

The ABC's of PPP's: Implementing Public-Private Partnerships

California Special Districts
Association
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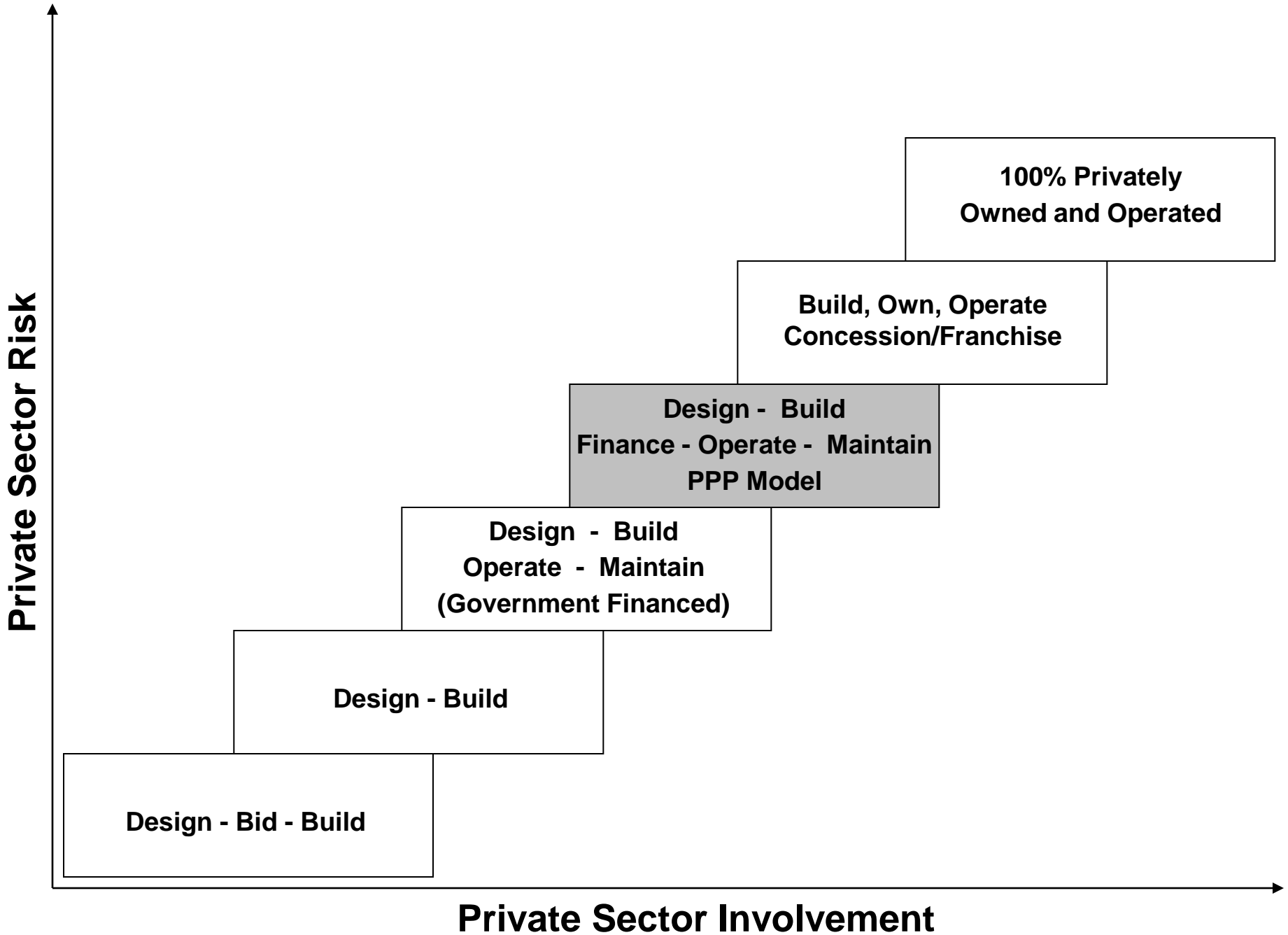
Why are we talking about PPP's?

- Great need for infrastructure
 - California needs \$500B over 20 years
- Significant constraints on public funding
 - Drop in tax revenues
 - Limits on bonding capacity
 - Cuts in grant programs
- Success in other parts of the world
- Belief in private sector efficiency

What is a PPP?

“A public-private partnership is a contractual arrangement formed between public and private sector partners, which allows more private sector participation than is traditional.”

-- US Federal Highway Administration



What Type of Projects Work with PPP's?

- Toll Roads
- Water Facilities
- Courthouses
- Prisons
- Complex Technical Facilities

When is a PPP Appropriate?

- Risk Transfer Makes Sense
- Urgent Need
- Timing Benefit
- Successful Elsewhere
- Private Investors Interested
- Multiple Bidders Interested
- Easy to Monitor/Enforce

Issues in Implementing PPP's

Financial Concerns:

- Transfer of Existing Asset
- Creation of New Facility
 - Self-funded (tolls/fees)
 - Availability Payments
- Mixing Funding Sources
- Providing Return on Investment
- Tax Issues

Issues in Implementing PPP's

Environmental Issues:

- Timing of Environmental Review
 - *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116) questions ability of agencies to commit to deals prior to completion of environmental review
 - *Cedar Fair LP v. City of Santa Clara* (2011) 194 Cal. App. 4th 1150: Non-binding term sheet for proposed stadium transaction does not require EIR.

Issues in Implementing PPP's

Procurement Issues:

- Solicitations
- Unsolicited Proposals
- Legal Issues
 - Qualifications-based Awards
 - Competitive Bidding
 - Legislative Authority

Issues in Implementing PPP's

Contracting Issues:

- Term
- Complexity
- Performance Bonds
- Hand-back Terms
- Funding Future Expansion
- Limiting Public Competition

Issues in Implementing PPP's

Political Issues:

- Transparency
- Public Participation
- Labor Terms
 - Prevailing Wages
 - Project Labor Agreements
 - Community Benefits Agreements
- Fronting Transaction Costs

Legal Authority

- Authority varies with each jurisdiction
- Florida, Texas, Virginia, California have authority
- Canadian provinces have many successful projects

Cal. Infrastructure Financing Act (Gov't Code 5956 et seq.)

- Term limited to 35 years
- Fee-producing infrastructure
- Hearings required to increase fees
- Specified Projects (wide range)
- 100% Bonding Required
- No Property Tax Exemption
- Attempts to correct flaws blocked by public sector labor unions

SB 4 (Cal. Sts. & Hwys. §143)

- In Former Governor's Budget Deal
- Reflects PPP Best Practices
 - Clearinghouse for information
 - Flexibility in award method
 - Contractor qualification requirements
 - Ultimate State approval of deals
 - Limits on unsolicited bids
 - Turnover at no cost at end of term
 - Goal is to model successful projects
 - Limited range of eligible agencies

Criticisms of PPP's

“The Legislature . . . must ensure public agency oversight and involvement in future PPP projects to prevent **foreign, multi-national companies and Wall Street investment houses from taking huge profits out of our transportation system, preventing the improvement of public roads, and inflicting outrageous tolls on motorists.**”

--Professional Engineers in California Government, “PECG Objectives for 2009”

Presidio Parkway Project

- Replacement of Doyle Drive for Seismic Safety Reasons
- First use of new PPP statute
- Unique Circumstances
 - No Tolls Available
 - Half of Project Conventionally Built
 - First time through new statute

Legal Challenge to Presidio Parkway Project from PECG

- Challenge reflects long-term friction between in-house State employees and private-sector engineering firms
- At trial court level, PECG raised a host of technical issues, including absence of toll revenues for funding

*Prof. Engineers in California
Government v. Dept. of
Transportation
(August 8, 2011)*

- Appeals court not persuaded by hyper-technical arguments raised by PECCG
- Supports basic policy in law to promote PPP's

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