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ARTICLES

WE BUILT IT, AND THEY CAME! NOW WHAT? PUBLIC–PRIVATE PARTNERSHIPS IN THE REPLACEMENT ERA*

Chasity H. O'Steen**
John R. Jenkins***

I. INTRODUCTION

The unsexy and oft-forgotten topic of infrastructure has recently garnered attention and airtime due to the "infrastructure investment[s]" funded under the American Recovery and Reinvestment Act of 2009.[1] Infrastructure consists of material that we use and rely on every day, the "substructure or underlying foundation or network used for providing goods and services," and includes such things as roads, water systems, sewers, sidewalks, power plants, schools, and transportation and communication systems.[2] Many people assume that public entities, which provide

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** Chasity H. O'Steen is an attorney with Sniffen & Spellman, P.A. Ms. O'Steen practices in the areas of local government, water and wastewater utilities, administrative law, civil rights defense, and employment law.

*** John R. Jenkins is an attorney with the law firm of Sundstrom, Friedman & Fumero, LLP where he practices in the areas of public utilities, local government, and transactional law.

1. Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17, 2009).

2. U.S. Envt'l Protec. Agency Off. Grants & Debarment, *Definition of "Infrastructure" for Purposes of the American Recovery and Reinvestment Act of 2009*, at 1 (May 8, 2009) (available at http://www.epa.gov/ogd/forms/Definition_of_Infrastructure_for_ARRA.pdf). Social-infrastructure needs and the role that public–private partnerships can play in addressing such needs are beyond the scope of this Article.

the "vast majority of infrastructure,"[3] will operate, maintain, repair, and replace it on an ongoing basis.

The important role that infrastructure plays in our society cannot be discounted. Clean water—just one infrastructure sector—is a basic necessity for all areas of community development, including economic growth, social development,[4] and human health.[5] For example, "[w]ater and wastewater pipelines, treatment plants[,] and related facilities are core components of our environmental infrastructure."[6] Most of this infrastructure lasts a long time, but it is now nearing the end of its useful life, and the costs associated with "taking care" of this capital infrastructure are huge.[7] For example, an estimated forty percent of the water produced by the Lake Region Water Treatment Plant—a $58 million reverse-osmosis facility serving customers in the Cities of Belle Glade, Pahokee, and South Bay, as well as certain unincorporated areas of Palm Beach County, Florida—is lost because of a network of ninety-year-old leaking water mains and pipes.[8] Ac-

3. Jeffrey Delmon, *Understanding Options for Public–Private Partnerships in Infrastructure: Sorting out the Forest from the Trees: BOT, DBFO, DCMF, Concession, Lease . . .* 8 (World Bank Fin. Econ. & Urb. Dev., Policy Research Working Paper No. 5173, 2010). As used in this Article, the term "public entity," or collectively "public entities," means any federal, state, or local government entity, authority, special district, or any subdivision or component of these.

4. Elizabeth Howard, *Infrastructure Funds: The Why, What and How?* 1 (OTC Conseil 2009) (available at http://www.otc-conseil.fr/fre/High/publications/articles/3000/infrastructure-funds.pdf).

5. U.S. Envt'l Protec. Agency Off. Water, *Implementation of the American Recovery & Reinvestment Act of 2009: Clean Water and Drinking Water State Revolving Fund Programs* 4 (2011).

6. Clean Water Council, *Sudden Impact: An Assessment of Short-Term Economic Impacts of Water and Wastewater Construction Projects in the United States* 4 (Nat'l Util. Contractors Ass'n 2009) (available at http://www.nuca.com/files/public/CWC_Sudden_Impact_Report_FINAL.pdf); *see also* Water Infrastructure Network, *Water Infrastructure Now: Recommendations for Clean and Safe Water in the 21st Century* 1 (2000) (available at http://win-water.org/reports/winow.pdf) (noting that wastewater treatment plants stop "billions of tons of pollutants" from contaminating water supplies and promote public health). In addition to water and wastewater utility infrastructure, in the United States "[c]lean water supports a $50 billion a year water-based recreation industry, at least $300 billion a year in coastal tourism, a $45 billion annual commercial fishing and shell fishing industry, and hundreds of billions of dollars a year in basic manufacturing . . . ." *Id.*

7. Am. Water Works Ass'n, *Dawn of the Replacement Era: Reinvesting in Drinking Water Infrastructure* 10 (2001) (available at http://www.win-water.org/reports/infrastructure.pdf).

8. Jennifer Sorentrue, *Repairs to Glades Water Plant May Cost Millions, Palm Beach County Says*, http://www.palmbeachpost.com/news/repairs-to-glades-water-plant-may-cost-millions-1564053.html (updated July 13, 2011, 5:36 p.m. ET).

cording to the American Water Works Association, a significant amount of buried infrastructure is at or near the end of its expected life span, and will need to be replaced in the next thirty years; thus, "[w]e stand at the dawn of the replacement era."[9]

The problem of meeting infrastructure needs, and the resulting implications, will continue to worsen over time if not addressed. It must come to the forefront of public discussion and become a public priority. Not surprisingly, public entities are grappling with how to pay for needed infrastructure. Federal, state, and local government officials, in the search for new sources of funding, are exploring the use of public–private partnerships to fill the current void in government coffers.[10] In the current economic climate, public–private partnerships are "one of the tools in a policymaker's arsenal" to consider when analyzing, choosing, and implementing policies to improve infrastructure delivery, increase financing alternatives, minimize waste and corruption, and otherwise manage infrastructure efficiently and effectively.[11]

This Article discusses infrastructure needs both in Florida and the nation, and suggests that these needs will drive public–private partnerships' use as a supplemental means of addressing infrastructure need in today's economic climate. This Article provides examples of infrastructure needs, primarily in the area of water and wastewater utilities because this sector is critical to residents and the tourist industry, and is "the most capital intensive of all utilit[ies]."[12] Part II discusses private involvement in public infrastructure, the distinctions between public–private partnerships and privatization, and the problems that overlapping terminology creates. Part III outlines the legal authority in Florida for public–private partnerships, and Part IV provides an overview of the Florida constitutional joint-owner and pledge-of-credit prohibitions. Part V identifies some common types of public–private partnership arrangements. Parts VI and VII discuss procurement and contract issues, respectively. Part VIII postu-

9. Am. Water Works Ass'n, *supra* n. 7, at 5 (reporting that "thousands of miles of pipes that were buried over [a hundred] or more years ago will need to be replaced in the next [thirty] years").

10. Hiroyuki Iseki et al., *Task B-2: Status of Legislative Settings to Facilitate Public Private Partnerships in the U.S.* 1 (Cal. Path Program Inst. Transp. Studies 2009) (available at http://www.path.berkeley.edu/PATH/Publications/PDF/PRR/2009/PRR-2009-32.pdf).

11. Delmon, *supra* n. 3, at 8.

12. Am. Water Works Ass'n, *supra* n. 7, at 10.

lates that infrastructure needs will drive the development of public–private partnerships, and Part IX identifies some key elements to successful public–private partnerships. Part X concludes by urging public officials to consider utilizing the public–private partnership as a tool to implement necessary upgrades, particularly to water and wastewater infrastructure.

II. PUBLIC–PRIVATE PARTNERSHIPS

A. Private Involvement in Public Infrastructure

The public–private partnerships concept has been around for almost as long as the United States itself.[13] Private parties' involvement in highway projects dates back to as early as 1792, when "the first turnpike was chartered and became known as the Philadelphia and Lancaster Turnpike in Pennsylvania."[14] Several events negatively impacted private-party involvement beginning with legislation Congress passed in the early 1800s to publicly fund the National Road, which stretched from Maryland through Pennsylvania to the Ohio River.[15] Under the Federal Aid Highway Act of 1916, which funded highway construction primarily in rural areas, each state was required to create a "[s]tate highway agency with engineering professionals to carry out the [f]ederal-aid highway program."[16] This requirement further institutionalized the states' role in constructing major highways.[17] It wasn't until the late 1980s and early 1990s that states and the federal government began to consider private-party involvement in state

13. *See* Cal. Debt & Inv. Advisory Comm'n, *Public–Private Partnerships: A Guide to Selecting a Private Partner* 2–3 (2008) (available at http://icma.org/en/icma/knowledge_network/documents/kn/document/302101/public_private_partnerships_a_guide_to_selecting_a_private_partner, *select* Public-Private Partnership: A Guide to Selecting a Private Partner) (citing partnership arrangements that have lasted as long as ninety-nine years).

14. U.S. Dep't Transp., *Report to Congress on Public–Private Partnerships* 15 (Dec. 2004) (available at http://www.fhwa.dot.gov/reports/pppdec2004/pppdec2004.pdf).

15. *Id.*

16. *Id.*

17. *Id.* The Federal-Aid Highway Act of 1921 strengthened the relationship between the state highway agencies and the federal government and established the state–federal partnership. Beginning in the early 1900s, states and the federal government began to rely on fuel taxes to fund highway programs. Motorists were willing to pay tolls in exchange for the benefits of using the new turnpikes, and states began to issue bonds and charge highway users as a means of constructing highways much more quickly. *Id.* at 15-16.

highway construction projects as a means of maintaining the quality of highways and reducing the impacts on highway users.[18]

Since the late nineteenth century, local governments have largely been responsible for providing water and wastewater service in the United States.[19] The City of Burlingame, California was the first municipal government in the country to enter into a water and wastewater industry public–private partnership arrangement when, over thirty-five years ago, it transferred the operation of its wastewater facility to a private entity.[20] The trend toward private participation in this sector has gradually increased over time. As of 2005, about half of the 52,837 community water systems in the United States were privately owned.[21] Many of these systems are very small, with private company service comprising only sixteen percent of large systems (serving at least 100,000 people).[22] There are now many public–private partnerships in the industry, but no comprehensive information on number or types is available.[23]

B. Public–Private Partnerships Defined

The meaning of the term public–private partnership is neither consistent nor clear.[24] The pronounced lack of unanimity about what the term means likely results from the differing purposes and objectives of these arrangements.[25] Some commentators decline to define the term and, instead, identify characteristics "deemed essential to the establishment and success of" public–

18. *Id.* at 17.

19. Envt'l Fin. Advisory Bd., *Public Private Partnerships in the Provision of Water and Wastewater Services: Barriers and Incentives* 2 (2008).

20. Water P'ship Council, *Establishing Public–Private Partnerships for Water and Wastewater Systems: A Blueprint for Success* 10 (2003) (available at http://www.nawc.org/uploads/documents-and-publications/documents/document_567764ad-b69f-4715-bc5d-eaa32c304fdd.pdf).

21. Envt'l Fin. Advisory Bd., *supra* n. 19, at 3.

22. *Id.*

23. *Id.* at 4 ("There is no comprehensive list or survey of these arrangements, now or in the past, so it is not possible to say anything about their prevalence."). "Public Works Financing publishes an annual summary of major long-term water [public–private partnerships] in the U.S." *Id.* at 5.

24. Stephen P. Mullin, *Public–Private Partnerships and State and Local Economic Development: Leveraging Private Investment* 1 (U.S. Econ. Dev. Administration 2002) (available at www.eda.gov/PDF/Econsult_final.pdf).

25. *Id.*

private partnerships.[26] These five characteristics are: (a) "two or more partners, with at least one public entity," (b) partners with the ability and authority to bargain, (c) a continuing relationship, (d) an arrangement in which each partner "brings genuine value," and (e) shared responsibility for the outcome of actions taken via the public–private partnership.[27]

The "partners" component of these arrangements is the lynchpin of the five characteristics cited above. When applied in the public–private partnership context, "partners" defines a relationship "in which there is cooperation between the public and private sectors in one or more of the development, construction, operation, ownership[,] or financing of infrastructure assets, or in the provision of services."[28] From an economic perspective, using "partnership" suggests that the gains from establishing this type of arrangement for all parties outweigh the potential gains from other production or decision-making arrangements.[29]

Cooperation is a central element represented in numerous definitions: "sharing of responsibilities, decision[-]making power and authority, sharing of risks and rewards[,] mutual benefit, pursuing shared or compatible objectives and joint investment."[30] Other public–private partnership definitions focus more on the legal, or contractual, aspects of these arrangements. The United States General Accounting Office (GAO) has defined the term as

> A contractual arrangement [that] is formed between public- and private-sector partners. These arrangements typically involve a government agency contracting with a private partner to [perform any of the following services:] renovate,

26. *Id.* at 12.

27. *Id.*

28. *Id.* (citing Mary Rose Brusewitz, *Public–Private Partnerships in the United States*, 2005 Project Fin. Leg. Advisers Rev. 70, 70 (available at http://www.orrick.com/fileupload/394.PDF).pdf)).

29. Mullin, *supra* n. 24, at 5.

30. Gladys Palmer, *Public–Private Partnerships: Literature Review—Draft* 5 (Aid Delivery Methods Programme 2009) (available at http://www.dpwg-lgd.org/cms/upload/pdf/PublicPrivatePartnership__Lit__Review.doc); *see also* Erik Jan Kleingeld, *Public–Private Partnership in Urban Redevelopment, Quo Vadis? Where Does It Go? Working Together for Now or Living Together for Better or Worse?* (Int'l Fed'n Surveyors 2000) (available at http://www.fig.net/pub/proceedings/prague/kleingeld-abs.htm) (stating that a public–private partnership is a "sustained collaborative effort between the public and private sectors in which each contributes to the planning and resources needed to accomplish a mutually shared objective").

> construct, operate, maintain, [ ]or manage a facility or system, in whole or in part, that provides a public service.[31]

Under such arrangements, the public entity may own the project while the private partner generally "invests its own capital to design and develop" or otherwise benefit the project.[32]

In Florida, the only statutory definition of public–private partnership incorporates the concept of cooperation and refers to the contractual aspect of a public–private partnership arrangement.[33] As applied in the Community Workforce Housing Innovation Pilot Program context, a public–private partnership means

> Any form of business entity that includes substantial involvement of at least one county, one municipality, or one public[-]sector entity, such as a school district or other unit of local government in which the project is to be located, and at least one private sector for-profit or not-for-profit business or charitable entity, and may be any form of business entity, including a joint venture or contractual agreement.[34]

Thus, a public–private partnership is an umbrella concept that "encompasses a wide range of contractual arrangements."[35] Part V discusses some of the different types of contractual arrangements that this concept includes.

C. Public–Private Partnerships and Privatization—Similar but Distinct Concepts

Both public–private partnerships and traditional privatization are concepts "rooted in the philosophy that private [entity] involvement in the delivery of public projects or services can result in operational and fiscal benefits for a public agency."[36] They

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31. U.S. Gen. Acctg. Off., *Public–Private Partnerships: Terms Related to Building and Facility Partnerships* 13–14 (1999) (available at http://www.gao.gov/archive/1999/gg99071.pdf).

32. *Id.* at 14.

33. Fla. Stat. § 420.5095(3)(c) (2010).

34. *Id.*

35. Dominique Custos & John Reitz, *Public Private Partnerships*, 58 Am. J. Comp. L. 555, 558 (2010).

36. Cal. Debt & Inv. Advisory Comm'n, *Issue Brief, Privatization vs. Public–Private*

are also both "alternative service delivery arrangements to traditional public procurement."[37] The two concepts are similar but distinct based upon three primary differences and should not be used interchangeably.[38]

The first primary distinction between traditional privatization and public–private partnerships is who owns the asset or enterprise subject to the transaction.[39] "Ownership refers to the party who has and controls the rights or interests in an asset or [infrastructure]."[40] Privatization involves selling or transferring a public asset or infrastructure's ownership to private industry.[41] By contrast, under a public–private partnership arrangement, the public partner owns the asset or infrastructure, directs the management of the asset or infrastructure, and establishes user rates.[42]

The second distinction between traditional privatization and public–private partnerships is the structure.[43] Structure refers to the resulting contractual arrangements between public and private partners that formalize the involvement of both parties after privatization or creating a public–private partnership.[44] In a privatization scenario, government involvement is minor, except possibly in a regulatory role.[45] Traditional privatization also features no ongoing contract or formal agreement between the public

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Partnerships: A Comparative Analysis 12 (2007) (available at http://www.treasurer.ca.gov/cdiac/publications/privatization.pdf).

37. Palmer, *supra* n. 30, at 3 (citing Robin Ford & David Zussman, *Alternative Service Delivery: Sharing Governance in Canada* 6 fig. 1 (Inst. Pub. Administration Can. 1997)).

38. Cal. Debt & Inv. Advisory Comm'n, *supra* n. 36, at 12 (noting key differences between privatization and public–private partnerships); *but see* Delmon, *supra* n. 3, at 8–9, 51 (discussing misuse of the term "privatization" by, in part, referring to the Thames Water, U.K. privatization project.) The model in the Thames Water, U.K. privatization is similar in structure to a concession or a public–private partnership, and the use of different terminology to refer to similar arrangements creates confusion. *Id.* at 51.

39. Cal. Debt & Inv. Advisory Comm'n, *supra* n. 36, at 12.

40. *Id.*

41. *Id.*; *see also* Water P'ship Council, *supra* n. 20, at 12 (explaining how public entities can benefit from well-managed public–private partnerships).

42. Water P'ship Council, *supra* n. 20, at 12.

43. Cal. Debt & Inv. Advisory Comm'n, *supra* n. 36, at 13.

44. *See* Water P'ship Council, *supra* n. 20, at 50–51 (listing five options that elected officials may consider when selecting a suitable contractual arrangement between public and private partners).

45. Palmer, *supra* n. 30, at 4; *but see* Donald R. Keer, *Privatization of American Water Utilities*, http://www.mdcsystems.com/publications/technology/privatization-of-american-water-utilities.html (2005) (noting that there "needs to be an understanding that privatization does not mean that the government is not involved").

entity and private industry.[46] In contrast, in most public–private partnership arrangements the public entity "retains a substantial role" in the arrangement and exerts control and oversight of the asset or infrastructure.[47]

Risk is the third distinction between traditional privatization and public–private partnerships.[48] Risk refers to the financial and legal responsibilities that the appropriate partner—either the public entity, the private entity, or both entities jointly—undertakes as a contractual condition.[49] In a public–private partnership arrangement, public and private partners allocate risk between themselves; alternatively, when an asset is privatized, the private entity assumes sole responsibility for all asset and infrastructure risk.[50]

A well-known example of traditional privatization occurred in the 1980s when Prime Minister Margaret Thatcher divested Britain's ownership of the steel, coal, electricity, and oil industries to stimulate the British economy.[51] An analogous example here in the United States involved the sale of Elk Hills Naval Petroleum Reserve in Kern County, California to Occidental Oil & Gas for $3.65 billion, which represented the largest privatization of federal property in U.S. history.[52] Following that divestment in 1998, the federal government's only role in producing oil and gas has been that of a regulatory entity.[53]

The distinctions between traditional privatization and public–private partnerships are logical and reasonable, but colloquial application of the term "privatization" in different contexts muddies the waters considerably.

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46. U.S. Dep't Transp., *supra* n. 14, at 13.

47. Palmer, *supra* n. 30, at 4.

48. Cal. Debt & Inv. Advisory Comm'n, *supra* n. 36, at 18; *see also* Howard, *supra* n. 4, at 2 (reporting that the risk-sharing contract is the difference between a public–private partnership and privatization or a traditional public procurement).

49. Cal. Debt & Inv. Advisory Comm'n, *supra* n. 36, at 18.

50. *Id.*

51. *Id.* at 3 (citing Ted Balaker et al., *Annual Privatization Report 2006: Transforming Government through Privatization* 4 (Leonard C. Gilroy ed., Reason Found. 2006) (available at http://reason.org/files/d767317fa4806296191436e95f68082a.pdf).

52. *Id.* at 7 (citing U.S. Dep't of Energy, *Largest Federal Divestiture Completed, Elk Hills Transferred to Private Owner*, http://fossil.energy.gov/news/techlines/1998/tl_elsold.html (Feb. 5, 1998)).

53. *See id.* (observing that "[w]ith the divestment, the federal government was out of the oil and gas producing business").

D. Overlapping Terminology

Privatization is commonly used as "an umbrella term covering all private[-]sector involvement, including outsourcing and [public–private partnerships],"[54] but there are "significant differences between the[se] three forms of alternative service-delivery."[55] At the other end of the spectrum from privatization, outsourcing (sometimes called "contracting out") involves a private party performing a service that a public entity previously provided.[56] Though there may be a contract when a service is outsourced, the private entity has no meaningful participation in decision-making in this service-delivery method.[57] Additionally, unlike in a public–private partnership arrangement, outsourcing features "little transfer of control or risk" from the public entity to the private entity.[58] One example of outsourcing is a contract in which a private entity provides courier or cleaning services to a public entity.

Some sources treat public–private partnerships as a subset or type of privatization.[59] Executive Order 12803, issued April 30, 1992 under the George H. W. Bush administration, directed federal executive departments and agencies to facilitate the privatization of federally financed infrastructure assets.[60] Under this directive, privatization means "the disposition or transfer of an infrastructure asset, such as by sale or by long-term lease, from a [s]tate or local government to a private party."[61]

In at least one instance, Florida legislation incorrectly uses the term "privatization" to describe contracts that govern public–private partnership agreements.[62] Public entities, such as counties, municipalities, community development districts, and special districts, are authorized to "purchase or sell a water, sewer, or wastewater reuse utility that provides service to the public for

54. Palmer, *supra* n. 30, at 3 (citing Robert Hebdon & Hazel Dayton Gunn, *Community Development Reports: The Costs and Benefits of Privatization at the Local Level in New York State* (Cornell Community & Rural Dev. Inst. 1995)).

55. Palmer, *supra* n. 30, at 4.

56. *Id.*

57. *Id.*

58. *Id.*

59. *See e.g.* Keer, *supra* n. 45 (describing various types of "privatization contracts").

60. Exec. Or. 12803, 57 Fed. Reg. 19064, § 3 (May 4, 1992).

61. *Id.* at § 1(a).

62. Fla. Stat. § 180.30.

compensation, or enter into a wastewater facility privatization contract for a wastewater facility" provided that the public entity holds a public hearing and determines that the purchase, sale, or contract is in the public interest considering enumerated criteria.[63] As this language plainly states, public entities may choose to "purchase" from, or "sell" their utility systems to, other public or private entities. The latter's occurrence would result in the traditional privatization of the utility system. The Legislature's intent and scope of the public entities in those respects is clear from the statute's express language.

Because the term includes the word "privatization," it is not as clear from the statutory language what arrangement the legislature contemplated when it authorized public entities to enter into "wastewater facility privatization contracts." This term's statutory definition is helpful. It refers to

> A written agreement, or one or more related written agreements, between a private firm and one or more public entities, which provides for the operation, maintenance, repair, management and administration, or any combination thereof, of a wastewater facility for a term of more than [five] years, but not more than [forty] years in duration, and which may also provide for the planning, design, construction, improvement, acquisition, financing, ownership, sale and leasing, or any combination thereof, of the wastewater facility.[64]

Regarding these contracts, the legislature has declared that the public entities' ability to "provide efficient wastewater facilities will be enhanced by specifically authorizing public entities to enter into 'long-term privatization contracts' for the performance of wastewater facility functions by private firms."[65]

The legislative history bears out the conclusion that these wastewater facility privatization contracts govern public–private partnership arrangements; the legislative history states that a public entity has the inherent authority to sell its wastewater fa-

63. *Id.* (governing municipalities); *id.* at § 125.3401 (governing counties); *id.* at § 190.0125 (governing community development districts); *id.* at § 189.423 (governing special districts).

64. *Id.* at § 153.91(1).

65. *Id.* at § 153.90(1)(e).

cilities to a private firm.[66] This legislative history provides that a public entity may enter into contracts that take the form of private ownership, leases, or leases combined with service agreements "for the operation, maintenance, repair, management[,] and administration of a wastewater facility for at least [five] years, but not more than [forty] years in duration."[67]

III. AUTHORITY FOR PUBLIC–PRIVATE PARTNERSHIPS IN FLORIDA

A review of Florida constitutional and statutory law helps to frame the authority of public and private entities in Florida to enter into public–private partnerships.

A. County and Municipal Power before the 1968 Florida Constitution

Article VIII, Section 1 of the Florida Constitution of 1885 provided that "[t]he State shall be divided into political divisions to be called counties."[68] All county power was derived expressly from the Legislature, and no county could imply or infer any power that the State did not expressly confer.[69] Special acts were the primary source of county power.[70] Under the 1885 Florida Constitution, municipal powers depended on the Legislature specifically delegating authority in a general law or special act.[71] Requiring an express legislative grant reflected the prevailing nineteenth-

66. Fla. H. Comm. Utils. & Telecomm., *Final Bill Analysis & Economic Impact Statement CS/SB 1268*, 98th Leg., Reg. Sess. 1 (June 3, 1996) (on file with *Stetson Law Review*).

67. *Id.*

68. Fla. Const. art. VIII, §1 (1885) (superseded 1968 by Fla. Const. art. VIII).

69. *See Molwin Inv. Co. v. Turner*, 167 So. 33, 33 (Fla. 1936) (prohibiting implied authority from warranting the exercise of a "substantive power not conferred"); *Amos v. Mathews*, 126 So. 308, 320 (Fla. 1930) (stating that local powers must "have their origin in a grant by the state which is the fountain and source of authority").

70. *See City of Boca Raton v. State*, 595 So. 2d 25, 27 (Fla. 1992) (explaining that when the State's population increased after World War II, the Florida Legislature was "flooded with local bills and population acts designed to permit municipalities to provide solutions to local problems").

71. Fla. Const. art. VIII, §1 (1885) (superseded 1968 by Fla. Const. art. VIII). "The Legislature shall have power to establish and to abolish municipalities to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time." *Id.*

century local government theory known as "Dillon's Rule."[72] Under this approach to municipal power, "[t]he authority of local governments in all matters, including those purely local, was limited to that expressly granted by the [L]egislature, or that which could be necessarily implied from an express grant."[73]

B. County and Municipal Power under the 1968 Constitutional Revision

1. County Power

The constitutional power of self-government for charter counties is embodied in Article VIII, Section 1(g) of the Florida Constitution and provides "all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors."[74] This power of self-government to regulate, provide essential services, and legislate by ordinance flows directly from the Florida Constitution to a charter county through the provisions of the county's charter.[75]

While a charter county derives its authority from its charter and the Florida Constitution, a non-charter county has "such power of self-government as is provided by general or special law."[76] The power of self-government provided to non-charter counties in Florida Statutes Section 125.01 is broad. Section 125.01(1) provides:

> The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to . . . .[77]

An enumeration of specific powers follows this provision.

Section 125.01(3) reiterates that the grant of power provided is not restricted to those enumerated powers and that the Legisla-

72. *See City of Boca Raton*, 595 So. 2d at 27 (reporting that Florida courts consistently applied Dillon's Rule under the Florida Constitution of 1885).

73. Steven L. Sparkman, *The History and Status of Local Government Powers in Florida*, 25 U. Fla. L. Rev. 271, 282 (1973).

74. Fla. Const. art. VIII, § 1(g).

75. *Id.*

76. *Id.* at art. VIII, § 1(f).

77. Fla. Stat. § 125.01(1).

ture intended Section 125.01 to implement all the powers of self-government that the Florida Constitution authorizes.[78] Section 125.01(3)(a) specifically provides that the enumeration of powers "shall not be deemed exclusive or restrictive, but shall be deemed to incorporate all implied powers necessary or incident to carrying out such powers enumerated."[79] Courts must liberally construe this Section to carry out its purpose and to secure for the counties the broad exercise of home rule powers that the State Constitution authorizes.[80] The counties' enumerated powers and duties set forth in Section 125.01 include many infrastructure projects, such as water supplies; waste and sewage collection; air, rail, bus and water terminals; port facilities; public-transportation systems; and roads, tunnels, bridges, and related facilities.[81]

2. Municipal Power

The 1968 Florida Constitution abolished Dillon's Rule and created modern municipal home rule power:

> Municipalities shall have governmental, corporate[,] and proprietary powers to enable them to conduct municipal government, perform municipal functions[,] and render mu-

78. *Id.* at § 125.01(3)(a).

79. *Id.*

80. *Id.* at § 125.01(3)(b). The Supreme Court of Florida explored the scope of county home rule authority in three leading opinions: *Taylor v. Lee County*, 498 So. 2d 424 (Fla. 1986); *Speer v. Olson*, 367 So. 2d 207 (Fla. 1978); and *State v. Orange County*, 281 So. 2d 310 (Fla. 1973). In all three opinions, the Supreme Court recognized the expansive home rule powers conferred by Article VIII, Section 1(f) of the Florida Constitution and Florida Statutes, Section 125.01 and concluded that counties need no specific statutory authority to enact ordinances. *See Taylor*, 498 So. 2d at 426 (reasoning that under general law, counties have the power to issue bonds and to "provide and regulate toll roads and bridges"); *Speer*, 367 So. 2d at 211 (allowing Pasco County to issue bonds through its home rule power unless the Legislature has pre-empted the County on that particular subject); *Orange Co.*, 281 So. 2d at 311–312 (reasoning that no general or special law precluded Orange County from issuing revenue because the Florida Constitution delegates that authority). Counties have the home rule authority to enact ordinances for any public purpose, so long as the ordinances are consistent with general or special law. *Id.* at 312.

81. Fla. Stat. § 125.01(1)(k)–(m). In addition, any county has the power to construct, acquire, improve, maintain, and operate a wide variety of infrastructure projects, either within or outside of the county's territorial boundaries, including, but not limited to, public mass transportation, port, shipping, and airport facilities. *Id.* at § 125.01(1)(l).

> nicipal services, and may exercise any power for municipal purposes except as otherwise provided by law . . . .[82]

Florida Statutes Chapter 166, the Municipal Home Rule Powers Act, compliments the constitutional municipal home rule concept.[83] To affirm and emphasize the broad constitutional deferral of municipal legislative power, Florida Statutes Section 166.021(4)

> [S]hall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. [The Legislative intent is] to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.[84]

C. Florida Statutory Authority and Regulation

While other countries have typically adopted a central statutory framework to define and govern public–private partnerships,[85] in the United States the law of public–private partnership is "fragmented."[86] Congress and most states, including Florida, have enacted department-specific public–private partnership legislation to accommodate private-partner involvement in identified public sectors, such as transportation and housing.[87] In the 2011 legislative session, the Florida Legislature introduced, but did not enact, the more comprehensive Florida Public–Private Partnership Act.[88] Another iteration of this legis-

82. Fla. Const. art. VIII, § 2(b). This Subsection is entitled "POWERS." *Id.*

83. *See City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764, 766 (Fla. 1974) (Dekle, J., concurring) (citation omitted). In this case, the Florida Supreme Court recognized that Section 166.021 was a broad grant of power to municipalities and recognized and implemented Florida Constitution, Article VIII, Section 2(b)'s provisions. *Id.* This legislation enabled municipalities to exercise any power for municipal services except when other law expressly prohibited such exercise.

84. Fla. Stat. § 166.021(4).

85. Custos & Reitz, *supra* n. 35, at 557.

86. *Id.*

87. *Id.* See *infra* pts. III(C)(1)–(4).

88. Fla. H. Res. 1313, 2011 Reg. Sess. 1 (Mar. 7, 2011).

lation has been filed in advance of the 2012 Florida legislative session.[89]

Existing Florida public–private partnership legislation is sector- or project-specific.[90] The State exercises some oversight of public–private partnerships. In the Executive Office of the Governor, the Chief Inspector General is responsible for several aspects of public–private partnership oversight.[91] These include, but are not limited to, providing advice to public–private partnerships that regards developing, utilizing, and improving internal control measures to ensure fiscal accountability[92] and receiving and investigating complaints of fraud, abuse, and deficiency that relate to public–private partnership programs and operations.[93]

Public–private partnership legislation is important because it "sets the ground rules" by which public and private partners may reach an arrangement that is most suitable and mutually advantageous.[94] Legislation can promote, limit, or prohibit public–private partnerships;[95] provide the basis for contracts between public and private partners; and affect risks involved in these arrangements for the public and private partners.[96] This Section discusses sector-specific Florida legislation related to infrastructure public–private partnerships.

1. Water and Sewer Systems

The three parts of Florida Statutes Chapter 153 that pertain to water and sewer systems are replete with general and specific authority for county water and wastewater service activities, including authority for counties to enter into public–private partnerships. Of particular interest, Section 153.90 declares the

89. Fla. H. Res. 337, 2012 Reg. Sess. 1 (Jan. 10, 2012).

90. See *infra* pts. III(C)(1)–(4).

91. *See* Fla. Stat. § 14.32(3) (discussing those duties of the Chief Inspector General that are relevant to public–private partnerships).

92. *Id.* at § 14.32(2)(a).

93. *Id.* at § 14.32(3)(c).

94. Iseki, et al., *supra* n. 10, at iii.

95. *Id.*; *see e.g.* U.S. Conf. of Mayors Urb. Water Council, *Mayor's Guide to Water and Wastewater Partnership Service Agreements: Terms and Conditions* 6–7 (Richard F. Anderson ed., 2005) (noting that some states have existing procurement laws that may also restrain how local government officials can structure public–private partnership arrangements).

96. Iseki, *supra* n. 10, at iii.

legislative intent to encourage public partnership with private entities to finance, operate, and improve wastewater facilities and "allow private firms to utilize their expertise, experience, and resources to enable public entities to provide modern, efficient wastewater services while protecting the rights and interests of citizens."[97] The County Water System and Sanitary Sewer Financing Law is "deemed to provide an additional and alternative method for the doing of things authorized [thereby, and is] regarded as supplemental and additional to the powers conferred upon the commission by other laws, and [not] in derogation of any powers."[98]

Besides the Municipal Home Rule Powers Act, municipalities enjoy additional statutory authority regarding municipal public works as set forth in Florida Statutes Chapter 180.[99] To accomplish that Chapter's purpose, a "municipality may execute its corporate powers within its corporate limits [or] outside of its corporate limits . . . as may be desirable or necessary for the promotion of the public health, safety[,] and welfare."[100] Any municipality or private company has statutory authority to undertake a variety of municipal public works.[101] A municipality may enter into a public-private partnership "for any purpose related to the provisions of this [C]hapter" as authorized.[102]

2. Housing

The State Comprehensive Plan includes a policy to encourage public–private partnerships as a means to "[i]ncrease the supply of safe, affordable[,] and sanitary housing for low-income and

97. *Id.* at § 153.90(f).

98. *Id.* at § 153.20(1). Since the 1968 constitutional revisions, counties have enjoyed home rule powers, and county water and sewer financing can be undertaken pursuant to authority other than Florida Statutes Chapter 153. *See e.g. Speer*, 367 So. 2d at 211–212 (Fla. 1978) (discussing the Legislature's intent and stating that "[u]se of the statute is not mandatory, but is only an additional grant of authority or power to do the things expressed therein").

99. *See* Fla. Stat. § 180.02 (discussing municipalities' powers).

100. *Id.* at § 180.02(1)–(2). That corporate power, however, cannot extend "within the corporate limits of another municipality." *Id.* at § 180.02(2).

101. *See id.* at § 180.17 (discussing contracts with private companies). A City may also grant a franchise to a private company to construct, operate, or maintain public works and may acquire private companies' property. *Id.* at § 180.14.

102. *Id.*

moderate-income persons and elderly persons."[103] As part of the State housing strategy, the Legislature has identified public–private partnerships as a cost-effective way to "produce and preserve affordable housing."[104] The Legislature has also determined that the State should provide certain incentives for forming public–private partnerships to achieve maximum reduction to housing costs, including through regulatory relief and a "streamlined application process for [S]tate-level programs."[105]

In 2006, the Legislature enacted the Florida Housing Finance Corporation Act (Act)[106] to address the need for affordable low-, moderate-, and middle-income housing in Florida.[107] Under the Act, the Legislature created the Community Workforce Housing Innovation Pilot Program to "provide affordable rental and home ownership community workforce housing for essential services personnel affected by the high cost of housing, using regulatory incentives and state and local funds to promote local public[–]private partnerships and leverage government and private resources."[108] Community Workforce Housing Innovation Pilot Program public–private partnerships "must involve at least one public sector entity and one private sector for-profit or nonprofit entity."[109]

3. Transportation

The Florida Transportation Code[110] governs public–private partnerships in the transportation context and provides that the State "may receive or solicit proposals and . . . enter into agreements with private entities, or consortia thereof, for the building, operation, ownership, or financing of transportation facilities."[111] The statute further addresses certain aspects of public–private

103. *Id.* at § 187.201(4)(b)(3).
104. *Id.* at § 420.0003(3)(b).
105. *Id.* at § 420.0002(10).
106. *Id.* at § 420.501.
107. *See id.* at § 420.502 (discussing legislative findings).
108. *Id.* at § 420.5095(2).
109. Fla. Housing Fin. Corp., *Community Workforce Housing Innovation Pilot Program (CWHIP)*, http://www.floridahousing.org/NR/rdonlyres/B9FD0DB5-6C62-48D1-94DB-BEE293D323BE/0/CWHIPonepager.pdf (accessed Feb. 20, 2012).
110. Fla. Stat. § 334.01.
111. *Id.* at § 334.30(1).

partnerships, such as reimbursing project funds;[112] leasing toll facilities;[113] developing new toll facilities and increasing capacity on existing toll facilities;[114] regulating revenues; procuring public–private partnerships;[115] using innovative financing techniques;[116] and providing specific terms that public–private partnership agreements must address.[117]

Additionally, when giving grants to counties to enhance highway-transportation facilities or relieve traffic congestion on highways as part of the County Incentive Grant Program, one of the criteria the Florida Department of Transportation must consider is the "extent to which the financial assistance would foster innovative public[–]private partnerships and attract private debt or equity investment."[118] The Florida Department of Transportation may consider this same criterion when deciding whether to make "loans [or] credit enhancements to government units and private entities" from the State-funded infrastructure bank "for use in constructing and improving transportation facilities."[119]

4. Energy Performance Savings Contracts

Florida Statutes, Section 489.145, entitled "Guaranteed Energy, Water, and Wastewater Performance Savings Contracting Act," furthers a State policy to encourage State and local government agencies to invest in "energy, water, and wastewater efficiency and conservation measures."[120] The statute designates qualified contractors as those "experienced in the analysis, design, implementation, or installation of energy, water, and wastewater efficiency and conservation measures through energy performance contracts."[121] A governmental agency may enter into a guaranteed contract with a qualified contractor (energy service company or ESCO) to "reduce energy or water consumption,

112. *Id.*
113. *Id.* at § 334.30(2)(a).
114. *Id.* at § 334.30(2)(b).
115. *Id.* at § 334.30(6).
116. *Id.* at § 334.30(8).
117. *See id.* at § 334.30(9), (12) (addressing payment structure and terms of public–private partnership agreements).
118. *Id.* at § 339.2817(1), (3)(c).
119. *Id.* at § 339.55(1), (7)(d).
120. *Id.* at § 489.145(1)–(2).
121. *Id.* at § 489.145(3)(e).

wastewater production, or energy-related operating costs of an agency facility through one or more energy, water, or wastewater efficiency or conservation measures."[122]

IV. THE JOINT OWNER AND PLEDGE OF CREDIT PROHIBITIONS

Just as some other states limit or prohibit certain public-partnership arrangements or terms, Florida constitutionally prohibits public entities from jointly owning a business enterprise with a private entity or from pledging their credit to a private business.[123] Florida adopted this provision to "protect public monies" and "to keep the State out of private business; to insulate State funds against loans to individual corporations or associations and to withhold the State's credit from entanglement in private enterprise."[124]

Before 1885, the Florida Constitution contained a prohibition against the State using public money for private business,[125] but the Florida Constitution "did not prohibit the Legislature from authorizing local governments to provide public money to private business."[126] Authorized by legislative enactment, the State and many local governments became bondholders or stockholders in, and otherwise loaned their credit to, commercial institutions such as banks and railroads.[127] When many of these private businesses, which were poorly managed, either failed or had financial difficulty, the State and local governments, and ultimately the taxpayers, became responsible for private business's debt and other financial obligations.[128] The Florida Constitution was

122. *Id.* at § 489.145(4)(a). The contract includes a written guarantee that may take the form of an insurance policy, letter of credit, or corporate guarantee that "annual cost savings will meet or exceed the amortized cost of energy, water, and wastewater efficiency and conservation measures." *Id.* at § 489.145(5)(a).

123. Fla. Const. art. VII, § 10.

124. *Jackson–Shaw Co. v. Jacksonville Aviation Auth.*, 8 So. 3d 1076, 1086 (Fla. 2008) (citing *Dade Co., Bd. of Pub. Instr. v. Mich. Mut. Liab. Co.*, 174 So. 2d 3, 5–6 (Fla. 1965)).

125. Fla. Const. art. XIII, §10 (1865) (superseded in 1968 by Fla. Const. art. VII, § 10) ("The General Assembly shall not pledge the faith and credit of the State to raise funds in the aid of any corporation whatever.").

126. *Jackson-Shaw Co.*, 8 So. 3d at 1085 (citing Joseph W. Little, *The Historical Development of Constitutional Restraints on the Power of Florida Governmental Bodies to Borrow Money*, 20 Stetson L. Rev. 647, 655–657 (1991)).

127. *Id.* at 1085–1086 (citing *Bailey v. City of Tampa*, 111 So. 119, 120 (Fla. 1926)).

128. *Id.* at 1086 (citing *Bailey*, 111 So. at 120).

amended in 1885 to "restrict the activities and functions of the State [and local governments and to prevent them from engaging] directly or indirectly in commercial enterprises for profit."[129]

Subsequent amendment to provide limiting constructions and some exceptions to the broad prohibition[130] did not substantially alter the prohibition against public entities becoming joint owners with, or pledging their credit to, private business.[131] While the term "joint owner" is not defined in the Florida Constitution or in caselaw, the Florida Supreme Court concluded upon reviewing the constitutional language that "joint owner" does not necessarily equate to the terms "joint venture" or "partner."[132] The Court further cautioned that an arrangement may fail the joint-venture test if even one element is not met, so "equating the term joint owner to joint venturer may fail to recognize joint ownership arrangements that jeopardize public funds but do not strictly meet the test for a joint venture."[133]

In the seminal case, *Jackson–Shaw Co. v. Jacksonville Aviation Authority*,[134] the United States Court of Appeals for the Eleventh Circuit presented the Florida Supreme Court with two certified questions.[135] The initial question for the Court was

129. *Id.*; Fla. Const. art. IX, § 10 (1885) (superseded 1968 by Fla. Const. art. VII, § 10) ("The credit of the State shall not be pledged or loaned to any individual, company, corporation[,] or association; nor shall the State become a joint owner or stock-holder in any company, association[,] or corporation. The Legislature shall not authorize any county, city, borough, township[,] or incorporated district to become a stockholder in any company, association[,] or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution[,] or individual.").

130. *See* Fla. Const. art. VII, § 10(a)–(d) (amended 1974) (expressing that it does not prohibit laws authorizing "the investment of public trust funds;" the investment of other funds in obligations of the United States; the issuance of bonds to finance local airports or port facilities; the issuance of bonds for industrial or manufacturing plants if the interest is exempt from income taxes and bonds are payable solely from revenues therefrom; and the joint ownership with or pledge of taxing power or credit to any private entity for the ownership, "construction[,] and operation of electrical energy generating or transmission facilities").

131. *Id.* ("Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend[,] or use its taxing power or credit to aid any corporation, association, partnership[,] or person"); *Jackson–Shaw Co.*, 8 So. 3d at 1086.

132. *Jackson–Shaw Co.*, 8 So. 3d at 1090 (noting that prior Attorney General advisory opinions may or may not have equated the term "joint owner" with the terms "partner" or "joint venture" and taking into consideration the framers' intent to protect public funds).

133. *Id.* at 1091.

134. 8 So. 3d 1076 (Fla. 2008).

135. *Id.* at 1084.

whether Jacksonville Aviation Authority (Authority) was a joint owner in violation of Article VII, Section 10 of the Florida Constitution by virtue of a business agreement that it had entered into with a private company to use the Authority's vacant property long-term.[136] In determining that the contractual arrangement did not constitute joint ownership, the Court indicated that the answer depended on (1) whether the Authority "incurred financial obligations as a result of the agreement," and (2) the nature of the public and private parties' relationship.[137]

Regarding the financial-obligations issue, the Court determined that neither the Authority's obligation to pay for an already planned and budgeted road extension nor the Authority's obligation to use some of its property for wetland mitigation to benefit the private partner's development at no cost to the private partner rendered the partners joint owners.[138] The Court also determined that the nature of the relationship between the Authority and the private developer did not enable the Authority to become a joint owner with the private partner because the Authority had no responsibility for promoting, developing, or financing the proposed project; no loans of the private partner encumbered the Authority's title to the land; and the Authority was not obligated to the private partner's creditors.[139]

The second question certified to the Court was whether the Authority had impermissibly pledged its credit to the private partner by virtue of its obligations under the agreement.[140] The Court stated that "[i]n order to have a gift, loan[,] or use of public credit, the public must be either directly or contingently liable to pay something to somebody."[141] If on the one hand, the public entity has given, lent, or used its credit, any benefits to a private entity must be incidental, and the project must serve a para-

136. *Id.*

137. *Id.* at 1092–1093. The opinion addressed "the prohibition against a public entity becoming a joint owner with, or stockholder of, a private entity" and noted that the focus is "the nature of the relationship that would arise through a proposed arrangement." *Id.* at 1091.

138. *Id.* at 1093–1094.

139. *Id.* at 1093; *see also* Fla. Att'y Gen. Op. 10-08 at 32–33 (applying the rationale in *Jackson–Shaw Co.* to determine whether a public entity had become a joint owner and discussing joint venture criteria).

140. *Jackson–Shaw Co.*, 8 So. 3d at 1094.

141. *Id.* at 1095 (quoting *Nohrr v. Brevard Co. Educ. Facilities Auth.*, 247 So. 2d 304, 309 (Fla. 1971)).

mount public purpose.[142] On the other hand, a project must serve only a public purpose, rather than a paramount public purpose, if the public entity has not given, lent, or used its credit.[143] In *Jackson–Shaw Co.*, the Court concluded that the public entity had not given, lent, or used its credit to benefit the private party based on various factors, including (1) the public entity bore no responsibility for developing, promoting, or financing the project; (2) the public entity bore no direct or indirect obligation to pay any private-entity debt; and (3) the public entity's fee-interest in the property was not obligated by any potential default of the private entity.[144] As a result, the Court ultimately determined that the public entity entered into the agreement to generate revenue that would ultimately provide tax relief, which fulfilled a valid public purpose.[145]

In sum, a public entity must comply with project- or sector-specific statutory requirements and limitations and ensure that it does not run afoul of the constitutional prohibition against becoming a joint owner with a private entity or pledging its credit to a private entity. Within this regulatory framework, public and private entities are free, and in some instances encouraged, to enter into a variety of public–private partnership arrangements.

V. TYPES OF PUBLIC–PRIVATE PARTNERSHIP ARRANGEMENTS

> There is no universal norm for the most appropriate approach to [public–private partnerships, and no one arrangement or] model is necessarily more universally appropriate than another.[146]

Many types of public–private partnership arrangements are possible,[147] though some may be prohibited outright, and state

142. *Id.*
143. *Id.*
144. *Id.* at 1096–1097.
145. *Id.* at 1094, 1099.
146. Delmon, *supra* n. 3, at 15.
147. *See* Custos & Reitz, *supra* n. 35, at 560 (expressing that the GAO has identified eighteen possible combinations of infrastructure public–private partnerships across sectors); *see generally* U.S. Gen. Acctg. Off., *supra* n. 31, at 3–16 (listing and explaining the various types of, and terms related to, public–private partnerships).

law may restrict the use of others.[148] Local governments should consider various factors in determining which public–private partnership arrangement, if any, is best suited to address an infrastructure need, including "cost benefit, value for money, the sources of finance, the commercial arrangements, [and] the nature of investors and government participants."[149]

There is a spectrum of public- and private-entity involvement in providing infrastructure. At one end of the spectrum, only public entities provide the infrastructure, and any private entity involvement is very limited, such as with traditional design–build arrangements.[150] At the other end of the spectrum, private entities are solely responsible for providing infrastructure and are subject only to governmental oversight or regulation.[151] Different public–private partnership arrangements fall between these two extremes.

Though the public–private partnership arrangements listed below are not all-inclusive, they are helpful to illustrate the diversity of public–private partnership arrangements that are available and that local governments use to meet infrastructure needs and obligations.[152]

A. A+B Contracting

At one end of the public–private partnership spectrum, A+B contracting is a traditional design–build contract. Here the private-entity contractor bids the project cost (A) and the project-completion timeframe (B).[153] Under the contract, the private-entity contractor assumes the risk of failing to complete the project within the timeframe specified, and the contract's compensation typically includes an early-completion bonus or late-completion penalty.[154] This type of public–private partnership occurs most frequently when project-completion time is a critical component.[155]

148. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 6–7.
149. Delmon, *supra* n. 3, at 8.
150. U.S. Dep't Transp., *supra* n. 14, at 10.
151. *Id.*
152. For discussion of different classification models, see Delmon, *supra* n. 3, at 23–47.
153. U.S. Dep't Transp., *supra* n. 14, at 14 fig. 2.2.
154. *Id.*
155. *Id.*

B. Asset Management or Operation and Maintenance Contract (O&M Contract)

An operation and maintenance contract is one of the most common public–private partnership arrangements.[156] The public partner "contracts the day-to-day management, operation, and maintenance responsibility to a private partner—in whole or in part—for the [infrastructure]."[157] This type of public–private partnership may serve to operate or maintain long-term an existing infrastructure[158] or new infrastructure.[159] Historically, contract terms for these arrangements range from one to five years.[160] "Longer term contracts, up to twenty years, have become more common" since the tax law changed in 1997,[161] as Part VII(J)(1) further discusses.

Typically the private partner must finance needed improvements and receives compensation from the public partner.[162] Private investment is more likely if the private partner can increase operation efficiency over the contract term.[163] "The longer the contract term, the greater the opportunity for the private partner to recoup its investment through cost savings."[164]The parties may also, at least in part, base a fee arrangement on performance incentives and disincentives.[165] O&M contracts have, in some instances, provided substantial cost savings over conventional public management.[166]

In 2001, JEA (formerly Jacksonville Electric Authority) bought twenty-eight water production, treatment, storage, and distribution systems and thirteen sanitary wastewater collection, treatment, and disposal systems in Duval, Nassau, and St. Johns Counties from United Water Florida, Inc.[167] At closing, the parties

156. Water P'ship Council, *supra* n. 20, at 51.
157. *Id.*
158. U.S. Dep't Transp., *supra* n. 14, at 14 fig. 2.2.
159. Water P'ship Council, *supra* n. 20, at 50 tbl.
160. *Id.*
161. *Id.* at 51.
162. U.S. Dep't Transp., *supra* n. 14, at 14 fig. 2.2.
163. Water P'ship Council, *supra* n. 20, at 51.
164. *Id.*
165. U.S. Dep't Transp., *supra* n. 14, at 14 fig. 2.2.
166. *Id.*
167. *Service Agreement for Maintenance and Operation of Water and Wastewater System Facilities in Nassau, Duval and St. Johns Counties, Florida between JEA ("JEA") and*

entered into a twenty-year performance-based service agreement "for the maintenance and operation of [seven] wastewater treatment plants with [six] collection systems and [eleven] water treatment plants and distribution facilities" that JEA acquired.[168] The agreement included detailed standards regarding delivering and processing water and wastewater, repairing and maintaining the system with cost-sharing arrangements, staffing and training provisions, maintaining safety, complying with applicable law, making contingency for uncontrollable circumstances, complying with permitting and insurance requirements, and keeping records.[169] The service fee included a base O&M charge, a variable portion of the fee, a Consumer Price Index adjuster, and acknowledgement of certain pass-through costs.[170] This O&M agreement promoted a smooth transition from private to public ownership utilizing the seller's institutional knowledge and a competitive fee structure.

C. Design–Build–Operate–Maintain (DBOM) and Design–Build–Operate (DBO) Contracts

The DBOM form of public–private partnership is popular.[171] It is similar to a design–build–finance–operate contract, but the private partner—while still playing a major role in the project design, construction, maintenance, and operations—is less involved in financing the project.[172] The public partner supplies performance specifications; the private partner has significant latitude in complying.[173] This arrangement may be used for new

United Water Florida Operations LLC ("Company") 6 (Dec. 28, 2001) (on file with *Stetson Law Review*) [hereinafter *Service Agreement*]; *see* PR Newswire Ass'n, *JEA and United Water Complete $219 Million Transaction*, http://www.prnewswire.com/news-releases/jea-and-united-water-complete-219-million-transaction-74688952.html (Dec. 28, 2001) (reporting on United Water's sale to JEA); *see generally Agreement of Purchase and Sale of Water and Wastewater Assets by and among United Water Florida Inc. and United Water Florida LLC and JEA* (Dec. 2001) (on file with *Stetson Law Review*) (setting forth the agreement regarding the sale of the systems).

168. *Service Agreement*, *supra* n. 167, at 6–7, 26. The Agreement provides for earlier termination in the event JEA assumes operational responsibility, but not for any other private operator.

169. *Id.* at 11–18, 30–31.

170. *Id.* at 23–35.

171. Water P'ship Council, *supra* n. 20, at 51.

172. U.S. Dep't Transp., *supra* n. 14, at 13 fig. 2.2.

173. Water P'ship Council, *supra* n. 20, at 51.

projects or to upgrade existing infrastructure; contract terms average between fifteen and twenty-five years.[174] Contractually, the public partner may base the private partner's compensation on incentives and disincentives for "operational performance and the physical condition" of the facilities.[175]

Tampa Bay Water (TBW) is a regional water agency supplying water to more than 2.4 million consumers spanning three counties in Florida's Tampa Bay area.[176] In 2002, TBW entered into a public–private partnership with Veolia Water North America to design, build, and operate a surface-water-treatment plant.[177] The plant is the hub of TBW's "Enhanced Surface Water System—the first alternative water supply built to serve local governments that traditionally relied on groundwater[, and which] has a maximum rated capacity of 120 million gallon[s] per day. . . . [TBW] is the owner of the plant, but Veolia designed, built[,] and is under contract to operate the plant until 2023."[178] This project is currently the largest water and wastewater DBOM project in the United States.[179]

D. Design–Build–Finance–Operate (DBFO) Contract

The private partner has a lot of involvement in a DBFO arrangement. The private partner's responsibilities include facility design, construction, operation, maintenance, and project financing.[180] The primary application for this type of arrangement is new systems, and the average term of these public–private partnerships is twenty years or more.[181] Revenues are typically generated from direct user fees, payments from the public partner, or both.[182] The operations portion of a DBFO contract may

174. *Id.*

175. U.S. Dep't Transp., *supra* n. 14, at 13 fig. 2.2.

176. Tampa Bay Water, *About Tampa Bay Water*, http://tampabaywater.org/about/index.aspx (accessed Feb. 20, 2012).

177. Tampa Bay Water, *Surface Water Treatment Plant*, http://development.tampabaywater.org/facilities/surfacewater/treatmentplant.aspx (accessed Feb. 20, 2012).

178. *Id.*

179. Stephen K. Siegfried, CLE Presentation, *Operation Models in Public-Private Partnerships* 15 (Fla. Water L. Seminar, May 19–20, 2011) (copy of PowerPoint presentation on file with *Stetson Law Review*).

180. U.S. Dep't Transp., *supra* n. 14, at 13 fig. 2.2.

181. *See id.* (stating that a facility typically reverts to the state after twenty-five years or more); *see also* Water P'ship Council, *supra* n. 20, at 50 chart.

182. U.S. Dep't Transp., *supra* n. 14, at 13 fig. 2.2.

provide for performance incentives and include provisions for such things as maximum rate of return, non-compete clauses, and maximum user fees.[183]

The Port of Miami Tunnel Project will develop as a public–private partnership.[184] MAT Concessionaire, LLC, formerly Miami Access Tunnel, LLC (MAT), will design, build, finance, operate, and maintain the tunnels.[185] Based on a competitive bid process, design and construction will cost $607 million.[186] The partnership structure will transfer substantial risk for construction cost overruns and the long-term cost of operations and maintenance to the private party.[187] The Florida Department of Transportation (FDOT) will make availability payments for providing vehicle access through the tunnel at regular intervals for the partnership's thirty- to fifty-year duration.[188] MAT will bring key subcontractors, such as the project designer, builder, and operator, who may or may not be equity investors in the project.[189]

183. *Id.*

184. Fla. Dep't Transp., *Port of Miami Tunnel Project*, http://www.portofmiamitunnel.com (accessed Feb. 20, 2012).

185. *Id.* "The two finance investors in the company [MAT Concessionaire, LLC] are Meridiam Infrastructure Finance (made up of nine banks) with [ninety] percent equity and Bouygues Travaux Publics with [ten] percent equity." Fla. Dep't Transp., *FAQs*, http://www.portofmiamitunnel.com/faqs/financial, *select* Is the contracted team, MAT Concessionaire, LLC, one company or a group of companies? (accessed Feb. 20, 2012) [hereinafter *FAQs*]; *see* Shelly Sigo, *Miami Tunnel Reaches Closure*, http://www.bondbuyer.com/issues/118_200/miami-tunnel-project-1002638-1.html ?zkPrintable=true (Oct. 19, 2009) (discussing the port of Miami tunnel project's financing).

186. Fla. Dep't Transp., *Project Overview*, http://www.portofmiamitunnel.com/projectoverview/project-overview-1/ (accessed Feb. 20, 2012) [hereinafter *Project Overview*]. In addition to funds that the private party put forth, FDOT and Miami-Dade County will also provide funding. Fla. Dep't Transp., *Financial*, http://www.portofmiamitunnel.com/faqs/financial/, *select* What are the sources of revenue? (accessed Feb. 20, 2012) [hereinafter *Sources of Revenue*].

187. *FAQs*, *supra* n. 185 (explaining that "[t]he POMT is a public[–]private partnership (PPP) designed to transfer the responsibility to design–build–finance–operate–and–maintain ("DBFOM") the project to the private sector"); *see also* Fla. Dep't Transp., *Port of Miami Tunnel and Access Improvement Project: Project Information Memorandum* 29 (Feb. 17, 2006) (copy on file with *Stetson Law Review*) [hereinafter *Port of Miami Tunnel*] (discussing the project's risk-allocation).

188. *Port of Miami Tunnel*, *supra* n. 187, at 28 (discussing general information on concessionaire's contractual obligations and the payment mechanism).

189. *See FAQs*, *supra* n. 185 (noting "[t]he company brought in key subcontractors for the design, construction, and operations of the project, some of whom are affiliated with the equity investors").

E. Concession–Lease Contract

The concession–lease public–private partnership arrangement primarily applies to existing systems.[190] In this arrangement, the private partner typically pays the public partner, as the owner, for the right to manage the infrastructure.[191] The private partner may be "responsible for capital upgrades, expansion, and a broader range of functions."[192] The average concession–lease contract's term is between ten and twenty years.[193] Among the most prominent national public–private partnerships involving concession–lease arrangements are the $3.8 billion Indiana Toll Road public–private partnership and the $1.8 billion Chicago Skyway public–private partnership.[194] "In the Chicago Skyway and Indiana Toll Road partnership arrangements, the public entity realized substantial upfront value through long-term agreements for the operation of toll road facilities. These landmark agreements were used as a model for maintaining and operating highways throughout the country."[195] The GAO has reported that the concessionaires for the Indiana Toll Road and Chicago Skyway are actually held to higher standards of performance than were the public operators of such roads that preceded them.[196]

F. Lease–Purchase and Sale–Leaseback Contracts

Under the lease–purchase scenario, the public and private partners enter into an installment-purchase contract where the private partner "finances and builds a new facility" it leases to the public entity on an ongoing basis.[197] The public entity accumu-

190. Water P'ship Council, *supra* n. 20, at 50 tbl.

191. *Id.* at 53.

192. *Id.*

193. *Id.* at 50 tbl.

194. U.S. Dep't Transp., *Innovation Wave: An Update on the Burgeoning Private Sector Role in the U.S. Highway and Transit Infrastructure* 3, www.ncppp.org/councilinstitutes/dotpppreport_20080718.pdf (July 18, 2008).

195. *Id.*

196. U.S. Gov't Acctg. Off., *Highway Public–Private Partnerships: More Rigorous Upfront Analysis Could Better Secure Potential Benefits and Protect the Public Interest* 41–42, www.gao.gov/new.items/d0844.pdf (2008).

197. The Nat'l Council for Pub.–Priv. P'ships, *Types of Public-Private Partnerships*, www.ncppp.org/howpart/ppptypes.shtml (accessed Feb. 20, 2012).

lates equity in the facility upon each scheduled lease payment to the private partner and either owns the facility at the end of the lease term or purchases it at the cost of the lease's remaining unpaid balance.[198] This type of arrangement has built federal office buildings, state prisons, and other correctional facilities.[199]

A sale–leaseback public–private partnership arrangement is similar to a lease–purchase public–private partnership arrangement, but the public entity sells its facility to a private partner and afterward leases the facility back from the new private-partner owner.[200] Under this arrangement, the public entity continues to operate the facility.[201] Public entities have used this arrangement to limit statutory governmental liability.[202]

VI. PROCUREMENT

Proper partner selection is one of the most critical elements for a public–private partnership's long-term success—even more so in recent years, as the duration of public–private partnership arrangements has increased dramatically from three- to five-year terms to longer-term arrangements that range from ten to twenty years.[203] When a procurement process is not well planned and executed, time is wasted and all parties incur unnecessary expense.[204] Procurement is a multi-step process and should be customized to meet the public entity's needs. Fundamentally, however, the basic public–private partnership procurement steps involve deciding on the procurement process to utilize, preparing procurement documentation to disseminate to interested private parties, evaluating proposals, and awarding a contract.[205]

A. Procurement Process Alternatives

Procuring a public–private partnership partner may involve a variety of processes. As a preliminary step, a public entity may

198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. Cal. Debt & Inv. Advisory Comm'n, *supra* n. 13, at 2–3.
204. Water P'ship Council, *supra* n. 20, at 57.
205. *Id.*

solicit "Expressions of Interest" to determine private firms' level of interest to participate in a project.[206] Before soliciting bids, the public entity may also wish to request comments on draft procurement documents to identify and troubleshoot any inaccurate and problematic aspects of the project or information.[207] Using the traditional "low bid" procurement process is typically limited for public–private partnership projects because of unknown variables in the scope of work, plan of finance, or schedule.[208] For simple projects, the public entity may use "a sole[-]source or qualifications-based procurement" if state or local law does not prohibit this process, although long-term projects do not typically use this type of procurement.[209]

Public entities commonly use the "two-step request for qualifications" (RFQ) and "request for proposals" (RFP) to obtain a qualified pool of candidates.[210] The first step of this process may be necessary when a project involves technical aspects and the public entity desires to pre-qualify potential private partners to limit the number of private firms invited to submit proposals in the second step.[211] Using this process may also indicate the level of private interest in the project, and interested private parties benefit because preparing an RFQ response is less expensive than preparing an RFP response.[212] The RFP process may be used as the second step in the process outlined above, or it is also commonly used as a stand-alone procurement process to receive proposals from interested private parties.[213]

An interview with potential private partners should be part of the procurement process.[214] This interview will give the public entity and private-partner candidate the opportunity to meet one-on-one[215] and get a feel for the dynamics of their working relationship. Thereafter, the public entity selects a private partner based on various criteria identified in the procurement documents.[216]

206. Cal. Debt & Inv. Advisory Comm'n, *supra* n. 13, at 4.
207. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 6.
208. Cal. Debt & Inv. Advisory Comm'n, *supra* n. 13, at 4.
209. Water P'ship Council, *supra* n. 20, at 57.
210. *Id.*; Cal. Debt & Inv. Advisory Comm'n, *supra* n. 13, at 4.
211. *Id*.
212. Water P'ship Council, *supra* n. 20, at 58.
213. *Id.*
214. Cal. Debt & Inv. Advisory Comm'n, *supra* n. 13, at 10.
215. *Id.*
216. *See* U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 5 (suggesting that the

Overall, the procurement process must be conducted in a transparent and fair manner.[217]

The use of a "best value" approach is encouraged when making a selection determination, particularly for design-build or DBO projects when public entities may desire a private partner to meet project needs creatively.[218] Factors that may contribute "value" to a project include, but are not limited to, "project design, project delivery schedule, use of innovation, access to expertise, [and] project financing."[219]

B. Procurement Documentation

Procurement documents should be drafted to attract competitive bids; clarify and minimize questions after publication; reduce the outstanding issues to be addressed or negotiated before the public entity can award the contract; and create a "level playing field" for evaluating bids.[220] Procurement documents should provide information adequate to reduce the risk-burden to interested private parties; if not, they will be forced to make assumptions that may increase the proposed fee or project cost to account for the uncertainty.[221] Generally, the public entity should explicitly state the expectations, goals, specifications, preferences, and minimum requirements in the procurement documents.[222] Categories of information contained in the procurement documents include such things as the project background and objectives; a description of the desired services; identification of the clear and unambiguous evaluation criteria and any weight assigned to individual criteria; insurance and bonding requirements; proposed or alternative financing structures; the proposed contract term; instructions for submitting a bid; and an explanation of the evaluation and selection process.[223]

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public partner should provide evaluation criteria in its RFP to avoid challenges from unsuccessful private entities who argue that the criteria was vague or arbitrary).

217. Cal. Debt & Inv. Advisory Comm'n, *supra* n. 13, at 18.

218. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 5.

219. Cal. Debt & Inv. Advisory Comm'n, *supra* n. 13, at 5.

220. Water P'ship Council, *supra* n. 20, at 58.

221. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 5.

222. *Id.* at 4.

223. Water P'ship Council, *supra* n. 20, at 60. Information that may be helpful or essential to a prospective proposer may include the condition of surface and subsurface infrastructure, regulatory standards and requirements, history of compliance and en-

As a rule of thumb, the more prescriptive the scope of work, the more costly the project may be.[224] In other words, the procurement documents should specify the partnership's expectations but not identify how the private partner must meet those expectations.[225]

C. Selection Criteria & Proposal Evaluation

A public entity should request sufficient technical and financial information from proposers to ensure that the public entity can conduct sufficient due diligence. The public entity should require the proposer to draft a statement of understanding that covers the project scope and objectives and how the proposer will meet the project objectives.[226] The proposed private entity should describe the entity, including the project team.[227] This information should also include a history of the organization, ownership, corporate structure, and any additional information that conveys the entity's expertise and ability to meet the project's objectives.[228] The private entity should also require the proposer's qualifications and experience with similar projects and the proposer's financial capability, references, risk transference, and litigation and controversy information.[229] The proposer should also include how its qualifications and experience may benefit the project, including such things as accelerated project delivery and cost-efficiencies.[230]

Both partners must have the financial ability to complete the project.[231] The public entity should complete due diligence to confirm the potential private partner's resources and its financial

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forcement actions, maintenance records, drawings and specifications, engineering reports, adopted capital improvement plans, rate or user fee information, revenue and expense documentation, permit information, citizen complaint history, and other information relevant to the project. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 5. If any local or state approval is required for the project, this issue should be identified in the procurement documents, and the allocation for responsibility of obtaining the necessary approval should be addressed up front.

224. *Id.* at 3.
225. Water P'ship Council, *supra* n. 20, at 61.
226. *Id.*
227. Cal. Debt & Inv. Advisory Comm'n, *supra* n. 13, at 6.
228. *Id.* at 5.
229. *Id.*
230. *Id.* at 9.
231. *Id.* at 12.

viability.[232] Documentation that explains and justifies the cost proposal should accompany the proposer's price.[233] If applicable to the project, the public entity should confirm the net working capital with which the potential partner proposes to finance the project, as well as the proposer's bonding capability.[234] Some public entities may require that an independent financial consultant conduct and certify a financial review before ultimately selecting a private-entity partner.[235]

Overall, the proposer must demonstrate that it brings some measurable public benefit to the project that the public entity cannot access or achieve without the proposer.[236] As previously mentioned, the proposal documentation should clearly state how the public entity will weigh and score the project proposal's various aspects.[237] The public entity should base proposal-evaluations solely on the identified selection criteria and should retain documentation that supports the public entity's actions and decisions that pertain to each proposal's evaluation.[238]

D. Unsolicited Bid Procurement

Some public entities may authorize private entities to submit unsolicited proposals for projects. Miami-Dade County (County), for example, has adopted such an ordinance.[239] The County allows private entities to submit to the County unsolicited proposals containing certain minimum information,[240] along with a fee, to contract for work associated with public infrastructure that costs more than $15 million dollars.[241] Within a prescribed timeframe,

232. *Id.* at 11. The public entity should review the proposer's financial data, including audited financial statements or annual reporting documents for at least the preceding three- to five-year period. *Id.*

233. Water P'ship Council, *supra* n. 20, at 62.

234. Cal. Debt & Inv. Advisory Comm'n, *supra* n. 13, at 11.

235. *Id.*

236. *Id.* at 9.

237. Water P'ship Council, *supra* n. 20, at 61.

238. Cal. Debt & Inv. Advisory Comm'n, *supra* n. 13, at 18.

239. *See* Metro. Dade Co. Code Ordin. (Fla.) § 2-8.1(k) (1992) (discussing unsolicited proposals).

240. *Id.* at § 2-8.1(k)(8).

241. *Id.* at § 2-8.1(k)(1)–(2). The type of work identified is "design, construction, operation, ownership, acquisition, or leasing of public infrastructure." *Id.* at § 2-8.1(k)(1). Additionally, "public infrastructure" means "transit structures, housing structures, roads, bridges, streets, highways, drainage, underground excavation, piping and all structures

the County must consider certain enumerated factors to determine whether to accept the unsolicited proposal and issue a competitive solicitation statement asking for other proposals for the same project for a certain period of time.[242] After the response period expires, the County evaluates and ranks proposals using the criteria identified in the solicitation publication or a subsequent publication.[243] The County may then negotiate with the highest-ranked proposers.[244] The Dr. Martin Luther King Jr. Plaza Office Building is one example of a County project that was a not-for-profit agency's unsolicited bid.[245] Under that public–private partnership arrangement, the developer constructed the improvements and leased land for project development, and County agencies leased the building from the developer with the option to purchase it at a later time.[246]

E. Project Finance

Project finance is a component of the procurement process that is worthy of thoughtful and deliberate consideration. A national poll reflects that voters whom the economy distresses want their elected officials to explore nontraditional options for addressing fiscal problems.[247] The most popular method among voters is private investment in infrastructure.[248] Self-described moderate voters prefer private investment by two to one.[249] Infrastructure public–private partnerships usually require the initial investment of funds, from either the public entity or the private partner, that are "recovered over time from future revenue streams."[250] When private-partner project financing is involved,

incidental thereto." *Id.*

242. *Id.* at § 2-8.1(k)(4)–(6), (10).

243. *Id.* at § 2-8.1(k)(10), (13).

244. *Id.* at § 2-8.1(k)(14).

245. Miami-Dade Co. Transit, *Joint Development Project—Dr. Martin Luther King Jr. Plaza Metrorail Station*, www.miamidade.gov/transit/about_joint_mlk.asp (accessed Feb. 20, 2012).

246. *Id.*

247. Tom Suozzi, *How About a Partnership Stimulus?* http://online.wsj.com/article/SB10001424052748704635704575604563679175190.html (Nov. 11, 2010) (stating that Lazard sponsored the national poll).

248. *Id.*

249. *Id.*

250. Asian Dev. Bank, *Public-Private Partnership Handbook* 56 (available at http://www.apec.org.au/docs/ADB%20Public%20Private%20Partnership%20Handbook

lenders typically perform their own due diligence concerning cash flow and project performance to determine the amount of debt financing a project can sustain.[251]

Industrial Development Revenue Bonds (IDRBs), also known as "private activity bonds," are tax-exempt securities issued to finance certain capital projects that private entities undertake to serve a public purpose.[252] Applicable federal and state regulations and policies that the issuing local government entity adopts govern the qualifications of IDRB financing.[253] The applicable Florida statute broadly defines the types of projects that qualify for such financing, including, but not limited to, water and sewer facilities, manufacturing and industrial plants, warehousing and distribution facilities, and hazardous or solid-waste facilities.[254] Certain types of projects have been designated as "priority projects" for allocation purposes because of their importance to State infrastructure needs.[255] IDRBs are not issued by the private entity undertaking the project, but by a local government agency that sponsors the project, usually through an industrial-development authority.[256] While the federal government does not tax interest earned on tax-exempt debt, it does limit the amount of private-activity bonds that the states may approve.[257] Therefore, to finance a project through an IDRB, an allocation of this state-bond

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251. *Id.* at 57.

252. *See* Fla. Stat. §§ 159.25–159.53, 159.801–159.816 (establishing the Florida Industrial Development Financing Act, creating local Industrial Development Authorities, and allocating the State volume limitation for IDRBs).

253. *See* Fla. Const. art. VII, §§ 10, 12 (granting state and local governments the authority to pledge credit to issue and sell revenue bonds and granting local governments the authority to issue bonds to finance capital projects); Securities Act of 1933, 15 U.S.C. § 77a-3(a)(2) (2006) (exempting industrial development bonds from the registration requirements of the Securities Act of 1933); I.R.C. §§ 141–150 (2006) (governing municipal bonds' federal taxation); Fla. Stat. § 159, pts. II, III, VI (governing requirements and criteria for IDRBs); *id.* at §§ 75, 189 (addressing bond validation and special districts).

254. Fla. Stat. § 159.27(5).

255. *See id.* at § 159.803(5) (defining priority projects as solid waste and water facilities).

256. *Id.* at §§ 159.28(7), 159.287; *e.g.* Charlotte Co. Indus. Dev. Auth., *Industrial Development Revenue Bond Financing Guidelines and Procedures* (Aug. 30, 2006) (available at http://www.floridaedo.com/pdf_folder/CCIDA_Guidelines.pdf).

257. *See* Fla. Stat. § 159.802 (citing I.R.C. § 156 (2006)) (allocating state volume limitation on private activity bonds).

volume limit must be obtained from the State of Florida as administered by the Division of Bond Finance.[258]

Using private, non-profit corporations in structuring public–private infrastructure financings is also a tool available to public entities. Sometimes called "63–20 corporations," these non-profits may preserve a project's eligibility for financing with "tax-exempt bonds, while maintaining . . . most of the benefits of private development."[259] Section 103 of the Internal Revenue Code allows only states or political subdivisions to issue tax-exempt debts.[260] "Obligations issued by a non-profit corporation formed under the general non-profit corporation law of a state, for the purpose of stimulating industrial development within a political subdivision of the state, will be considered issued 'on behalf of' the political subdivision," provided certain requirements are met.[261] Requirements include that the corporation perform activities that are essentially public in nature, that it is organized not for profit, that its income does not "inure to any private person," that the political subdivision has a "beneficial interest in the corporation," and that the political subdivision approved the corporation.[262]Accommodating a 63–20 corporation in a transaction can be challenging to both public and private participants, and drafting the necessary contractual relationships requires balancing the rights and responsibilities between the parties.[263]

F. Special Considerations

In some instances, special requirements must be met in procuring partnership arrangements. This may involve project- or sector-specific procedural requirements, such as the requirement for wastewater facility privatization contracts that a local gov-

258. *Id.* at §§ 159.802, 159.804.

259. Karen J. Hedlund, *The Role of 63–20 Nonprofit Corporations in Public/Private Infrastructure Financings*, 113 Pub. Works Fin. 20, 20 (1997).

260. I.R.C. § 103(a), (c)(1).

261. Rev. Rul. 63-20, 1963-1 C.B. 24.

262. *Id.*

263. Hedlund, *supra* n. 259, at 21. In 1998, Lee County, Florida created Gulf Environmental Services Corp., a 63–20 corporation, to acquire the water and sewer assets of Gulf Utility Company. *Severn Trent Floats Florida 63–20 Deals*, 117 Pub. Works Fin. 2 (1998). The County issued approximately $50 million in tax-exempt revenue bonds to finance the acquisition and entered into a long-term management contract with Severn Trent Environmental Services to maintain the systems' operations. *Id.*

ernment hold a public hearing and make a determination of public interest based on enumerated statutory criteria.[264]

Some public entities grant a preference to local vendors, contractors, or service providers.[265] A public entity that has adopted a local-preference policy should determine whether it applies to a given public–private partnership project procurement and, if so, evaluate the potential implications. Public entities may receive proposals from foreign-owned or -operated firms, some that typically have experience participating in public–private partnership arrangements[266] and may be qualified public-partner candidates. One example of foreign-owned firm interest occurred in response to a recent RFP for a twenty-year DBO contract for a reverse-osmosis water treatment plant in the City of Hialeah, Florida.[267] Many of the consortiums bidding on the project included international firms or their American subsidiaries.[268] Hialeah awarded the contract to Inima USA Corp., a Spanish multinational utility company.[269]

264. *See* Fla. Stat. § 180.301 (governing municipalities); *id.* at § 125.3401 (governing counties); *id.* at § 190.0125 (governing community development districts); *id.* at § 189.423 (governing special districts). This requires developing detailed information, including historical utility financial information; the physical condition of the facilities; transaction price and terms; impacts on utility customers; and future investment. *Id.* at §§ 180.301, 125.3401, 190.0125. In the case of a wastewater privatization contract, a public entity must consider a private firm's capital investment; transaction alternatives; impact on customers if the transaction does not proceed; and ability to provide and maintain high-quality and cost-effective utility service. *Id.* at §§ 180.301, 125.3401, 190.0125.

265. *E.g.* Titusville Code Ordin. (Fla.) § 6-1994 (1994) (as amended by Titusville Code Ordin. §§ 10-1995, 46-2009).

266. *See* Cal. Debt & Inv. Advisory Comm'n, *supra* n. 13, at 6 (discussing the recent trend to use public–private partnerships for transportation projects).

267. City of Hialeah, Fla., *City Council Summary Agenda* 5 (June 8, 2010) (available at http://www.hialeahfl.gov/dep/council/pdf/2010/jun8.pdf).

268. *Id.*

269. Leonard Gilroy & Harris Kenny, *Annual Privatization Report 2010: Water and Wastewater* 3 (Leonard Gilroy ed., Reason Found. 2011). Inima also has facilities in Chile, Brazil, Europe, North Africa, and Mexico. Robert Preer, *On the Saltwater Front: Brockton Sees an End to Water Shortages with New England's First Desalination Plant*, http://www.boston.com/news/local/articles/2007/06/03/on_the_saltwater_front (June 3, 2007).

VII. CONTRACT ISSUES: REALISTIC EXPECTATIONS ARE KEY

A. Introduction; Scope of Work

Under public–private partnerships, the public partner usually continues to own the assets and sets user rates.[270] The service agreement clearly defines the private firm's responsibilities and makes both parties accountable to ensure that the public's service needs are being met.[271] Where the scope of the operation and maintenance obligations is clear, the private partner should bear the risk that the sum it proposes is sufficient to cover its services' cost.[272] "Without clarity the public partner runs the risk of what it believes are gaps in service," and as a result "the private partner may face an ever-increasing scope of work."[273] A well-crafted contract protects both partners' interests and provides guidance on expected performance standards.[274] As in most sectors, water partnerships that unduly favor either the public or private partner are likely to fail both parties and the public.[275]

B. Managing Risk Allocation and Performance Criteria

Utility asset-management contracts are generally "performance-based contracts."[276] Output specifications are set, leaving the means and methods of reaching those standards (management approaches, operating techniques, and so forth) to the contractor.[277] One of the main benefits of a public–private part-

270. Water P'ship Council, *supra* n. 20, at 12.

271. Cal. Debt & Inv. Advisory Comm'n, *supra* n. 13, at 8.

272. Water P'ship Council, *supra* n. 20, at 62.

273. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 14; *see* Elisabetta Iossa et. al, *Contract Design in Public–Private Partnerships: Report Prepared for the World Bank* 9 (2007) (noting that output specifications must be clearly defined to avoid inconsistency between output specifications and infrastructure needs).

274. Water P'ship Council, *supra* n. 20, at 60–61; *see also* Cal. Debt & Inv. Advisory Comm'n, *supra* n. 13, at 8 (explaining that "[p]ublic agencies should have all agreements reviewed by legal counsel to ensure their rights and remedies are well represented").

275. *See* Water P'ship Council, *supra* n. 20, at 10 ("In a partnership, the public partner retains ownership and control of the assets. Well-managed partnerships benefit the community, and when these partnerships are built on sound contracts and reinforced by mutual trust, the resulting benefits are significant.").

276. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 7.

277. *See* Iossa et al., *supra* n. 273, at 9 (reasoning that this "incentivizes innovative solutions").

nership is risk-allocation to the partner best able to mitigate or bear the risk.

In a design-build or DBO contract, the private partner is responsible for timely project completion within the specified budget.[278] The private partner assumes the risk of changes in labor and material costs, cost management, and efficient construction practices.[279] The primary benchmark in water utility operation and maintenance contracts is "compliance with current applicable law and regulatory standards."[280] The private partner bears responsibility for compliance with applicable laws, regulations, and "fines and damages imposed for non-compliance, provided that the failure to comply was not the result of an [u]ncontrollable [c]ircumstance, or a limitation of the physical assets that the private partner is being asked to operate."[281] Water quantity and quality guarantees are often essential contract terms.[282] The contract may include financial incentives for when the private partner's performance exceeds expectations.[283]

For water and wastewater utilities, as-is risk may be allocated between above ground facilities that the private partner can inspect and below ground (subsurface) facilities that "may be treated with some shared risk between" the public and private partners.[284] One way to reduce uncertainty, and associated risk, is for the public partner to obtain an engineering study before issuing a request for proposals.[285]

C. Non-Performance

The contract "normally provides relief from performance guarantees when the private partner's failure to meet the perfor-

278. Water P'ship Council, *supra* n. 20, at 72; *see also* Cal. Debt & Inv. Advisory Comm'n, *supra* n. 13, at 12 (noting that "[u]sually the private sector brings to the partnership the ability to deliver a project in a timely and cost-effective manner, thereby maximizing any direct revenue sources").

279. Iossa et al., *supra* n. 273, at 19.

280. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 8; *see e.g. Service Agreement*, *supra* n. 167, at 16 app. 1 (requiring the private partner to operate the facility in accordance with every applicable law, rule, and regulation).

281. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 8.

282. *Id.* at 9.

283. *See id.* at 3 (suggesting that private-partner incentives can result in innovation, which could result in additional value for a city).

284. *Id.* at 11.

285. *Id.*

mance guarantees results from an uncontrollable circumstance."[286] Circumstances outside the control of the private partner that uses reasonable care excuse performance.[287] A contract should provide remedies for non-performance aside from default and termination, and "[t]he remedies should be reasonable in light of the actual damages suffered by the public partner."[288] Remedies often include liquidated damages, which the parties determine in advance to compensate for estimated economic losses, and the parties often calculate them using a percentage of the contract price.[289]

D. Repair and Replacement; Change Orders

A traditional approach to repair and replacement is to establish in the contract a threshold amount for the cost of a repair below which the private partner is responsible and above which the public party is responsible.[290] The private partner has an incentive to maintain the equipment properly because many equipment components fall under established thresholds.[291]Alternatively, a contract may include all repair and replacement costs in the service fee.[292]

In general, the agreement between the parties requires the private partner to guarantee delivery on its contract obligations.[293] Contractual provisions with pre-determined compensation formulas, or that provide equal bargaining between the parties to negotiate price changes that result from change orders, substantially reduce the risk that the private partner assumes.[294] The public partner generally has the right to approve capital improvements; therefore, the public partner should be re-

286. *Id.* at 12.

287. *Id.* at 13. Some examples of uncontrollable circumstances that the force-majeure clause in the contract covers are changes in law, acts of God, and loss of power. *Id.* at 12.

288. *Id.* at 14.

289. Iossa et al., *supra* n. 273, at 19.

290. *See* Water P'ship Council, *supra* n. 20, at 70 ("Many contracts require the private partner to pay for repairs or equipment replacement costing less than a specific amount, such as $2,500 per occurrence.").

291. *Id.*

292. *See* Iossa et al., *supra* n. 273, at 36 (noting that fixed-price payments are workable if the private partner can bear substantial risk).

293. *See* Water P'ship Council, *supra* n. 20, at 73 (explaining that the private partner bears the risk that costs may exceed the proposed budget).

294. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 16.

quired to approve a capital improvement necessary to meet contractual obligations or comply with relevant law.[295]

E. Contract Termination

A public–private partnership contract will allow the public partner to achieve its objectives without termination absent uncontrollable circumstances.[296] Contracts should clearly describe performance standards and establish liquidated damages for nonperformance in appropriate situations.[297] Typically, a public partner desires the option to terminate for cause or for convenience.[298]

Termination for cause occurs when the private party fails to meet established performance criteria.[299] In the event of termination for cause, the public partner may have the right to seek legal and equitable remedies, including compensation for damages stemming from non-performance, transitioning to public or other private operation, and the net present value of any increased costs of operations by the new provider.[300]

A public partner may wish to end a contract for a reason other than poor performance.[301] In the event of termination for convenience, the private partner may be entitled to payment for demobilization, supplier or subcontractor cancellation costs, outstanding debt for capital improvements and start-up costs, and some or all lost revenues and profits.[302] The considerations for

295. *See id.* (observing that a private party may (1) incur fines for noncompliance with laws or (2) default under the contract if a public partner fails to approve necessary improvements).

296. *See id.* at 13 (explaining that uncontrollable circumstances may permit contract termination); Water P'ship Council, *supra* n. 20, at 73.

297. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 14; *see* Water P'ship Council, *supra* n. 20, at 72 (noting that performance standards may include criteria for safety, service quality, community relations, and employee and community satisfaction).

298. Water P'ship Council, *supra* n. 20, at 75–76; *see e.g. Service Agreement*, *supra* n. 167, at 27–29 (giving either party the option to terminate for cause upon the other party's default under the agreement and allowing the public partner to terminate the contract without cause if the public partner pays the private partner a sum based on the length of the contractual relationship and retains the private partner's employees at their current salaries).

299. Water P'ship Council, *supra* n. 20, at 75.

300. *Id.* at 75–76; *see e.g. Service Agreement*, *supra* n. 167, at 28 (stipulating that if the public partner terminates the contract for cause, the private partner must pay the public partner the "costs of procuring a new operator").

301. Water P'ship Council, *supra* n. 20, at 75.

302. *Id.* at 77; U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 21.

DBO contracts are different than those for operations contracts because DBO contracts involve some type of financing; therefore, any termination must address repaying the financing.[303]

F. Bonding and Insurance

The requirement that a contractor must purchase and maintain certain minimum levels of insurance is a standard contract requirement.[304] Common forms of insurance are workers compensation insurance policies, comprehensive general liability insurance policies, and automobile liability insurance policies.[305] The public partner, as owner, usually maintains property and casualty insurance,[306] and requires that contractors pass through this expense as a cost of providing service.[307] The parties should establish sufficient insurance limits to ensure adequate but not unreasonable protection.[308] "Over [ninety-eight percent] of general liability claims [pay] or settle under $1 million, and between [eighty five and ninety percent] of environmental [and] professional claims against large contractors [and] consultants [pay] or settle for $1 million or less."[309]

To ensure performance, a "public partner might require a performance bond, a letter of credit, a parent[-]company guarantee, or other types of surety."[310] Performance or surety bonds are common guarantees used before complete construction.[311] The payment bond guarantees the contractor will pay subcontractors and vendors for labor and materials.[312] The parties usually establish specified liability limits, which are typically a percentage of either contract value or capital installed.[313] Liquidated damage provisions and performance bonds will increase costs, and the public partner should assess this issue on a cost–benefit basis.[314]

303. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 21.
304. Water P'ship Council, *supra* n. 20, at 66.
305. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 22.
306. Water P'ship Council, *supra* n. 20, at 77.
307. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 22.
308. *Id.*
309. *Id.*
310. Water P'ship Council, *supra* n. 20, at 77.
311. Iossa et al., *supra* n. 273, at 48.
312. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 24.
313. *Id.* at 20.
314. Iossa et al., *supra* n. 273, at 48–49.

The private sector is not shielded from tort liability in the same manner as the public sector.[315] Sovereign immunity usually protects the public partner, and state tort laws typically limit liability.[316] Private partners can seek protection from tort liability through insurance.[317]

G. Public Entity's Responsibility to Perform the Contract

A public partner's responsibility and involvement does not end just because there is a private-partner operator.[318] A public partner remains responsible to ensure that residents receive adequate service and that the private partner complies with the contract requirements.[319] Monitoring tasks may include "supervising service quality, resolving contractual disputes and customer complaints, applying sanctions and performance rewards," and renegotiating contract terms that address termination and renewal.[320] Additionally, there are many activities and obligations that the public partner retains, such as serving as the point of contact for "customer service requests related to the project activities. . . . The public entity will retain its rate[-]setting and enforcement rights even when the related administrative and operating activities are transferred . . . ."[321]

H. Payment Mechanisms

The parties should design partnership arrangements to provide incentives for the private partner to price services based on the contract's life and to undertake innovations to cut costs and improve service.[322] Payment types can include (1) user charges,

315. U.S. Dep't Transp., *supra* n. 14, at 62.

316. *Id.*; *see e.g.* Fla. Stat. § 768.28 (2010) (stating recovery limits for tort actions when the defendant is a public entity).

317. U.S. Dep't Transp., *supra* n. 14, at 89.

318. *See* Water P'ship Council, *supra* n. 20, at 77 ("A public partner cannot delegate operations and maintenance to a private partner and then walk away.").

319. *Id.*; *see also* Cal. Debt & Inv. Advisory Comm'n, *supra* n. 13, at 1 (noting that in a public–private partnership, public and private entities "share responsibility for project or service delivery").

320. Rui Cunha Marques & Sanford V. Berg, *Public–Private Partnership Contracts: A Tale of Two Cities with Different Contractual Arrangements* 6 (Jan. 6, 2010) (on file with *Stetson Law Review*).

321. *Id.*

322. *See* Iossa et al., *supra* n. 273, at 40.

under which the private partner receives revenues directly from customers and users; (2) usage payments, in which a public partner pays the private partner instead of the private partner receiving payment from service users; (3) availability payments under which the public partner compensates the private partner for making service available regardless of usage; and (4) performance payments, which reward the private partner for meeting certain standards.[323]

In the water and wastewater utility industry, for example, most public–private partnerships involve a fixed price with an annual increase based on economic indices and contingencies for changes in water flows and wastewater loads.[324] The private-partner pricing considers a variety of costs including labor, maintenance, operations, repair and replacement, administrative costs, overhead, and the risk and profit that attend periodic service payments.[325] "Certain expenses and costs, however, such as the utility costs, may be passed through directly to the community, subject to guaranteed maximum utilizations."[326] Incentives should be objective, beneficial to the public partner, and attainable.[327] The parties typically base payments for a DBO contract's design–build phase on percentage-of-completion benchmarks.[328]

I. Employment Issues

A major concern when considering partnerships is the status of public employees.[329] "As the trend in water partnerships continues to favor longer-term service agreements," fundamental issues arise including "continued employment at current staffing levels, compensation and benefits[,] and[ ] representation by collective bargaining units."[330]

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323. *Id.* at 41, 44–46. Performance payments usually complement a usage or availability payment scheme. *Id.*

324. Water P'ship Council, *supra* n. 20, at 69.

325. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 26 (noting the private partner typically receives service payments monthly).

326. *Id.*

327. Water P'ship Council, *supra* n. 20, at 69.

328. *Id.*

329. *See generally id.* at 25–31 (explaining the employee considerations that must be taken into account when forming a public–private partnership).

330. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 28.

A contract goal is to protect the interests of current employees without limiting the private partner's ability to operate the facility efficiently and in a manner of its choosing.[331] Private parties often agree to take on the public partner's employees (subject to employee screening).[332] It is common for contracts to limit staffing cuts to cause or attrition.[333] "Where employees are unionized, the bargaining process . . . normally governs employee rights for continued employment as well as for seniority recognition, accrued benefits disposition, pay[,] and other benefit issues. . . . Partnerships do not exempt employers from labor laws;" therefore, the private–partner employer cannot prevent employees from voting to join a collective-bargaining unit.[334]

J. Miscellaneous Issues

1. Qualified Management Contracts

In order for a public entity to maintain the existing tax-exempt status of debt previously issued for a system, or issued to finance any future capital needs of a system, the contract should constitute a management contract that does not result in private-business use of property that the public entity financed under Revenue Procedure 97-13.[335]

Before 1997, the typical term for an operations and maintenance contract was three to five years.[336] With the 1997 release of Income Tax Regulations regarding "qualified management contracts" in Section 1.41-3(b)(4), and the release of IRS Revenue Procedure 97-13 and 97-14, longer term contracts of up to twenty years have been permitted.[337] "Private business use can arise by ownership, actual or beneficial use of property [under] a lease, a

331. Water P'ship Council, *supra* n. 20, at 69.

332. *Id.* at 30.

333. *Id.* at 69.

334. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 28–29.

335. Rev. Proc. 97-13, 1997-1 C.B. 632, § 2.01(1) ("Under § 103(a) of the 1986 Code, gross income does not include interest on any *state or local bond*. . . . [H]owever, § 103(a) of the 1986 Code does not apply to a private activity bond . . . ." (emphasis added)).

336. Robin A. Johnson et al., *Long-Term Contracting for Water and Wastewater Services*, 3 (Reason Found. 2002) (available at http://reason.org/files/5a63382124e59656385c428741ef3278.pdf).

337. Rev. Proc. 97-13, 1997-1 C.B. 632.

management or incentive payment contract, or certain other arrangements."[338]

In general, the contract must provide for reasonable compensation for services rendered with no "compensation based, in whole or in part, on a share of net profits from the operation of the facility."[339] In particular, longer-term contracts may provide that the public partner will not pay compensation for services to the private partner for any year of the contract if such payment, or any portion of the payment, would result in (1) less than eighty percent of the private partner's compensation for services for such year of the contract being based on a periodic fixed fee, or (2) any portion of the private partner's compensation being based on net profit.[340] Thus, up to twenty percent of the private partner's compensation can be variable.[341] Costs paid directly to third parties and costs that the private partner passes through to the public partner for reimbursement are disregarded in the fixed-fee and variable-fee ratio.[342] Compliance with these rules allows project debt to be considered a governmental obligation, and therefore tax-exempt.[343]

2. Public Records Law

Article I, Section 24(a) of the Florida Constitution establishes a public right of access to:

> any public record made or received in connection with the official business of any public body, officer, or employee of the [S]tate, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.[344]

338. *Id.* at § 2.01(3).

339. *Id.* at § 2.01(6); Treas. Reg. § 1.141-3(b)(4)(i) (2001).

340. Rev. Proc. 97-13, 1997-1 C.B. 632, § 5.03(2).

341. *See id.* (noting that a public entity must base at least eighty percent of compensation for services on a periodic fixed fee).

342. Douglas Herbst, *The Impact of Recent IRS Revisions for Management Contracts on Long-Term Public/Private Partnerships*, http://waterindustry.org/irs1.htm (accessed Feb. 20, 2012).

343. *See* Rev. Proc. 97-13, 1997-1 C.B. 632, § 5.01 ("If the requirements of . . . this revenue procedure are satisfied, the management contract does not itself result in private business use.").

344. Fla. Const. art. I, § 24(a).

The Public Records Act[345] is the statutory counterpart to the above-cited constitutional provision for the right to access the records of State and local government agencies and the private entities that act on behalf of these agencies.[346] Statutory law broadly defines the term "public records."[347] The Florida Supreme Court has interpreted "public records" to include all materials that an agency creates or receives in connection with that agency's official business and that "perpetuate, communicate or formalize knowledge."[348] In addition to a comprehensive list of state and local entities, the term "agency" includes private entities "acting on behalf of any public agency"[349] "to ensure that a public agency cannot avoid disclosure . . . by contractually delegating to a private entity that which otherwise would be an agency responsibility."[350]

Neither the act of a private entity contracting with a public entity[351] nor the receipt of public funds, in and of itself, is dispositive of whether the private entity's records are subject to the Public Records Act.[352] Whether the private entity's records are subject to public access under the Public Records Act is fact-dependent and evaluated on a case-by-case basis. Courts have developed two different tests for determining when a private entity is "acting on behalf of a public agency" for purposes of applying the Public Records Act. First, the "totality of factors" approach applies when a public agency contracts with a private entity to provide goods or services to facilitate the agency in performing its

345. Fla. Stat. §§ 119.01–119.15.

346. Fla. Stat. § 119.01(1). The term "Agency" includes private entities that "act[ ] on behalf of any public agency." *Id.* at § 119.011(2).

347. *See* Fla. Stat. § 119.011(12) (defining the term "Public Records" to include "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency").

348. *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

349. Fla. Stat. § 119.011(2).

350. *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029, 1031 (Fla. 1992).

351. *See id.* (indicating that merely contracting with a public agency does not dispose of the public records issue).

352. *E.g. Sarasota Herald-Trib. Co. v. Community Health Corp.*, 582 So. 2d 730 (Fla. 2d Dist. App. 1991).

duties.[353] This test determines whether the public agency reaches a significant level of involvement that would subject the private entity to the Public Records Act.[354] By contrast, the "delegation test" determines whether the private entity's records are subject to the Act when the private entity provides a public service *in the place of* a public entity—as opposed to providing a public service *to* a public entity.[355]

Thus, documents of private partners participating in public–private partnership arrangements may be subject to the Public Records Act. Some public entities, such as Miami-Dade County, provide that private entities that submit documents in the unsolicited bid procurement process are subject to the Public Records Act if the documents are not otherwise exempt by law.[356]

3. Government in the Sunshine Law

Article I, Section 24(b) of the Florida Constitution establishes a right of public access.

> All meetings of any collegial public body of the executive branch of [S]tate government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public . . . .[357]

Florida Statutes Section 286.011 (The Sunshine Law) is the statutory counterpart to Article I, Section 24(b) of the Florida Constitution.[358] The Sunshine Law does not generally apply to

353. *News & Sun-Sentinel Co.*, So. 2d at 1031–1033 (identifying six factors that the "totality of factors test" employs).

354. *Id.*

355. *See e.g. Stanfield v. Salvation Army*, 695 So. 2d 501, 502 (Fla. 5th Dist. App. 1997) (holding that "providing misdemeanor probation services pursuant to its contract with Marion County" subjected the Salvation Army to the Public Records Act).

356. *See* Metro. Dade Co. Code Ordin. (Fla.) § 2-8.1(k)(11) (providing that unsolicited bid "[p]roposal documents submitted by private entities are public records under [the Public Records Act and are] subject to any exemption otherwise provided by law").

357. Fla. Const. art. I, § 24(b).

358. Fla. Stat. § 286.011(1) (2010) (providing that "[a]ll meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision . . . at which official acts are to be taken are declared to be public meetings open to the public at all times").

private organizations,[359] but there are exceptions. Courts have applied the Sunshine Law to private entities created pursuant to law or by public agencies.[360] Merely receiving public funds does not subject a private entity to the Sunshine Law.[361] The Sunshine Law may also apply when a public entity has delegated the "performance of its public purpose" to a private entity[362] or when the private entity plays an integral part in the public entity's decision-making process.[363]

4. Consultant's Competitive Negotiation Act

Florida Statutes Section 287.055, the "Consultant's Competitive Negotiation Act," (CCNA) requires each agency to publicly announce, in a uniform and consistent manner, whenever a project requires the agency to purchase professional services for a project.[364] "'Professional services' means those services within the scope of the practice of architecture, professional engineering, landscape architecture, or registered surveying and mapping."[365] The statute provides threshold amounts for purchasing categories that identify when an agency must go through the CCNA procurement requirements.[366] In general, the CCNA "is not

359. Fla. Att'y Gen. Op. 07-27 at 102 (June 26, 2007).

360. *See City of Miami Beach v. Berns*, 245 So. 2d 38, 40 (Fla. 1971) ("The Legislature intended to extend application of [the Sunshine Law] so as to bind every 'board or commission' of the [S]tate, or of any county or political subdivision over which it has dominion or control."); Fla. Att'y Gen. Op. 07-17 at 63–64 (Mar. 14, 2007) (concluding that a not-for-profit corporation that a city redevelopment agency created to assist with implementing its redevelopment plan was a private organization subject to the Sunshine Law).

361. *See e.g. McCoy Rests., Inc. v. City of Orlando*, 392 So. 2d 252, 254 (Fla. 1980) (concluding that the airlines at issue were not subject to the Sunshine Law by virtue of their lease with aviation authority public representatives).

362. *See Mem'l Hosp.–W. Volusia, Inc. v. News–J. Corp.*, 729 So. 2d 373, 383 (Fla. 1999) (holding that the hospital taxing authority had delegated "the performance of its public purpose" to the private nonprofit organization and that the private nonprofit organization was therefore subject to the Sunshine Law).

363. *See e.g.* Fla. Att'y Gen. Op. Informal (Feb. 14, 2002) (available at http://myfloridalegal.com/ago.nsf/Opinions/03768352B9A6080385256B64004EE4EC) (concluding that the Sunshine Law applied to the State University Presidents Association if the association acted as a collegial body for initial decision-making).

364. Fla. Stat. § 287.055(3)(a)(1). Also note "agency" means "the [S]tate, a [S]tate agency, a municipality, a political subdivision, a school district, or a school board." *Id.* at § 287.055(2)(b). "The term 'agency' does not extend to a nongovernmental developer that contributes public facilities to a political subdivision under [Section] 380.06 or [Sections] 163.3220[–]163.3243." *Id*.

365. *Id.* at § 287.055(2)(a).

366. *Id.* at § 287.017.

applicable to the procurement of design–build contracts by any agency, [though] the agency must award design–build contracts in accordance with the procurement laws, rules, and ordinances applicable to the agency."[367] Agencies must institute a process of review and approval for contractual services contracts that cost more than the statutory threshold amount.[368]

VIII. INFRASTRUCTURE NEED AS A DRIVER OF PUBLIC–PRIVATE PARTNERSHIPS

There is a huge need for substantial, industry-wide infrastructure investment in the United States. Within the drinking-water industry alone, the Environmental Protection Agency identified a twenty-year capital need ranging from $204 billion to $590 billion.[369]

Government funding sources are currently insufficient to meet this need. The Environmental Protection Agency's fourth report to Congress on public water system infrastructure needs shows the twenty-year national need trending upward from $200.4 billion in 1995 to $334.8 billion in 2007 (reported in 2007 dollars).[370] The $6 billion in funding through the American Recovery and Reinvestment Act of 2009 dedicated to provide for clean water and drinking water infrastructure improvements[371] is an important step; yet it is simply not enough to address the nation's aging infrastructure's immediate and long-term needs.[372] Over time, federal subsidies for water and wastewater utility infra-

367. *Id.* at § 287.055(9)(a).

368. *Id.* at § 287.057(18).

369. Off. of Water, U.S. Envt'l Protec. Agency, *Drinking Water Infrastructure Needs Survey and Assessment: Fourth Report to Congress* 4 (2009) (available at www.epa.gov/ogwdw000/needssurvey/pdfs/2007/report_needssurvey_2007.pdf); *but see* Cong. Budget Off., *Future Investment in Drinking Water & Wastewater Infrastructure* ix–x (2002) (available at http://www.cbo.gov/ftpdocs/39xx/doc3983/11-18-WaterSystems.pdf) (estimating drinking-water investment and operation costs for the years 2000–2019 will range between $37.3 billion and $51.9 billion).

370. Off. of Water, U.S. Envt'l Protec. Agency, *supra* n. 369, at i.

371. Alliance for Water Efficiency, *American Recovery and Reinvestment Act Signed by President Obama: Take Action to Seek Stimulus Funding for Water Efficiency Projects*, http://www.allianceforwaterefficiency.org/ARRA-Signed.aspx (Mar. 2, 2009).

372. *See* Ltr. from Ken Kirk, Exec. Dir. Nat'l Ass'n Clean Water Agencies, to Balt. City Paper, *Clean Water Costs*, in Balt. City Paper, *The Mail*, http://www2.citypaper.com/eat/story.asp?id=18243 (June 17, 2009) (representing that the National Association of Clean Water Agencies views the federal stimulus of $4 billion for clean water as an important first step, but not nearly enough).

structure costs have dramatically declined, and the burden has shifted to local governments—and, by extension, water and wastewater utility customers—to pay these costs.[373]

The condition of Florida's water and wastewater utility infrastructure is in line with the state of the nation's infrastructure. Even well-run utility systems have identifiable problems and are confronted with the need for investment. The City of Hollywood (City) is one example. In 2010, the City reported fourteen percent water loss, which equates to a loss of more than four million gallons of water per day or 1.46 billion gallons of water per year.[374] This water loss, which is just a little over the acceptable range of unaccounted-for water, is attributed to the City's outdated water-supply system, which has pipes in service that were installed over sixty years ago in the 1940s.[375] To fix the problem, the City is "spending $200 million to replace outdated pipes, extend wastewater lines[,] and make other improvements over the next five to [ten] years."[376]

Private capital is available as a source of funding to meet these infrastructure needs.

> Over [thirty] major investment funds with more than $180 billion in capital are seeking to invest in long-term public infrastructure projects. That capital can be leveraged by the funds to nearly $1 trillion. There are also fifty pension funds with approximately $40 billion available for infrastructure investments.
>
> Some of America's largest public pension funds already invest directly in infrastructure projects. The Dallas Police and Fire Pension System now owns a 10% stake in a $2.7 billion Texas public[–]private partnership, the LBJ Freeway. CalPERS purchased a $157 million, or 12.7% interest in Gatwick Airport—in the United Kingdom.[377]

373. *See id.* (reporting that besides educational costs, cities spend the most on wastewater infrastructure).

374. Andy Reid & Maria Herrera, *Palm Beach County and Broward County Utilities Lose 33 Million Gallons of Water a Day*, http://articles.sun-sentinel.com/2011-05-05/news/fl-south-florida-water-loss-20110503_1_water-meters-broward-county-utilities-water-providers (May 5, 2011).

375. *Id.*

376. *Id.*

377. Suozzi, *supra* n. 247.

Infrastructure spending stimulates the economy and creates jobs. The immediate value of infrastructure investment to a local economy can be measured in three well-defined ways:

> [(1)] Direct impacts through jobs and the purchase of materials and supplies directly related to the construction and operation of the project. [(2)] Indirect impacts through jobs and the purchase of equipment, materials[,] and supplies by vendors indirectly related to the construction and operation of the project. [(3)] Induced impacts supported by spending and re-spending of the income earned by workers in [one] and [two] above, often described as the 'multiplier effect.'[378]

Long-term economic benefits that stem from such projects during the facility's multi-decade life expectancy include "higher private sector profitability, increased private investment in plant and equipment, improved labor productivity, a stronger tax base[,] and future employment."[379]

The United States Department of Transportation estimates that every $1 billion in infrastructure spending creates 25,000 jobs; this should prompt the private and public sectors to support and pursue public–private partnerships.[380] The construction, engineering, and manufacturing sectors would benefit most from critical water and wastewater infrastructure investment while improving the nation's long-term competitiveness and water quality.[381] Job creation in a "green" sector for economic benefit and environmental protection is one area, at least, that both environmentalists and business interests should be able to support.

Given the legal authority for local government contracting in Florida, the variety of public–private partnership arrangements available to accommodate public and private partners' needs, and the clear need for infrastructure investment, how can we develop mutually beneficial partnership arrangements?

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378. Clean Water Council, *supra* n. 6, at 4–5 (citing *America's Environmental Infrastructure* (1990) (available by request from the Clean Water Council)).

379. *Id.* at 5.

380. *Id.* at 11; Suozzi, *supra* n. 247 (citing U.S. Dep't of Transp. estimates).

381. Nat'l Ass'n of Clean Water Agencies, *Create 400,000 Jobs in 2010—Invest in Water Infrastructure*, http://www.environmental-expert.com/articles/create-400-000-jobs-in-2010-invest-in-water-infrastructure-76678 (Dec. 4, 2009).

IX. KEYS TO A SUCCESSFUL PARTNERSHIP

Worldwide experience suggests that public and private entities must evaluate projects on a case-by-case basis to determine whether a public–private partnership arrangement will benefit both parties and the community in meeting infrastructure needs. Though there is no one-size-fits-all framework suitable to every occasion or project,[382] a review of public and private sector partnership analyses reveals some common ground on key elements to a successful partnership:

- *Public Entity Commitment*. To be successful, a partnership requires commitment from the senior public officials on down.[383] The ideal procurement situation will ensure that all local government stakeholders support the partnership approach.[384] This promotes a stable, predictable, and reliable procurement process.[385]

- *Direct and Continued Public Partner Involvement.* On establishing a partnership, the public partner must continue to remain actively involved and continually monitor the partnership's performance.[386] This includes benchmarking and "a specific methodology for evaluating performance."[387]

- *Detailed Business Plan.* A well-crafted business plan should include a detailed and extensive contract that clearly indicates and describes the public and private partner's responsibilities.[388] The parties must know what to expect beforehand, and the governing contract must

382. Iossa et al., *supra* n. 273, at 5.

383. *See* The Nat'l Council for Pub.–Priv. P'ships, *How PPPs Work*, www.ncppp.org/howpart/index.shtml (accessed Feb. 20, 2012) (discussing six keys to successful public–private partnerships).

384. U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 4.

385. Water P'ship Council, *supra* n. 20, at 15.

386. Nat'l Ass'n of St. Chief Info. Advisors, *Issue Brief—Keys to Collaboration: Building Effective Public–Private Partnerships* 7 (2006) (available at http://www.nascio.org/publications/documents/nascio-keys%20to%20collaboration.pdf).

387. Water P'ship Council, *supra* n. 20, at 15.

388. Nat'l Ass'n of St. Chief Info. Advisors, *supra* n. 386, at 7.

provide a clear dispute-resolution process for unforeseen contingencies.[389]

- *The Right Partner.* "The 'lowest bid' is not always the best choice for selecting a partner."[390] "The 'best value' in a partner is critical in a long-term relationship."[391] A candidate's experience in a particular area is also an important factor.[392]

Only certain infrastructure projects "are ripe for a true partnership."[393] Case studies indicate, however, that water-sector partnerships provide considerable advantages to public entities seeking alternative approaches to manage their water and wastewater utilities, modernize their facilities, and finance investments in water infrastructure.[394] It is clear that both parties must "set and manage reasonable expectations."[395] If the parties can agree on the keys to success, it is possible for implementation to occur in a fair and efficient manner.

X. CONCLUSION

Private involvement in providing public infrastructure has been around for a long time. "Public[–]private partnerships are globally proven models," with more than 1,300 public–private partnerships valued in excess of $250 billion signed in Canada, the European Union, Australia, South America, and Asia over the past twenty years.[396] Comparatively, the United States lags far behind other countries, despite recently implementing public–private partnerships in the United States, including Florida.[397]

389. The Nat'l Council for Pub.–Priv. P'ships, *supra* n. 383.
390. *Id.*
391. Nat'l Ass'n of St. Chief Info. Advisors, *supra* n. 386, at 8. The "best value" is based on price, but also other factors and criteria including creativity in meeting public sector needs; s*ee* U.S. Conf. of Mayors Urb. Water Council, *supra* n. 95, at 5 (noting that "best value" selection considers factors other than price).
392. The Nat'l Council for Pub.–Priv. P'ships, *supra* n. 383.
393. Nat'l Ass'n of St. Chief Info. Advisors, *supra* n. 386, at 8.
394. Suozzi, *supra* n. 247.
395. Nat'l Ass'n of St. Chief Info. Advisors, *supra* n. 386, at 8.
396. Suozzi, *supra* n. 247.
397. *Id.*

Over the years, Florida has enacted legislation to promote public–private partnerships to meet different societal needs.[398]

Public entities need to take stock of their limited resources and options and give public–private partnerships serious consideration as an alternative to meet their infrastructure needs, particularly in the water and wastewater utility sector. There may be reluctance from various quarters stemming from one factor—simple resistance to change. The public is also "accustomed to looking to government for safe and adequate drinking water supply,"[399] and some opponents of public–private partnership arrangements question the private sector's reliability to provide a service as imperative as drinking water.[400] For others, the issue is one of simple economics and an assumption that private involvement will cause higher rates and charges.[401]

The reality remains that our nation's infrastructure needs are growing, and public entities do not have the resources to meet those needs without private entities' cooperation and assistance. Public–private partnerships may not be appropriate for every infrastructure project, but these arrangements can provide a successful and beneficial means of meeting our nation's infrastructure needs, particularly in the critical water and wastewater utility infrastructure sector.

398. See *supra* pt. III(C).
399. Envt'l Fin. Advisory Bd., *supra* n. 19, at 2.
400. *Id.* at 12.
401. *Id.* at 13.