

Harvard Kennedy School, “Tapping Private Financing and Delivery to Modernize America’s Federal Water Resources”

Section 3 of the Harvard Kennedy School’s report entitled “Tapping Private Financing and Delivery to Modernize America’s Federal Water Resources,” which may be found at http://ash.harvard.edu/files/ash/files/hks_ashcenter_federal_water_resources_report_web.pdf, contains a summary of P3 constraints and solutions, which are briefly outlined below:

1. Enable Revenue Generation & Ring-Fencing

- **Constraints:** There is a threefold challenge facing federal agencies when it comes to leveraging usage payments for federally-owned and operated water resource infrastructure. These include the following: 1. Limited ability to assess new fees and generate revenues, 2. Inability to commit revenues for project-specific purposes (ring-fencing), and 3. Lack of contract authority to enter into agreements that encumber future revenues
- **Strategies for Addressing Constraints and Action Plan:** There is a compelling need for Federal value capture and revenue potential (including flexibility to create and assess new user fees); revenues collected and retained for project-specific purposes; establishment of trusts or revolving funds project-specific purposes; minimum revenue guarantee commitments to treasury as a policy parameter; and, viability gap funding to meet the challenge of cost recovery for water resource projects

2. Enable Budget-Based Compensation Structures

- **Constraints:** Given the existing policy and legislative constraints relating to revenue generation and ring-fencing, federal agencies are limited to budget-based compensation structures for P3 projects. Nevertheless, while budget-based P3 are very common in both the US and across the globe, a number of constraints exist that limit their use with regards to federal water resource projects. These include: budget scoring (generally requiring the entire total obligations over the life of the P3 contract to be scored against the legislation in the year in which the budget authority is first made available), continuing contract authority (the Anti-Deficiency Act, together with the bona fide needs rule, prohibits contracts purporting to bind federal agencies beyond the obligational duration of the appropriation), and budget prioritization (recognize alternative financing and delivery results in efficiency savings and acceleration of public benefits within the budget prioritization process).
- **Strategies for Addressing Constraints and Action Plan:** There is a need to carve out new scoring parameters for civil works concessions and other forms of P3, either via the Control Methodology (which focuses principally on the level of public sector control of services) or the Risk-Reward Methodology (based on an economic risk and reward test). In accordance with GASB distinctions, budget scoring rules for federally sponsored water resource and similar civil works P3 arrangements should be distinguished from capital leases. Specific multiyear contracting authority (e.g., 62 Comp. Gen. 569 (1983)), would allow federal agencies involved in federal water resource P3 to enter into a multiyear contract without requiring obligations of the full contract amount at the time of contract award. Together with OMB, develop policy framework for budget prioritization of P3 projects. Through a legislative initiative, either expand the application of memorandum M-98-13 for performance-based contracting to improvements in operating and maintenance efficiencies for federal water resources or pursue special authorities. Budget Prioritization for federal P3 projects should ensure that projects are compared on equal footing (versus only Benefit-Cost-Ratio that does not take into account federal return on investment, Value-for-Money, accelerated benefits and cost savings, or risk transfer).

3. Develop Policy Framework for Federal Funding Contributions for Cost-Shared and Transferred P3/P4 Projects

- **Constraints:** Not all jurisdictions have P3 enabling legislation applicable to water resource projects, and as such, not all non-federal sponsors can leverage P3/P4 for project delivery. While some jurisdictions may be able to leverage value-capture tools, such as Tax Increment Financing, Special Assessments and Dedicated Taxes, poorer and less populated communities will struggle to create a reliable or credit-worthy revenue source. Non-federal project sponsors are often small, specially established, quasi-public entities and are often not credit-worthy, nor do they have the resources necessary to serve as the primary counterpart to a private partner under a P4. Federal agencies must be able to commit to their cost-share and other obligations contemplated under a P4. There is a need for a policy framework to objectively screen, select and prioritize for budget purposes federal funding for P4 projects.
- **Strategies for Addressing Constraints:** States should be encouraged to implement or expand existing state-level P3 legislation to explicitly allow for P3 to be used for water resources projects. Federal agencies should create a policy framework to assist non-federal sponsors of cost-shared water resource projects to identify, access and leverage value-captures opportunities. Federal agencies should establish detailed screening and selection criteria for P4 projects, including budget prioritization criteria.
- **Action Plan:** Federal agencies could provide local sponsors with broad-based parameters and best practice examples of adequate P3 enabling legislation for federal water resource projects; formalize strategy into a multi-agency or single-agency policy and assistance framework for non-federal sponsors of cost-shared or transferred water resource projects; and formalize strategy into a policy.

4. Develop a P3/P4 Enabling Framework

- **Constraints:** At present, alternative finance and delivery approaches, such as P3, are contemplated within Congressional 302(b) appropriations ceilings. This dis-incentivizes the use of innovative finance, as monies obligated for P3 are taken out of other projects. Even if P3 create greater efficiencies and more opportunities in the long-term, federal authorities are disinclined to pursue P3 if it means funding is being reduced for existing programs and priorities. Critical areas where legislation is lacking include, among others, the following:
 - Authorities to assess fees and commit them for project-specific purposes
 - Contract Authority and exemption from Anti-Deficiency to enable federal agencies to encumber future revenues in specified revolving funds for P3 project-specific purposes
 - Contract Term: Federal agencies require authorization to enter into long-term contracts to allow for repayment opportunity and to minimize contract risk
 - Authorized P3 Program: Where legislation is in place to support P3 programs (such as §5014 of WRRDA 2014), the enabling legislation is only authorized to the extent specifically provided for in subsequent appropriations acts. Nevertheless, to date, there have been no appropriations assigned to §5014 of WRRDA, thereby impeding the ability of USACE from formally undertaking actions to develop a P3 pilot program.

In order to lower the cost of privately financed water resources, additional efforts should be made towards expanding access to concessionary finance, credit enhancements and infrastructure banks for federally sponsored water resource projects.

- **Strategies for Addressing Constraints:** On a pilot basis, funding for alternative finance and delivery projects, such as P3, should not be included in the Budget Committee 302(b) ceilings, but should be added to the current budget ceiling. Work with Congress to address shortfalls in the existing legislative framework. Create a national Federal credit program or infrastructure bank.
- **Action Plan:** There is a compelling need to exempt funding for alternative finance and delivery projects from Budget Committee 302(b) ceilings on a pilot basis, address shortfalls in enabling legislation, and provide access to Federal credit programs / infrastructure bank.