

Examples of Risk Allocation in P3 Contracts – Development Risk

One of the most crucial issues in dealing with P3 contracts is the ways in which the various types of risks are managed and allocated. This memo focuses on development risk—the risks associated with the development and construction of a project. Below are descriptions of some of the various ways that the University of California, Merced managed and allocated these risks in their recent \$1.16 billion project to improve and expand their campus.

- **Design and Construction Standards:** The developer is responsible for using reasonable care to ensure that the design and construction standards used are not erroneous, unsafe, or illegal. The developer is responsible for all additional costs and time required to fix a problem that the developer discovered or should have discovered.
- **Responsibility for Unforeseen Damage:** The developer is responsible for all damage caused by the elements or from the execution or non-execution of work and must rebuild or repair any damage without further cost to the owner. The same is true for any damage caused by the developer's construction to the owner's property.
- **Coordination with other Contractors and Utilities:** The developer is responsible to coordinate with all other adjacent entities with construction projects. The developer also has sole responsibility to coordinate with utilities. The developer's entitlement to additional time or money due to such issues is limited.
- **Preliminary Planning:** The developer is responsible to perform all planning and engineering activities and bears the risk of any incorrect or incomplete information in connection with such activities. The owner is not liable for any mistakes in surveys, data, reports, or other information provided by the owner to the developer.
- **Governmental Approvals:** The developer is responsible for securing all necessary approvals and permits. The developer's ability to obtain extensions on time is limited and the developer may not receive additional compensation or money due to delays.
- **Submittals:** The owner set up tiers of submittals (change orders, plans, etc.) that govern the owner's right to review and approve a submittal. These tiers establish different levels of review by the owner and limit the developer's entitlement to extensions of time or additional compensation due to the failure of the owner to timely review a submittal.
- **Limitations on Developer's Right to Rely:** The owner has established that any review, acceptance, or approval of anything by the owner does not relieve the developer of its duty to complete the project or bring the project up to acceptable standards. This protects the owner from any design or construction defects that are not immediately apparent.
- **Deadlines for Construction:** The owner has established conditions to beginning construction with requirements for construction to begin within certain timeframes.
- **Performance and Payment Bonds:** The developer is required to provide two separate performance and payment bonds each for the full contract amount of \$1.16 billion. These two bonds would provide sufficient funds to for the owner to complete the entire project.

Together, these contractual provisions shift most of the development risk onto the developer of the project in exchange for a higher price paid to the developer. This is the safer—though more expensive—route for a P3. If the owner elected to take on more risk, the price would be lower.