



Public-Private Partnerships

Committee on Regulation

Proposed Recommendation from Committee on Regulation | October 30, 2018

1 Federal agencies, to assist in carrying out their missions, have long participated in public-
2 private partnerships (P3s).¹ A private-sector entity and the federal government may have a
3 variety of reasons for wanting to partner with one another. Both sectors may find, for instance,
4 that a partnership with the other allows them to access more resources and expertise. Expanded
5 access to such resources and expertise may allow them to complement and reinforce their
6 missions, producing outcomes with greater impact than they could achieve working entirely
7 independently of one another.² Recent government-wide initiatives relating to, among other
8 areas, workforce training³ and technology innovation,⁴ are centered on P3s.

9 There is no binding definition of “public-private partnerships” that spans across all
10 agencies, but an interagency working group has defined them as “collaborative working
11 relationships between the U.S. government and non-federal actors in which the goals, structures,
12 and roles and responsibilities of each partner, are mutually determined.”⁵

¹ The term “public-private partnership” is most commonly used across levels of government (i.e., local, state, and federal) to describe agreements between a government entity and a private firm in which the government owns and seeks to upgrade or replace an infrastructure asset, and the private partner designs, builds, finances, operates, or maintains the asset. Infrastructure P3s are not the focus of this Recommendation and the *Guide to Legal Issues Encountered in P3s* (described below). Rather, the *Guide* and Recommendation focus on P3s that relate to social welfare topics, such as health, labor, education, and diplomacy. Such P3s are more common at the federal level. Readers who are interested in infrastructure P3s should consult, among other sources, U.S. Dept. of Treas., *Expanding the Market for Infrastructure Public-Private Partnerships: Alternative Risk and Profit Sharing Approaches to Align Sponsor and Investor Interests* (Apr. 2015), available at https://www.treasury.gov/resource-center/economic-policy/Documents/2_Treasury%20Infrastructure%20White%20Paper%20042215.pdf.

² See CMTY. P’S SHIPS INTERAGENCY POLICY COMM., BUILDING PARTNERSHIPS: A BEST PRACTICES GUIDE 2 (2013).

³ See Exec. Order No. 13,845, 83 Fed. Reg. 35,099 (July 24, 2018).

⁴ See OFFICE OF MGMT. & BUDGET & GEN. SERVS. ADMIN.: THE GEAR CENTER, <https://www.performance.gov/GEARcenter/> (last visited Aug. 8, 2018).

⁵ See CMTY. P’S SHIPS INTERAGENCY POLICY COMM., *supra* note 2, at 1 n.1.



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13 There is no bright line distinction between P3s and other forms of collaboration between
14 federal agencies and the private sector, but there are certain characteristics that are indicative of a
15 P3 relationship. With P3s, there is continuous, ongoing assessment and decision making with
16 respect to the goals and structures of the partnership, the roles and responsibilities of each
17 partner, and the risks that each partner assumes. Because of the continuous nature of this
18 decision making, there is often a strong alignment of resources: that is, both parties to the P3
19 generally spend their own materials, time, and money throughout the course of the partnership,
20 without reimbursement from the other partner.

21 In other forms of collaboration between agencies and the private sector (e.g.,
22 procurement contracts), these aspects of the relationship are typically determined at a single
23 point in time and memorialized through a legally binding instrument such as a contract.
24 Although it is possible for a P3 to be formalized through a contract, P3s are far more often
25 formalized through non-binding memoranda of understanding (MOUs) or memoranda of
26 agreement (MOAs). These instruments are often quite concrete and specific with respect to the
27 goals of the partnership, but broad and flexible with respect to the roles and responsibilities of
28 the partners, and the governance of the partnership. They are therefore better suited than
29 contracts for formalizing P3s.

30 This Recommendation does not attempt to adopt a definitive definition of P3s, but the
31 foregoing characteristics should help agencies identify the types of relationships that fall under
32 the P3 umbrella. Ultimately, it is up to agencies to determine what relationships qualify as P3s
33 and under what circumstances they should draw upon the recommendations below.⁶

⁶ For examples of relationships that some agencies consider to be P3s, see Occupational Safety & Health Admin., U.S. Dep't of Labor, *Partnership: An OSHA Cooperative Program*, www.osha.gov/dcsp/partnerships/index.html (last visited Aug. 18, 2017); *Partnership for Freedom*, <https://partnershipforfreedom.org/> (recently ended) (last visited Aug. 18, 2017); and U.S. Dep't of State, *Diplomacy Lab*, <https://www.state.gov/s/partnerships/ppp/diplab/> (last visited Aug. 8, 2018).



34 **Development of the *Guide to Legal Issues Encountered in Public-Private Partnerships***

35 In the spring of 2017, at the suggestion of the Committee on Regulation, the
36 Conference’s Office of the Chairman convened dozens of federal officials from 21 different
37 agencies who actively work on P3s. Throughout the course of three meetings from July 2017
38 through February 2018, and various discussions with individual group members, the group
39 collaboratively drafted the *Guide to Legal Issues Encountered in Public-Private Partnerships*
40 (*Guide*).

41 The *Guide* addresses major legal issues that agencies will likely encounter as they
42 participate in P3s. The *Guide* also offers a definition of “public-private partnerships,” briefly
43 discusses a previous interagency effort regarding P3s, highlights activities that agencies often
44 undertake as part of P3s, and provides examples of specific P3s. Finally, the *Guide* discusses
45 issues pertaining to agencies’ vetting of potential private partners.

46 **Potential Inefficiencies in Vetting Private Entities**

47 Officials across agencies can benefit from sharing experiences with one another
48 regarding P3s. One issue that has emerged as a particularly good candidate for such interagency
49 discussion is how agencies vet potential private-sector partners. Agencies vet potential private
50 partners to avoid possible conflicts of interest or harm to the agency’s reputation. Vetting can be
51 a time intensive and potentially duplicative enterprise, both for the agencies and for potential
52 private partners that are asked to submit information to agencies.⁷

53 Agencies have differing practices with respect to vetting of potential private-sector
54 partners. Some agencies have central vetting units with officers whose exclusive responsibility is
55 to vet proposed private-sector partners and an official whose responsibility is to approve
56 partnerships for the entire agency. Other agencies lack a central vetting unit and, instead,

⁷ See INTERACTION, PARTNER VETTING INDEPENDENT ASSESSMENT: INSUFFICIENT JUSTIFICATION FOR A GLOBAL ROLLOUT 17 (2016), available at <https://www.interaction.org/document/partner-vetting-independent-assessment-insufficient-justification-global-rollout>.



57 authorize each of their offices to conduct its own vetting. Some of the latter agencies produce
58 resources that all staff are directed to use.

59 Duplication of vetting happens across agencies (“external duplication”) when two or
60 more agencies gather the same information about the same potential private partner. Duplication
61 also happens within agencies (“internal duplication”) when two or more parts of a single agency
62 gather the same information about the same potential private partner. Some agencies have
63 developed or are developing practices to avoid internal duplication. There do not appear to have
64 been robust efforts to avoid external duplication.

65 Agencies with a centralized vetting unit are better able to avoid internal duplication by
66 maintaining copies of their vetting reports and updating those reports rather than starting anew
67 when there is another request to partner with that same entity. Some agencies that do not have
68 centralized vetting units maintain central databases that allow all employees to manage P3s and
69 upload relevant documents, including vetting results. Other employees, as they begin exploring
70 potential partnerships, can access these databases and search them for past or current P3s and
71 supporting documentation before vetting a potential partner, thereby reducing or eliminating
72 duplicative vetting.

73 **Agency Officials Exchanging Best Practices Regarding P3s**

74 An online forum could be structured to allow agency officials to exchange best practices
75 on any number of topics involving P3s, such as how to:

- 76 • Initiate or create a P3 in a manner that is consistent with ethical requirements,
- 77 • Evaluate the success of P3s,
- 78 • Structure an internal vetting process (for example, should there be a central vetting unit,
79 or should vetting be carried out office by office?),
- 80 • Develop internal processes to reduce duplication in vetting, and
- 81 • Resolve complex legal issues encountered during the lifecycle of partnerships.



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82 The forum could also allow agency officials to exchange resources with one another,
83 including sample MOUs and MOAs, and checklists or worksheets that agencies use when vetting
84 potential private-sector partners or structuring P3s.

85 Additionally, while taking into consideration relevant laws and protections regarding
86 privacy, ethics, and other restrictions on disclosure of personally identifiable information,
87 agencies can consider sharing notes about specific private-sector entities that have been vetted.
88 These notes may help reduce external duplication by allowing agencies to see the results of other
89 agencies' vetting of specific entities.

90 MAX.gov, a website established by the Office of Management and Budget in 2007, can
91 offer such a forum. The website can be accessed only by those with a federal government email
92 address. An agency could set up an interagency P3 group on MAX.gov that would allow agency
93 officials to exchange best practices with respect to P3s and share resources.

RECOMMENDATION

- 94 1. All agencies that are considering, or are currently participating in, a public-private
95 partnership (P3) should distribute the *Guide to Legal Issues Encountered in Public-
96 Private Partnerships (Guide)* to attorneys in their general counsels' offices, or other
97 central legal offices, and should distribute it to partnership staff throughout the agency.
- 98 2. The Office of the Chairman of the Administrative Conference should create a group on
99 MAX.gov titled "Strategies for Developing and Managing Successful P3s." The group
100 should be structured to allow agency officials to exchange best practices with one another
101 regarding P3s. It should also allow agency officials to share resources, including sample
102 memoranda of understanding or agreement, and checklists or worksheets that agency
103 officials use when vetting potential private-sector partners.
- 104 3. All agencies that are considering, or are currently participating in, a P3 should encourage
105 staff responsible for P3 efforts to join the MAX.gov group and actively participate in the
106 discussion topics and uploading of resources. Participation should be consistent with
107 protections regarding privacy, ethics, and other restrictions on disclosure of personally



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108 identifiable information and should be undertaken in consultation with the agency's
109 general counsel's office or other designated legal office.