

Network for Success

Local Programs Workshop



BREAKOUT SESSION - GROUP 4

Track D – PPTA

Thursday, September 26, 2013

1:00pm – 2:30pm

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Legal and Project Development Issues

September 26, 2013

Ryan Pedraza

Senior Assistant Attorney General

Office of the Attorney General

P3 Enabling Legislation – Overview

- **Transportation P3 projects in Virginia procured using Public-Private Transportation Act of 1995 (Va. Code § 56-556 to 575)**
- **Intent of PPTA is to provide for more timely development and/or operation of transportation facilities; encourage investment by private entities (Va. Code § 56-558(A))**
- **Public and private entities are to have the greatest possible flexibility in contracting with each other (Va. Code § 56-558(C))**
- **Virginia Public Procurement Act does not apply to the PPTA (Va. Code §56-573.1)**

P3 Enabling Legislation – Overview (cont'd)

- **A Responsible Public Entity may use PPTA to develop and operate a Qualifying Transportation Facility**
- **A Responsible Public Entity includes local governments that have the power to develop and/or operate the qualifying transportation facility (Va. Code § 56-557)**
- **“Qualifying Transportation Facility” broadly defined – includes roads, mass transit facilities, and parking facilities (Va. Code § 56-557)**
- **A Responsible Public Entity must have guidelines that set out a process for reviewing proposals (Va. Code § 56-560(D))**

P3 Enabling Legislation – Overview (cont'd)

- **A Responsible Public Entity can solicit proposals or receive unsolicited proposals (Va. Code § 56-560)**
- **If a Responsible Public Entity accepts an unsolicited proposal, the Responsible Public Entity must seek competing proposals (Va. Code § 56-560(D))**
- **Options for contracting with a private entity:**
 - **Interim Agreement – allows for cost and risk sharing on project development activities**
 - **Comprehensive Agreement – provides for the development and operation of a qualifying transportation facility**
- **PPTA includes a number of opportunities for stakeholder involvement**

P3 Enabling Legislation – Issues to Consider

- **Update guidelines to keep pace with changes to the PPTA and best practices for P3 procurements**
 - Example – Recent amendments to PPTA mandate a 120 day competition period following acceptance of an unsolicited proposal
 - Guidelines developed and maintained by the OTP3 are available at www.vappta.org
- **Proposed project may cross boundaries of a locality or otherwise require approval from another entity – PPTA anticipates this scenario and includes a process for coordination (Va. Code § 56-566.2)**
- **Va. FOIA includes a number of exemptions that apply to PPTA procurements (Va. Code § 2.2-3705.6(11))**

P3 Project Development Issues

- **Construction phase of a P3 likely to be delivered via design-build agreement**
- **Traditional contracts used by a Responsible Public Entity for delivering public works may not be adequate templates**
- **Localities, especially those with no or limited experience in managing design-build projects, should pay close attention to the following:**
 - Are technical requirements and standards to be incorporated into the agreement appropriate for design-build project delivery?
 - How will the notices to proceed for design and construction work be issued?
 - How will the design review process and the construction oversight process work?
 - Does the locality's oversight program properly align with the risk allocation in the agreement?
 - How will the contractor be paid for work performed?
 - How will the dispute resolution process work?

P3 Project Development Issues (cont'd)

- **Receipt of an unsolicited proposal can create resource challenges**
 - Developing guidelines, even if a locality has no immediate plans to pursue a project using the PPTA, can ensure a review/management process is in place should the locality receive an unsolicited proposals
- **Use risk workshops throughout the project development and procurement process to help inform key decisions**
 - Can help a project owner develop and refine the scope of the project
 - Can help to a project owner develop a negotiating strategy or consider feedback received from proposers during the procurement process
 - Risk matrix useful when briefing internal stakeholders about the project and contract terms
- **Be mindful of additional requirements that may come along with particular sources of funding**
 - Using federal funds for a project may trigger additional oversight, reporting, and procurement requirements

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Risk and Design-Build Issues

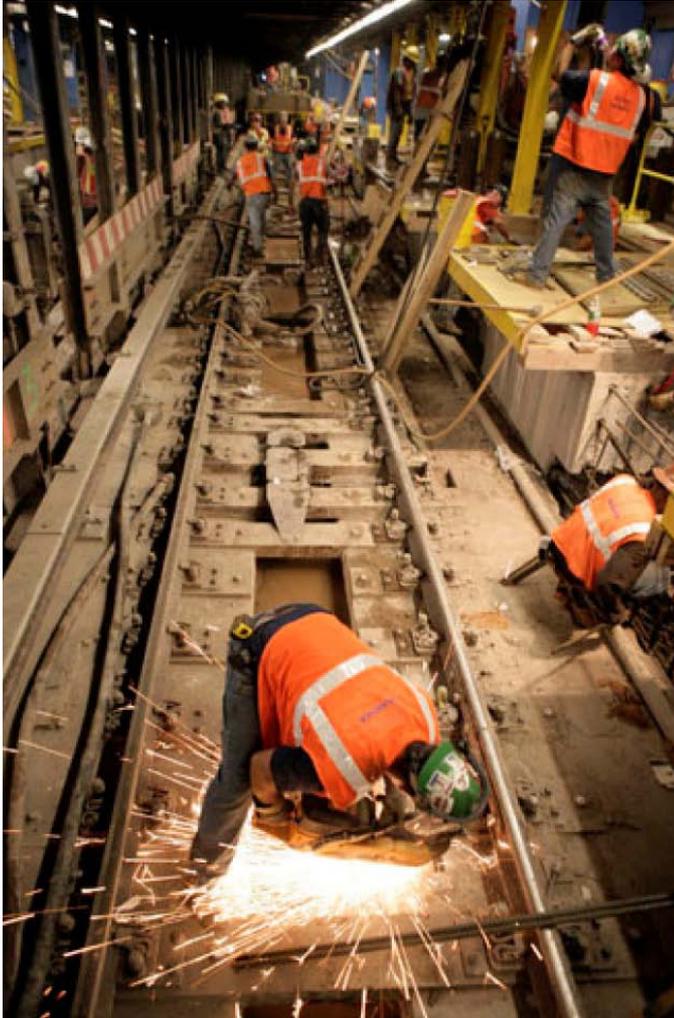
September 26, 2013

Chris Guthkelch

Project Director

Skanska, ID

P3 Key Benefits



Optimal Risk Allocation

Innovation

Fixed-price, Date Certain Delivery

Whole Life Solution

Performance-based

**Private Sector
“Skin-in-the Game”**

P3 Challenges and Mitigations

Challenges	Mitigations
Multiple stakeholders	Stakeholder management
Differing risk attitudes	Candid, open dialogue
Protecting the taxpayer	Open book pricing
Complex procurement	Competent, experienced advisors
Political process	Keep decision-makers closely informed

Risk Allocation between Traditional and P3



Traditional Procurement	
Authority	Contractor
Financing	
Permits	
Program	
Force Majeure	
Organization	
Design	
	Construction
O&M	
Availability	

PPP	
Authority	Concessionaire
	Financing
Permits	
Program	
Force Majeure	
	Organization
	Design
	Construction
	O&M
	Availability



Design-Build Key Risks

“Fixed price, date certain delivery”



Geotechnical

Environmental and permits

Existing conditions and latent defects

Inflation

Force majeure

Railroads

Design-Build Key Risks

“Fixed price, date certain delivery”



Utilities Relocation

ROW acquisition

Change-in-law

Owner's Oversight Regime

Performance regime

DBE/SWAM

Insurance

Summary



P3 procurement is messy and complex; but it delivers value for money projects!

Everything is interdependent; a perfect opportunity for collaboration!

You can't predict the long-term; but you can manage it with robust contracts!

You can't get rid of risk; but you can optimize risk allocation!

It's whole life; relationships and trust matter!

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Financial and Commercial Issues

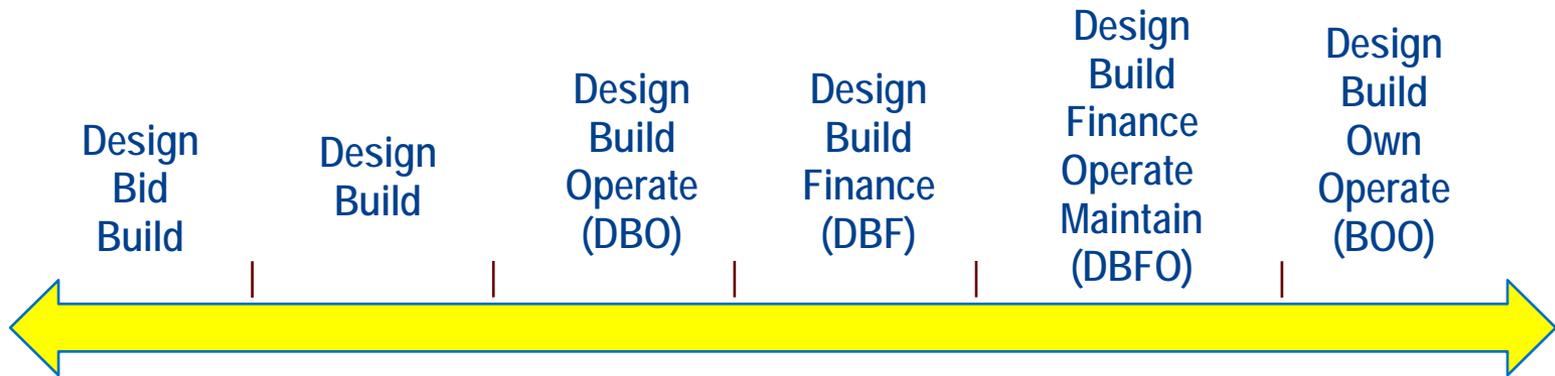
September 26, 2013

Morteza Farajian

Program Manager

Office of Transportation Public-Private Partnerships

Project Delivery Methods



Public Agency Controlled

Public Private Partnerships

Concessions / Privatizations
More Private Sector Control

Taxpayers Pay

Users Pay

Recourse Debt

Non-recourse Debt

Public Control

Private Control

Public Risk

Private Risk

The Magic of P3s

- Expedited delivery of mega projects
 - » Observed project benefits
 - » Savings on cost inflation
- Life-cycle cost savings
- Private sector's experience and efficiencies
 - » Alternative Technical Concepts
 - » Construction Management and Quality Assurance
- Risk transfer and Value for Money
- New funding sources (i.e. debt, equity, equity, low-interest rate loans, etc)
- And the list goes on....

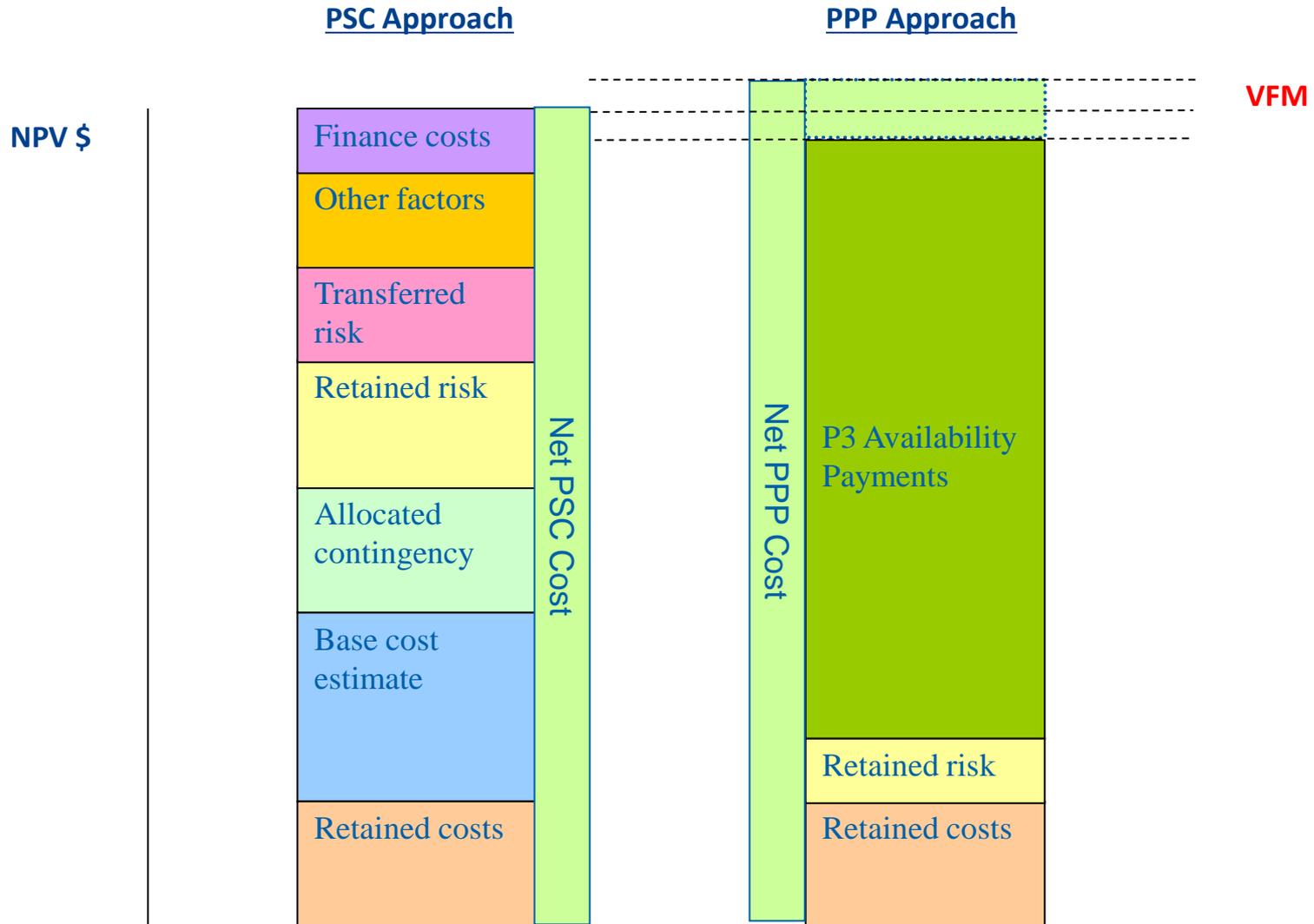
The Myth of P3s

If P3s are so great, why don't we use them on all projects?

- Not all projects are financially feasible under a P3 structure
- P3 structures are complicated. They work best for complicated projects.
- P3 procurement is resource consuming. It may not be beneficial for small scale projects.
- Not all projects have enough complexity to leverage private sector's innovation/experience
- Transferring risk to private sector may be more expensive

Value for Money may not be achieved on some projects

Value for Money (VfM) Concept

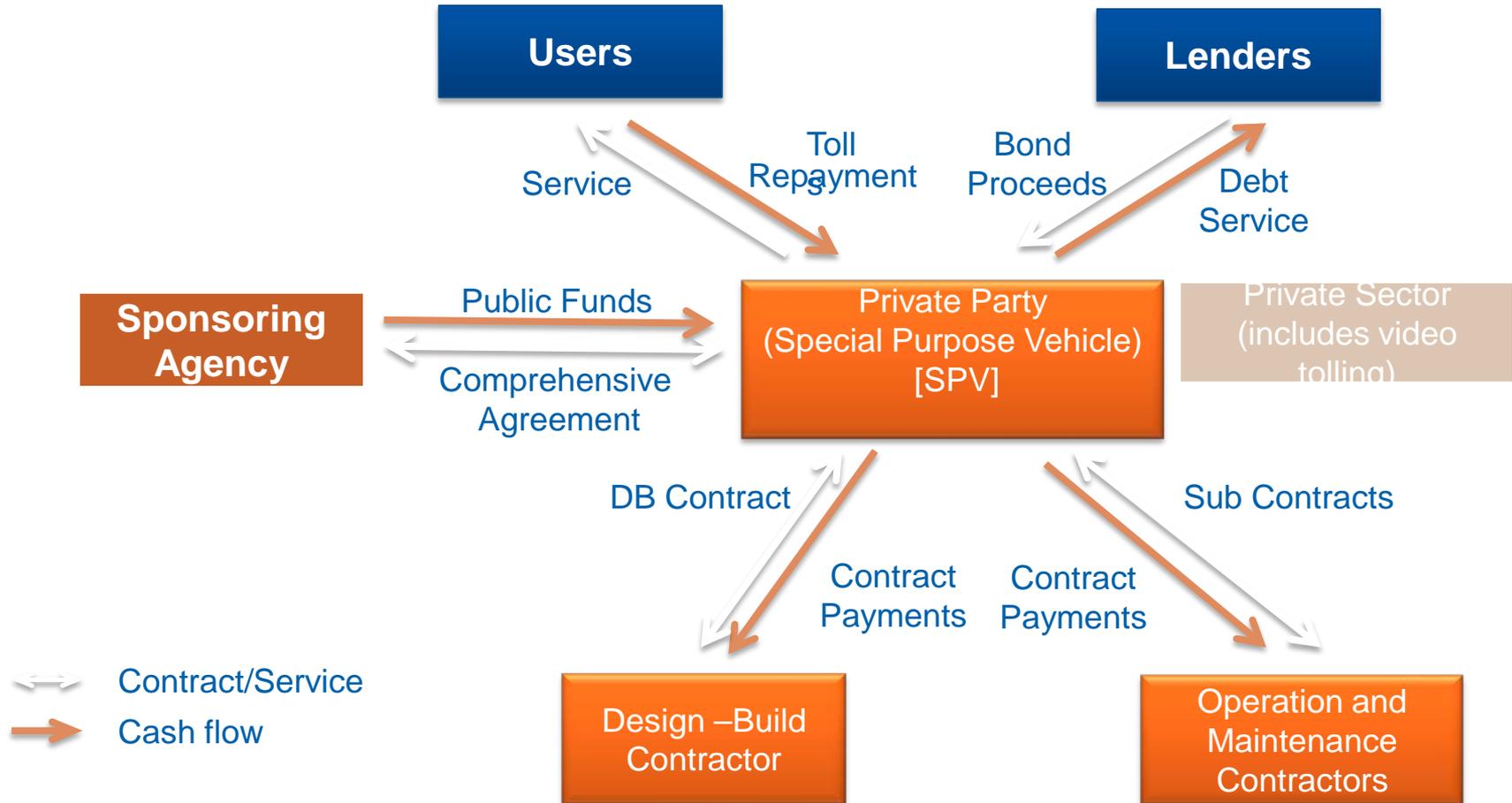


P3 Commercial Structure

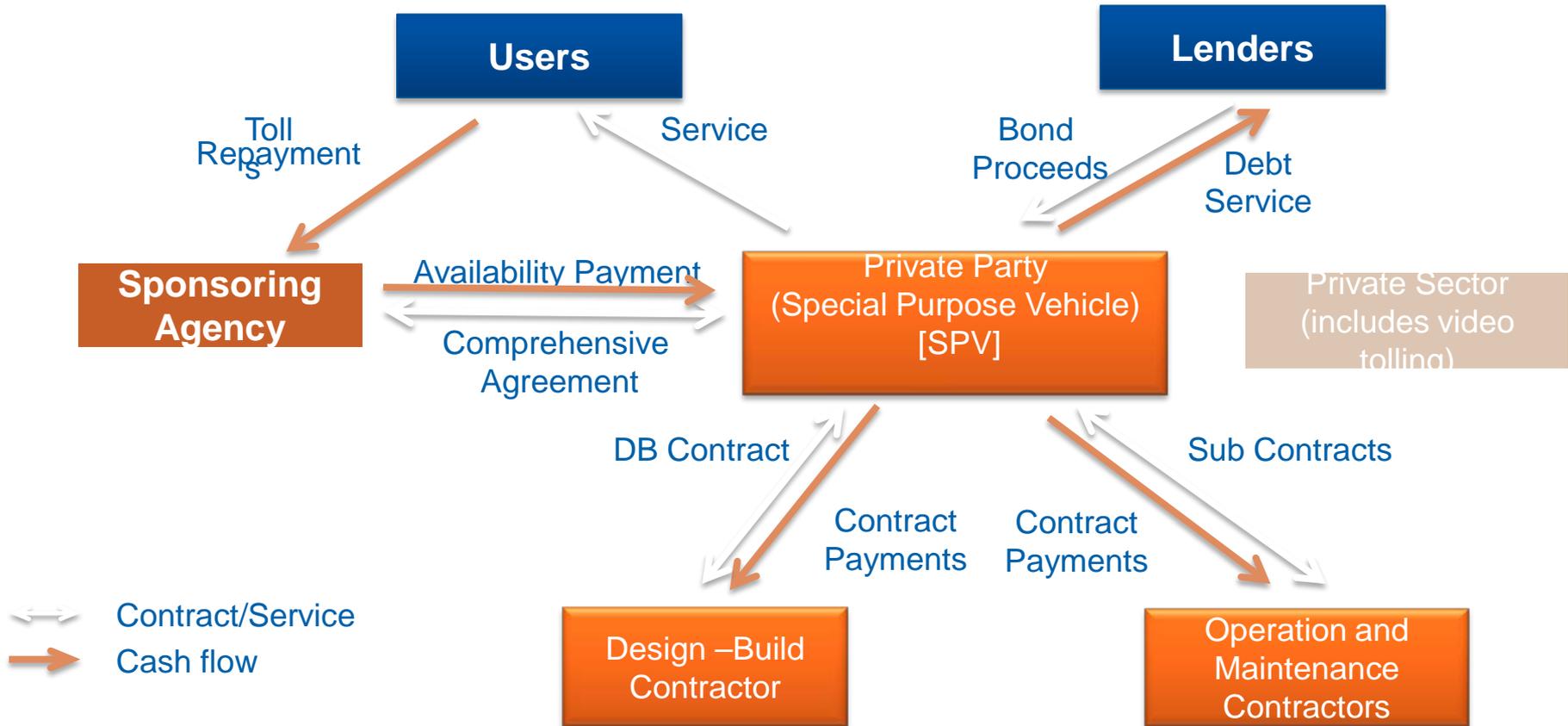
There are three main general commercial structures for P3s:

- 1. Toll Concession**
- 2. Availability Payment with tolls**
- 3. Availability Payment without tolls**

Typical Commercial Structure for a P3 toll concession

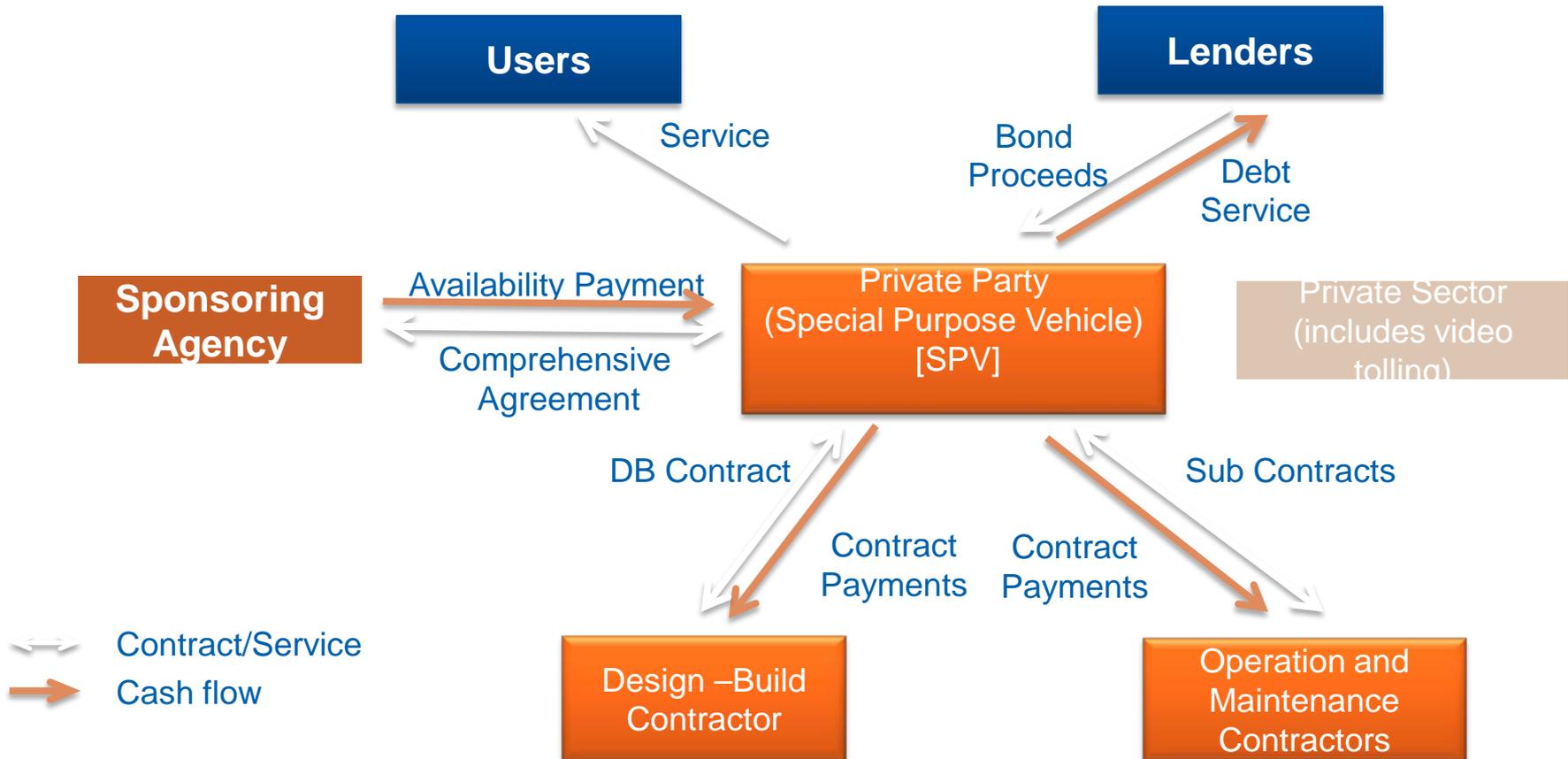


Typical Commercial Structure for a P3 Availability Payment with tolls*



*This structure is currently under review as a new concept in the Commonwealth

Typical Commercial Structure for a P3 Availability Payment without tolls*



*This structure is currently under review as a new concept in the Commonwealth

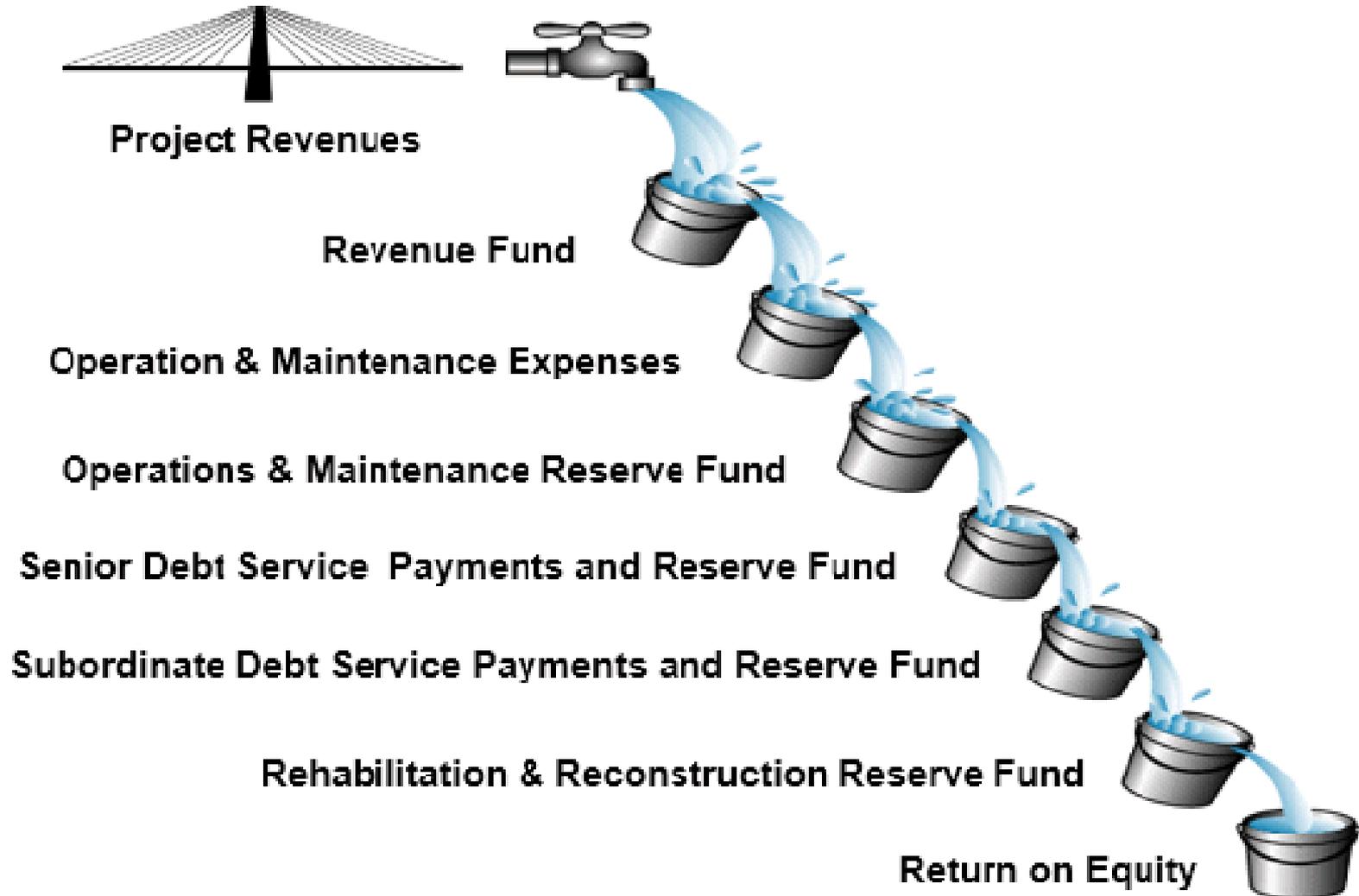
P3 Financial Structure

There are three main financial structures for P3s:

1. **Debt**
2. **Equity**
3. **Public Funds**

$$\text{Project Cost} = \text{Debt} + \text{Equity} + \text{Public Funds}$$

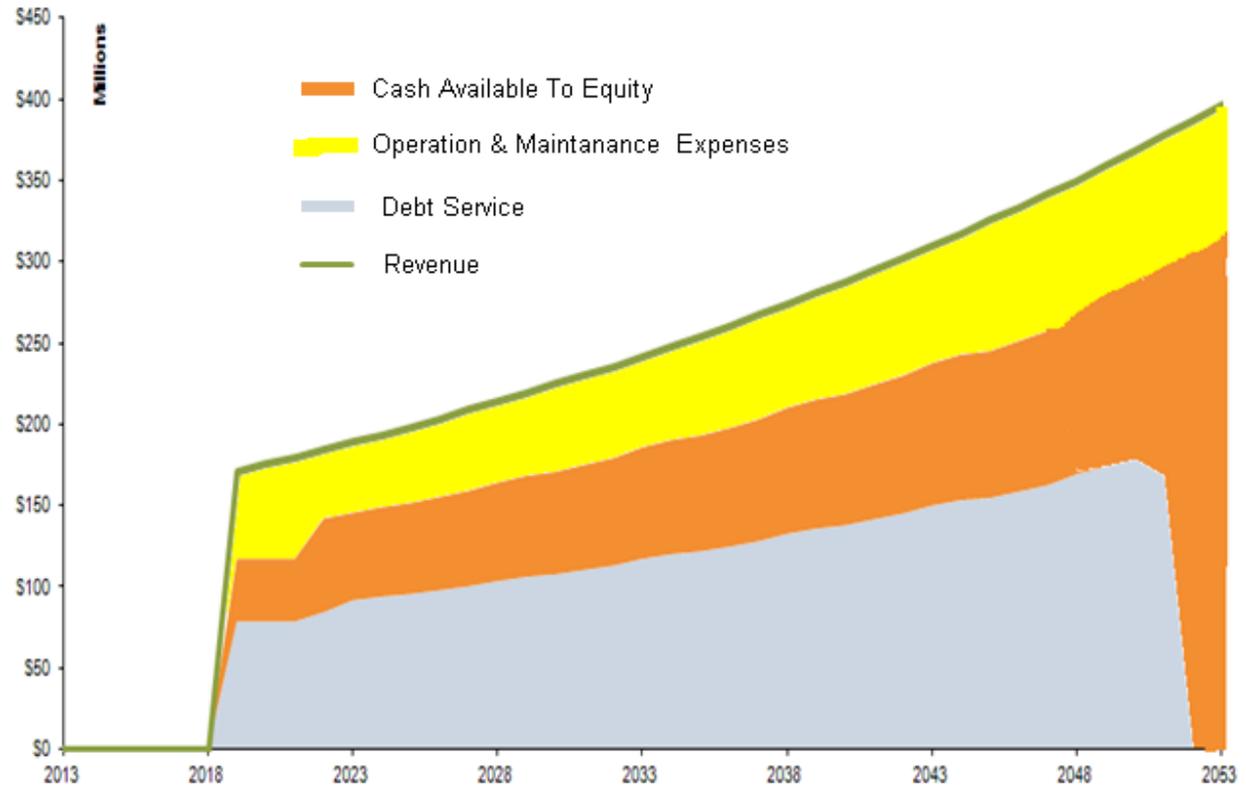
Financial Structure of P3s



Financial Structure of P3s

Some Financial terminology:

- Net Present Value (NPV)
- Internal rate of Return (IRR)
- Weighted Average Cost of Capital (WACC)
- Debt Service Coverage Ratio (DSCR)



$$\text{Public Funds} = \text{Project Cost} - \text{Debt} - \text{Equity}$$

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