Insights: Alerts

P3 and Your Tax Dollars – Federal Government Makes Next Foray into Public Private Partnerships

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In an interesting turn, the U.S. Army Corps of Engineers (the "Corps") published a Request for Information On Conceptual Public Private Partnership Delivery of Specific Corps Projects. 84 Fed. Reg. 1084-85, Feb. 1, 2019, https://www.federalregister.gov/documents/2019/02/01/2019-00709/request-for-information-on-conceptual-public-private-partnership-p3-delivery-of-specific-us-army. Under this RFI Notice, the Corps has been directed to create a pilot program on P3s to try and determine the viability of different and new (at least new to the Government) delivery methods. It is the hope that these "new" methodologies will result in reduced cost and time impacts to project deliveries.

P3s, like the name suggests, are partnerships between, in this instance, a federal agency and private/commercial sector partners in which the agency retains ownership of the facility or system, but the private partner invests capital to design, develop and operate the facilities, typically with a revenue stream in mind. *See e.g.*, GAO GGD-99-23 (https://www.gao.gov/assets/230/226973.pdf). These may relate to operate and maintain ("O&M"); operate, maintain, and manage ("OM&M"); or other types of lease/develop/operate vehicles, to name just a few. Typically, the private partner builds, maintains, and operates the facility for a fixed number of years through a contract vehicle in return for part of the revenue stream. At the end of that term, the asset is either returned to the agency, or the contract vehicle is renewed or replaced.

While the Government has dabbled with P3s in the past, particularly with base housing in which private entities build, operate, maintain and oversee military family housing on federal land, the Government has largely taken a very hands-off approach to P3s. In the past the Office of Management & Budget frowned upon P3s as they, in effect, give away (albeit temporarily but for a long term) federally-owned property. With the turn of the century, however, Congress provided statutory authority for certain agencies to enter into P3s (including the National Park Service, Veterans Affairs, and others).

In summary, this initial foray by the Corps is seeking submission of proposals to develop the program in which the Corps identifies up to ten P3 pilot projects. The initial screening criteria consist of:

(1) The P3 proposal:

(a) Has a construction cost in excess of $50 million;

(b) Has non-Federal sponsor support;

(c) Includes design, build, finance, operation and maintenance (DBFOM) or some combination thereof for Federally authorized projects;

(d) Accelerates project delivery; and

(e) Has the ability to generate revenue or leverage non-Federal funding sources.

(2) Existing authorities are sufficient to allow the P3 project to be completed.

(3) A qualitative assessment demonstrating that the P3 will deliver the project faster and/or more cost effectively than traditional delivery.

The Selection Criteria consist of the following:

(1) Return on Federal Investment.

(a) P3 project proposals will be evaluated and ranked on the basis of Return on Federal Investment (ROFI). ROFI will be calculated by annualizing the total project benefits and Federal costs utilizing the current discount rate, and applying the formula: (Benefits & Federal Costs)/(Federal Costs).

(b) For any P3 project where it has been determined that a reduction in the non-Federal share is warranted with authority provided in 33 U.S.C. 2213, the ROFI calculation will be adjusted to account for those modifications and address concerns pertaining to equity.

(2) *Replicability:* Project proposals that are replicable, meaning the proposed P3 structure or underlying concepts may be applied to other prospective projects.

(3) *Reliable Funding Sources:* Reliable non-Federal funding sources for the design, construction, operation and maintenance of Federally authorized water resource projects are identified.

(4) *Risk Allocation:* Project effectively allocates delivery and performance risk to non-Federal entities and minimizes Federal direct and contingent liabilities associated with the project.

Interestingly, based on prior research, the Corps recognizes certain “key known challenges”, which are typical to most government programs. These include: “(1) [i]nability to collect, retain and reinvest fees; (2) inability to make commitments on future appropriations; and (3) enabling framework and authorities to implement P3 projects.”

The Corps' Notice keeps the type and size of the projects sought open, but notes some examples, including hydropower, navigation systems, ecosystem restoration, flood management, and the like.

While this is both an interesting and strong next step for the Corps (and presumably, by extension, the government as a whole), it is not without significant potential problems and questions that remain. Some fundamental questions and concerns exist from a plain reading of the Notice.

For example, seeking proposals on contracts in excess of $50 million but only providing about 1½ pages of notice and related data is highly problematic. The Notice itself is quite vague and lacks the sort of details that one might expect associated with the sort of spend these projects anticipate. There is also little in the way of investment information, how evaluation will occur (there is reference to an evaluation matrix but it is not included) and what the end deliverable or outcome will be. As a pilot program, there appears to be much asked, but little told. Some pressing questions:

- What is the likelihood of the Corps pursing the projects submitted (recognizing that the offerors/responders are not reimbursed for their proposal responses)?
- How is proprietary information disclosed to be truly protected (recognizing that there are methods under the FAR and FOIA exemption (b)(4) for trade secret and competition sensitive information)?
- Perhaps most vital, is how will the government develop P3 programs given its relatively small experience in both commercial work and in P3s in particular? Where will it develop that expertise?

Hopefully this pilot program creates the first step in learning about the “ins and outs” of P3s; and while this appears to be a good effort, the Corps needs to tread carefully. We will continue to watch and report as further developments occur.

For further insight go to the Corps P3 homepage at:

https://www.usace.army.mil/Missions/Civil-Works/Infrastructure/Infra_P3_program/