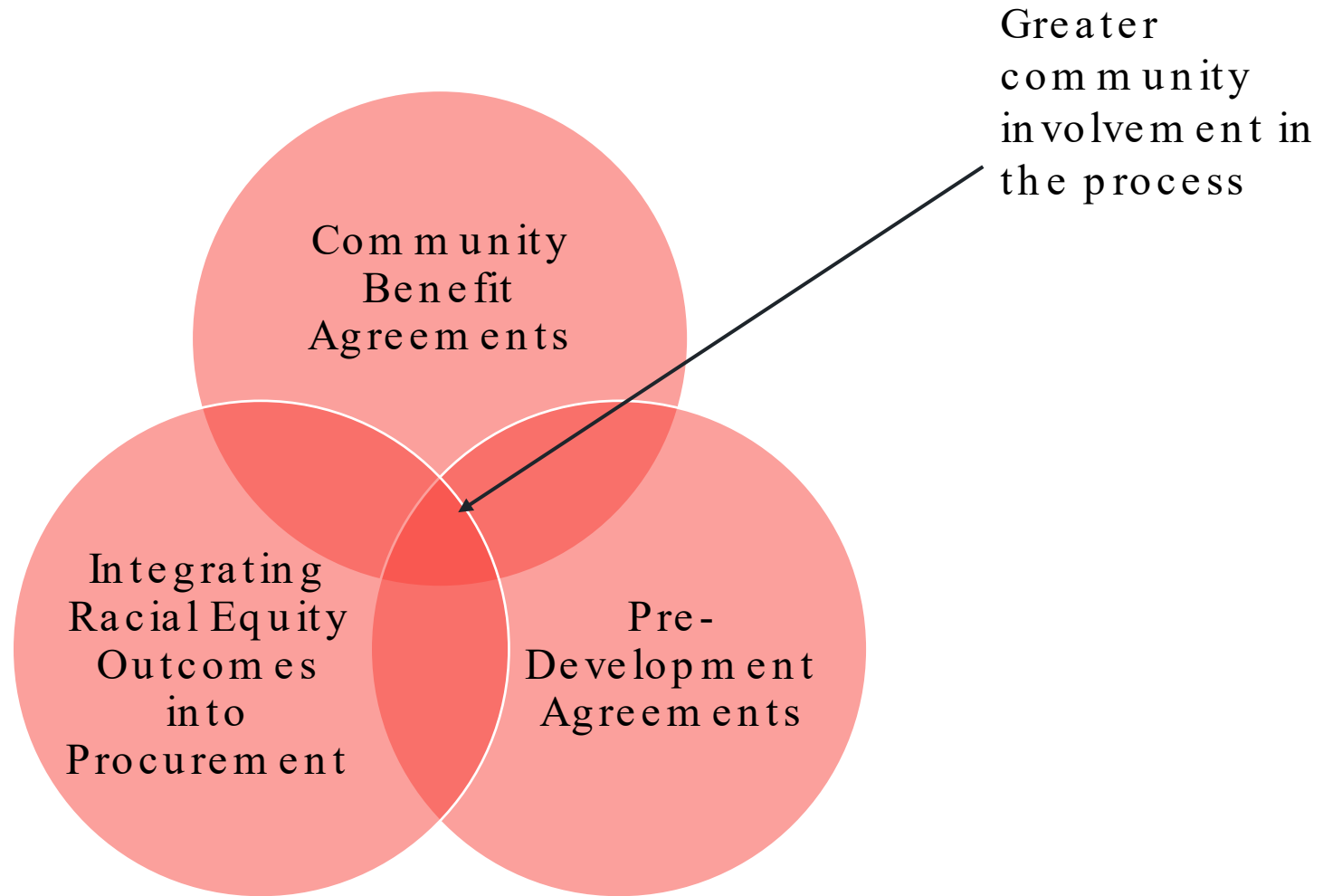
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NEPA Regulations – An Update Appears Likely

- Ongoing litigation on 2020 rulemaking
- DOJ requested the rule remanded to CEQ
- CEQ has identified “substantial and legitimate concerns”
 - *Whether the 2020 Rule may adversely affect environmental justice or impair participation by environmental justice communities in the NEPA process*
- Will Racial Equity and Environmental Justice be emphasized in the new rulemaking?
- How will agencies update policies to incorporate this concept?

What Does This Mean for P3s?

7



Community Benefit Agreements

Ensure broader benefits of infrastructure

- Physical or social benefits leveraged by dollars committed to infrastructure
- Targeted at those who may experience adverse effects from construction or operation of the facility

NEPA Considerations

- Encourages early community engagement
- Depending on the commitment and its timing – do CBAs effect the project definition?

Maybe costly to developer

- Need to know about CBA terms or outcomes early to understand financial implications

Possible Types of CBA Outcomes



Local Hire or Local Suppliers

- *Minimum requirements*



Community Amenities

- *Recreation Center*
- *Community Art*
- *Improved infrastructure unrelated to project purpose*

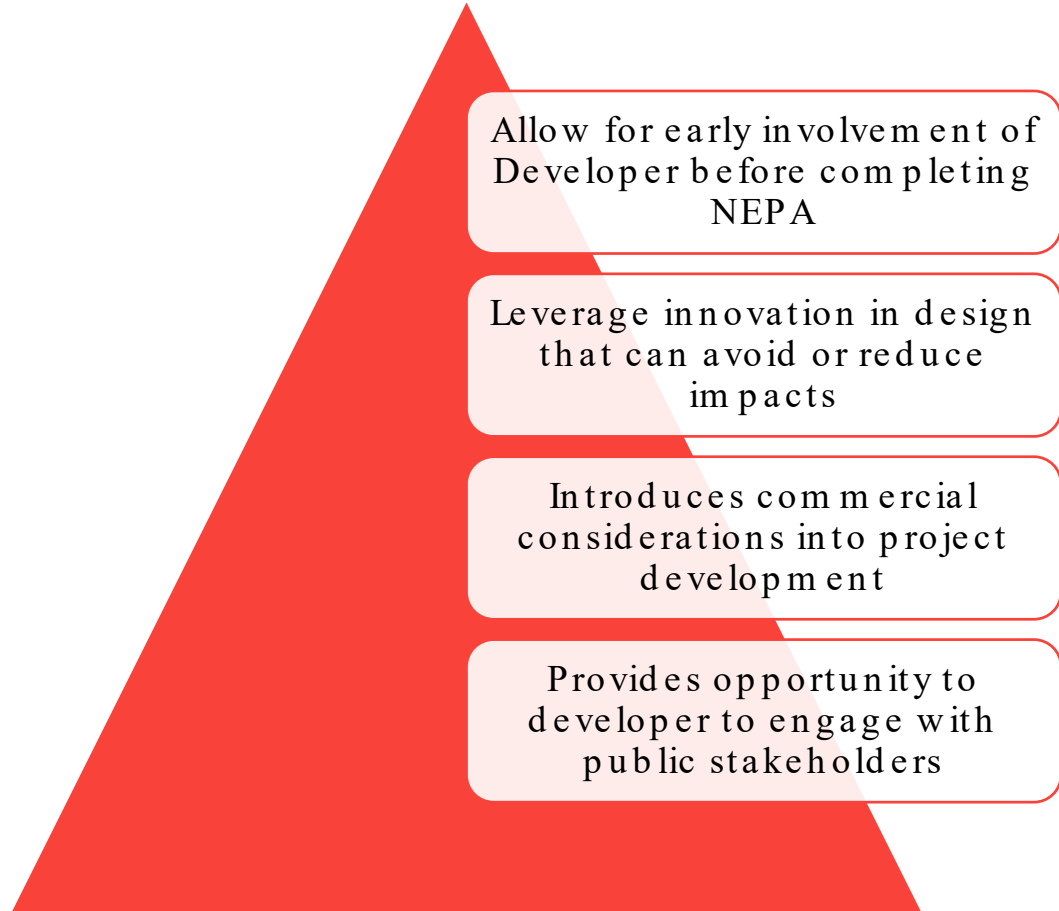


Affordable housing

- *In excess of required mitigation*

Pre-Development Agreements (23 CFR 636)

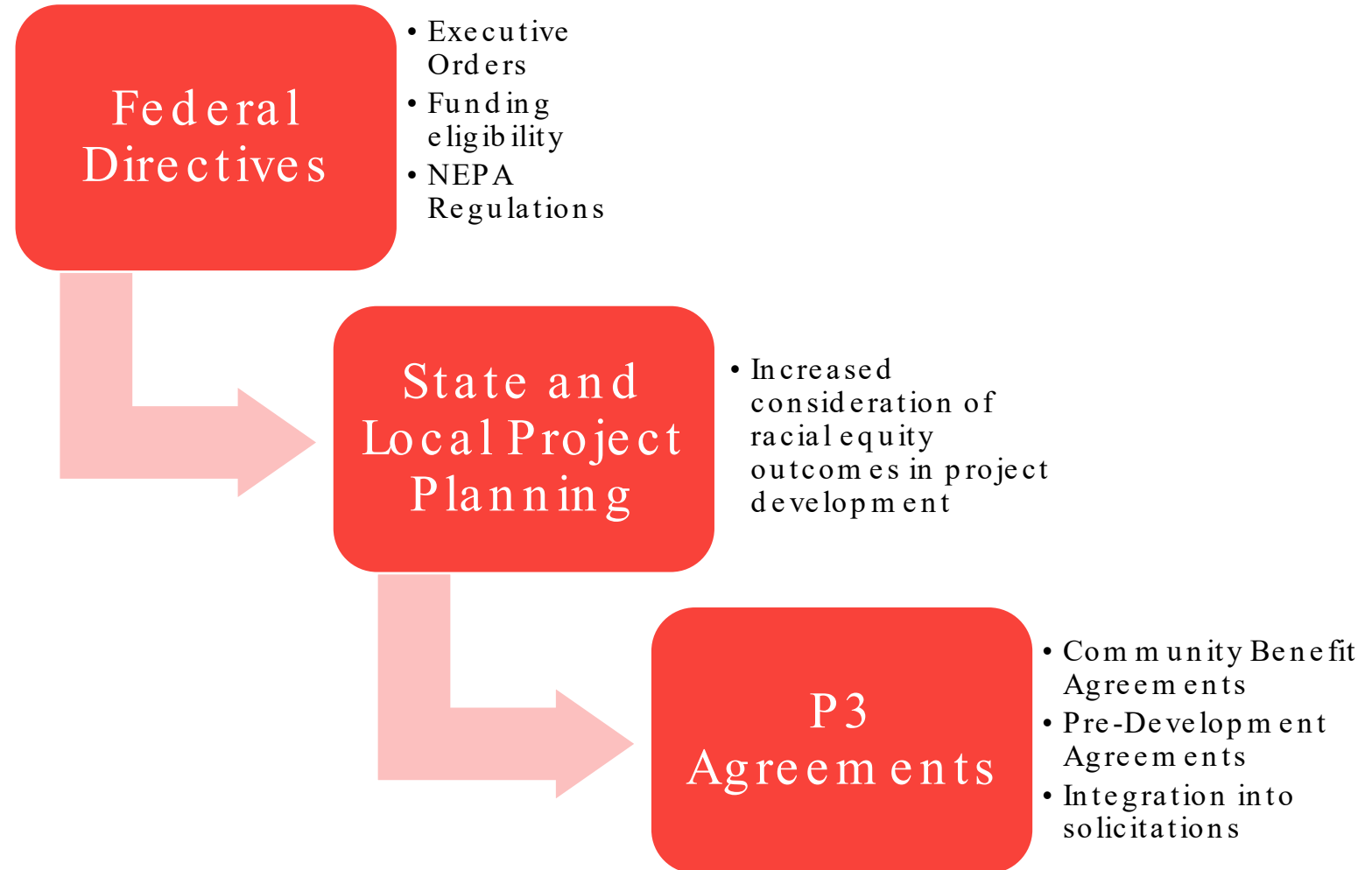
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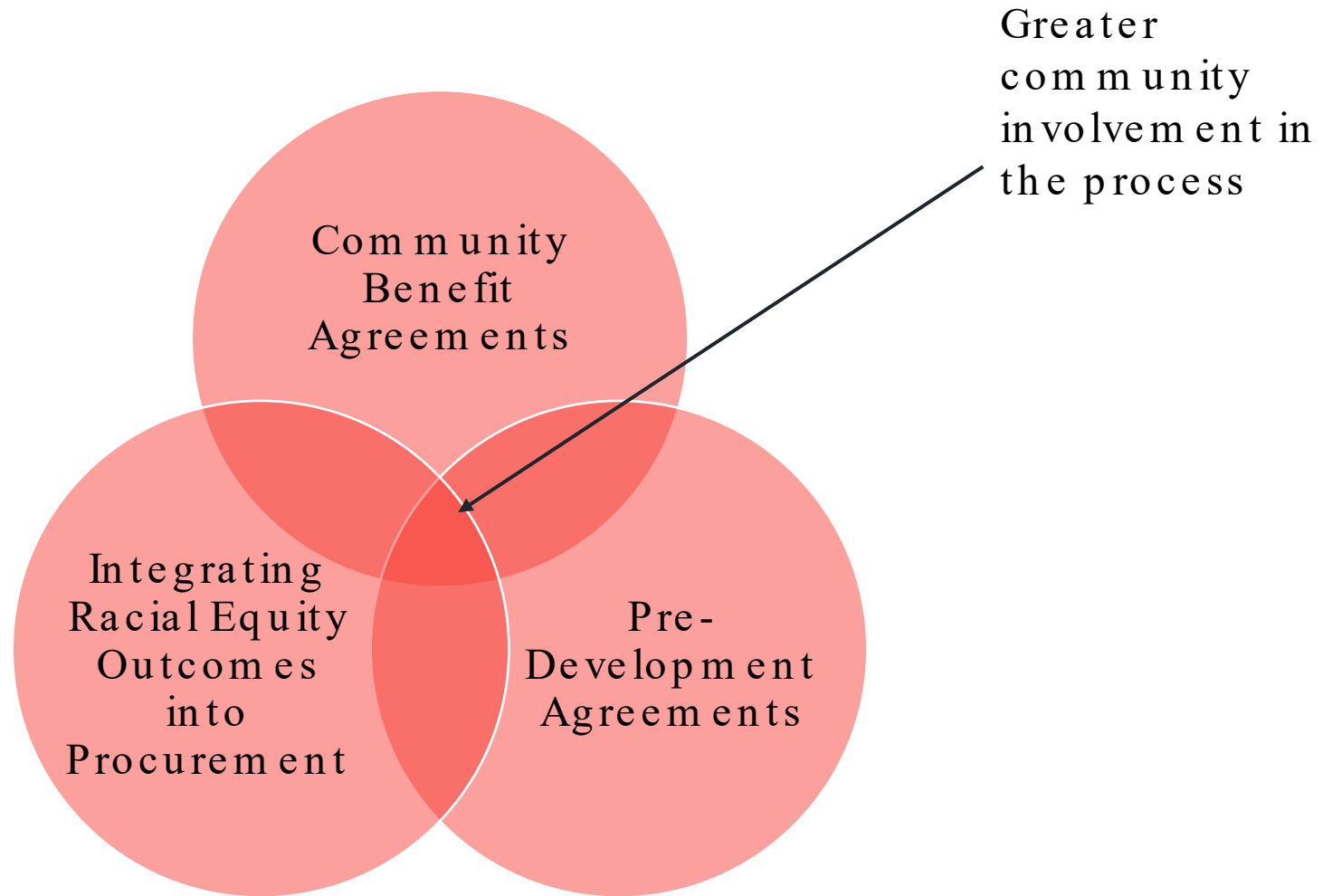
Procurement Approaches (23 CFR 636)

- Community Benefit Framework
 - *Set of guidelines established by local agency as part of procurement*
 - *Could be produced in partnership with potentially affected communities*
- Rating criteria
 - *Identify racial equity outcomes as part of solicitation package*
 - *Evaluate offerors on their ability to ensure the project provides equitable benefits to users and/or the community*

How Racial Equity as a Policy Priority May Affect P3s



What Does This Mean for P3s?



Thank you!

Eric.Beightel@wsp.com

Today's Panelists

#TRBWebinar



Moderator: David Miller,
Nossaman LLP



Andree Blais,
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Janet Myers,
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