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Negotiating and Implementing Relief Event Programs in P3 Projects.

The primary vehicle for allocating design and construction risk in a public private partnership (P3) using the design-build-finance-operate (DBFOM) P3 model is the Relief or Supervening Event regime in the public private agreement.1 A Supervening Event entitles the private partner to some financial or schedule relief from the public authority under the public private agreement (PPA).

The PPA will be consummated in a competitive request for proposal process including input from the public partner, private partner, and impacted participants including developers/equity providers, lenders, design-builders, and operation and maintenance service providers. This article focuses on the Supervening Events that can have an impact on these participants during the construction phase of the PPA. The Supervening Event issues addressed in this article include:

- Voluntary changes or breaches by the public sector
- Right of way/land access
- Permits, environmental conditions, endangered species, archeological conditions and hazardous materials
- Weather
- Changes in law
- Labor shortages or strikes
- Other force majeure events
- Differing site conditions
- Utility delays

Before we get into the case law and sample contract terms for these issues, it is worth pausing to reflect on how the financial markets view these risks in terms of rating the financial risks associated with a P3 transaction. Moody's has published a wide variety of risk and rating data based on P3 transactions and financing risks. Here is Moody's risk factor summary from a P3 rating article published in 2016:

Continue reading.

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