

# Public Private Partnerships: USA

Article

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## General PPP Framework: USA

### Overview

**How has the concept of public-private partnership (PPP) developed in your jurisdiction? What types of transactions are permitted and commonly used in your jurisdiction?**

The integrated delivery model recognised as PPP is a relatively recent concept in the United States. The first such contracts were implemented in the 1990s with a few road projects such as the Pocahontas Parkway in Virginia and SR 125 in California, but the real kick-start to the PPP market started with the prominent brownfield concessions of the Chicago Skyway in 2005 and the Indiana Toll Road in 2006. Before that, public authorities traditionally separately procured design, construction, operation or maintenance contracts, and used the public finance markets to directly issue tax exempt bonds, the interest rates on which are tied to their public credit ratings.

There is no national PPP law for the United States, while federal agencies, states and local governments have their own definitions. There are, however, numerous federal laws and regulations that apply to particular aspects of what can be procured as a PPP under state or municipal law, including programmes providing grants and low-coupon subordinated debt. Moreover, some federal agencies provide support and training on PPPs; most notably among those, the Federal Highway Administration provides support and training on PPP within its Innovative Finance Support Center.

The principal regulatory framework for PPP procurement in the United States is contained in the individual states' laws, and in many cases, municipal charters of self-ruled counties, cities or towns, or even self-ruling authorities. While one can find similarities in the definition of a PPP in most of these legal regimes, the

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actual scope of transactions that states, authorities or municipalities may procure varies considerably significantly by jurisdiction. For instance, New York has not approved a state-wide PPP law, but the City of New York and the New York – New Jersey Port Authority have developed PPP models and closed transactions based on their respective charters.

## *Covered Categories*

### **What categories of public infrastructure are subject to PPP transactions in your jurisdiction?**

Currently PPP projects are being procured or have achieved financial close in transportation (toll roads, non-tolled roads, light rail and transit and related infrastructure such as street-lighting), ports, airports and airport facilities, energy (mainly university and central district energy systems), water and social infrastructure (including courthouses and civic centers, schools and universities, telecom and military housing).

## *Legislative Framework*

### **Is there a legislative framework for PPPs in your jurisdiction, or are PPPs undertaken pursuant to general government powers as one-off transactions?**

Currently 36 states plus the District of Colombia and Puerto Rico have dedicated PPP laws. Most states only permit their use for certain kinds of projects (for example, transportation or education in Virginia, transportation only in Colorado). Other jurisdictions have more comprehensive statutes allowing PPPs for any projects developed by any governmental department (Arkansas, Puerto Rico). In addition, a municipality or authority without a specific PPP statute typically has the power to act on the basis of its general contracting powers in accordance with its charter. At the same time, numerous federal agencies have procured projects based on statutory authorisations that contain some P3 features, such as the Department of Defense Military Housing Privatization Initiative, which has generated over US\$30 billion in private sector funding to build and upgrade military housing under design-build-lease-operate structures.

## *Relevant Authority*

### **Is there a centralised PPP authority or may each agency carry out its own programme?**

There is no national PPP authority in the United States. Rather, PPP is generally a matter of state or municipal regulation. Puerto Rico and the District of Columbia have each created an integrated authority to procure PPPs within different departments of the local government, and states where the use of PPPs is limited may create a separate office within a given department. For instance, the Virginia Department of Transportation has a separate PPP office. In some jurisdictions a centralised authority holds the power to approve new

projects (such as the Economic Development Commission in Arkansas or the Office of P3 in the District of Columbia), or to the approval of the relevant department's head or secretary, or, in others, to the approval of the legislature or the governor.

## *Procurement*

### **Are PPPs procured only at the national level or may state, municipal or other subdivision government bodies enter into PPPs?**

PPPs are generally procured at the state level, or by municipalities (whether applying state law or invoking self-ruling powers under their particular 'home rule' charters) or by special authorities, entities typically created under state or municipal law to perform a specific governmental duty.

## *Remuneration*

### **How is the private party in a PPP remunerated in your jurisdiction?**

The permitted forms of remuneration for the private party vary by state. Commonly used compensation schemes include construction milestone payments, availability payments, and revenue risk projects where the developer or concessionaire charges and retains user payments (eg, tolls and rider fares, etc). While in the last two decades numerous greenfield projects have been procured with revenue risk, in the last few years most jurisdictions have opted for availability payment structures.

## *Sharing Revenue and Usage Risk*

### **May revenue risk or usage risk be shared between the private party and the government? How is risk shared?**

There is no sharing of revenue increases or decreases in the case of availability payment deals (except any events occur that entitle the project company or concessionaire to contractual relief); and typically there is also no sharing in revenue risk deals, with certain exceptions such as SH 288. It has, however, become a common feature for most PPP project agreements to require some form of sharing of gains obtained by refinancing the project's debt.

## *Government Payment Obligations*

### **In situations where the private party is compensated in whole or in part through availability or other periodic payments from the government, are the payment obligations of the government subject to the relevant legislative body approving budgetary funding in the future?**

Most US states and territories have a general constitutional prohibition against the assumption of long-term payment obligations that extend beyond the constitutional budget period (one or two years, in most cases). Thus, almost all availability-payment projects in the United States are subject to appropriation risk. Understanding and addressing this risk is a typical due diligence concern

of both government sponsors, developers and lenders, but most project agreements contain solutions involving the procuring authority's obligation to seek an appropriation and the developer's right to termination that both developers and funders have become satisfied with. As a business matter the public procuring authorities are aware that a failure to appropriate the necessary funds for a PPP project during any appropriations period will have serious consequences on their ability to procure future PPP projects as well as on their ability to launch municipal bond issuances down the road.

## *Rate of Return Caps*

### **Is there any cap on the rate of return that may be earned by the private party in the PPP transaction?**

Generally, there is no contractual right to rebalance a project agreement after the achievement of a particular rate of return for the investor. The investor's right of return is often limited in the termination compensation mechanisms, especially where the grantor is authorised to terminate for convenience. In those cases (as in the case of termination for the granting authority's default) there is a recognition of the right to provide some compensation for the loss of equity return, limited to an IRR agreed at the outset in the project agreement. The same IRR is used also where compensation for certain limited relief events is recognised.

## *Restriction of Ownership Transfer*

### **Is the transfer of direct or indirect ownership interests in the project company or other participants restricted?**

Generally speaking direct and many times indirect transfers of equity interests in the 'developer' or concession holder are prohibited during construction and during a period of three to five years after commencement of commercial operations of the asset, with transfers after that period to be limited thereafter. Often transfers among the concessionaire's equity members are allowed, so long as the key stakeholders on whose prowess the granting authority has relied in awarding the procurement maintain 'skin in the game', at least for the minimum periods referred to above. Most project contracts permit changes of control under certain circumstances (for instance where there are transfers effectuated by capital markets transactions) and many allow transfers without consent of the granting authority where specific financial and technical track records are met by proposed transferees.

## **Procurement Process**

### *Relevant Procedure*

### **What procedures normally apply to a PPP procurement? What evaluation criteria are used to award a PPP transaction?**

Procurement processes vary depending on the granting authority. Most state statutes require compliance with internal planning and approval processes to

determine whether the project is worth pursuing as a PPP. Some states, such as Arizona, Maryland, Texas and Virginia, require the procuring authority to determine that the PPP model will provide better value to the public sector than a traditional procurement model. Once the relevant authority has decided to procure a project under the PPP model, a public bidding process is generally required under the applicable legislation. The most commonly used process involves a solicitation for expressions of interest together with or followed by a request for qualifications (RFQ) process that leads to a shortlist of potential proposers. The procuring authority then issues a request for proposals (RFP) that includes not only the selection and evaluation criteria but also the draft project agreement and ancillary documents which the bidders comment on for several rounds and are invited to discuss with the authority in one-on-one meetings prior to submission of final financial and technical proposals.

Evaluation criteria differ from project to project, but it is not unusual for such criteria not to be based solely on the best economic proposal, an approach that can have dire consequences as was the case in the Indiana I-69 roadway procurement.

#### *Consideration of Deviating Proposals*

**May the government consider proposals to deviate from the scope or technical characteristics of the work included in the procurement documentation during the procurement process, without altering such terms with respect to other proponents? How are such deviations assessed?**

Many jurisdictions within the United States allow proposers to offer alternative technical concepts on a confidential basis, and it is a common feature in many of the current PPP procurements. The authority may accept these deviations and determine whether it will indeed receive better value for money by accepting the deviations, while at the same time satisfying the expected outcome from the original technical requirements.

#### *Unsolicited Proposals*

**May government parties consider unsolicited proposals for PPP transactions? How are these evaluated?**

Some PPP statutes, particularly in the most active states in the PPP market, permit submission of unsolicited proposals, in most cases subject to an analysis similar to that of projects the states propose. If the authority decides to proceed with the unsolicited project as proposed, it often has to proceed through the same procurement process as if it had proposed the project itself. In some cases, the proponent is entitled either to credit in the evaluation of the proposals or to a special stipend for its work.

#### *Government Stipend*

**Does the government party provide a stipend for unsuccessful short-listed proponents or otherwise bear a portion of their costs?**

In some states the procuring authority is permitted to offer a stipend. The stipend is customarily limited, and paid to the extent that the unsuccessful proponents agree to assign their work product related to their bid to the procuring authority, which can then incorporate it into the project at hand or other projects.

*Financing Commitments*

**Does the government party require that proposals include financing commitments for the PPP transaction? If it does not, are there any mechanisms during the procurement process to ensure that the applicable PPP transaction, once awarded, is financeable?**

The vast majority of large PPP procurements in the United States require committed financing at the bid date. Procurements require financing commitments of at least 120 days from award, a statement from lenders or underwriters that they have conducted all required due diligence and become satisfied with the project documents. In the past few years, however, some procurement authorities have opted to use a 'pre-development agreement' model where the authority selects a developer on the basis of its qualifications (technical and financial), and agrees to negotiate party a definitive project agreement exclusively with that. This is looked on favourably by proposers due to the reduction in bid-development costs.

*Legal Opinion*

**May the government ask its counsel to provide a legal opinion on the enforceability of the PPP agreement? May it provide representations as to the enforceability of the PPP agreement?**

Typically procuring authorities offer a legal opinion of their counsel which covers the enforceability of the project agreement, the legality of the procurement process, and in some cases as to the budgetary process or other specific risks of the transaction. These opinions can be provided by external counsel or in some cases by the state's Attorney General or chief counsel for the relevant authority.

*Restrictions on Foreign Entities*

**Are there restrictions on participation in PPP projects by foreign entities? May foreign entities exercise control over the project company?**

Generally speaking, there are no specific restrictions on foreign entities' participation in US PPP projects or controlling the project company. However, foreign investments into infrastructure can be subject to review by the Committee of Foreign Investments in the USA (CFIUS). A real estate project may need CFIUS approval if it is located in close proximity to certain sensitive areas — such as near an airport, a seaport, or a military base. Additionally,

CFIUS approval may be mandatory if the project is classified as 'critical infrastructure.' Important to note, CFIUS does not have jurisdiction to bar (in certain cases) participation by investors from 'excepted foreign states,' currently Australia, Canada and the United Kingdom.

## **Design and Construction in Greenfield PPP Projects**

### *Form of Contract*

**Does local law mandate that any particular form of contract govern design and construction activities? Does it mandate the choice of governing law?**

There is no particular form of design and construction agreement for PPP transactions. The market has developed the practice of drafting such contracts using the PPP project agreement as a template so as to achieve the maximum 'drop-down' of design and build obligations onto the design-build contractor. Many PPP project agreements, however, require compliance with a number of state requirements, such as the employment of minority or women owned subcontractors, or both, and in some states it is illegal to require a retainage against progress payments to the contractor. Although not all project agreements require design-build contracts to be governed by the law of the state, in practice that law is chosen, among other things to facilitate the interpretation of back-to-back provisions from the project agreement and the compliance with required state law.

### *Design Defect Liability*

**Does local law impose liability for design defects and, if so, on what terms?**

Generally, laws governing design defects in construction vary from state to state to a degree that would be well beyond the scope of this publication.

### *Warranties*

**Does local law require the inclusion of specific warranties? Are there implied warranties in cases where the relevant contract is silent? Does local law mandate or regulate the duration of warranties?**

Although a review of the construction and design warranty law of each state in the US would exceed the limits of this publication, typically PPP contracts require the developer to seek warranties from its design and build contractor. PPP statutes do not specifically require the inclusion of warranties, but authorities use design and build contract models and practices common in the state. Such contracts typically contain a requirement for the contractor to provide good workmanship and similar warranties, although there may be implied warranties under local law.

### *Damages for Delay*

## **Are liquidated damages for delay in construction enforceable? Are certain penalty clauses unenforceable?**

Liquidated damages are generally enforceable to the extent that they are a reasonable estimation of damages that are difficult to calculate, and the intent of the clause is to compensate the non-breaching party and not to penalise the breaching party. On the other hand, clauses requiring the payment of a penalty owing to breaches are generally unenforceable.

### *Indirect or Consequential Damages*

## **What restrictions are imposed by local law on the contractor's ability to limit or disclaim liability for indirect or consequential damages?**

As a matter of practice, most PPP and dropdown design-build agreement contain a general disclaimer of liability for indirect, consequential, exemplary or punitive damages, which is generally enforceable as a matter of state law. A disclaimer of a contractor's liability that arises owing to its wilful misconduct or gross negligence is likely to be held unenforceable. In fact, liability cap provisions typically expressly except such liability from a liability cap.

### *Non-Payment*

## **May a contractor suspend performance for non-payment?**

A contractor's remedy to suspend for non-payment is usually negotiated on a case-by-case basis; in any event the suspension needs to be reasonably back to back with the developer's suspension rights under the PPP agreement, and it is a typical ask of developers during the one-on-one negotiations to have the right to suspend construction work in case of delay in payment by the grantor.

### *Applicable Clauses*

## **Does local law restrict 'pay if paid' or 'paid when paid' clauses?**

Payment terms are governed by different rules in each state. Some states deem some payment terms in construction contracts to be matters of public policy and have enacted 'prompt payment' statutes. Others see contract provisions shifting the risk from the contractor to the subcontractor as valid and enforceable. In many states, pay-if-paid provisions are enforceable; however there is disagreement as to whether such clauses create a timing mechanism for when payment is due or if it is a condition precedent to payment. For example, in Alaska and Georgia, a pay-if paid provision creates a condition precedent to payment, but in Alabama, a pay-if-paid provision, simply suggesting when payment was to be remitted. Some states, like California, will enforce pay-when-paid provisions but not pay-if paid provisions. Others, like Florida, permit pay-if-paid only when the provision unambiguously shifts the burden from contractor to a subcontractor, but will otherwise interpret them both as timing issues. In North Carolina, neither form is enforceable.

## **Are 'equivalent project relief' clauses enforceable under local law?**



Equivalent project relief clauses are generally enforceable. However, to the extent that they run afoul of prompt payment statutes (eg, permitting a contractor to withhold payment to a subcontractor simply because the payment has been withheld by the owner and not on the basis of a specific breach by the subcontractor), equivalent project relief provisions may be unenforceable.

## *Expansion of Scope of Work*

### **May the government party decide unilaterally to expand the scope of work under the PPP agreement?**

Typically PPP agreements in the United States give the grantor a broad right to change the scope of work during construction or the services during operation, accompanied by a right of the developer to be compensated for additional work required. Most additional work is subject to a price negotiation, but if no agreement is reached, governments often reserve the right to issue mandatory work orders on a cost-plus basis based on pre-established unit prices. Payment for additional work or services (or the reduction of availability payment when applicable) can be made in cash, extension of the term (rarely) or over time via an adjustment to an availability payment.

## *Rebalancing Agreements*

### **Does local law entitle either party to have a PPP agreement ‘rebalanced’ or set aside if it becomes unduly burdensome owing to unforeseen events? Can this be agreed to by the parties?**

The concept of ‘restoring the economic balance’ or similar formulations is not found in US PPP agreements. Thus, the impact of unexpected significant events or changes in general economic conditions will not result in any change to the PPP conditions unless these changes or events can be characterised as one of the circumstances entitling the developer to receive schedule relief or compensation under the agreement as a force majeure, relief event or similar.

## *Liens Laws*

### **Are statutory lien laws applicable to construction work performed in connection with a PPP agreement?**

Statutory lien laws are not necessarily overridden by PPP statutes, and therefore would be applicable to any work performed in connection with a PPP agreement. However, to the extent that the asset on which work is performed is the property of the state, different rules may apply to such liens.

## *Other Relevant Provisions*

### **Are there any other material provisions related to design and construction work that PPP agreements must address?**

Generally speaking, all states require the posting of performance and payment bonds to secure the developer’s design and construction obligations under the PPP agreement. In general, the requirement is for those bonds to have a ‘penal

sum' (ie, a maximum liability for the surety) equal to the contract price, although when the price exceeds certain high thresholds, the statutes would require a penal sum for a lower amount. Most PPP contracts allow the developer to comply with this requirement by providing evidence of the bonds delivered by its design-build contractor to developer. These bonds will invariably need to reflect both the grantor and the collateral agent as co-beneficiaries.

## **Operation and Maintenance**

### *Performance Obligations*

**Are private parties' obligations during the operating period required to be defined in detail or may the PPP agreement set forth performance criteria?**

Although there is no mandatory uniform treatment across states, all PPP contracts, whether for projects with demand risk or without it, contain a requirement for the developer to perform its O&M obligations in accordance with certain performance criteria to incentivise the minimisation of facility unavailability cases and maintenance failures, among other things.

### *Failure to Maintain*

**Are liquidated damages payable, or are deductions from availability payments possible, for the private party's failure to operate and maintain the facility as agreed?**

Availability-payment projects normally contain a system of agreed deductions to the availability payment, which may at least in theory be in an aggregate monthly amount equal to or exceeding the availability payment.

### *Refurbishment of Vacated Facilities*

**Are there any legal or customary requirements that facilities be refurbished before they are handed back to the government party at the end of the term?**

It is customary for PPP contracts to contain handback provisions that require the developer to return the asset in an adequate state of conservation. Many contracts (especially in social infrastructure projects) prescribe the minimum useable life that certain specified construction elements must have at the time of handing back the facility. It is typical also for the grantor to require some form of liquid security to cover such obligations.

## **Risk Allocation**

### *Delay*

**How is the risk of delays in commercial or financial closing customarily allocated between the parties?**

The project company typically is not excused from achieving commercial close, unless the state authority has failed to satisfy its obligations, including obtaining

authorisations allocated to it. Most PPP contracts contain provisions for the parties to share on the risk of interest rate changes for the period going between the bid date and financial close.

**How is the risk of delay in obtaining the necessary permits customarily allocated between the parties?**

If responsibility for the acquisition of the permit was allocated to the government party (which is typically limited to major environmental authorisations), a delay in obtaining such a permit typically entitles the private party to relief in the form of an extension of the time to perform its obligations. With respect to developer permits, this is a matter of negotiation in most projects and while grantors are generally reluctant to grant relief for permitting delays, this remedy may be available in specific justified cases.

*Force Majeure*

**How are force majeure and geotechnical, environmental and weather risks customarily allocated between the parties? Is force majeure treated as a general concept relating to acts outside the parties' control or is it defined with reference to specific enumerated events?**

Occurrence of a force majeure event typically entitles the private party to relief in the form of an extension of the time to perform its obligations, but not additional economic compensation. Weather conditions are usually covered by the concept of force majeure in those cases in which the private party is entitled to relief.

Discovery of geotechnical circumstances that were not shown in the reference information provided by the government party, or that could not be expected or learned after a reasonable investigation (the standard of which may vary from state to state), typically entitles the private party to relief in the form of an extension of time to perform its obligations and payment of additional compensation to cover for additional costs (though, increasingly, grantors are requiring developers to share in this risk by assuming liability up to an agreed monetary threshold). A similar approach is usually followed for pre-existing environmental conditions (for which the grantor assumes liability as generator) and third-party release of hazardous substances, but the calculation of the compensation for additional costs arising from these circumstances in some cases is different.

*Third-Party Risk*

**How is risk for acts of third parties customarily allocated between parties to a PPP agreement?**

This can vary from contract to contract. Depending on the type of project, the government party typically assumes responsibility for some matters, such as the performance of work by other contractors or interferences from utilities. However, PPP agreements sometimes make the private party responsible for

obtaining some access rights or cooperation from third parties (including with utilities and in connection with additional property (not originally contemplated for the project)). To the extent that the government party has assumed such a responsibility, any failure to provide access, lack of cooperation or failure to perform by third parties typically entitles the private party to relief, including in the form of economic compensation or extensions to the schedule.

## *Political, Legal and Macroeconomic Risks*

### **How are political, legal and macroeconomic risks customarily allocated between the parties? What protection is afforded to the private party against discriminatory change of law or regulation?**

PPP agreements customarily include protection (i.e., compensation) to the developer for certain changes in law, and especially discriminatory changes in law, namely, a change that is intended to apply only to the developer or, owners or operators of facilities similar to the one covered by the PPP agreement. In addition, most PPP also provide protection for termination for convenience by the grantor. However, other political risk, such as the risk of a procuring authority deciding to drop a procurement even at an advanced stage, normally has no protection.

## *Mitigating Events*

### **What events entitle the private party to extensions of time to perform its obligations?**

Typically, all relief events for which compensation is to be paid by the grantor also provide for schedule relief; however, not all the circumstances that allow for schedule relief would also give rise to compensation. For instance many PPP agreements contemplate schedule relief but no compensation for construction delays caused by force majeure.

### **What events entitle the private party to additional compensation?**

In addition to compensation for certain events as set out above, compensation events can include certain actions of the grantor, delays and costs incurred by court decisions preventing the developer from performing its obligations and other issues specific to the particular transaction.

## *Compensation*

### **How is compensation calculated and paid?**

In revenue risk projects, compensation is generally provided for both cost incurred by the developer and loss or revenue, subject to the developer's obligation to mitigate and net of cost savings and positive revenue derived from the event. In addition, certain relief events can give rise to an extension of the term. Payment is generally in a lump sum, or in instalments over time. In availability payment projects, the grantor reserves the right to either pay in one lump sum, in several instalments, or over time as an adjustment to the

availability payment. Generally speaking the grantor will provide compensation for financing costs attributable to its decision to defer payment of compensation,

## *Insurance*

**Are there any legal or customary requirements for project agreements to specify a programme of insurance? Which party mandatorily or customarily bears the risk of insurance becoming unavailable on commercially reasonable terms?**

Customarily, PPP agreements include a programme of insurance that each party must carry. Most PPP contracts currently include provisions addressing the potential unavailability of required insurance, either because insurers cease to cover such risks or because they charge premiums that are excessively high. The solution typically involves a choice by the grantor to either cover the risk totally or partially, or terminate the PPP agreement and pay compensation as a no-fault termination.

## **Default and Termination**

### *Remedies*

**What remedies are available to the government party for breach by the private party?**

PPP agreements in the United States contain a combination of remedies for grantors, including charging and collecting liquidated damages for some delays, seeking compensation or offsetting the availability payment or terminating the agreement. Performance-based availability payment agreements typically contain a pre-established set of deductions (with a monetary value for certain specified performance failures) to be calculated with the same periodicity as the availability payment so that the aggregate amount of such deductions is offset against the next availability payment coming due. In addition the government party typically reserves the right to step in or remedy certain failures in performance, subject to the rights of the collateral agent for the lenders to do the same, which grantors customarily accept as having priority.

### *Termination*

**On what grounds may the PPP agreement be terminated?**

Termination events normally include certain serious developer defaults (including violations of material provisions such as the restrictions on change of control, repeated performance failures (or the accumulation of deductions above certain thresholds).

**Is there a possibility of termination for convenience?**

PPP agreements in the United States typically provide for termination for convenience.

## **If the PPP agreement is terminated, is compensation available?**

Market practice currently distinguishes between terminations occurring during the construction period and terminations during the operating period. In the case of terminations during construction, the developer may be entitled to compensation even if the termination is due to a developer default, which is normally based on the value of the work minus the damage caused to the grantor, and recognises the repayment of at least a part of the project's senior debt. Compensation will also be available for no-fault terminations such as cases of extended force majeure or the occurrence of changes in law or court injunctions or decisions making the entry into the PPP contract or the performance of the obligations therein illegal. Finally, terminations for grantor default or for convenience will give rise to fuller compensation, including some kind of compensation for loss of IRR, based on the calculations set out in the approved financial model. It should be noted that the timing for the actual disbursement of compensation can vary from case to case, and can go up to more than one year. In addition, the payment of termination compensation is in almost all cases subject to appropriation risk.

## **Financing**

### *Government Financing*

#### **Does the government provide debt financing or guarantees for PPP projects? On what terms? Which agencies are responsible?**

At the federal level, there are financing programmes under the financing and grant programmes such as the Water Infrastructure Finance and Innovation Act (WIFIA), the Transportation Infrastructure Finance and Innovation Act (TIFIA), Railroad Rehabilitation and Improvement Financing (RRIF) and Infrastructure for Rebuilding America (INFRA). The most widely used of such programs is the TIFIA loan, which provides up to 33 per cent of a project's eligible costs at favourable rates on a subordinated basis (with a 'springing lien' whereby such loan becomes *pari passu* with senior debt upon the occurrence of a bankruptcy event). The Build America Bureau was created in 2016 as a single point of contact for infrastructure financing. In addition to these direct lending and other direct grants (both federal and state), some eligible PPP projects (such as roads or rail projects) are eligible to be financed by 'private activity bonds', a kind of tax-exempt bond widely used in the US. Notably such bonds are compatible with TIFIA financings.

### *Privity of Contract*

#### **Are lenders afforded privity of contract with the government party through direct agreements or similar mechanisms? What rights will lenders typically have under these agreements?**

Typically, PPP agreements in the United States provide for lender rights. Privity of contract is normally afforded by the entry into direct agreements between the granting authority and the lenders' collateral agent or trustee. Even if a direct

agreement is contemplated, all PPP agreements contain an express recognition of the lenders' rights and the general primacy of their rights over those of the grantor until the debt is repaid. Direct agreements give the collateral agent the right to cure defaults (with or without stepping into the developer's shoes), to step in to replace the developer temporarily, to provide a replacement developer and in some cases obtain a replacement project agreement. Instead of using direct agreements some PPP agreements include lender protection provisions in the body of the PPP agreement, expressly recognising the lenders or the collateral agent as intended third-party beneficiaries.

## *Step-In Rights*

**Is there a mechanism under which lenders may exercise step-in rights or take over the PPP project? Are lenders able to obtain a security interest in the PPP agreement itself?**

Typical direct agreements recognize the lenders' right to step in to cure defaults by the project company, such rights taking precedence over similar rights reserved by the grantor in the project agreement. Lenders are also afforded the right to take over the project by taking over the project company, and in some cases obtain a replacement project agreement. Lenders typically are afforded the right to take a security interest in the developer's interest under the PPP agreement.

## *Cure Rights*

**Are lenders expressly afforded cure rights beyond those available to the project company or are they permitted to cure only during the same period and under the same conditions as the project company?**

This has varied from project to project, depending, in particular, on the jurisdiction procuring the project. In some cases, the cure period is in addition to the cure period of the project company, and in others, the lenders are afforded only the same period as the project company.

## *Refinancing*

**If the private party refinances the PPP project at a lower cost of funds, is there any requirement that the gains from such refinancing be shared with the government? Are there any restrictions on refinancing?**

This term is not necessarily addressed by PPP statutes. However, most PPP agreements include an obligation to share on refinancing gains, except in certain refinancings that are deemed to be permitted from the outset.

## **Governing Law and Dispute Resolution**

### *Local Law Governance*

**What key project agreements must be governed by local law?**

PPP agreements are almost invariably governed by the law of the grantor's state; dropdown contracts are also typically governed by the same law as the PPP agreement.

## *Government Immunity*

**Under local law, what immunities does the government party enjoy in PPP transactions? Which of these immunities can be waived by the government?**

Generally, governments that enter into valid agreements are liable for the obligations incurred under the contract; entering the contract acts as a waiver of sovereign immunity consistent with similar principles of international law in this regard. In addition, all states have enacted some form of a state claims acts or a state tort claims acts, which either provide a general waiver of immunity with certain exceptions, assert state immunity providing for a limited number of exceptions, or establish a special court to adjudicate claims against the states have adopted sovereign claim acts that allow for the state to be sued for liability subject to the satisfaction of certain procedural formalities, in some cases having to prosecute the claim before specific (in some cases, special) courts. However, the scope of immunities that states have retained varies from state to state, and may include immunity from exemplary or punitive damages.

## *Availability of Arbitration*

**Is arbitration available to settle disputes under the project agreement between the government and the private party? If not, what regime applies?**

Although this may change in some cases, grantors will typically prefer to use the local courts to adjudicate disputes regarding PPP agreements.

## *Alternative Dispute Resolution*

**Is there a requirement to enter into mediation or other preliminary dispute resolution procedures as a condition to seeking arbitration or other binding resolution?**

Some state legislations require mandatory mediation or the use of dispute resolution boards for certain matters, but there is no specific approach that can be deemed uniform throughout jurisdictions in the United States.

## *Special Mechanisms*

**Is there a special mechanism to deal with technical disputes?**

There is no particular mechanism that is uniform throughout jurisdictions, although expedited resolution of technical disputes is found.

## **Updates and Trends**

### *Key Developments of the Past Year*



**What are the current issues of note and trends relating to public-private partnerships in your jurisdiction? Are there any identifiable trends in the financing of PPP projects in the jurisdiction?**

The PPP sector was impacted seriously by the covid-19 pandemic in 2020, with many procurements put on hold, although the gradual lifting of restrictions by the end of the year saw a reactivation of projects. The practical full reopening of business as we write this, and the fast growth expected for the second half of 2021 and 22, is anticipated to bode well for the industry going forward. Moreover, an increase in inflation could spur greater interest from investors attracted by the anti-inflationary nature of PPP infrastructure assets. Having said this, procuring and bringing to financial close PPP projects is likely to continue to be challenging politically or practically slow in many US jurisdictions; new project growth will not be uniform across industries or states and certainly will not progress at a rate to the satisfaction of many investors and professionals.

On the transportation side of the market, we would predict a number of availability-based transportation projects to continue coming to market but on the managed lanes front, we expect an increase in revenue risk projects.

We also expect continued growth in the use of PPPs for social infrastructure projects, including more school projects and other vertical DBFOM or DBOM projects. We should also see the new University deals, most likely energy monetisation and modernisation projects following the recent examples of the Universities of Idaho and Iowa projects.

Broadband is another area of growth, with many procurements in the pipeline, including fixed line projects, many of them linked to existing highway rights of way, rural access to broadband, municipal systems and fiber-to-home projects.

Finally, on the legislative front, while we anticipate PPP procurement to remain a state and local government affair, the market may be energised to the extent that the US Congress is able to pass comprehensive infrastructure legislation.

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