Public-Private Partnerships:

A New Tool For California's Infrastructure Needs

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I. INTRODUCTION

A. What Are Public-Private Partnerships ("P3")?

P3 is an alternative construction project delivery method that typically involves a long-term partnership between a public entity and private developer (known as a "concessionaire" in the P3 realm) for the concessionaire's design, build, financing, operation, and maintenance of a substantial public improvement work. Usually, though not always, a P3 project is built on public land and involves the construction and operation of public infrastructure with a projected revenue stream that is used to help secure and repay the substantial project costs over time. P3 projects have been successfully completed worldwide in both "traditional" public infrastructure areas (such as transportation and transit) and "social infrastructure" areas including healthcare, judiciary, corrections, education, and public amenities. As will be explained below, P3 is not a solution for all public infrastructure needs, but it is a growing and important tool for public agencies and private entities to consider and utilize for appropriate projects. It also is a potential "gap-filler" for the project void created by the recent demise of redevelopment agencies in California.

B. The Modern P3 Movement

The modern P3 project movement was borne out of economic necessity, beginning in Great Britain in the early 1990's and spreading to Australia, Canada, and other parts of Europe. Governments in those countries, strapped for funding and desperate for transportation and healthcare infrastructure, embraced P3 as an important method of providing critical services to the public. To that end, they adopted broad, systematic government programs to spur the development of the P3 delivery method. Over the last two decades, more than 1,300 P3 projects were undertaken in the European Union, representing an estimated capital value of approximately €253 billion.[1]

The successes of P3 projects in the British Commonwealth and Europe, together with concerns about available public agency budgets and funding sources, have created a wave of interest in P3 projects in the United States. The United States Government and more than half of the states have now enacted P3-enabling legislation to encourage private firms to invest in public projects. Indeed, although California has lagged behind other states and the federal government in enacting legislation enabling the "design-build"[2] delivery method for its public agencies, the dire need to upgrade California's infrastructure, together with its lack of available public funding to meet that need, has prompted California's Legislature to enact enabling legislation for a significant number of P3 "traditional" (e.g., transportation, transit, and utilities) and "social" infrastructure projects. As the California Legislature has recognized:

> Local governmental agencies have experienced a significant decrease in available tax revenues to fund necessary infrastructure improvements. If local governmental agencies are going to maintain the quality of life that this infrastructure provides, they must find new funding sources. One source of new money is private sector investment capital utilized to design, construct, maintain, rebuild, repair, and operate infrastructure facilities. Unless private sector investment capital becomes available to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities, some local governmental agencies will be unable to replace deteriorating infrastructure. Further, some local governmental agencies will be unable to expand and build new infrastructure facilities to serve the increasing population.[3]

These California P3 enabling statutes will be discussed further, below.

II. P3 VERSUS THE TRADITIONAL PUBLIC WORKS PROJECT

A. Project Finance

A significant difference between the traditional public works project and the P3 project lies in the project financing. A traditional, large public works project usually involves some form of public bond financing, often supplemented by federal grant money, to raise the funding necessary to pay the design and construction costs over the several year term of project design and construction. For such public bonds, the public owner repays the principal plus tax-exempt interest to the bondholders over an extended period.

In a P3 project, however, the private concessionaire typically obtains all or most of the financing in the private sector, which is repaid either directly from the project's revenue stream once construction is completed and operating, or by the public owner via milestone and other "availability" payments. By utilizing private financing, or a hybrid of private and public financing, public agencies can often leverage their infrastructure construction budgets over longer time periods and cover more projects.

Every P3 project is unique, and the project finance arrangements often vary. Typically, various project finance

"tools" are used, including: (a) private equity investment by the concessionaire and/or investors; (b) loans from private commercial lenders; (c) government grants; (d) federal government loan and guarantee assistance programs (e.g., federal SAFETEE-LU/TIFIA);[4] and, (e) Private Activity Bonds[5] or other corporate bond financing.

Even with multiple funding sources available, these projects have some limitations. Because P3 projects usually are built on public land, which is immune from security instruments, a common issue is finding adequate security to satisfy the private institutions providing project financing. Some government finance assistance programs, like TIFIA, exist to provide such security;[6] other forms of security sometimes used include private company guarantees or letters of credit.

B. Design-Build on Steroids: Efficient Consideration and Transfer of Long Term Project Responsibilities and Risks

A second important difference between the P3 delivery method and the traditional public works project is the difference in the efficient consideration and management of the project responsibilities and risks. The P3 delivery method takes the efficiencies and risk transfer of the design/build[2] delivery method and extends them throughout the life cycle of the asset.

1. Design Responsibility and Risk

In a P3 project, the public owner typically prepares a conceptual design sufficient to generate comparable proposals and selects a concessionaire. The project design typically is performance-based, rather than prescriptive, giving the concessionaire the freedom to maximize efficiencies and take advantage of its expertise in design and construction.

Perhaps most importantly, the focus on the long-term performance of the asset promotes a natural evolution of efficiencies in asset development – an evolution that began with the increased design/construction efficiencies of the design/build delivery method now continues with the long-term "life cycle" cost considerations of the P3 delivery method. The design/build method increased efficiencies in the design and construction of assets by combining the responsibility of design and build into a single entity/team. This allows the contractors who will construct the building to contribute to the building's design. The result often allows construction to commence before the design is completed, decreasing the time necessary to complete the project, reducing conflicts in the design, and generally increasing the efficiencies of the construction itself.

P3 not only takes advantage of these design/build method efficiencies, but it extends them by integrating the long-term operations and maintenance providers into the concessionaire's "team" at the beginning of the design stage. Because the long-term operations and maintenance and refurbishment costs of most facilities dwarf the asset's design and construction costs,[7] this consideration of the asset's "life cycle" costs from the outset results in greatly increased efficiencies and long-term cost savings that often are neglected under earlier delivery methods.

Of course, to efficiently transfer design responsibilities and risks to the concessionaire and its team, the public owner must transfer much of the design control. Historically, construction design liability has been governed by the *Spearin* Doctrine, which has been applied in many jurisdictions, including California.[8] In essence, this doctrine provides that "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications."[9] Several federal decisions also follow this principle that design liability follows control over the design on both traditional design/bid/build and more contemporary design/build projects.[10]

The legal principle that design risk follows design control, of course, applies to projects regardless of whether their basis is traditional design/bid/build, design/build, or P3. Thus, a hallmark of P3 projects is to relinquish public control over the design sufficient to transfer as much design risk as possible to the private concessionaire.

2. Construction Responsibility and Risk

A P3 project typically places the traditional responsibilities for construction of the project upon the concessionaire, and often enhanced responsibility and risk for items such as testing and inspection of systems, obtaining government permits and approvals, testing and removal of hazardous materials, differing site conditions, indemnities, insurance, and extended warranties. These project agreement terms can carry substantial risks and costs, which should be negotiated between the public owner and concessionaire (and between the concessionaire and its design-build contractor), and reflected in the total contract price prior to project commencement.

3. Payment Responsibility and Risk

P3 projects typically involve either "toll/revenue concession" or "availability payment" approaches to compensate the concessionaire. The toll/revenue concession model contemplates direct payment to the concessionaire from tolls, user fees, or other revenue produced by the constructed facility after the project is placed into service and during the term of the project's operations and maintenance agreement, while the availability payment concession model requires the public owner to make payments to the concessionaire with substantial payments delayed until the project is operating and providing revenue to the public owner. Often, these availability payments are supplemented with milestone/subsistence payments made prior to asset availability. In either case ("toll/revenue concession" or "availability payment"), a substantial portion of the payment for construction is made to the concessionaire *after* the facility is substantially complete and generating revenue. This financing structure can allow public owners to leverage their infrastructure construction budgets by spreading financing over longer project terms and more projects, while shifting more liability and costs to the concessionaire.

4. Operations and Maintenance ("O&M") Responsibility and Risk

P3 projects generally include a lengthy period during which the concessionaire is responsible for the completed facility's operations and maintenance. The length of the O&M period varies, but often is twenty to fourty years following completion. The concessionaire typically will contract with a private company or companies with expertise in the particular

areas of operation and maintenance necessary to operate and maintain the asset, and, in most instances, will involve the operations and maintenance expert in the design phase of the project. This results in consideration of the substantial long-term operations and maintenance and refurbishment costs of the asset in its original design. Additionally, because the concessionaire is generally responsible for maintenance and operation of the facility, the concessionaire/owner prime contract typically includes an extended warranty of construction beyond the typical one year express warranty period for traditional public works projects. As a result, the concessionaire is obligated as to materials, workmanship, and repairs for a longer period of time.

As explained above, public entities achieve better "value for money" by using private sector enterprise with its specialized construction, management, financial, and operations competencies and by allocating long-term risk to the party best able to manage it. These factors are often a driving force for public entities' serious consideration of the P3 structure.

For the concessionaire and contractor, although the P3 delivery method includes greater/extended risks, if the contract terms and price fairly reflect these risks, this delivery method typically enables larger projects, more control, higher returns on investment, fewer competitors, and often a qualitative element (i.e., best value, rather than lowest bidder) to the bid selection process.

III. CALIFORNIA'S P3-ENABLING LEGISLATION

P3 projects require specific enabling legislation that typically identifies the public agencies and types of projects to which it applies, defines the concessionaire (and sometimes design-build contractor), selection methodology to be followed (to guard against possible collusion), establishes the term of the operations and maintenance agreement, and often expressly mandates that the public improvement remain in the ownership of the government and not be privatized at the end of the project term. California's most prominent P3 enabling statutes are as follows:

A. Transportation Projects: Streets & Highways Code section 143

- Allows CalTrans and regional transportation agencies, until January 1, 2017, to " solicit proposals, *accept unsolicited proposals*, negotiate, and enter into comprehensive development lease agreements with public or private entities, or consortia thereof, for transportation projects." (italics added) Prior to this amendment, Caltrans was limited to only four P3 projects (that law expired on January 1, 2012).
- Authorizes contracting entity to impose tolls or user fees.
- Selection is based on low bid or best value.

B. Local Government Public Works Projects: Government Code sections 5956 et seq.

- Enables local governments to use private investment capital to design, build, and operate "fee producing infrastructure" for the following categories of projects: (a) irrigation; (b) drainage; (c) energy or power production; (d) water supply, treatment, and distribution; (e) flood control; (f) inland waterways; (g) harbors; (h) municipal improvements; (i) commuter and light rail; (j) highways or bridges; (k) tunnels; (l) airports and runways; (m) purification of water; (n) sewage treatment, disposal, and water recycling; (o) refuse disposal; and (p) structures or buildings, except structures or buildings that are to be utilized primarily for sporting or entertainment events.
- Requires payment and performance bonds, and competitive negotiation process to demonstrate "competence and qualifications" at "fair and reasonable prices."
- Limitation: does not apply to state agency projects or projects receiving state funding.

C. Court Facilities: Government Code sections 70371.5 and 70391

- Establishes the Judicial Council as the policy-making body of the judicial branch.
- Establishes the Immediate and Critical Needs Account for state court facilities (the "Account"). The Account proceeds can be used for payment of court facilities' rent, leases, or service contracts, including those contracts in which one or more private sector participants share some of the risks of financing, design, construction, or operation of the court facilities.
- Authorizes the Judicial Council to make recommendations to the State Public Works Board by considering any "economic opportunity" – e.g., any viable financial partnerships with private parties which could result in lower project delivery costs.

D. High Speed Rail: Public Utilities Code section 185036

- Authorizes the California High Speed Rail Authority to:
  - enter into contracts with public or private entities for design, construction, and operation of high speed trains;
  - acquire rights-of-way;
  - issue debt secured by pledges of state funds and Federal grants; and
  - enter into joint development agreements with local governments and private entities.
- Authority is conditioned upon further statute or voter approval of financial plan:
  - in November 2008, California voters approved a $9.95 billion Bond Act; and

- in February 2009, the California Attorney General issued an opinion finding that the Bond Act meets the conditions of section 185036.

It should be noted that there is a significant amount of P3 legislation at the federal level currently used for P3 federally-financed transportation projects. In 1991, Congress passed the Intermodal Surface Transportation Efficiency Act, a federal pilot program for P3 projects on toll roads.[11] That act was followed in 1998 by the Transportation Equity Act for the 21st Century.[12] In 2005, Congress extended the use of P3s by enacting the Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users (SAFETEE-LU), which provided $286.4 billion, including $52.6 billion for transit, for various federal credit assistance programs through the 2009 fiscal year.[13] In July 2012, Moving Ahead for Progress in the 21st Century (MAP-21) authorized $105 billion for federal highways, transit, and safety programs for fiscal years 2013 and 2014.[14]

Although several P3 enabling statutes exist in California, more will be needed for P3 to be used for a broader array of infrastructure projects in the state. The California Legislative Analyst's Office ("LAO") has recently issued a report entitled "Maximizing State Benefits From Public-Private Partnerships" in which it recommends expanded availability of P3 among California agencies and the creation of a permanent government body with P3 expertise to recommend, implement, and regulate P3 projects within the state.[15]

IV. P3 PROJECT TYPES

P3 projects tend to be appropriate for certain types of public works infrastructure projects, and typically include both "traditional infrastructure" involving transportation/transit projects or utilities (e.g., water treatment facilities, alternative energy power plants) that generate revenue, and nontraditional "social infrastructure" projects such as healthcare, education, housing, hospitality, and even courthouses. Although not a panacea, P3 can be help fill the void left by the recent demise of redevelopment agencies in California – again, for appropriate infrastructure projects. Below are several case studies in California and other states illustrating how P3 projects have been used in different sectors.

A. Transportation/Transit Case Study: The Presidio Parkway Project

The Presidio Parkway P3 Project is a two-phase project involving Caltrans and the San Francisco County Transportation Authority, and consists of replacing the existing Doyle Drive facilities on Route 101 in San Francisco (south access to the Golden Gate Bridge), with a new six-lane parkway-type roadway and a southbound auxiliary lane.

Phase I involved performing advanced environmental mitigation, constructing portions of the Southern Park Presidio interchange and Southbound High Viaduct, Southbound Battery Tunnel, and relocating utilities. Phase II consists of work on the main Post tunnels, Northbound Battery Tunnel, utility work, Girard Road undercrossing, northbound lanes, and landscaping.

Phase I was a design/bid/build project, however, Caltrans changed to a P3 delivery method for Phase II and required the concessionaire to design, build, finance, operate, and maintain the facilities. Caltrans selected Golden Link Concessionaire to develop Phase II. Under their original contract, milestone payments were set at $185.43 million, to be paid at substantial completion, and an additional payment of $91 million to the concessionaire upon completion of construction.

Funding for this project totaled $364.7 million, and was obtained by Golden Link Concessionaire from a variety of sources. These funding sources include bank loans ($166.6 million), a TIFIA Tranche A loan ($89.8 million), a TIFIA Tranche B loan ($60.2 million), a parent company contribution ($2.6 million), private equity ($43 million), and TIFIA capitalized interest ($2.5 million). Full repayment of the Tranche A short-term loan must be made following substantial completion (milestone payment). The Tranche B $60.2 million long-term loan (Tranche B) is to be repaid using the non-federal portion of a quarterly availability payment to Golden Link Concessionaire over a 28-year period. The TIFIA loans are secured by a lien on project collateral.

B. Airports Case Study: La Guardia NY Airport Central Terminal

The La Guardia New York Airport Central Terminal is a new P3 project at the stage of qualified concessionaire bid solicitation by the public owner. The project includes a design, build, finance, operate, and maintain P3 model to replace the La Guardia Airport central terminal, roadways, aircraft ramps, and ancillary facilities. The project includes new construction while operating the existing transfer tenants in the airport seamlessly. It currently includes an "availability payment" scheme whereby the public entity's significant payments to the concessionaire do not begin until the new asset is substantially complete and ready to generate revenue. The approximate project value is just under $2 billion.

C. "Social Infrastructure" Case Studies

1. *Judiciary Case Study: Long Beach Courthouse*[16]

The new Long Beach, California Courthouse, currently under construction, is an example of a courthouse delivered through use of the P3 method. In fiscal year 2007-2008, the California Legislature faced a $2.4 billion deficit in the state's general fund. The Administrative Office of the Courts ("AOC") saw the limitation on the construction fund and worked with the Legislature to build a new courthouse using the P3 delivery method.

Before deciding on P3, the AOC evaluated several alternatives, including (a) design/bid/build, (b) design/build for a court-only building with traditional state management and financing, (c) a court building with space for justice partners using design/build with traditional state management and financing, and (d) a court building with space for justice partners using a P3 delivery method. The AOC selected the P3 method because it would be more cost-effective for construction and over the life of the courthouse, and also because the P3 would not obligate the AOC to pay for the design and construction until the courthouse was ready for use. The AOC's analysis indicated that, over the life cycle of the new facility, a P3

approach would cost the state up to $52 million less than would a traditional state-financed construction project. The AOC also estimated that utilizing the P3 method would allow the AOC to use the facilities thirty months earlier than would be expected using the traditional design/bid/build process.

Under the P3 arrangement, the private concessionaire entered into a thirty-five-year service agreement with the state. In exchange for the state's payment of an annual service fee, the private entity would design, build and finance construction of the facilities, and then operate and maintain the completed facilities for a period of thirty-five years. The state's total payment to the private entity for design, construction, and finance is fixed, with the portion of the state's payment representing the costs of ongoing operation and maintenance adjusted annually to reflect changes to an agreed-upon index. Under this plan, the state is not obligated to make any service payments at all until the building is completed.

Financing for the project was obtained from equity contributions of approximately ten-percent of the construction cost, in addition to loans obtained by the concessionaire from private lenders for the remainder of the project costs. The project is currently under construction. The concessionaire is Long Beach Judicial Partners LLC, a joint venture comprised of Meridiam Infrastructure, Clark Design/Build of California, Edgemoor Real Estate Services, Johnson Controls, and an AECOM-led design team.

2. Education Case Study: UC Student Housing

The University of California ("UC") has used the P3 method to deliver approximately sixty projects, ranging from student apartments and hotels to medical office buildings and research facilities.[17]

Using P3 to deliver generic projects for student housing has proven effective and beneficial to the UC. The Vista Del Norte student housing at UC Irvine is an example. The project goal was to deliver a large number of beds at a competitive rate without affecting rates for existing UC housing or significantly impacting debt capacity. The agreed upon lease term for this project was fourty years, subject to earlier or later termination upon payoff of bonds. The financing was funded through tax-exempt bonds issued on behalf of a non-profit entity through a conduit issuer. The project was developed by ACC SC Development (UCI II, LLC) under contract with CHF (Coligent Housing Foundation, Irvine, LLC, a non-profit owner of student rental housing). American Campus Management, California, LLC, under contract with CHF, manages the project, and the project was financed with a thirty-year, tax-exempt uninsured bond issue placed in UC's financing trust structure ("FTS"). The only UC commitment was a three-year occupancy guarantee.

3. Healthcare (Hospitals and Research Facilities) Case Study: UCSF Neuroscience Building

Although numerous large hospitals and other healthcare facilities have been built in the British Commonwealth and Europe using the P3 method, the only California P3 healthcare project to date known to the authors is the UCSF Neuroscience Building project.[18] This project involved a six-story research building with laboratories and clinical space at the UC San Francisco Mission Bay Campus (Neurosciences Building). Financing was arranged through a hybrid tax-exempt bond finance model made available through a non-profit entity and a conduit issuer. The financing was accomplished as a condition to the start of the construction.

Interestingly, a study conducted on the effectiveness of P3 for this project found that the use of this P3 finance method negatively affected UC's financial credit beyond this project.[19] Despite the use of tax-exempt bonds for financing, the front-end capitalized interest rate paid on the bonds was higher than the rate paid by the UC on its conventional public financing bonds. However, as explained above, when long-term asset "life cycle" cost savings are factored into the analysis, P3 can give public entities a much better value for money than traditional project delivery methods.

4. Hospitality Case Study: Omni Hotel, Dallas, Texas

Publicly-owned hotels and convention centers that will generate revenue also are appropriate for P3 development consideration. A number of cities in the United States are in need of more hotel space to attract business and tourism. One such city is Dallas, Texas. In 2009, this need prompted Dallas to develop a twenty-three story, 1,000-guestroom hotel with 80,000 square feet of meeting space on city-owned land adjacent to its existing convention center. Using a P3 model, but with mostly public revenue bond financing, the City of Dallas contracted with a private developer who, in turn, hired a design-build team to complete the project. The City of Dallas entered into a separate long-term operating agreement with Omni Hotels to operate and maintain the hotel, which opened in early 2012 and has greatly enhanced the area's business climate. According to media reports, the hotel's construction came in under budget,[20] and the profitability during its first year of operations exceeded the city's budget projections.[21]

V. CONCLUSION

While P3 is not appropriate for all public works projects, for large public projects consisting of buildings or infrastructure that are expected to generate a revenue stream, it can be a very efficient and effective construction and maintenance delivery method. By bundling the design/construction with the asset's long-term operation and maintenance from the outset of development, P3 represents an important evolution of the efficiencies realized in the design/build project delivery method. These efficiencies, combined with P3's ability to increase budget leverage for public entities in the short-term, have greatly increased public agencies' interest in the P3 method, and promise to spark its use and growth in California and throughout the United States.

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ENDNOTES

1 *See* Andreas Kappeler & Mathieu Nemoz, Eur. Inv. Bank, *Public-Private Partnerships in Europe—Before and During the Recent Financial Crisis*, Econ. & Fin. Report 2010/04 (July 2010), *available at* http://www.bei.europa.eu/attachments/efs/efr_2010_v04_en.pdf.

2 The design/build construction delivery model has seen a steady increase in use among public and private property owners. This shift toward the design/build model has been largely driven by the recognition that it often greatly increases project delivery efficiencies over the traditional "design/bid/build" delivery model.

In the more traditional design/bid/build delivery model, the project owner first contracts with an architect or engineer to design the project. Once the design is complete, the project owner uses the completed design documents to obtain bids from various competing prime contractors for the completion of project construction. Once a suitable contractor is selected, the project owner enters into a separate contract with the chosen prime contractor. After construction of the project is complete, the owner generally enters into a separate contract or contracts for the long-term maintenance of the facility, sometimes using its own staff to assist with the maintenance.

By contrast, the design/build delivery model streamlines this process, combining the designer and contractor into one contracting entity or team with the owner. By streamlining the design and construction process so that the same "entity" performs both functions, often overlapping the functions, the design/build method often results in faster completion of construction projects and greater cost savings. *See* Design-Build Inst. of Am., *What Is Design-Build?*, http://www.dbia.org/about/designbuild (last visited Dec. 12, 2012). Recognizing these efficiencies, the use of the design-build model for commercial construction has skyrocketed over the past decade.

By 2010, more than half of all new, "large" (greater than $10 million) non-residential construction projects in the United States were utilizing the design/build project delivery method. *See* Media Advisory, Design-Build Inst. of Am., Design-Build Project Delivery Used for More than 40 Percent of Non-Residential Construction Projects, Report Shows (June 7, 2011), http://www.dbia.org/news/press/rsmeans110606.htm; Design-Build Inst. of Am., *Design-Build Project Delivery Used for More than 40 Percent of Non-Residential Construction Projects, Report Shows* http://www.dbia.org/pubs/research /rsmeans110606.htm (last visited Dec. 12, 2012).

3 Cal. Gov't Code § 5956.

4 TIFIA was originally authorized under the Transportation Equity Act for the 21st Century (TEA-21) and was reauthorized and amended in 2005 by SAFETEA-LU. The TIFIA program "provides Federal credit assistance in the form of direct loans, loan guarantees, and standby lines of credit to finance surface transportation projects of national and regional significance. TIFIA credit assistance provides improved access to capital markets, flexible repayment terms, and potentially more favorable interest rates than can be found in private capital markets for similar instruments." U.S. Dep't of Transp., Fed. Highway Admin., *TIFIA*, http://www.fhwa.dot.gov/ipd/tifia (last visited Dec. 12, 2012).

5 Private Activity Bonds are issued on behalf of a private entity and generally restricted for use on projects that benefit the public. The obligor under the bond is the private entity, not the government.

6 Other government programs, in addition to TIFIA, include public benefit corporations (used for public buildings, hospitals, courthouses, and schools) and Section 129 loans under 23 U.S.C. § 129.

7 *See* July 2010 Healthcare BIM Consortium Report (2010). The BIM Consortium consists of the Department of Defense Military Health System, the Department of Veterans Affairs, Kaiser Permanente, and Sutter Health. Combined, these entities represent $26 billion of healthcare construction.

8 *See, e.g.*, *L.A. Unified Sch. Dist. v. Great Am. Ins. Co.*, 49 Cal. 4th 739 (2010); *Souza & McCue Constr. Co., Inc. v. Superior Court*, 57 Cal. 2d 508, 510–11 (1962).

9 *United States v. Spearin*, 248 U.S. 132, 136 (1918).

10 *See M.A. Mortenson Co.*, ASCBA No. 39978, 1993-3 BCA ¶ 26,189; *see also Donahue Elec., Inc.*, VABCA No. 6618, 2003-1 BCA ¶ 32,129.

In *Mortenson*, the Government issued a design/build contract for a medical clinic at Kirtland Air Force Base, New Mexico. The conceptual design drawings were 35% complete at the time of the RFP. The RFP provided that the government's preliminary design could be used in preparing proposals but that the contractor would need to verify the design information during its design of the project. After award, the contractor found that the preliminary structural design was incomplete and made a claim against the owner for the resulting increased quantity costs. The Board awarded the contractor additional compensation for providing additional structural concrete and reinforcing steel required by the final design. The basis for the Board's decision was that the contractor could reasonably rely on the information provided with the RFP, and that the contract required the contractor to verify and validate the design as part of the design work, not the proposal effort.

In *Donahue*, the administrative law judge noted that "[s]pecifications included in a design/build contract, however, to the extent specific requirements, quantities and sizes are set forth in those specifications, place the risk of design deficiencies on the owner" even where drawings indicated they were for 'information only.'"

Additionally, there are several California statutes that prevent the owner from transferring liabilities to the contractor for design prepared by or on behalf of the owner. California Public Contract Code section 1104 (which is California's codification of the *Spearin* Doctrine) prohibits public agencies from delegating responsibility for the accuracy and completeness of their plans and specifications to the contractors. In fact, in enacting Public Contract Code section 1104, the California Legislature expressly found that the practice of holding contractors responsible for the accuracy and completeness of plans and specifications produced by public agencies was against public policy. California Civil Code section 2782 also voids any indemnity provision which requires indemnification for "defects in design" or indemnification for a contractor's or owner's sole negligence, active negligence, or willful misconduct. Cal. Civ. Code § 2782.

11 Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991).

12 Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998).

13 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144 (2005).

14 Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, 126 Stat. 405 (2012).

15 Cal. Legislative Analyst's Office, Maximizing State Benefits from Public-Private Partnerships (2012).

16 *See* Letter from William C. Vickrey, Admin. Dir. of the Courts, to Hon. Denise Moreno Ducheny, Chair, Joint Legislative Budget Comm., et al. (June 9, 2008); *see also* Admin. Office of the Courts, Supplemental Report—New Long Beach Court Building (2008).

17 *See* Gordon Schanck & Tara Lamont, Capital Res. Mgmt., Private Public Partnerships at the University of California (2010).

18 *See id.*

19 *See id.*

20 *See Omni Plans to Build Underground Garage*, Dallas Morning News, July 26, 2012, at Briefing 5.

21 *See* Rudolph Bush, *Omni Raking in More than Expected in First Year*, Dallas Morning News, Dec. 18, 2012, at A01.