



PARTNERSHIPS IN TRANSIT

San Diego, CA

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Statutory and Regulatory Requirements:
A National Perspective

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Public Private Partnerships

- Contractual agreements that shift to private entities a portion of the risk associated with the planning, design, development, financing, construction, operation and maintenance of public transportation system and facility projects.

Key Public Sector Objectives

- Streamline Project Delivery – Design, Construction, Operation and Maintenance
- Maximize Private Sector Investment and Risk Sharing
- Limit Public Financial Exposure
- Reasonable User Fee Structure and Profits
- Opportunity for Revenue Sharing
- Effective Assurances of Performance
- Effective Remedies

Key Public Sector Challenges

- PPP Delivery May Run Counter to Public Procurement Policies
- PPP Delivery May Run Counter to NEPA Process
- Public Sector Needs Legislative and Regulatory Authority to Tailor Procurements on a Case-by-Case Basis

PPP Continuum

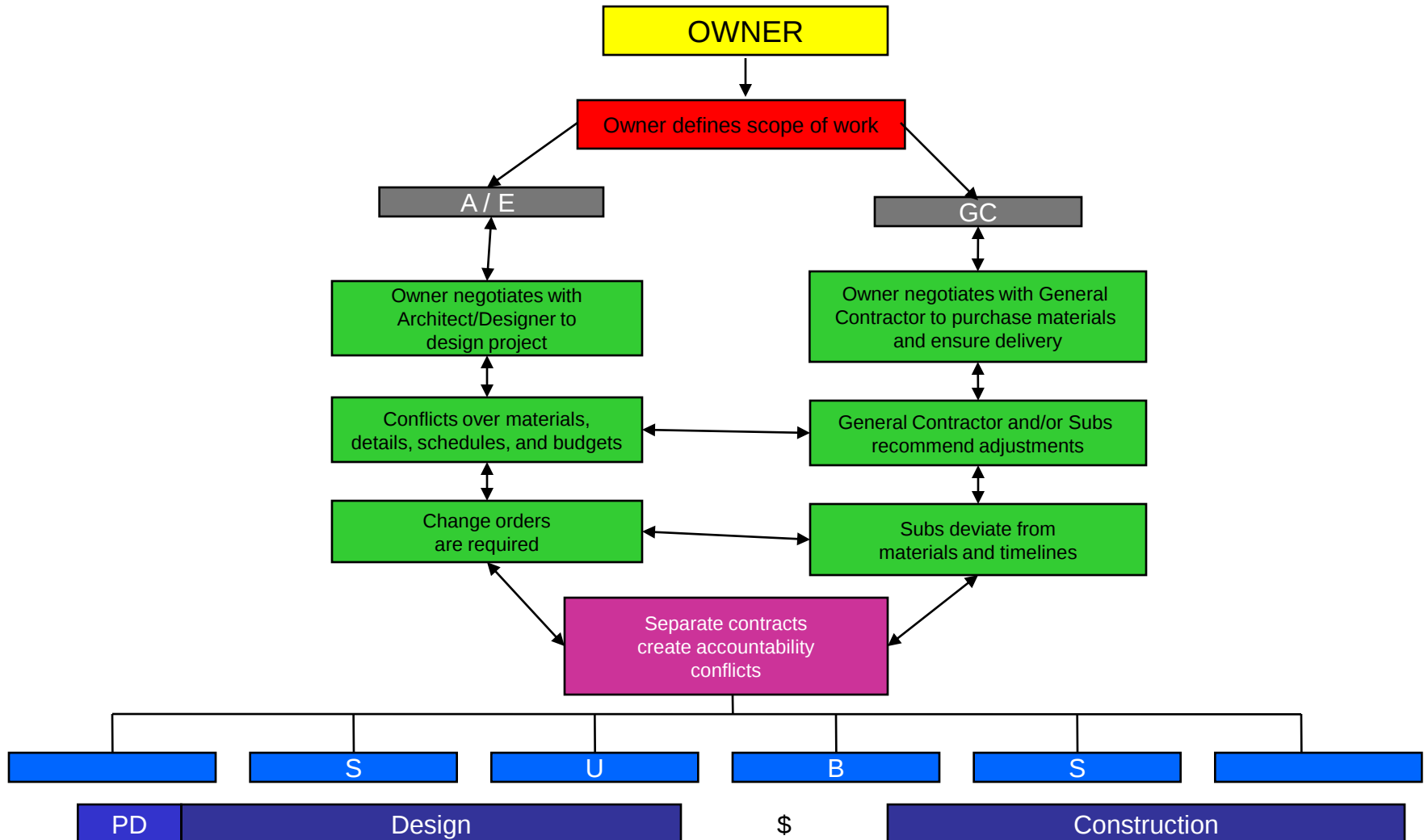
PPP Options			
New Build Facilities	Design Build	Design Build Operate (Maintain)	Design Build Finance Operate
Existing Facilities	O & M Concession		Long Term Lease



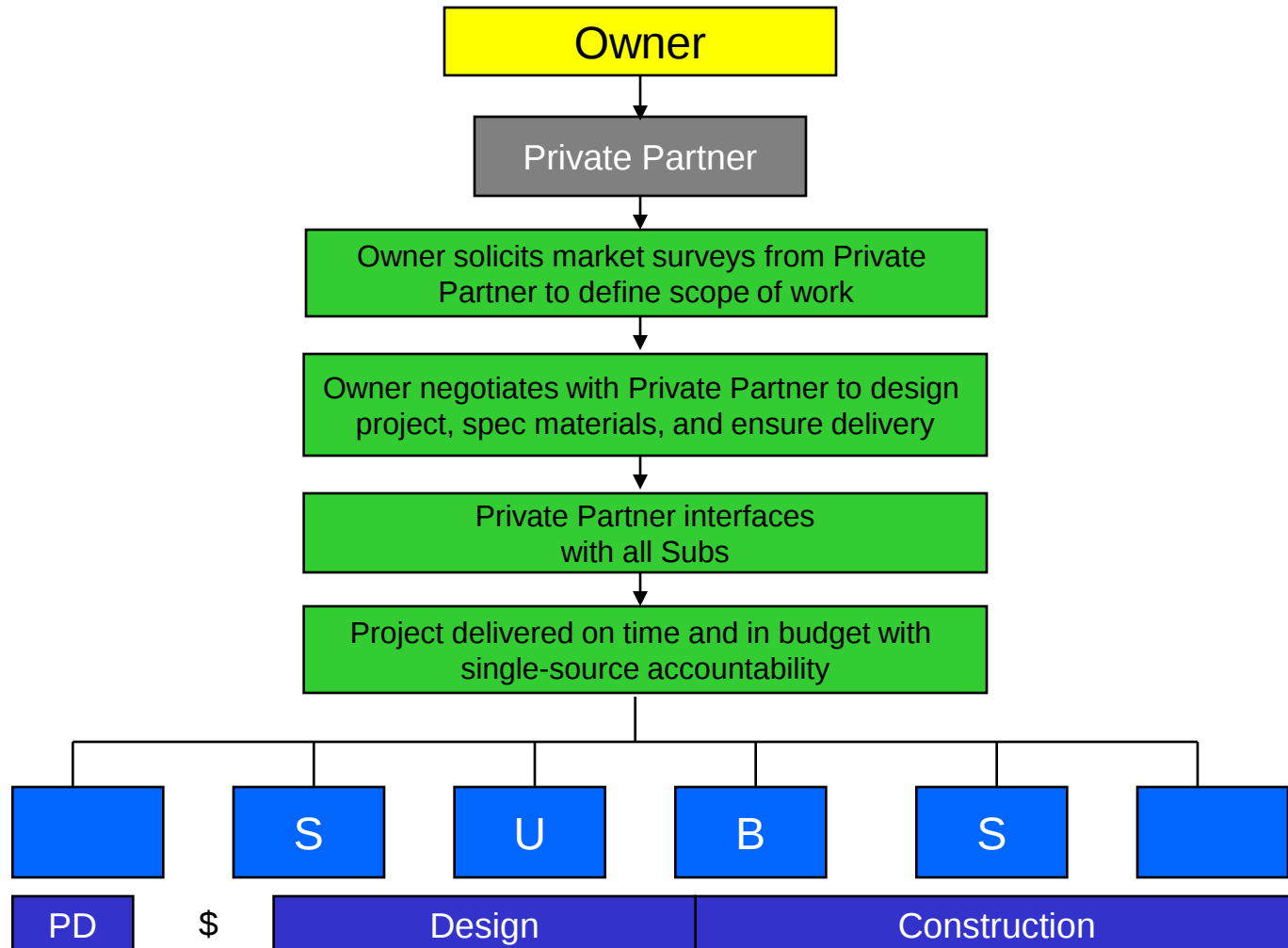
Public Responsibility

Private Responsibility

Conventional Process



PPP Process



Obstacle: Appropriations Restrictions

- For many public entities, design fees are appropriated in one year and the construction funds in another
- Many public procurement laws and ordinances require that plans be developed and approved by the public body before bids are solicited
- For a single PPP contract there must be an appropriation for all the funding in the same year

Obstacle: Qualifications-Based Selection Laws

- Federal law requires architects and engineers selection to be based on qualifications rather than fee alone (Brooks Act)
- Fees are not to be discussed or negotiated until the most qualified firm is selected
- At least one court has found that design-build based on competitive bids violates the state “mini-Brooks” Act

Obstacle: Competitive Bidding Laws

- Require public contracts for construction to be awarded by competitive bidding to the lowest bidder
- Main roadblock preventing public agencies from using a combined price plus qualifications procurement

Obstacle: Separation Acts

- Some states require that separate contracts must be awarded to trade contractors (plumbing, heating, air conditioning, and electrical work)
- Awarding a single PPP contract and delegating the selection of trade contracts to the PPP contractor violates separation acts
- Problem with facilities construction

Obstacle: Organizational Conflicts of Interest

- Organizational Conflict of Interest laws bar architects and engineers from being both designer and contractor on the same project
- Conflict of Interest laws prohibit the firm that designed the project from bidding on the construction work

Obstacle: Subcontractor Listing Statutes

- Some states require contractors to identify major subcontractors at of bidding
- Intent is to prevent bid shopping and bid peddling, where contractor gets a bid from one sub and then shops that price to other subs
- In the PPP setting, these requirements are difficult to meet because prime has not finalized the design at the time of the selection

Authority to Enter PPP Contract

- Ability to bundle:
 - Design
 - Construction
 - Operations
 - Maintenance
 - Finance
- Authority to enter into multi-year contracts
- Authority to enter into leases



Additional Procurement Issues

- Are calls for project proposals allowed?
- Are unsolicited proposals allowed?
- Is prequalification/short-listing allowed?
- Are pre-award negotiations allowed?
- Requirement to list subcontractors in bid?
- Are required evaluation criteria consistent with desired approach?
 - weighted selection criteria system to evaluate proposals based on qualitative factors such as financial commitment, innovative financing, technical, scientific, technological, or socio-economic merit, in addition to cost
- Is payment of a stipend allowed?

Additional Procurement Issues

- Are performance-based payments such as availability payments or on-time incentives allowed?
- Can federal, state and local funds be combined with any private sector funds for any project purposes?
- Can evaluation fees be charged?
- Hire financial, legal consultants?
- Alternative dispute resolution?

Other Issues to Consider in Drafting Legislation

- Transit-oriented development (legislative provisions that allow/encourage/discourage)
- Investment by foreign entities
- Application of regulated utility laws

Federal Statutory and Regulatory Issues

- FTA policies provide flexibility
 - competitive proposals and “best value” selection permitted
- “Penta P” pilot program under SAFETEA-LU
 - risk sharing
 - streamlined project development

Penta P and Environmental Process

- General Rule: until ROD is issued
 - no RFP
 - no ROW acquisition
 - no final design
- *Penta P* exceptions
 - can issue procurement docs so long as no alternative is precluded
 - preliminary engineering is permitted, not “final design”
 - accelerated review process

Where to Look for Legislative Precedent

- Project-specific statutes (LAX/Palmdale)
- Agency-specific statutes
 - Louisiana Transportation Authority
 - Los Angeles Metro
 - Maryland Transportation Authority
- Statutes applicable to multiple agencies (CA, DE, NV, VA, WA)
- ABA Model Code (ABA, HI, MD)
- Nossaman Model Statute – Arizona HB 2396
- Non-profit approach (MI)

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