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New P3 Contract Form Promises to Better Allocate Risk.

Dive Brief:

- ConsensusDocs has released a new form of agreement that public agencies, contractors and other stakeholders can use for public-private partnership (P3) projects.
- At 17 pages, "[ConsensusDocs 900 Standard Public-Private Partnership \(P3\) Agreement and General Conditions \(Where the Basis of Payment is Milestone, Completion and Availability Payments\)](#)" gives participants a "fair, off-the-shelf" alternative to the massive and complicated P3 contracts now in use, according to ConsensusDocs, as it does not bury the imbalance of risk contained in many agreements.
- A more equitable standard form of agreement, said ConsensusDocs, should lower transactional costs for small and medium-sized projects as users try to create a fair agreement and evaluate their risk. The ConsensusDocs 900 agreement was developed with input from a coalition of industry groups including the Associated General Contractors of America, the Associated Builders and Contractors and the Construction Financial Management Association.

Dive Insight:

There has been more interest in P3s during the last decade, said Brian Perlberg, executive director and senior counsel at ConsensusDocs, probably more than one might think because a lot of the activity is with small and medium-sized projects at the state and local government level, not just with the multibillion-dollar projects that make the news.

And, Perlberg said the P3 will only become more prominent as the U.S. seeks to deliver new infrastructure under current budgetary constraints.

"However," he said, "the way P3 contracting is currently operating is broken. Companies are fleeing the market because of the unprofitable, unsustainable risk transfer that is occurring." Trying to manage the improper risk, Perlberg said, sometimes makes the P3 model too expensive for big projects, let alone smaller ones.

While ConsensusDocs 900 could be a good starting point in developing a P3 agreement, such contract templates should only be looked at as guides since all P3s are different and one size does not fit all, said attorney Keith Poliakoff, a partner in the Fort Lauderdale, Florida, office of Saul Ewing Arnstein & Lehr and co-chair of the firm's government relations practice group. For example, he said, ConsensusDocs 900 presumes that financing will include availability payments and use the design-build method of project delivery. "If either is incorrect," Poliakoff said, "the agreement would have to be modified."

"There are many important benefits of using the P3 delivery method for appropriate infrastructure projects —simplicity of the contract documents is not one of them," said attorney William Eliopoulos with Rutan & Tucker, which is headquartered in Costa Mesa, California. "Every P3 project is different." The ConsensusDocs 900 document, he said, omits and glosses over many important terms that should be included even in small to mid-sized projects.

For example, he said, an important benefit of the P3 model is that the concessionaire gives the public entity owner post-construction facility performance guarantees and agrees to financial penalties if they are not met. "This important benefit seems to be missing from the ConsensusDocs 900 project agreement," Eliopoulos said.

In addition, he said, one of the important advantages of the P3 delivery method is that it allows the public entity owner, concessionaire, design-build contractor and long-term operations and maintenance service provider to collaborate at the beginning of procurement and determine how best to structure the deal, including who is in the best position to price and control each of the project's major risks, how best to design it, build it, finance it and operate and maintain it. This seems to be missing from ConsensusDocs 900, Eliopoulos said.

The new form, Perlberg said, is not intended to be everything to everyone but rather a good starting point to help reset the conversation about what is fair and what is a reasonable risk allocation for all concerned, particularly for projects less than \$100 million. "Part of the problem is there hasn't been anything on the marketplace to fulfill that need," he said.

Construction Dive

by Kim Slowey

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