



Project Perspectives

Exploring Trends and Developments in
Alternative Project Delivery

MAY 2024

Welcome to Our 2024 Report

For the past six years, Husch Blackwell has published an annual report detailing developments in the world of public-private partnerships (P3s), and during this time, we've come to recognize that the definition of P3 is in a constant state of flux.

One recent academic study of P3s claimed to find 65 different ways to define P3. Given our experience, we don't doubt it. We cheer this diversity of activity and interpret it to mean that P3 is constantly adapting to the needs and goals of project participants; however, it also makes it difficult at times to take the measure of P3, especially as its structures evolve and are applied to new project types.

Amid these changes, we thought it was time for our annual report on P3s and infrastructure to evolve as well. This year, we've chosen to bring together a collection of perspectives to provide some color and depth to the ongoing evolution of P3 and to situate P3 on a wider spectrum of alternative project delivery approaches, rather than focus on P3 deal volumes and values that often obscure as much as they reveal. We hope you find our 2024 report helpful in contemplating what is possible through these alternative project delivery approaches—including all the varieties of public-private partnerships.

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Infrastructure's Long Covid

CHARLES RENNER

The scarcity of labor and materials along with soaring costs and unpredictable patterns of consumer demand has placed a new emphasis on alternative project delivery strategies.

Empty office buildings and retail establishments, overwhelmed medical facilities, and ghostly quiet freeways were but mere parts of the strangeness of the pandemic years, punctuating how completely Covid rearranged our view of “normal.” Economic data told a similar story, as the depictions of numerous data series resembled a seismograph’s gyrations measuring the arrival of a massive earthquake. Gross domestic product, inventories, shipping rates, and spot prices for natural resources were but a few of the areas that saw historical seesawing movements up and down as they passed through the pandemic.

These dislocations played havoc with the ability of companies to plan, even when short-term issues were under consideration—or, perhaps, *especially* when short-term issues were at stake. Anecdotally, over the past few years, there seemed to be more confidence in the long-term resolution of Covid-related challenges than in the ability to deal with the wildly volatile day-to-day dynamics of the pandemic years. Businesspeople yearned for normalcy, and many believed that, eventually, we would return to the familiar pre-pandemic business environment.

For some industries, that expectation has been mostly fulfilled. For instance, by the end of 2023, [commercial aviation had largely recovered to pre-pandemic levels](#) in terms of utilization. This has led to a corresponding positive outlook for airports and airport projects. The New York City area’s three

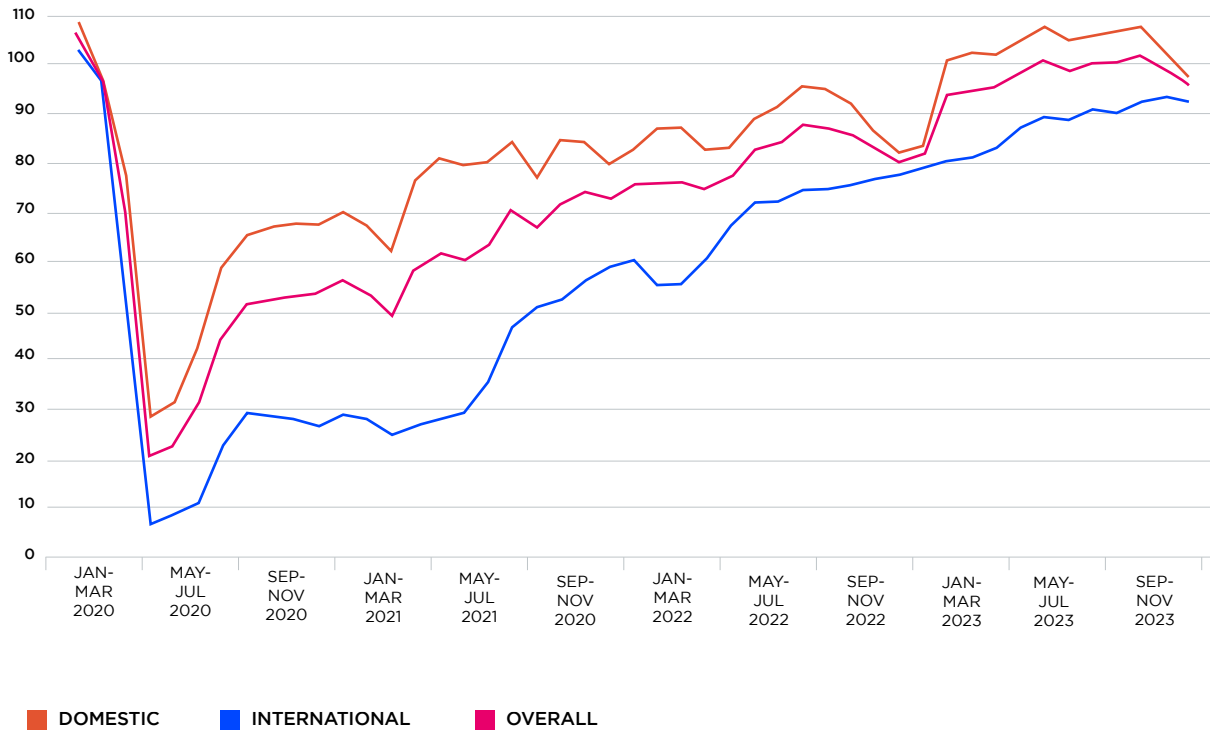
main airports posted record passenger traffic in 2023, and late in the year, Miami International Airport reported traffic that exceeded pre-pandemic levels. Overall, U.S. airports’ growth in passenger traffic has exceeded pre-pandemic levels by three percent, according to Fitch, a rating agency.

This rebound in utilization has been joined by several high-profile rating upgrades. Fitch recently upgraded to positive its rating on issues related to Denver International Airport (DIA) as DIA prepared the sale of over \$800 million in subordinate lien revenue bonds. Similarly, bonds attached to the renovation of the Minneapolis-St. Paul International Airport have seen upgrades as well.

While commercial aviation is flying high, the post-Covid fate of some other sectors has been far more complicated. Commercial real estate (CRE), higher education, and mass transit have emerged from the pandemic years under great distress, and in all three cases, the challenges trace back to changing patterns of demand. Covid spurred many companies to implement remote work strategies, and these have proved sticky, even after the end of the public health crisis.

PASSENGER FLIGHT UTILIZATION RATES, 2020-23

Flights (cycles) of passenger flights, indexed to equivalent month 2019.



Source: AWIN Tracked Aircraft Utilization. Informa Markets 2023.

CRE has taken the brunt of that cultural change, but it also figures into the challenges facing mass-transit systems, which have struggled to recover its pre-pandemic ridership. This is perhaps best illustrated by the woes of the Washington Metropolitan Area Transit Authority (WMATA), which has experienced a **\$750 million structural funding shortfall**—a deficit equal to more than 25% of the operating budget—due to persistently lower ridership post-Covid and its unique funding model. Unlike airports, no major U.S. mass transit system has reached or exceeded its pre-pandemic utilization, and some, like Bay Area Rapid Transit (BART) in California, are well under 50 percent of pre-Covid ridership, according to a **recent report from the Brookings Institute**.

Similarly, the disruptions of Covid have **led higher education to the brink**, exacerbating problems that were decades in the making. College enrollment peaked in 2010, but its rate of decline accelerated during Covid and has placed vulnerable institutions in jeopardy of closure or radical restructurings of operations. Fifteen nonprofit four-year colleges announced closures or otherwise shuttered operations during 2023.

HIGHER EDUCATION INSTITUTIONS CLOSED IN 2023

INSTITUTION	LOCATION	OPENED	ENROLLMENT	AFFILIATION
Presentation College	Aberdeen, SD	1951	577	Private; Catholic
Finlandia University	Hancock, MI	1896	496	Private; Lutheran
Iowa Wesleyan University	Mt. Pleasant, IA	1842	820	Private; Methodist
Medaille University	Buffalo, NY	1937	1,814	Private
Cardinal Stritch University	Milwaukee, WI	1937	1,365	Private; Catholic
Cabrini University	Radnor Township, PA	1957	~ 1,500	Private; Catholic
Alliance University ¹	New York, NY	1882	1,863	Private; Christian
The King's College ²	New York, NY	1938	384	Private; Christian
Hodges University	Fort Myers, FL	1990	443	Private
Alderson Broaddus University	Philippi, WV	1871	~ 600	Private; Baptist
Cox College	Springfield, MO	1907	956	Private
Lincoln Christian University	Lincoln, IL	1944	537	Private; Christian
University of Wisconsin-Platteville Richland	Richland Center, WI	1967	6,702	Public
Magdalen College	Warner, NH	1973	60	Private; Catholic
The College of Saint Rose	Albany, NY	1920	2,800	Private; Catholic

¹Formerly known as Nyack College.

²The King's College did not formally declare a closure; however, the institution canceled its fall 2023 semester, had its accreditation stripped, and is no longer operational.

Source: Moody, Josh. "A Look Back at College Closures and Mergers." *Inside Higher Ed*, December 21, 2023

<https://www.insidehighered.com/news/business/financial-health/2023/12/21/look-back-college-closures-and-mergers-2023>

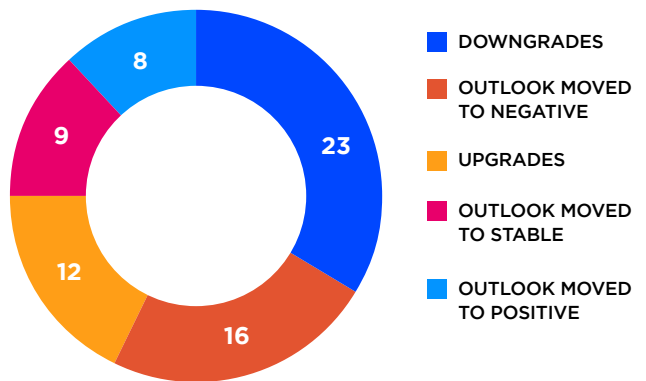
A common thread found in the recent histories of these institutions is a large and sudden decrease in enrollment; some experienced as much as a 50 percent or more decline within a decade, similar to the post-Covid travails of mass-transit systems. This kind of volatility to the downside regarding demand creates untenable operational circumstances in the short term and imperils long-term strategic planning, especially project finance. Against this backdrop of uncertainty and its implications for credit quality, the cost of debt is likely to be higher than what planners contemplated in the recent past. It also puts pressure on existing issues. For instance, U.S. higher education endured almost twice as many downgrades as upgrades in 2023, according to S&P Global Ratings.

The Stage Is Set for Alternative Project Delivery

Higher capital costs, fluctuating demand, and deteriorating financial conditions, such as the kind detailed above, are at the heart of the “Long Covid” some sectors of the economy have experienced, and yet enterprises in many of these sectors are under pressure to develop new facilities and assets or to renovate existing infrastructure in order to remain competitive—or merely relevant. The recent macroeconomic backdrop has added to the challenge, as interest rates remain “higher for longer” in response to generationally high inflation and labor and materials scarcity have created bottlenecks for a variety of projects. Traditional design-bid-build (DBB) approaches to projects often fall short in containing costs and managing risk, leaving project developers and contractors with limited options.

U.S. HIGHER EDUCATION RATING AGENCY ACTIONS, 2023

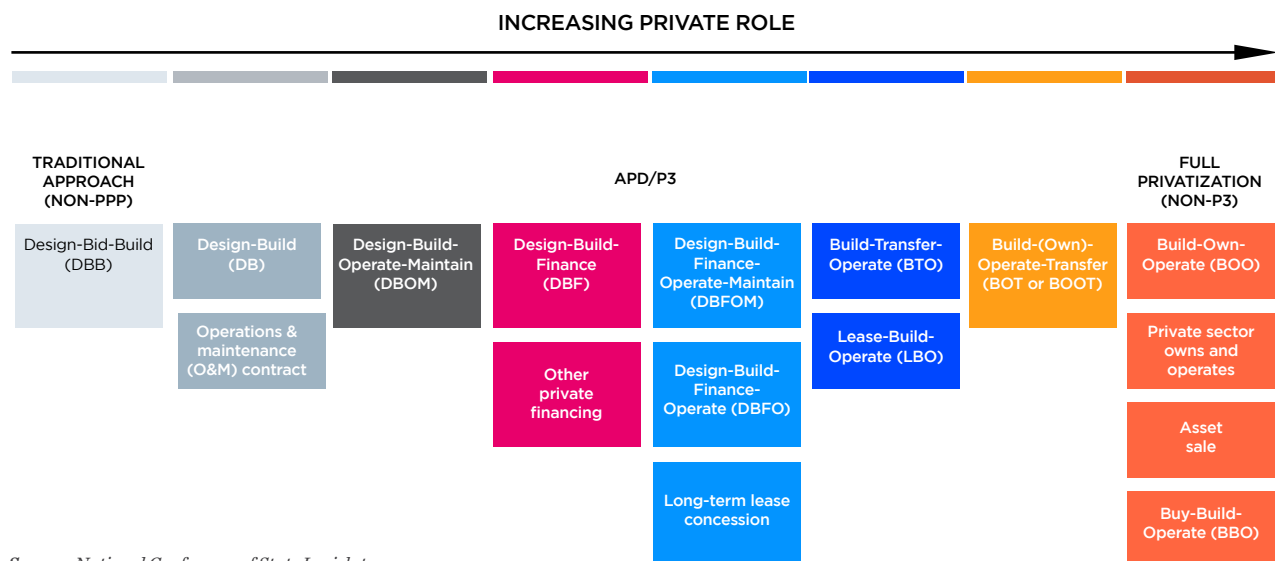
As of December 31, 2023



Source: S&P Global Ratings

Alternative project delivery (APD)—a range of project delivery methods that diverge from the traditional design-bid-build approach—is one possible strategy that can help project owners and contractors get big-ticket projects across the finish line while managing risk. In most cases, the key to APD is its ability to address all or most project phases at the same time, allowing participants the opportunity to allocate risks, costs, benefits, and responsibilities in a flexible manner.

PROJECT DELIVERY CONTINUUM



Source: National Conference of State Legislatures

APD principles come into play when considering a project's construction, finance, and operation and are most readily seen in the following areas.

Risk Management & Collaboration

Miscommunication between project participants entails its own kind of risk, especially in connection with complex, multi-phase infrastructure projects. Involving all participants at a project's inception (or near to it)—including the project owner, contractor, designer, and those responsible for operations and maintenance—can help align interests and reduce conflict.

For instance, some APD models bring contractors to the table during the design phase, which allows a deeper understanding of a design's cost and feasibility while reducing the likelihood of delays and overruns. This can also be accomplished by combining design and construction services under a single contract, which often can lead to faster project completion and cost savings.

Project Finance

The post-Covid period has been a strange time for project finance. On the one hand, the cost of money has greatly increased as interest rates have risen, but at the same time the U.S. government has launched historic infrastructure programs making a windfall of federal money available to state and local governments to pursue much-needed upgrades. Additionally, the U.S. government has attempted to provide greater flexibility for project finance by adding new categories of exempt facility private activity bonds (PABs) and additional volume cap for transportation PABs.

Not all projects, however, will qualify for PABs, and for a project owner suffering from its own version of Long Covid,

the flexibility afforded by APD can be the difference in getting a project off the drawing board. The ability to tap sources of private capital or to push investments off the balance sheet might be more important considerations than the mere cost of money for project owners struggling with various stages of financial distress.

Incentivizing Innovation

Private-sector businesses are generally thought to have special expertise in managing and delivering large, complex projects, and APD opens up the possibility for public-entity project owners to access that expertise, especially when the agreements underlying the project contain performance-based incentives that allow all project participants to benefit from innovation and efficiency.

Conclusion

As long as interest rates remain “higher for longer,” project finance and the cost of money will be a major concern for project owners and their collaborators; however, this is not the only concern. The post-Covid era showed us in stark terms what the result of large-scale supply chain dislocation looks like, and while supply chains have largely normalized since the worst of the post-pandemic period, there are significant economic and geopolitical risks that could lead to similar episodes of scarcity and volatility in the future. The associated risks can be devastating, especially for enterprises struggling with a Long Covid of lower demand, fluctuating revenues, and broken business models. The spectrum of APD solutions provides choice and flexibility, as well as the potential for more certain outcomes.



Charles Renner

is a partner in Husch Blackwell's Kansas City office and is the chair of the firm's Public-Private Partnership (P3) team. He has played a leading role in facilitating significant P3s across the U.S., including projects in the higher education, water/wastewater, aviation, and energy sectors.

Alternative Project Delivery in an Age of Price Volatility

JOSHUA LEVY

Recent construction project disputes have revealed the limitations of *force majeure*—and the need for more intentionality in the procurement process.

Once upon a time, I struggled to convince construction industry leaders that “there is no such thing as boilerplate” in drafting contracts. The contract training seminars I held were always well attended, but I had a suspicion that attendees doubted that every clause really required review.

That all changed in early 2020. As I sat in my son’s apartment at Colorado State University on March 16, 2020—our spring break adventure foiled by the ski industry’s decision not to allow scarfed, goggled, and gloved adults to ride chairlifts outdoors—I drafted a client alert to send before my long drive back to Wisconsin for what proved to a long mass hibernation. The communication contained a recent notice I had prepared for a contractor as a reminder to clients to consult their contracts’ *force majeure* language and be prepared to invoke it as needed. Within the week, my law firm and I were deluged with client requests to review contract language that, just a few days before, went largely unnoticed.

Covid and its aftermath have changed a great many things. A *force majeure* clause is a staple of most of the commonly used agreements and material purchase orders in construction; however, before the pandemic, it was usually triggered by isolated events such extreme weather or distinct product shortages. The onset of Covid brought the realization that delays and supply chain disruptions would hit everyone in some sense and would remain unpredictable for some time. We learned that the contract clauses to determine who would bear

the costs associated with those impacts for projects in progress were generally in place. The contract prices were set, and the impacts could be reasonably tracked.

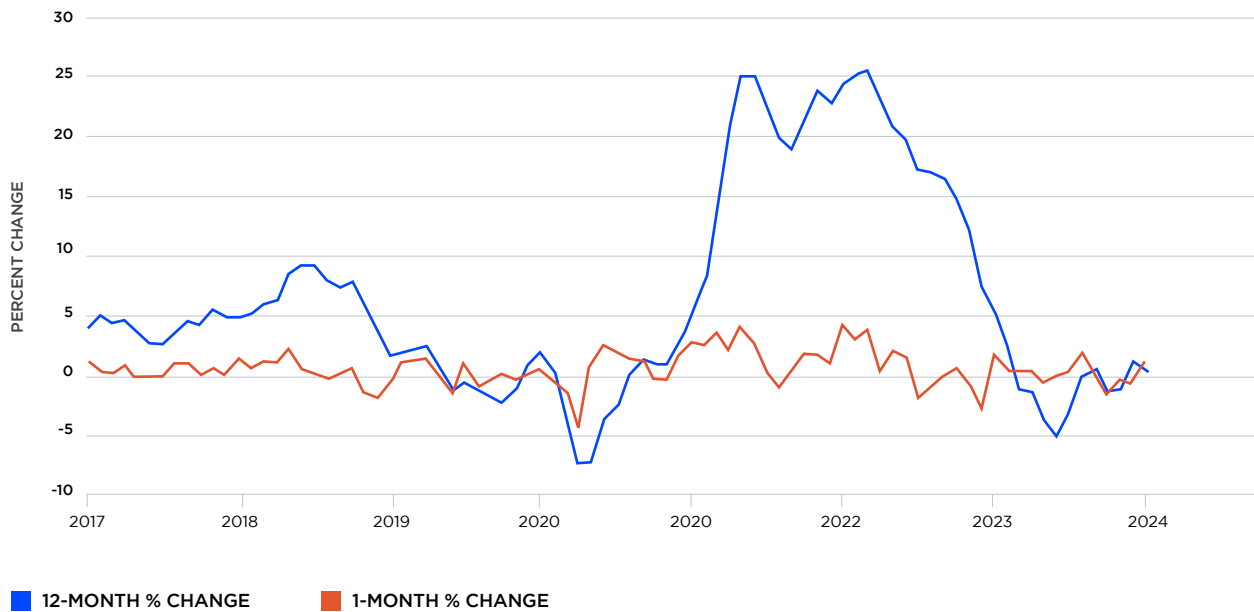
It was the next phase where things got tricky. Amid the massive Covid-related dislocations, we began to realize that the industry had to rethink the treatment of *force majeure* for post-shutdown projects. The types of events constituting *force majeure* would still include acts of God, extreme weather, wars, riots, and insurrections, but determining the second prong of the analysis—whether the impacts were “beyond the reasonable control” of the party invoking *force majeure*—warranted new standards. In short, *force majeure* is not a fixed concept; it changes as the world changes.

Inflation & Volatility

One of the changes that has occasioned a reappraisal of *force majeure*—and project agreements more broadly—is inflation and price volatility. From February 2020 to the end of 2023, material inputs for most construction projects have climbed in price almost 40 percent, according to the Producer Price Index (PPI). What the PPI conceals, however, is the intense volatility during this time period. For instance, plywood spiked over 46 percent in 2021; last year, its price fell nearly 17 percent. Similarly, softwood lumber jumped 42 percent in 2021, only to drop 30 percent in 2023. Some inputs have seen more modest rises, but consistently so. Increases in the cost of cement and aggregates, for example, accelerated over time.

CONSTRUCTION PROJECT INPUTS, 2017-23

Producer Price Index Percent Change



Source: U.S. Bureau of Labor Statistics

MATERIALS PRICE INFLATION, 2021-2026*

	2021	2022	2023	2024	2025	2026
ASPHALT PAVING	+3.6	+16.6	+4.8	-1.1	+2.4	+2.1
CEMENT	+4.0	+9.7	+12.1	+4.2	+2.3	+1.7
REINFORCING BARS	+54.3	+15.5	-15.4	-13.9	-0.3	+2.2
CONSTRUCTION MACHINERY	+4.5	+10.4	+9.0	+1.5	-0.1	+0.3
FABRICATED PIPE	+17.7	+15.0	+3.1	-3.9	-4.2	-3.4
GYPSUM PRODUCTS	+15.9	+18.2	+3.2	-5.9	-1.5	+1.1
SOFTWOOD LUMBER	+41.9	-3.2	-30.7	+1.1	+1.1	+1.6
PLYWOOD	+46.2	+0.7	-16.8	-1.1	-1.9	+1.2
AGGREGATES	+4.0	+10.1	+10.2	+3.0	+2.2	+1.8
SHEET-METAL WORK	+11.7	+19.8	+2.4	-2.4	-2.3	-0.7
STRUCTURAL STEEL	+26.7	+27.9	-0.9	-9.7	-7.4	-2.5

*Escalation rates are annual averages. Years 2024 through 2026 are projections.

Source: HIS Global Insight Inc.

Likewise, the price of construction equipment rose dramatically during 2021 and, since then, has fallen in a whipsaw-like motion that we've seen across numerous data sets. While not displaying the volatility of other inputs, labor costs have steadily risen, too, and are rising still in most cases, as contractors struggle with scarcity.

While there is overlap, the challenges presented by inflation and volatility are not the same. By itself, many forms of inflation can be accounted for using the traditional tools of project management; however, when fluctuations in price—either to the upside or downside—occur in wild gyrations, project planners struggle to manage risk. Over time, the aggregate rate of inflation may be quite small, but buried in that number is volatility that can wreck the economic viability of contractors in the short run. Covid illustrated this very well, as the 2021-22 time period caught many off-guard; some were then burned again when prices fell almost as rapidly as they rose.

It is through this lens that *force majeure* must be viewed.

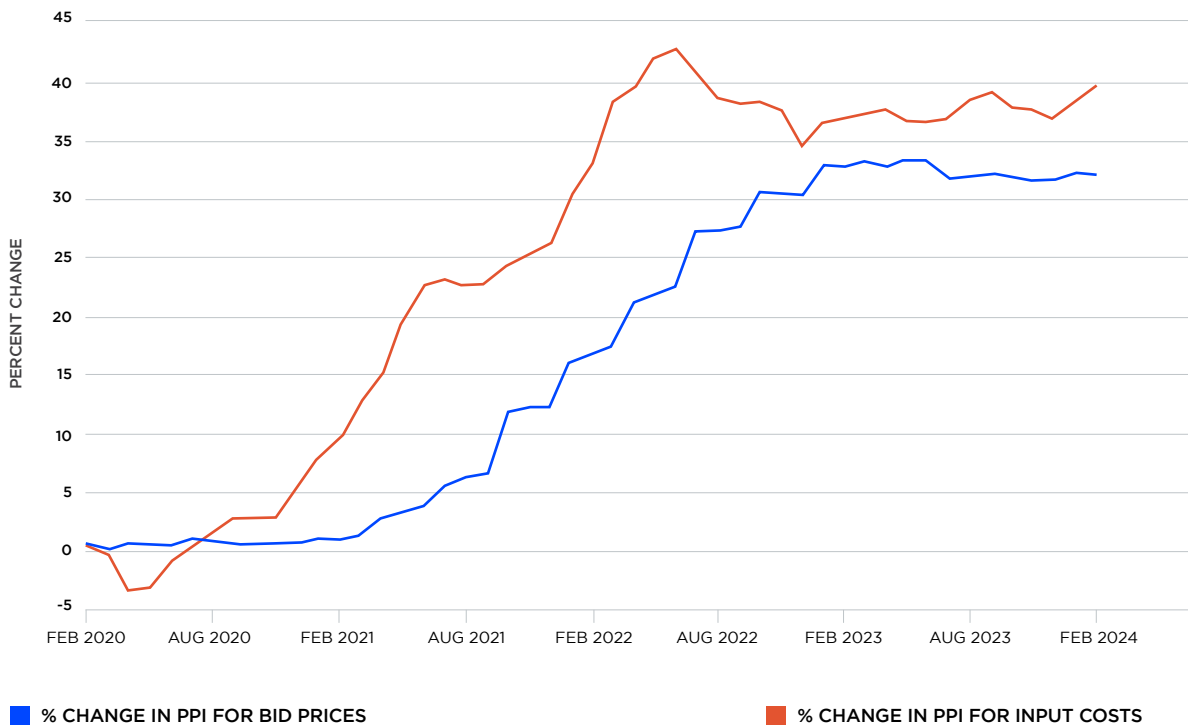
Normal and New Normal

As we entered 2021, our team began to receive more and more requests to review allegedly suspect claims of *force majeure*. For instance, a rough framing subcontractor signed a subcontract with a contractor in early October 2020 that carried \$8 million for lumber. In April 2021, it delivered *force majeure* notice seeking a \$3 million change order for material price escalation and schedule relief. The subcontractor relied on its lumber supplier's increases in prices to seek the adjustment. It was ultimately rejected by the contractor, who had added provisions to its post-Covid agreements stipulating that "material costs shall be locked for the duration of the project" and "hold up due to shortage of materials will not be tolerated."

The rejection was further premised on the fact that the subcontractor based its contract price on well-vetted supplier quotes. If the lumber could have been purchased for \$8 million in October, why did buyout wait until April? If the *force majeure* notice had been delivered a few months before, it might have been a different story, but by October 2020, the industry was

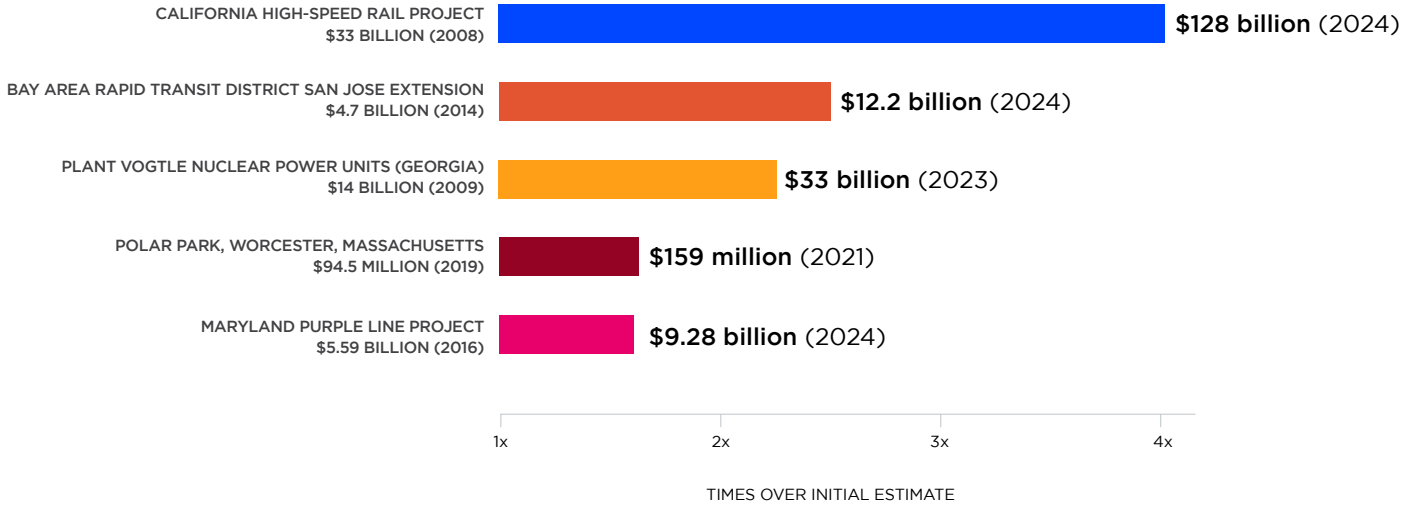
INPUT COSTS VERSUS BID PRICES

Cumulative change in Producer Price Index for inputs and bid prices for nonresidential construction projects.



Source: Associated General Contractors of America.

NOTABLE RECENT COST OVERRUNS IN INFRASTRUCTURE PROJECTS



well aware of Covid-related price volatility, especially in the lumber markets. In fact, the cost of lumber actually dipped in December 2020, but the subcontractor and supplier gambled that it would continue to decrease. Volatility can tempt contractors and subcontractors into being arbitrageurs, but it often ends badly, and when it does, those relying on *force majeure* to remedy the failure are often disappointed.

It is well settled that courts generally do not find fluctuations of market prices to be *force majeure* events.¹ When price volatility is the new norm, a party seeking *force majeure* relief must show that it is more than the victim of a bad bargain.

How Alternative Project Delivery Deals with Volatility

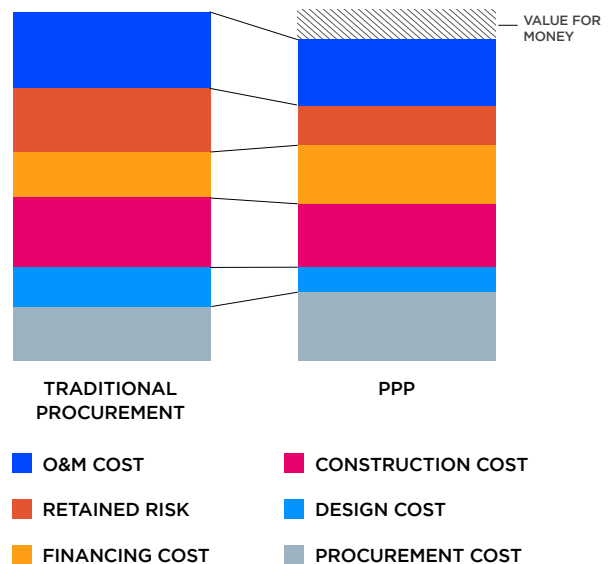
To better manage risks in project agreements post-Covid, parties are being more intentional by including price escalation clauses, obtaining supplier bonds, using allowances, and implementing creative early procurement strategies. Some of these creative approaches involve alternative project delivery, including the use of progressive P3s, where project participants can collaborate earlier more effectively.

It is generally true that P3 projects' initial costs run higher than traditional project delivery approaches, but we also have—literally—centuries of evidence demonstrating the serial inability of large government-sponsored

infrastructure projects to stay on time or on budget.

There is a strong predilection for the lowest price when it comes to public works, and that headline price tag tends to dominate the discussion vis-à-vis possible alternatives; however, project owners are warming to the notion of accounting for the full lifecycle costs of an infrastructure asset. This growing awareness explains in part the appeal of alternative project deliveries.

STANDARD VALUE-FOR-MONEY ANALYSIS

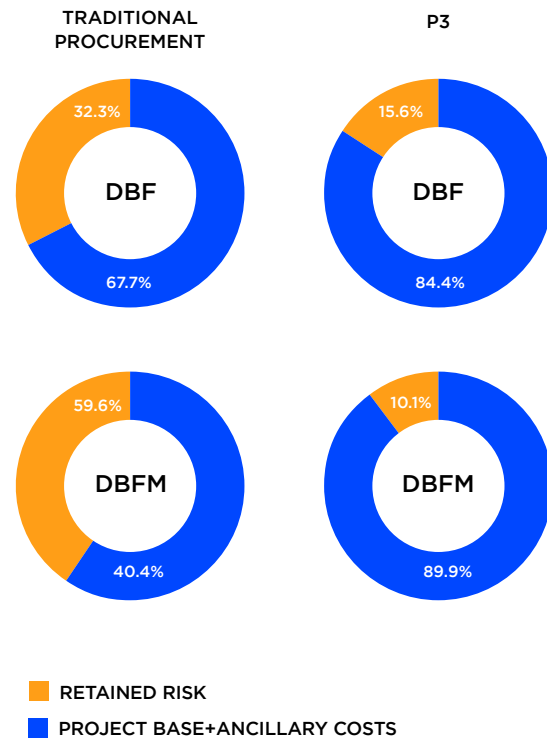


¹See, e.g., *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1293–94 (Fed.Cir.2002), where the court declined to apply the *force majeure* clause because “the risk that market price will make performance unprofitable is inherent in fixed-price contracts.”

A standard value-for-money (VfM) model, while simplistic, is useful in illustrating how alternative project delivery can contain costs versus traditional procurement. The model concedes that initial procurement and financing costs run higher; however, it is the other project phases—design/build and operations/maintenance—where cost can be squeezed out. Crucially, VfM models also account for risk retention, and while this varies across project types and industry sectors, studies have consistently shown that the level of retained risk is far lower on projects employing alternative project delivery methodologies.

There are a lot of challenges in the design/build phase that can be addressed via heightened awareness of contract language and provisions; however, in an era of great volatility, project owners and contractors are coming to the realization that smoothening out the costs and risks of infrastructure projects is possible through agreements that bundle project phases and reassign risks among project partners to those best capable of managing them. APD is complex and requires great skills of coordination and communication, but its potential long-term benefits are compelling.

PROJECT COSTS AND RISK TRANSFER



Note: DBF refers to Design-Build-Finance projects; DBFM refers to Design-Build-Finance-Maintain

Source: WSP Global Inc., "Analysis of Risk Transfer in Public-Private Partnerships (P3s)."



Joshua Levy

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Higher Ed on the Brink: An Interview with Chuck Ambrose



Charles M. Ambrose

*is a senior consultant for higher education strategy at Husch Blackwell; he most recently served as chancellor of Henderson State University, following presidencies at the University of Central Missouri and Pfeiffer University. He is the co-author of *Colleges on the Brink: The Case for Financial Exigency* (Rowman & Littlefield, 2023), coauthored with Michael T. Nietzel.*

Q: We have noted a steady increase in the number of P3 projects sponsored by institutions of higher education over the past few decades. To what do you attribute higher ed's strong interest in P3?

CA: Funding from traditional sources has dwindled and discounting models have eaten into institutional operating revenue, but competition for students and faculty has not eased, so there is a need to find creative ways to develop best-in-class campus infrastructure. P3 can fill that need, particularly when private debt or equity is included in the project scope.

Typically, campus leaders are looking for three things from these partnerships: cost efficiencies, risk sharing, and innovation.

Efficiencies depend on the nature of the agreements in place, but we've seen projects where the potential for saving money can occur at all phases of an agreement, from design and build to operations and maintenance. One of the advantages of the P3 methodology is its ability to address multiple project phases in one agreement. For example, it is incredibly inefficient for the design team to incorporate into the plan building materials that are difficult to procure due to cost or scarcity. Having the design and build teams collaborate early on as part of a larger agreement just leads to better results, and the same could be said for the operations segment as well, where institutions and their private partners can hammer out agreements leading to the potential reduction of fixed costs for the institution.

This begins to touch on the risk-sharing potential of P3s. Portfolios of infrastructure assets carry a lot of risk over the long term, and having private partners with the financial and operational wherewithal to manage that risk allows institutions to redirect resources and focus on their core capabilities.

Innovation is also a key component of P3. There are certain projects that institutions simply can't execute without the expertise of private partners, and as institutions look to leverage their skills and resources outside the campus setting—in community development or advanced platforms for vocational training—public-private partnerships become a crucial element of building the assets and structures needed to bring these programs into existence.

Q: What accounts for the increasing variety of project types?

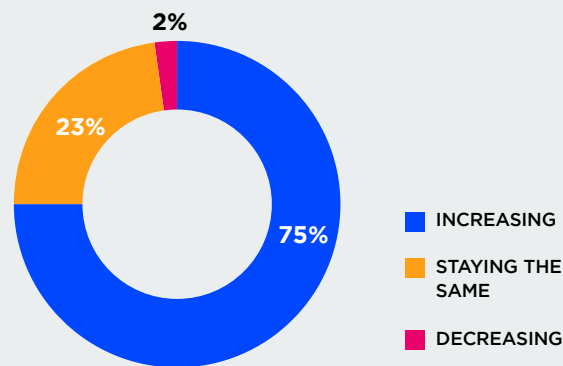
CA: I think we can view P3 in higher education along a kind of evolutionary track. In the beginning there were agreements that were little more than traditional commercial contracts. Those might have involved supplying and/or operating cafeterias, bookstores, and services of that nature. Then we had an explosion in campus housing projects, some of which had O&M as part of a larger agreement to design and build residences or other assets. These early forays into P3 were often premised on longer-term financial considerations in areas of operation that had tight margins or where the institution relied on private equity and/or debt to build assets and offer services.

The current stage of evolution has seen a broadening of that approach to cover newer areas of need. This third generation of partnership is being used to drive sustainability, economic and workforce development, and distance learning, among other things. For example, while I was at the University of Central Missouri, we were awarded the national climate leadership award for a partnership with Trane and the Clinton Foundation that reduced the institution's carbon footprint while significantly reducing energy costs. I've seen a lot of projects over the past five to ten years with similar goals.

Obviously, campus infrastructure projects entail a level of complexity that far outstrips bookstores or cafeterias, but as legacy infrastructure ages and as awareness of social responsibility increases, there is a growing need for these assets, so campus leaders have been willing to be creative about replacing or enhancing these assets.

EXPECTATION FOR P3 UTILIZATION IN HIGHER EDUCATION

Survey responses from 385 college and university presidents/chancellors, provosts, and CFOs.



Source: The Chronicle of Higher Education & P3 | EDU 2023 Public-Private Partnership Survey.

Q: What is the biggest risk associated with these projects of greater complexity?

CA: There are a lot of things that can go sideways on these large P3 infrastructure projects! It is important to go in with eyes wide open and get in front of the challenges. For example, any project that generates revenue could be subject to changes in market demand. As demand fluctuates, it could put stress on the project's underlying financial assumptions. There have been instances of this in recent years, where the pandemic and its aftermath eroded student enrollment or shifted instruction

online. This negatively impacted demand for some services, like campus housing or parking, and concessionaires dependent upon that demand have found themselves in a tough spot.

We are hopeful that enrollment stabilizes, but we also need to recognize that, even before Covid, enrollments were declining. In the context of a P3 agreement, institutions and their private partners need to model for this, and every institution is different in this regard, so that is not as easy as it sounds. Some institutions are well insulated from volatility in demand; others are profoundly affected. You have to understand where your institution is situated along that spectrum, because if you miscalculate, a project that might otherwise be credit-positive can have the opposite effect. In my estimation, getting the demand side of things wrong is probably the biggest risk with these projects.

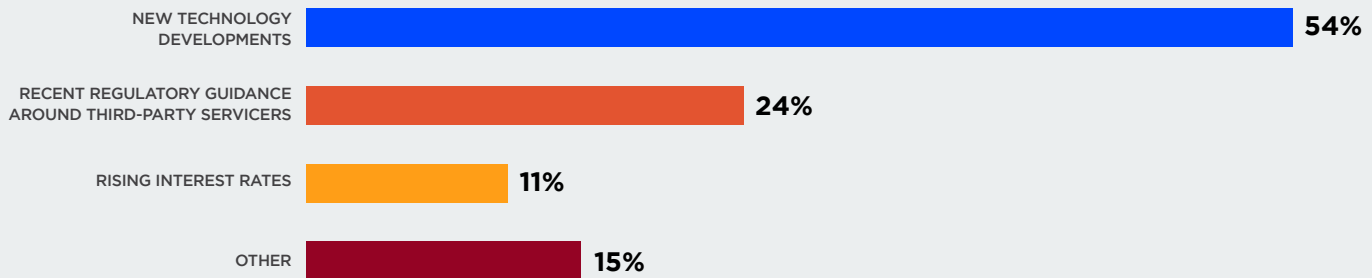
A secondary risk arises from the misalignment of project expectations and the design of the overall business model for the P3 relationship. Transparency and accountability are required by all of the partners in a P3 agreement.

Q: Are there some approaches that help project participants in mitigating that risk?

CA: You're not going to have a risk-free project, so you have to get comfortable with that. This would be the case with or without a P3 agreement in place. P3 is a tool, nothing more. If used well, it can genuinely reduce risk and provide all those benefits that campus leaders say they want, like accelerated deliveries, access to project expertise, and access to private capital. When misused, however, it can create new challenges. It can camouflage risk in the sense that it can lead institutions to believe they have shed risk when in fact the agreement in place has only shifted it a little or delayed a reckoning.

The best way to mitigate risk on these large P3 infrastructure projects is to surround yourself with star players who have a verifiable track record of success. We are challenged enough to understand what next year looks like; it is especially difficult to think through all the twists and turns that a 30- or 50-year agreement might encounter. The best approach is to partner with excellent people who understand how P3s work and who have the commitment and ability to adapt as the partnership matures.

EMERGING TRENDS DRIVING INCREASED P3 UTILIZATION IN HIGHER EDUCATION



Source: *The Chronicle of Higher Education & P3 | EDU 2023 Public-Private Partnership Survey*

Do you see P3 playing a greater role in higher education in the future?

CA: I think a greater role for P3s is inevitable in order for higher education to transform its operating models and refine its mission, and the next generation of P3 agreements will expand greatly upon what has come before. A large part of how we evaluate institutional success is going to be focused on what institutions do to enhance access to education for disadvantaged people. These measures are already being built in to the rankings, and to me, the challenge of access will lead institutions to explore how they can bring their skills and resources to bear on the wider community outside the walls of the university. The expansion of the educational ecosystem to include business and industry will necessitate P3 or P3-like agreements. For instance, we are now seeing companies where the factory floor becomes a classroom and where managers and engineers are instructors. As these types of partnerships take place, we can redefine the value of where we live, work, and learn based on the level of partnerships.

There are critical ingredients to make this next level of partnerships possible and certain outcomes we should all aspire to create:

- Understand your institution's strengths and weaknesses with the help of data-informed decision making
- Establish priorities for your potential partnerships and the specific performance enhancements that you are trying affect—clear goals and outcomes should always be the focus
- Use the same data-informed approach to understand the highest areas of need and demand of your student population, as well as the community-defined skills, competencies, and

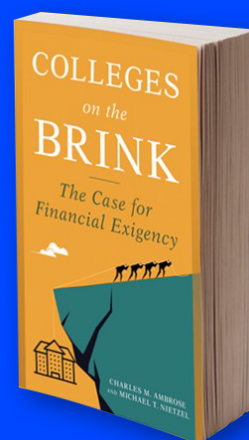
talents required to drive social, economic and educational mobility

This expanded view of higher education will require infrastructure in the old sense, to be sure, but it will also require structures for collaboration that don't really exist today in any standardized way. The P3 methodology could be central to these collaborations.

COLLEGES ON THE BRINK

The case for financial exigency

BY CHARLES M. AMBROSE
AND MICHAEL T. NIETZEL



"Colleges on the Brink should be required reading for those taking on the important task of making needed structural changes to allow institutions to thrive in the future and better serve today's students."

Jamie Merisotis,
president and CEO,
Lumina Foundation

The Role of Public-Private Partnerships in U.S. Transportation Electrification

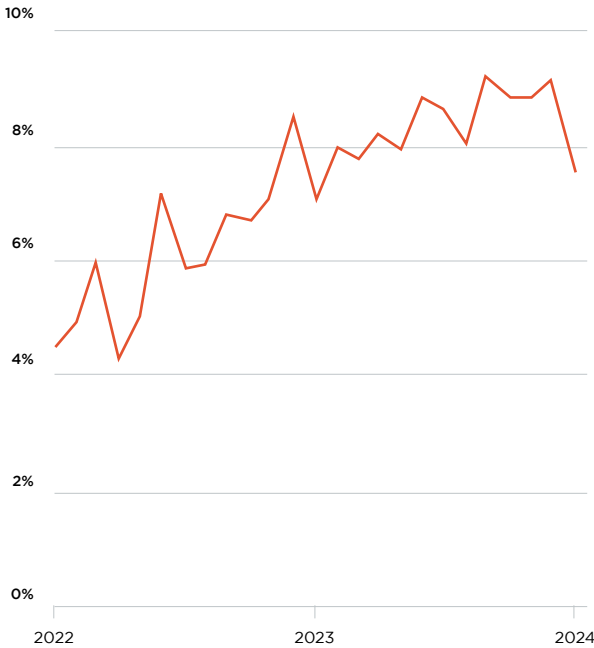
MICHAEL BLACKWELL

Energy transition goals will be difficult to achieve without significant private industry investment and know-how.

The transition to a more diverse energy resource mix in the United States is well underway. Still, in many ways clean energy goals remain a public policy abstraction that face a very challenging road before becoming a concrete reality. There are real laws that have allocated significant funds to the massive endeavor; however, shovel-ready infrastructure projects have been slow to materialize, especially so amid the post-Covid supply chain dislocations and complex permitting processes that have hampered large-scale construction projects.

This can be seen most acutely in the recent setbacks to some of the U.S. electrification endeavors. In the first months of 2024, Tesla not only reported its first year-over-year decline in quarterly deliveries since 2020, but also announced a 10 percent reduction in its global workforce and a nearly complete elimination of its Supercharger program. This disruption in progress for electric vehicles (EVs) sales and infrastructure development tracks with other challenges to public policy initiatives in the energy industry, including continued difficulties in permitting new grid infrastructure and calls for more detailed accounting of the carbon footprints associated with energy transition solutions.

ELECTRIC-VEHICLE RETAIL SALES AS A SHARE OF OVERALL U.S. VEHICLE SALE



Source: J.D.Power

Despite the recent pullback, it seems inevitable that EVs—in some form or other—are here to stay, and governments at all levels are slowly building out the infrastructure needed to support the nationwide fleet of commercial and personal EVs. For instance, there are already nearly 200,000 charging stations in operation across the U.S. The federal Infrastructure Investment and Jobs Act (IIJA), signed into law in 2021, dedicated \$7.5 billion to the construction of charging stations, although [reports](#) suggest the program has yet to install any chargers, adding yet another reason for consumers to forego or delay purchases of EVs.

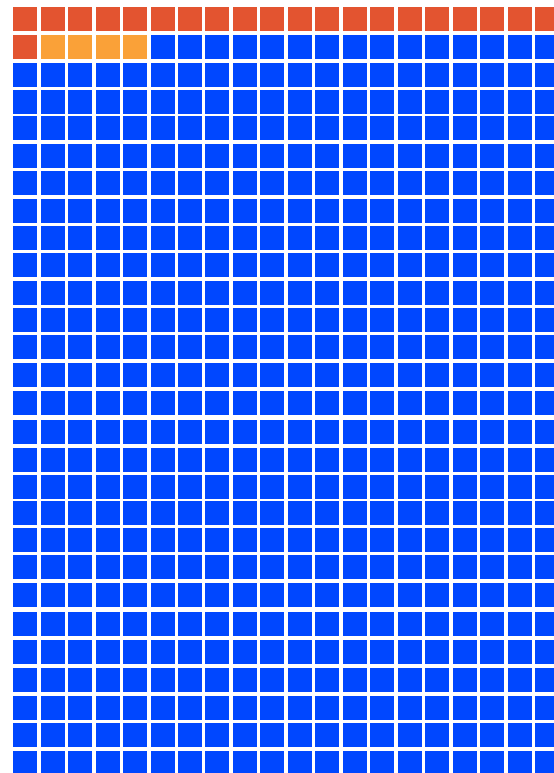
Even if the IIJA funding is fully and efficiently deployed, there will still likely be a significant gap between what is needed and what can be timely achieved. The Biden administration targeted the construction of 500,000 stations via IIJA implementation by 2030. That target would most likely fall significantly short of future EV charging requirements. According to a [June 2023 study by the National Renewable Energy Laboratory](#), a “mid-adoption scenario”—a somewhat conservative estimate of the EV market growth—suggests that the U.S. will need 28 million charging ports by 2030.

Simply put, transforming EVs from a fringe product into the dominant vehicle category will require significant additional investment and—perhaps—a better approach to project delivery for the necessary charging infrastructure. And this applies to numerous areas of concern for the energy transition including infrastructure development. Of the various means to accelerate such development, public-private partnership models may be a valuable tool to produce meaningful results. But are P3s the right approach?

Is P3 Fit for Purpose?

Traditionally, P3s have been utilized on projects with a government sponsor in order to fill a funding gap, but recent infrastructure legislation, including the IIJA and the Inflation Reduction Act (IRA), have made federal investment readily available—either through formula spending or grants—for numerous project types, including EV charging stations. If P3 were merely a mechanism to route private investment capital into public projects, it would seem unnecessary given the

EV CHARGING NETWORK REQUIREMENTS BY 2030



■ ■ ■ ■ → CURRENT CHARGING NETWORK

■ PUBLIC DESTINATION CHARGING STATIONS

■ PUBLIC FAST CHARGING STATIONS

■ PRIVATE OR RESIDENTIAL CHARGING

Each square represents 50,000 ports. National charging network to support 33 million EVs by 2030.

Source: National Renewable Energy Laboratory.

massive spending the U.S. government is steering into these projects. And to be sure, P3s have been largely absent from the early projects tied to these programs, especially given the programs’ focus on building infrastructure in rural or disadvantaged areas where there is significant demand risk.

But P3s and P3-like structures (including, for example, green bonds and public-private revenue sharing models) accomplish more than just adding heft to the capital stack.

They also bring into play a level of project delivery expertise that might otherwise be lacking. For example, when Georgia's Department of Transportation recently circulated a request for proposals for a P3 EV charging network, officials cited that a P3 approach would shorten the project delivery timeline, according to P3 Bulletin.

Private industry participation also allows public partners to reimagine the scale of projects on the drawing board, and as the data regarding EV charging stations illustrate, scaling up solutions will be necessary if policymakers are going to get anywhere near the aggressive targets they have established for the energy transition. The *opportunity* for P3-like agreements in EV infrastructure, among other areas, is there; the question remains about whether the proper *incentives* are in place.

In the EV context, private businesses—with or without government support—are most likely to invest in projects aimed at high-density urban areas with a relatively high percentage of EV ownership. These kinds of operations have better demand risk profiles and can support the costs associated with debt or private equity involvement; however, private industry's appetite for EV projects in states with lower EV ownership or a more dispersed population tails off significantly. This is where alternative project delivery approaches could work, especially if they are premised on availability payments where public partners accept more of the demand risk, but where risk and reward are mismatched, it is difficult to see how alternative project delivery approaches will attract the necessary private industry players.

Government-sponsored programs to enhance mobility and sustainability only go so far in altering the basic risk/reward calculation that private businesses must undertake, and not all programs will be perceived as having the elements necessary for the widespread use of P3s. Take, for instance, the [Transmission Facilitation Program](#) (TFP), which was created by the IIJA to spur the development of high-capacity electric transmission infrastructure. P3s were identified by the program framers as one of three main financing tools TFP would utilize to put its \$2.5 billion to work in building out the grid. To date, private industry enthusiasm for the

FINDING SCALE IN EV PROJECTS

Limited project scale and demand risk weigh upon the private sector's enthusiasm for EV infrastructure projects; however, there are some pockets of EV activity that appear to be better suited to alternative project delivery approaches. Fleet conversion projects—where a government sponsor is seeking the large-scale conversion of vehicles to electric—and fleet-scale charging hubs have received attention from private industry, as the projects tend to have the scale that private partners seek.

One notable recent project, a microgrid charging depot in Montgomery County, Maryland, provides a template that other local governments might find useful. Fleet conversions to EV vehicles are cost-intensive, not just in terms of the vehicles themselves, but also in terms of the supporting infrastructure needed to maintain and operate the fleet. Montgomery County purchased electric buses via federal grants and then developed a P3-like agreement to build out a microgrid and charging station that involved no upfront costs to the county. All of the necessary infrastructure was packaged as an Energy-as-a-Service (EaaS) contract. Rather than buying the microgrid and charging infrastructure outright, the County relied on its private partner to build, own, operate, and maintain the system. The agreement allowed the county to electrify its bus fleet while transforming the risk associated with ownership into a predictable operating cost that can be further reduced by utilizing an array of tax credits and incentives to limit the financial strain on taxpayers.

The project reached financial close in September 2021, and by the following October, elements of the depot were operational. The facility is able to charge up to 70 buses with solar power and was the nation's largest solar charging facility for public transportation at the time of its launch. The County has since [forwarded plans to purchase hydrogen-powered buses](#) and to develop an even larger depot to service the fleet.

program has been muted. The program has been slow to begin construction, and details vital to the underlying economics of P3s or P3-like agreements remain unsettled.

For example, when the Department of Energy (DOE) serves as an “anchor customer,” what is the nature of the arrangement? Will the capacity contracts be industry standard? Will DOE drive hard bargains, given the leverage it would enjoy as the main customer? Would the private partner have any ability to reject DOE’s assignment of the capacity contract to a third party? Under which conditions would DOE be allowed to terminate the contract? These kinds of considerations need a degree of certainty (or negotiability) if private finance is involved. DOE’s 2022 notice for public comment on the TFP received some [87 comments](#), many of which noted how, in the words of one commenter, “strong visibility into future cash flows is critical in achieving a credit profile that attracts the necessary investment associated with large-scale, capital-intensive projects.”

All Things at Once

Energy is all about connections, literally and figuratively, and the energy transition illustrates how complex these connections can be. Solutions to one challenge inevitably create second- and third-order challenges in other areas. For instance, if policymakers’ wildest dreams come true regarding the widespread adoption and use of EVs, the presence of all those charging stations will potentially create a surge of demand on an electric grid that may not yet be prepared to accommodate it.

Furthermore, the timing of the demand will alter peak times of usage (recharging batteries will often take place at night), which itself has consequences for the grid, including the generation of electric power and the collective maintenance of transformers and other equipment required to get electricity to the end user. And, of course, none of this begins to touch on the resource stack needed to manufacture electric batteries and renewable energy infrastructure, which contains a long list of elements and minerals that are difficult, costly, and dirty to source.

The good news is that the proliferating list of projects required to fully transition U.S. energy usage could benefit from alternative project delivery approaches. P3 and P3-like strategies force project owners to think through the full lifecycle costs and risks associated with EV infrastructure, and when the necessary incentives for private-sector participation go lacking, policymakers will have a much clearer line of sight into what a realistic—and achievable—set of goals looks like.



Michael Blackwell

Michael Blackwell is an attorney in Husch Blackwell’s virtual Link office and a member of the firm’s Energy & Natural Resources industry team. He is focused on helping clients navigate structural changes in the energy industry and advises on transactions as well as federal and state energy laws, regulations, and policies, including proceedings before the Federal Energy Regulatory Commission (FERC), state public service commissions, and state and federal courts.

The Resurgence of Davis Bacon Act Requirements in Recent Federal Infrastructure Legislation

MICHAEL SCHRIER

Recent federal infrastructure packages have attracted interest from contractors, but for those companies unfamiliar with performing such work there are significant labor laws that could pose challenges for the uninitiated.

During the Covid pandemic, Congress passed—and the Biden administration signed—two large infrastructure bills into law. The first is the Infrastructure Investment and Jobs Act that became law on November 15, 2021, as Public Law No: 117-58. The IIJA provides for, among other things, massive federal government spending on a wide range of infrastructure projects across the United States. The second is the Inflation Reduction Act of 2022 that became law on August 16, 2022, as Public Law No: 117-169. The IRA provides for, among other things, financial and tax incentives for owners and developers of new green energy infrastructure projects such as solar or wind farms. Both the IIJA and IRA fund or incentivize massive investments in domestic infrastructure projects.

One of the common themes in both statutes is the requirement that prime contractors and all tiers of construction contractors and suppliers on such IIJA and IRA covered infrastructure projects pay their construction workers Davis Bacon Act (DBA) prevailing wages and fringes for all construction work funded or incentivized by these two new federal laws. Given the huge

expansion in federally funded infrastructure projects resulting from the IIJA, which expressly requires DBA compliance, and the boom in green energy infrastructure projects incentivized by the IRA's tax credits, which are predicated on compliance with payment of prevailing wages, contractors and subcontractors at all tiers working on these federally funded or tax-incentivized projects should be familiar with DBA prevailing wage requirements and be prepared to take proactive steps to ensure compliance. Failure to comply with DBA requirements can lead to significant monetary and non-monetary penalties. DBA compliance is not overly difficult; however, it requires a degree of continued planning and diligence that most contractors not already performing federal contract work may be unfamiliar with and could pose traps for the unwary or unprepared.

The Davis Bacon Act

The DBA is a Great Depression-era statute requiring the payment of prevailing wages and fringes to all “laborers and mechanics” performing “construction, alteration, or repair,

including painting and decorating, of public buildings and public works.” The DBA requires that all federal construction contracts

must contain stipulations that . . . the contractor or subcontractor shall pay all mechanics and laborers employed directly on the site of the work, unconditionally and at least once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment computed at wage rates not less than those stated in the [applicable wage determination prepared by the U.S. Department of Labor].

Contractors and subcontractors are also required to post “the scale of wages to be paid in a prominent and easily accessible place at the site of the work.”

The “scale of wages to be paid” is what is commonly referred to as a “wage determination” (WD). The U.S. Department of Labor’s Wage and Hour Division prepares separate WDs for each county or region in every state and covered territory in the U.S. For each county or region, there are up to four separate WD’s—one for each type of construction activity—including “building,” “residential,” “highway,” and “heavy.”

Most infrastructure projects would tend to require application of the “heavy” category of WD. In a traditional federal contracting scenario (e.g., construction of a federal courthouse or other federal building), the federal agency contracting officer will select the appropriate WD and incorporate it into the Request For Proposals for the project and also into the ultimate construction contract awarded to the prime contractor, along with the required federal contracting DBA clauses.

The prime contractor is then responsible for ensuring that the DBA clauses and WDs are flowed down to each of its subcontractors and such subcontractors further flow the clauses and WDs down to each of their subcontractors and suppliers, as required by law. All contractors and subcontractors are required to provide a “certified payroll” on a weekly basis and under penalty of perjury, certifying the names of each worker, the classifications each worker assigned, the hours worked, and the wages and fringes paid.

WD’s are principally drawn from union collective bargaining agreements but are also based on survey data collected by the Department of Labor from both unionized and non-unionized construction companies in each locale. A typical WD will have a list of “classifications” for various kinds of building trades (e.g., carpenter, electrician, ironworker, mason, power equipment operator, etc.) and next to each will be a required minimum hourly wage rate and an associated minimum hourly fringe rate. It is incumbent upon the prime contractor and each of its subcontractors and suppliers performing work on a construction project to properly classify each of its construction workers using the classifications on the WD and then ensure that each such worker is paid no less than the proper classification wage and fringe rate for all hours worked on the construction project.

Noncompliance with DBA wage and fringe requirements can subject contractors and subcontractors to severe penalties. At a minimum, contractors and subcontractors are liable for making full back wage payments to underpaid employees to make them whole for the WD wages and fringes they should have received on a project. In addition to these monetary penalties, the DBA authorizes federal agencies to terminate federal contracts for non-compliance with DBA requirements and the “Government may have the work completed . . . and the contractor and the contractor’s sureties shall be liable to the Government for any excess costs the Government incurs.” Finally, the DBA authorizes the government to debar a contractor or subcontractor that fails to comply with the DBA. Debarment means that the contractor or subcontractor is placed on the U.S. government’s Excluded Parties List and is then prohibited from being a prime or subcontractor on any federal contracts or grants for three years. Many states and local governments also refer to the Federal Excluded Parties List when making procurement decisions, so contractors and subcontractors are advised to take all reasonable steps to avoid debarment for DBA violations as such debarment can have an outsized impact on a company’s commercial prospects or viability to the extent a significant portion of its business is derived from government contracts.

IIJA and the Davis Bacon Act

The IIJA expressly incorporates the Davis Bacon Act. As a result, all infrastructure work funded by the U.S. government pursuant to the IIJA requires DBA compliance. This means that not only are direct federal contracts for infrastructure projects covered but also state and local construction contracts using IIJA funds are also required to include DBA contract clauses and WDs.

Contractors and subcontractors at all tiers should pay close attention to ensure that the proper WDs are included in such government procurement contracts and also that the required contract clauses—found at [29 C.F.R. 5.5](#) (applicable to the IIJA and other development statutes with DBA requirements)—are included by the applicable government contracting officer. These clauses are quite detailed and, as explained above, must be “flowed down” along with all applicable WDs to each lower tier of subcontractor and supplier. The Department of Labor’s “new” DBA regulations expressly apply to any new IIJA infrastructure construction prime contracts (and all related subcontracts) issued/signed on or after October 23, 2023. Under these new regulations, even if a state or local contracting officer forgets to include the clause, the U.S. Department of Labor can later review DBA compliance and determine that the DBA clauses should have been included in the original contract and order that the contractor and all subcontractors retroactively comply with the DBA back to the original start of the procurement contract.

Prime contractors already familiar with DBA compliance should be wary of the legal twists and turns created by the new regulations. Contractors and subcontractors who have never dealt with DBA compliance in the past should take the time and effort to study the prevailing wage law’s legal requirements and either hire in-house expertise or find counsel with significant DBA experience to guide them. Prime contractors should pay close attention to the DBA compliance of all tiers of subcontractors, particularly since the new DBA regulations provide the Department of Labor with enforcement mechanisms effectively making the prime contractor liable for any DBA noncompliance by subcontractors. As a result, prime contractors and higher tier subcontractors should take steps to mitigate their DBA risk by providing effective oversight and review of subcontractor and supplier certified payroll and overall

2023 DAVIS BACON ACT UPDATES

In 2023 the U.S. Department of Labor published [new and updated DBA regulations](#) for the first time in forty years. The new regulations went into effect on October 23, 2023, and apply to all new construction contracts signed on or after the effective date. Among the changes or enhancements were:

- Enhanced recordkeeping requirements for contractors and subcontractors;
- Omitted DBA contract clauses may now be deemed included in federal contracts “by operation of law”;
- New additional anti-retaliation provisions;
- Mandatory interest payments on DBA underpayments, at the IRS penalty interest rate;
- Enhanced authority for federal agencies to withhold funds from prime contractors who are deemed to not be in compliance with DBA requirements;
- Greater potential liability for prime contractors for the noncompliance of any tier subcontractor or supplier; and
- Stricter debarment standards making it easier for the Government to place contractors and subcontractors on the Excluded Parties List.

These new Department of Labor DBA regulations will have a direct impact on IIJA contracts and will likely have an impact on IRA tax credit entitlements.

DBA compliance in real time and not wait until the end of a project.

IRA and Prevailing Wages

The Inflation Reduction Act poses different compliance challenges. The IRA is a tax law administered by the U.S. Treasury Department's Internal Revenue Service (IRS) and provides lucrative tax credits for those owners/developers who comply with prevailing wage requirements when constructing "green" energy infrastructure projects. The tax credits are lost—or owners/developers are not eligible for them—if they and their subcontractors do not comply with prevailing wage requirements. Instead of incorporating the DBA into the IRA, Congress merely requires that owners/developers pay prevailing wages and fringes set out on generally applicable and available Department of Labor prepared WDs that are otherwise required by the DBA. In this case, it is the IRS that is responsible for determining the prevailing wage compliance of contractors and subcontractors working on green energy projects that may be eligible for the tax credits. To date, the U.S. Department of Labor, even though it has no statutory authority to enforce IRA prevailing wage compliance, has its own webpages directing how contractors and subcontractors working on green energy infrastructure projects should comply with prevailing wage requirements. The Department of Labor's "guidance" looks very similar to its DBA regulations and guidance.

The problem inherent in IRA prevailing wage compliance

is that there are no mandatory prevailing wage contract clauses. The project owner—not a government contracting officer—is responsible for selecting the proper WD to apply to a project. In addition, many companies engaged in green energy infrastructure projects do not have prior experience with the DBA or state prevailing wage statutes, leaving them unknowledgeable and unprepared for prevailing wage compliance. Regardless, the owner/developer seeking the tax credits is subject to being deemed ineligible for such tax credits if contractors, subcontractors, and/or suppliers at any tier fail to comply with IRA prevailing wage requirements and/or fail to timely correct any prevailing wage errors through payment of back wages, interest penalties and other penalty payments.



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Project Labor Agreements

A project labor agreement (PLA), also known as a community workforce agreement, is a pre-hiring agreement negotiated by unions and contractors to set terms and conditions of employment.

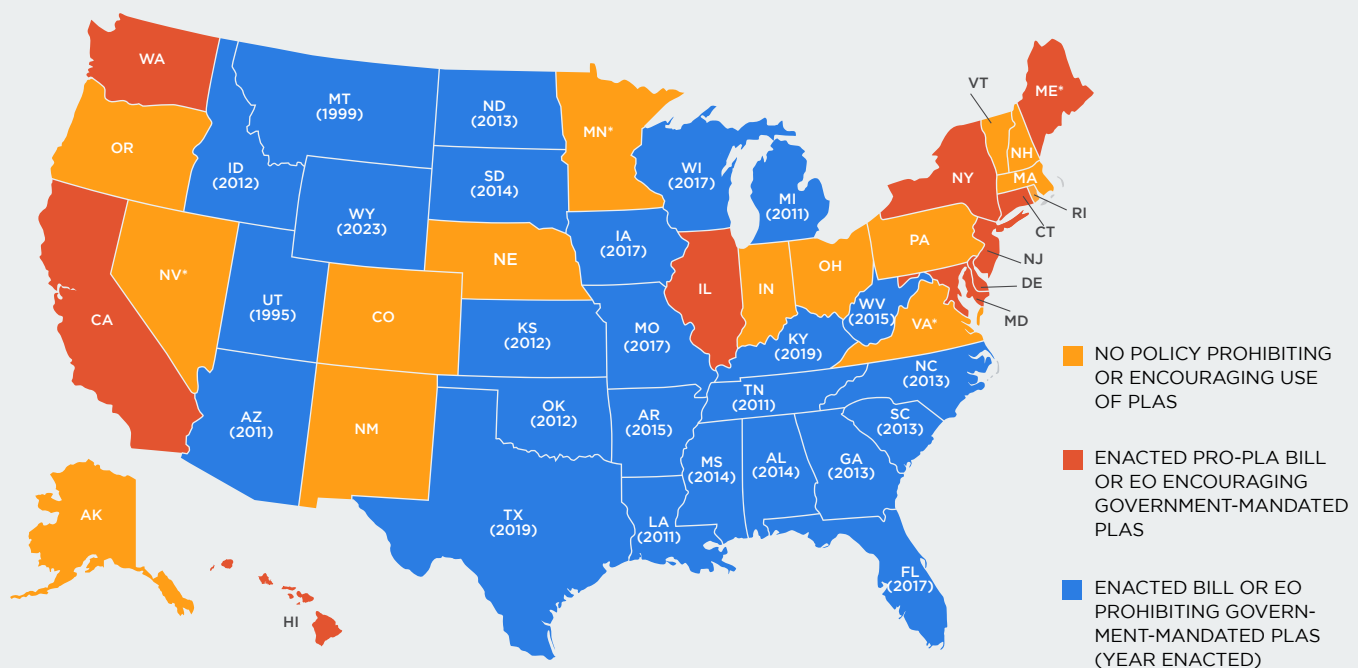
On February 4, 2022, President Joseph Biden published Executive Order 14063, which mandates that federal government agencies require the use of PLAs for large-scale federal construction projects, where the total estimated cost to the government is \$35 million or more, unless an exception applies (agencies still have the discretion to require PLAs for projects that do not meet the \$35 million threshold). This policy has expanded relevance to infrastructure projects given the federal government's allocation of capital via IIJA and IRA to various projects undertaken by local and state authorities. Refer to Federal Acquisition Regulation (FAR) [52.222-33](#) and [52.222-34](#), updated January 2024, for more information on the federal PLA requirements.

Traditionally, project owners and contractors encounter PLAs more frequently on the state and local level. While they are not always used in P3s, PLAs are common, especially in states

and cities requiring or encouraging them. PLAs can serve to streamline the negotiation process and ensure project delivery—especially among union workers—though there is some criticism that PLAs can be anti-competitive, discourage non-union workers, and potentially raise project costs. Many states in recent years have banned their state agencies from requiring PLAs (see map below for the status of each state).

While the actual provisions allowed or required in a PLA generally depend on the regulating government agency, it is common that these agreements bind all contractors and subcontractors who successfully bid on the project, even if that means superseding other existing collective bargaining agreements. Additionally, these agreements will generally touch on productivity, quality of work, safety, and health standards applicable to the project.

STATE-BY-STATE STATUS OF PROJECT LABOR AGREEMENT MANDATES



About Husch Blackwell's P3 Team Legislation

Husch Blackwell knows the P3 industry inside and out. We help private businesses and public agencies form partnerships and share the resources, risks and rewards of P3 projects. We guide clients through the negotiations, coordination and closings of contracts involving design-build, finance, operations, maintenance and transfer covenants. Our team has extensive experience and deep understanding of how to manage the legal, political and commercial complexities of P3s. Our representative projects include:



Higher ed facilities



Courthouses and social infrastructure



Professional sports facilities



Broadband



Airport renovation/expansion



Energy districts



Water/wastewater facilities



Transit-based mixed-use development