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Public-Private Partnerships for Purposes of Federal Real Property Management

Garrett Hatch
Specialist in American National Government

Kate M. Manuel
Legislative Attorney

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Summary

While public-private partnerships (PPPs) have long been used to manage real property, congressional interest in PPPs has recently increased due to the large number of underutilized and excess buildings owned by federal agencies, as well as sequestration and other spending constraints. There is no single, accepted definition of *public-private partnership*, and PPPs can be structured in many ways. However, for purposes of this report, a PPP is an agreement whereby a nonfederal entity acquires the right to use a real property owned or controlled by a federal agency—typically through a long-term lease—in exchange for redeveloping or renovating that property (or other property). In many cases, the agency and the nonfederal entity share the net cash flow or savings that result from the agreement. The term *real property* is defined by the Federal Management Regulation as any interest in land under the control of a federal agency except the public domain; lands reserved or dedicated for national forest or park purposes; minerals in lands withdrawn or reserved from the public domain; other lands withdrawn or reserved from the public domain; and crops separated from the land.

The process of forming a PPP typically begins when a federal agency identifies real property that could provide greater benefits to the government if it were redeveloped or renovated. The agency then works with nonfederal partners to see if a redevelopment strategy could be devised that provides the agency with the benefits it seeks, and the nonfederal partner with financial returns sufficient to cover the risk of investing in the property. The redevelopment strategy and method of financing are closely linked. The former refers specifically to the work that the nonfederal partner agrees to undertake, while the latter is a combination of the revenue generated from the improved space and, in some cases, savings realized by reduced operating costs. Financial benefits to the government may also include a division of property cash flows. Two common redevelopment and financing structures entail (1) leasing property to a developer, which then constructs a new facility on the land and subleases the facility; and (2) giving a developer excess real property in exchange for the developer building a facility for the agency on other land that the agency owns.

Federal law is generally silent as to PPPs, *per se*, particularly PPPs for purposes of improving or disposing of federal real property. A number of states have laws that define *public-private partnership*, and expressly authorize one or more state agencies (often, the Department of Transportation) to enter PPPs in general or for specific purposes (e.g., toll roads). With certain narrow exceptions (e.g., P.L. 106-407), federal law has no comparable provisions. Instead, those agencies which have, to date, entered agreements that could be characterized as PPPs have typically done so under their authority (1) to lease, otherwise convey, or permit the use of federal real property; and (2) to enter procurement contracts, particularly energy savings performance contracts (ESPCs). While the authorities as to procurement contracts often apply to all executive branch agencies, those as to leases generally apply only to specific agencies and properties, and sometimes only to agreements entered into for specific purposes. Thus, there is considerable variability in the types of PPPs that agencies may enter, and some uncertainties as to the legal requirements to which such partnerships are subject.

When contemplating expanded use of PPPs, Congress may wish to consider the limited information available about existing authorities that may permit landholding agencies to enter PPPs, and whether and how these authorities are currently being utilized. Congress may also wish to consider agencies' capabilities to enter into and oversee performance of these arguably complicated arrangements; agencies' authority to retain and use any net proceeds from PPPs; and the interplay between PPPs and current processes for disposing of excess property.

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While public-private partnerships (PPPs) have long been used to manage real property,[1] congressional interest in PPPs has recently increased due to the large number of underutilized and excess buildings owned by federal agencies, as well as sequestration and other spending constraints. According to a report on federal real property holdings in FY2010, the government's portfolio included 71,000 underutilized buildings and 6,700 excess buildings, which cost a combined $1.66 billion to operate and maintain.[2] Disposing of these buildings through the "standard" processes, described below, imposes its own costs—and can take years—as agencies must comply with various statutory mandates pertaining to environmental remediation, historic preservation, and "public benefit" conveyances. Moreover, these costs in operating, maintaining, or disposing of property are currently being incurred at a time when agencies generally have fewer appropriated funds at their disposal due to sequestration and tightening budgets. Annual appropriations for real property activities at the General Services Administration (GSA), for example, have decreased by more than half a billion dollars from FY2010 ($8.54 billion)[3] to FY2012 ($8.02 billion).[4] Taken together, these factors have prompted increased interest in PPPs, which generally rely upon nonfederal entities to finance redevelopment and, in some cases, disposal of federal real property.

There is no single, accepted definition of *public-private partnership*, and PPPs can be structured in many ways. However, for purposes of this report, a PPP is an agreement whereby a nonfederal entity acquires the right to use real property owned or controlled by a federal agency—typically through a long-term lease—in exchange for redeveloping or renovating that property (or other property). In many cases, the agency and the nonfederal entity share the net cash flow or savings that result from the agreement. The term *real property* is defined by the Federal Management Regulation as any interest in land, together with any fixtures thereon, under the control of a federal agency *except:* (1) the public domain; (2) lands reserved or dedicated for national forest or park purposes; (3) minerals in lands withdrawn or reserved from the public domain that are suitable for disposition under the public land mining and mineral leasing laws; (4) certain other lands withdrawn or reserved from the public domain; and (5) any crops designated for disposition by severance and removal from the land.[5]

This report provides an overview of key policy and legal issues pertaining to PPPs for purposes of federal real property management. It begins by discussing the current processes whereby federal agencies maintain and dispose of real property, as these processes help explain the appeal of PPPs. The report then discusses how PPPs are commonly structured, agencies' authority to enter PPPs, and the legal requirements to which PPPs may be subject. It concludes with considerations for Congress, such as agencies' capabilities to enter into and oversee performance of these arguably complicated arrangements.

Other CRS reports address the use of PPPs in other contexts, including CRS Report RL34567, *Public-Private Partnerships (PPPs) in Highway and Transit Infrastructure Provision*, by William

[1] *See, e.g.*, Daniel B. Klein & John Majewski, Economy, Community, and Law: The Turnpike Movement in New York, 1797-1845, 26 *Law & Soc'y Rev*. 469 (1992).

[2] Federal Real Property Council, *FY2010 Federal Real Property Report: An Overview of the U.S. Federal Government's Real Property Assets*, September 2011, at pg. 6.

[3] 123 Stat. 3187.

[4] Consolidated Appropriations Act, P.L. 112-74, General Services Administration—Real Property Activities—Federal Buildings Fund—Limitations on Availability of Revenue, 125 Stat. 911 (Dec. 23, 2011).

[5] *See* 41 C.F.R. §102-71.20.

J. Mallett; CRS Report R41880, *Foreign Assistance: Public-Private Partnerships (PPPs)*, by Marian L. Lawson; and CRS Report R43308, *Infrastructure Banks and Debt Finance to Support Surface Transportation Investment*, by William J. Mallett and Steven Maguire.

Background

Current interest in PPPs arises, in part, as a result of the "standard" processes agencies use to dispose of real property that they no longer need due to changes in their functions and missions. As a general rule, when agencies no longer need particular properties, they must dispose of these properties through statutorily prescribed processes, described below, that can be cumbersome and costly. Agencies frequently must spend appropriated funds to operate and maintain properties they no longer need, and pay costs associated with their disposal. PPPs potentially enable federal agencies to rely upon nonfederal entities to finance the operation and maintenance of such properties, or to exchange these properties for other real property or services.

Changes in Agency Missions, Changes in Property Portfolios

Federal agencies acquire and maintain a range of real property assets to help them fulfill specific functions and missions. The Department of Energy (DOE), for example, owns more than a dozen laboratories which support its mission of promoting scientific and technological innovation through research, and the Department of Veterans Affairs (VA) owns over a hundred hospitals which support its mission of providing health care to veterans and their families. Agencies also own thousands of properties they use for office space, barracks, family housing units, and warehouses.[6] In total, the government owned more than 306,000 buildings at the end of FY2012.[7]

Over time, agency portfolios change, sometimes significantly. Agencies may restructure their real property portfolios, for example, as their needs change. The Department of Defense (DOD) closed numerous bases over the past two decades as part of its effort to restructure America's military forces to meet national security threats in the post-Cold War environment.[8] Agencies may also consolidate their real property holdings in order to achieve operational benefits. The Department of Homeland Security (DHS), for example, is currently in the process of consolidating personnel from several locations in the Washington, DC, area, into a new headquarters at the West Campus of St. Elizabeth's Hospital—a move which DHS believes will improve communication and coordination across its administrative components.[9] Agencies may also transfer personnel from one location to another in order to reduce costs. The Bureau of Public Debt (BPD), for example, plans to relocate 450 employees from Hyattsville, MD, to

[6] The six building predominant use categories as defined by the Federal Real Property Council are laboratories, hospitals, office space, barracks, family housing, and warehouses.

[7] Federal Real Property Council, *FY2012 Federal Real Property Report: An Overview of the U.S. Federal Government's Real Property Assets*, September 2013, at pg. 11.

[8] U.S. Government Accountability Office, *High-Risk Series: Federal Real Property*, GAO-03-122, January 2003, at pg. 9.

[9] U.S. Government Accountability Office, *Federal Real Property: DHS Has Made Progress, But Additional Actions Are Needed to Address Real Property Management and Security Challenges*, GAO-07-658, June 2007, at pg. 30.

Parkersburg, WV, potentially allowing BPD to realize an estimated $36 million in savings over five years.[10]

When agency personnel are relocated, they leave behind empty space in the buildings their employees once occupied. In some cases, entire properties may no longer be needed by an agency, in which case those properties are designated as *excess*.[11] In other cases, an agency may choose to retain property that it only partially occupies, in which case the property is considered *underutilized*.[12] The frequent shifting of agency staff between buildings has left the government with a substantial amount of excess and underutilized space, which can be costly to maintain. As previously noted, according to a report on federal real property holdings in FY2010, the government's portfolio included 71,000 underutilized buildings and 6,700 excess buildings, which cost a combined $1.66 billion to operate and maintain.[13] Moreover, the number of excess and underutilized buildings is not steadily declining, but fluctuates over time, sometimes increasing by hundreds of properties a year. For example, the government ended FY2008 with 43,360 underutilized and 10,140 excess buildings in its portfolio, but ended FY2009 with 45,190 underutilized and 10,327 excess buildings—a net increase of 2,017 unneeded properties.[14] The ongoing cost of maintaining thousands of properties that are needed only in part, or not at all, is one of the primary reasons the Government Accountability Office (GAO) has included federal real property management on its "high-risk" list since 2003.[15]

"Standard" Disposal Process Can Be Cumbersome and Costly

One reason agencies hold so many unneeded properties is that the real property disposal process can be cumbersome and costly. The steps in the "standard" disposal process are prescribed by statute.[16] Agencies must first offer to transfer properties they do not need (i.e., excess properties) to other federal agencies, which generally must pay market value for excess properties they wish to acquire.[17] Excess properties that are not acquired by federal agencies (known as *surplus properties*) must then be offered to state and local governments, and qualified nonprofits, for use in accomplishing "public purposes" specified in statute, such as creating public parks or providing services to the homeless.[18] Agencies may convey surplus properties to state and local governments, and qualified nonprofits, for public benefit at less than fair market value—even at

[10] U.S. Department of the Treasury, Office of the Secretary, "Treasury Budget Supports Obama Administration's Efforts to Strengthen Economic Growth, Make Government More Efficient," press release, February 13, 2012.

[11] *See* 40 U.S.C. §102(3) (defining *excess property* as "property under the control of a federal agency that the head of the agency determines is not required to meet the agency's needs or responsibilities").

[12] 41 C.F.R. §102-75.50.

[13] *FY2010 Federal Real Property Report*, *supra* note 2, at pg. 6.

[14] Federal Real Property Council, *FY2009 Federal Real Property Report: An Overview of the U.S. Federal Government's Real Property Assets*, September 2010, at pg. 12.

[15] U.S. Government Accountability Office, *Federal Real Property: High-Risk Designation Remains Due to Persistent Management Challenges*, GAO-13-422, February 2013, at pg. 9.

[16] Particular agencies may have express statutory authorization to dispose of particular properties without following the "standard" process. *See infra* "Authority to Lease or Otherwise Convey Real Property."

[17] 40 U.S.C. §§521-528.

[18] 40 U.S.C. §§541-559 *See also* 40 U.S.C. §102(10) (defining *surplus property* as any excess property that the Administrator determines is "not required to meet the needs or responsibilities of all federal agencies").

no cost.[19] Surplus properties not conveyed for public benefit are then available for sale, or are demolished if the property cannot be sold due to its condition or location.[20]

Agencies have consistently argued that these statutory requirements slow down the disposition process, compelling them to incur operating costs for months—sometimes years—while the properties are being screened.[21] Real property officials at the VA have said the McKinney-Vento Act (P.L. 100-77)—which generally mandates that surplus property be screened for use by organizations that assist the homeless—can add as much as two years to the disposal process.[22] Because public benefit conveyance requirements are prescribed by statute, agencies generally may not skip screening, even for surplus properties that could not be conveyed anyway.[23] Statutes pertaining to environmental remediation and historic preservation can also add time to the process. It may take agencies years of study to assess the potential environmental consequences of a proposed disposal, and to develop and implement an abatement plan, as required by law.[24] Similarly, the National Historic Preservation Act requires agencies to plan their disposal actions so as to minimize the harm they cause to historic properties, which may require additional procedures, such as consulting with historic preservation groups at the state, local, and federal levels.[25] Agencies that wish to demolish vacant buildings face demolition and cleanup costs that, at times, exceed the cost of maintaining the property—at least in the short run—which may encourage real property managers to retain a property rather than dispose of it.[26] Further, some agencies have found their disposal efforts complicated by the involvement of stakeholders with competing agendas. The Department of the Interior (DOI) has said that its efforts to dispose of some of its unneeded real property can be complicated by the competing concerns of local and state governments, and historic preservation offices, as well as by political factors.[27]

PPPs as Alternative Means to Develop or Dispose of Property

In an effort to reduce the government's inventory of excess and underutilized properties, committees have held hearings during the 113th Congress on federal real property management and Members have introduced several bills that would reform the disposal process.[28] While many of these proposals have wide scope, there has been specific interest in expanding the use of PPPs. Proponents of PPPs have identified a number of potential benefits of such agreements, including that PPPs may enable agencies to finance real property activities—such as repairs and

[19] *See, e.g.*, 40 U.S.C. §550 (disposal of real property for certain purposes).

[20] 40 U.S.C. §545.

[21] U.S. Government Accountability Office, *Federal Real Property: Progress Made in Reducing Unneeded Property but VA Needs Better Information to Make Further Reductions*, GAO-08-039, September 2008, at pg. 39. The screening process also has certain benefits, but these are outside the scope of this report.

[22] *Id*.

[23] U.S. Government Accountability Office, *Federal Real Property: Progress Made toward Addressing Problems, but Underlying Obstacles Continue to Hamper Reform*, GAO-07-349, April 2007, at pp. 40-41.

[24] U.S. Government Accountability Office, *High-Risk Series: Federal Real Property*, GAO-03-122, January 2003, at pg. 41.

[25] 16 U.S.C. §470.

[26] U.S. Government Accountability Office, *Federal Real Property: Progress Made toward Addressing Problems, but Underlying Obstacles Continue to Hamper Reform*, GAO-07-349, April 2007, at pp. 40-41.

[27] *Id*., at pg. 16.

[28] For more information, see CRS Report R43247, *Disposal of Unneeded Federal Buildings: Legislative Proposals in the 113th Congress*, by Garrett Hatch.

renovations—they do not have the funds to undertake. The risks and limitations associated with PPPs, in contrast, may be less well understood due, in part, to the various legal authorities that agencies rely upon in entering PPPs, and uncertainties regarding the legal requirements to which PPPs are subject.

Potential Benefits of PPPs

PPPs would appear to offer federal agencies numerous benefits, including reduced operating costs; repaired and modernized space; decreased maintenance and repair backlogs; and increased revenue. This is because, regardless of how specific PPPs are structured (see "PPP Structures," below), the contributions of each partner are generally the same: the federal government provides real property—buildings, space within buildings, land, or structures[29]—and the nonfederal partner provides capital for improvements to the property. The real property the government provides is typically underutilized or excess, and may include undeveloped land. These properties are often in suboptimal condition and in need of costly repairs. Their poor condition is due in part to their age—underutilized and excess properties are often among the oldest properties in an agency's portfolio. Many unneeded DOD buildings were originally constructed in the 1940s and 1950s, for example, in response to the military needs of World War II and the Cold War. Similarly, many unneeded facilities held by VA were built to treat soldiers who served in the military many decades ago, including buildings that date back to the Civil War. St. Elizabeth's Hospital, the new headquarters for the Department of Homeland Security (DHS), was built in 1855.

Underutilized and excess properties are also in poor condition because they have not been a priority for reinvestment. Agencies do not have sufficient funds in any given year to meet all of their real property needs, and when comparing the benefits of investing in expensive repairs of aging buildings (e.g., replacing obsolete electrical systems, or repairing roofs that leak), or acquiring new space that can help the agency better fulfill its mission, agencies generally prioritize the latter. With the acquisition of new space, agency personnel move out of older properties, rendering them even less valuable to the agency and less likely to receive needed repairs. As a result, the government holds thousands of properties it does not need and cannot afford to maintain, but which are in poor condition and therefore more difficult to dispose of. It has been estimated, for example, that VA would need to spend about $3 billion to repair the buildings in its portfolio rated in "poor" or "critical" condition—56% of which were vacant or underutilized, and therefore might be candidates for disposal.[30] Not surprisingly, underutilized and vacant properties are often a net cost to the government. Operating expenses for unneeded buildings continue to accrue, even if there are no tenants—and hence no revenue. When there are tenants, aging, inefficient systems are costly to run. Energy costs in older buildings are higher, for example, because such buildings have heating and cooling systems that are several generations old.

Despite these factors, nonfederal partners may see an opportunity to generate a profit, and therefore be willing to invest in a PPP. While underutilized and excess properties are often in poor condition, they may be in desirable locations where rental rates are high. The nonfederal partner

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[29] *Structures* include a range of properties, such as parking lots, bridges, utility systems, storage facilities, and harbors. For more information, see the Federal Real Property Council's FY2010 Federal Real Property Report, Appendix C, at http://www.gsa.gov/graphics/ogp/FY_2010_FRPP_Report_Final.pdf.

[30] U.S. Government Accountability Office, *Federal Real Property: Progress Made in Reducing Unneeded Property, but VA Needs Better Information to Make Further Reductions*, GAO-08-939, September 2008, at pg. 5.

may renovate the property and be able to recoup its costs through subleasing the improved space. Similarly, the nonfederal partner may see opportunities in the market for a particular type of space which it could provide through construction or renovation. There might be a strong demand for hospital space in a local market, for example, and a nonfederal partner might conclude that it would be a relatively low-risk investment to construct a new medical facility on undeveloped federal land in that area. In other cases, a nonfederal partner might have expertise in a particular type of renovation, such as installing energy efficient wastewater systems, and enter into an agreement that pays for the costs of such renovations through the savings in operating costs. The nonfederal partner might also be able to renovate unneeded space in an older building and make it more mission-effective for the agency that holds it. For example, an agency may not have the funds to upgrade the electrical system in an underutilized building in order to take advantage of new technology. A nonfederal partner might upgrade the electrical system in the entire building as part of its renovation and retain the rights to sublease the unoccupied space, while sharing the revenue with the landholding agency. In short, nonfederal partners with access to capital and real property expertise are often able to find ways to monetize assets that the government cannot, particularly under current fiscal constraints.

Potential Risks and Limitations

Despite providing numerous potential benefits to federal agencies and their partners, PPPs are not without their risks and limitations. These risks and limitations are, however, typically less discussed than the potential benefits of PPPs, and can seem somewhat more abstract than the benefits. This is partly because, as discussed below, federal agencies currently rely upon various legal authorities in entering PPPs, and there can be some uncertainty as to whether particular PPPs are subject to specific legal requirements. Relatedly, there are fewer "real world" illustrations of these risks and limitations at the federal level, because federal agencies' use of PPPs for purposes of real property management has, to date, been fairly limited, particularly as compared to that of state and foreign governments.[31] Thus, this report generally discusses the potential risks and limitations of PPPs below, in the context of either the "Legal Framework as to PPPs" or "Considerations for Congress."

PPP Structures

PPPs can be structured in many ways, depending, in part, upon the legal authorities under which agencies enter and perform such agreements. However, despite this variability, PPPs—and particularly PPPs formed pursuant to agencies' authority to enter long-term leases of real property—generally share certain key elements. These elements, and examples of common PPP structures, are discussed below, as a way of illustrating the types of actions that agencies may wish to take in entering or performing a PPP and, thus, paving the way for a discussion of the "Legal Framework as to PPPs."

[31] *See, e.g.*, Fernanda Kellner and Oliveira Palmero, Are Share-in-Savings Contracting and Public-Private Partnerships Capable of Challenging Traditional Public Procurement Processes? 38 *Pub. Contr. L.J.* 633 (2009) (comparing the legal frameworks for and use of PPPs by the Brazilian and U.S. governments); R. David Walker, Enabling the Privatizing of Toll Roads: A Public-Private Partnership Model for New Jersey, 6 *Rutgers J. L. & Pub. Pol'y* 623 (2009) (use of PPPs by states).

Key Elements of a PPP

The process of forming a PPP typically begins when an agency identifies a property that could provide greater benefits to the government if redeveloped or renovated. The agency then works with a nonfederal partner to determine whether a redevelopment strategy would provide the agency with the benefits it seeks, and the nonfederal partner with financial returns sufficient to cover the risk of investing in the property. If an agreement is reached, the partners typically enter into a master ground lease, which formally establishes the terms of the partnership, including (1) the length of the master ground lease; (2) the redevelopment strategy; and (3) the method of financing the redevelopment. Taken together, these three elements constitute the structure of a PPP. Typically, the master ground lease is a long-term lease of 50 years or more. A long lease is preferable to nonfederal partners because it provides them with more time to recoup their investment and generate a profit. Generally, nonfederal partners seek a 15% return on their investment, sometimes referred to as the *internal rate of return* (IRR). If the market is not strong or the costs of the improvements are high—rendering a 15% IRR less likely—then the partner may want a lease that exceeds 50 years as one way to mitigate the increased risk.

The redevelopment strategy and the method of financing are closely linked. The former refers specifically to the work that the nonfederal partner agrees to undertake, while the latter is a combination of the revenue generated from the improved space and, in some cases, savings realized by reduced operating costs. A nonfederal partner might agree to renovate and modernize an aging VA medical center, for example, and, in return, obtain the right to construct and lease office space on the unused portion of the land. In this example, renovation and new construction are the redevelopment strategy; and the work is financed by revenue generated from leasing new office space on underutilized land.

Financial benefits to the government may also include a division of property cash flows. Under some PPPs, the nonfederal partner leases space from an agency, renovates that space, and subleases it at a rate higher than the rate it pays to the agency. The rental payments the nonfederal partner receives are referred to as *operating income*. In order for the nonfederal partner to make a profit, however, the sublease must generate sufficient income to exceed not only the cost of the lease, but also operating costs and payments on debt incurred to finance the renovation. The amount that remains after deducting lease payments, operating costs, and repayment of debt from operating income is defined as the *property cash flow*. Typically, the nonfederal partner takes a "preferred return" from the property cash flow, then divides the remaining revenue—known as the *net cash flow*—into two shares, one of which the nonfederal partner keeps, and the other of which it pays to the agency. The government has two revenue streams in this scenario: (1) lease payments, and (2) net cash flow. The amount that the government receives from net cash flows and the amount the nonfederal partner keeps are typically spelled out in the PPP agreement.

Examples of Common PPP Structures

There are many varieties of PPP structures, and the legal and policy ramifications of each are unique. However, several common redevelopment and financing structures can be identified.

- A federal agency holds underutilized land that includes four nearly vacant warehouses. The property is in a market where there is a strong demand for federal office space. The agency enters a PPP under which a developer leases the property and constructs a new office building on the unused portion of the land. The developer subleases the warehouses and the new office space, which is partially occupied by the lessor (i.e., the federal agency) and partially leased by other federal agencies.

- A federal agency owns a historic building that is unoccupied and in disrepair. The property is in a desirable location, and public and private entities are expected to be interested in acquiring space. A developer leases the property and renovates it in accordance with historic preservation requirements. The first floor is subleased by retailers, and the city government subleases the office space on the floors above.
- A federal agency owns land with a deteriorating office building and a small parking lot. The property is in a market where there is moderate to strong demand for private sector office space. The developer demolishes the existing building and constructs a larger, modern office building in its place, which is partially occupied by the lessor (i.e., the federal agency) and backfilled by businesses. The developer also replaces the parking lot with a garage that has space for tenants and for public parking.
- A federal agency holds family housing units that are in need of repair. The agency wishes to retain all of the units due to a shortage of space. The developer repairs the existing housing units and is able to add new units on underutilized land owned by the same agency.
- A federal agency's utility costs are well above average due to antiquated heating and cooling systems. A business installs new, more energy efficient equipment. In return, the business is repaid for the cost of the equipment and installation, and receives 50% of the energy savings.
- A federal agency wants to add an annex to a multi-use facility it owns. A developer builds the annex in exchange for several acres of excess property. The value of the excess land is roughly equal to the cost of constructing the annex.

In-Kind Benefits

While the benefits obtained by agencies in the above examples generally consist of lease payments from the developer and monetary savings through reduced utility costs and maintenance backlogs, agencies may also receive "in-kind" benefits. As a rule, agencies are required to obtain "fair consideration"—generally equivalent to fair market value—in exchange for selling or leasing real property.[32] However, agencies may accept non-monetary benefits as consideration when expressly authorized by statute to do so. In-kind consideration can include the provision of goods and services to the agency, or its personnel or clients. Examples of in-kind consideration are illustrated below.

- A federal agency wants new transitional housing for the clients it serves. A local government agrees to build the new housing units on vacant land the agency owns. The local government leases the land from the agency and uses part of the housing

[32] *Consideration* refers to a performance or return promise that is the inducement to enter a contract, and a lease can be seen as a type of contract. *See infra* note 87 and accompanying text. A legally binding contract requires, among other things, consideration from both parties. Federal law generally requires that consideration for leases of federal real property be in cash. *See* 40 U.S.C. §1302 ("Except as otherwise specifically provided by law, the leasing of buildings and property of the Federal Government shall be for a money consideration only. The lease may not include any provision for the alteration, repair, or improvement of the buildings or property as a part of the consideration for the rent to be paid for the use and occupation of the buildings or property.").

complex for its own homeless programs. As part of the agreement, the federal agency's clients get priority placement for housing.

- A federal agency needs renovated office space. A developer agrees to lease the building, renovate it, and sublease space back to the agency. As part of the agreement, agency personnel are allowed to use the child care center in the renovated building at reduced rates.
- A federal agency has unused space in a lightly utilized, deteriorating office building. It leases a majority of the space in the building and permits the lessee to offset its rent obligations by $1 million in exchange for building a water tower that could be used by all of the building's tenants.

Legal Framework as to PPPs

While many PPPs share the same key elements, discussed above (see "Key Elements of a PPP"), there is considerable variation in the legal authorities under which federal agencies enter and perform PPPs. This is largely because federal law is generally silent as to PPPs, *per se*, particularly PPPs for purposes of improving or disposing of federal real property.[33] Absent a statute that generally authorizes the formation of PPPs, agencies seeking to enter such agreements rely upon their authority to take the specific actions necessary to form and perform the contemplated agreement (e.g., lease property for a specific period of time, receive consideration in-kind). However, because individual agencies have differing authority to take such actions, the nature of the PPPs they enter can vary. Relatedly, because agencies must rely on other authorities—such as their authority to enter certain long-term procurement contracts—in forming PPPs, it can sometimes be unclear whether particular legal requirements that generally pertain to agencies' exercise of these authorities apply to their PPPs.

Legal Authority to Enter PPPs

Unlike some state laws, federal law does not define the term *public-private partnership*,[34] or, with certain narrow exceptions,[35] authorize agencies to enter PPPs, *per se*.[36] Instead, those agencies

[33] In a number of instances, federal law uses the term *public-private partnership* to refer to agreements that do not involve the federal government, or real property. *See, e.g.*, 20 U.S.C. §1153 (calling for federal grantees to "demonstrate substantial public and private support" for the operation of certain facilities by implementing public-private partnerships between state or local public entities and private entities); 22 U.S.C. §2151b (establishment and operation of public-private partnerships within certain countries affected by the HIV/AIDS pandemic).

[34] Maryland, for example, defines *public-private partnership* to mean a "sale or lease agreement ... under which ... [a] private entity assumes control of the operation or maintenance of an existing State facility; or ... constructs, reconstructs, finances, or operates a State facility or a facility for State use and will collect fees, charges, rents, or tolls for the use of the facility." MD. CODE ANN., TRANSP. §4-406(a)(5). Connecticut relies upon a similar definition that also requires the state's partner to fund a minimum percentage of the project's cost. *See* CONN. GEN. STAT. §4-255(a)(3).

[35] *See, e.g.*, Southeast Federal Center Public-Private Development Act of 2000, P.L. 106-407, 114 Stat. 1758 (Nov. 1, 2000) (authorizing the General Services Administration (GSA) to enter into leases, contracts, cooperative agreements, limited partnerships, joint ventures, trusts, limited liability company agreements, and other agreements to provide for the acquisition, construction, rehabilitation, operation, or use of a specific site within the District of Columbia).

[36] *See, e.g.*, ARIZ. REV. STAT. §41-2559(A) (stating that specified agencies "may enter into public-private partnership contracts); TENN. CODE ANN. §54-1-136(a) ("The department of transportation is authorized to undertake public-private partnerships with transportation fuel providers ... to install a network of refueling facilities, including storage tanks and fuel pumps, dedicated to dispensing biofuels, including, but not limited to, ethanol (E85) and biodiesel (B20).").

that have, to date, entered agreements that could be characterized as PPPs have done so under their authority (1) to lease, otherwise convey, or permit the use of federal real property; and (2) to enter procurement contracts.

A lease can be seen as a type of contract, whereby the owner of a particular property grants another party the right to use the property for a certain period of time.[37] However, under federal law, a lease of real property is generally not a procurement contract. The Federal Acquisition Regulation (FAR) defines a *procurement contract* as a "mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them"; and *supplies*, to mean "all property except land or interests in land."[38] Thus, contracts whereby the federal government acquires leasehold interests in real property are excluded from the standard definition of *procurement contract*. Leases whereby the federal government disposes of interests in land are similarly excluded because they do not involve a "seller" furnishing supplies or services to the government.[39]

Authority to Lease or Otherwise Convey Real Property

Because the opportunity to acquire or use federal real property, and enjoy certain proceeds therefrom, is typically what motivates prospective partners to enter PPPs with the government, federal agencies have historically relied upon their authority to lease or otherwise convey real property under their jurisdiction or control when entering PPPs.[40] Many agencies have such authority, notwithstanding the fact that GSA is commonly described as the federal government's "landlord,"[41] and, as a rule, is responsible for the leasing and disposal of federal real property.[42] Congress has enacted a number of statutes that authorize specific agencies, acting on their own and without the involvement of GSA, to lease certain real property for particular purposes.[43] For example, DOD has authority to lease nonexcess real property under its control for five or more years in exchange for the maintenance, repair, or environmental restoration of the property or facilities.[44] This and other examples are described in **Table 1**. Commentators sometimes describe

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[37] *See infra "*Applicability of Requirements Pertaining to "Contracts" or "Public Works"."

[38] 48 C.F.R. §2.101.

[39] *See, e.g.*, Arcus Props., LLC, B-406189 (Mar. 7, 2012) (describing the transfer of certain federal real property to a nonfederal entity as a "non-FAR real estate transaction").

[40] The terms *convey* and *conveyance* are not defined for purposes of federal property management law. However, these terms are generally understood to encompass any transfer of ownership or interest in real property by a deed, lease, or mortgage. *Jurisdiction* and *control* are similarly undefined for purposes of federal property management law, but *jurisdiction* typically refers to the power or right to exercise authority, while *control* refers to power over something.

[41] *See, e.g.*, Gen. Servs. Admin., Getting Started Using GSA, *available at* http://www.gsa.gov/portal/content/104772?utm_source=OCM&utm_medium=print-radio&utm_term=HDR_6_Help_new&utm_campaign=shortcuts (last accessed: Oct. 19, 2013) ("GSA is the government's landlord, providing office and other workspace services for the federal government.").

[42] *See, e.g.*, 40 U.S.C. §541 ("Except as otherwise provided in this subchapter, the Administrator of General Services shall supervise and direct the disposition of surplus property in accordance with this subtitle."); 40 U.S.C. §584 ("[T]he Administrator ... may assign or reassign space for any executive agency in any Federal Government-owned or leased building."); 40 U.S.C. §3302 ("Only the Administrator ... may construct a public building.").

[43] Such conveyances are generally not subject to the regulations governing the disposition of federal real property prescribed by GSA. *See* 41 C.F.R. §102-75.110 ("Transfers of real property must be made only under the authority of Title 40 of the United States Code, unless the independent authority granted to such agency specifically exempts the authority from the requirements of Title 40."). They are also generally not subject to GSA's regulations regarding its own acquisition of leasehold interests in real property. *See infra* note 82 and accompanying text.

[44] 10 U.S.C. §2667. *See supra* note 11 for the definition of *excess property*.

agencies that have statutory authority to enter such "long-term" leases as having enhanced use lease (EUL) authority.[45] However, a number of statutes grant agencies authority that is tantamount to EUL authority (i.e., authority to lease federal real property to public or private entities for a number of years in exchange for cash or in-kind consideration), but do not use the term "enhanced use lease."[46]

Relatedly, some agencies also have authority to convey federal real property by means other than leases, or to permit certain uses of such property, that they could potentially rely upon in entering public-private partnerships. For example, Section 111 of the National Historical Preservation Act (NHPA), as amended, authorizes federal agencies to

> lease an historic property owned by the agency to any person or organization, or exchange any property owned by the agency with comparable historic property, if the agency head determines that the lease or exchange will adequately insure the preservation of the historic property.[47]

Section 111 applies government-wide. However, some agencies have similar authority to exchange one real property for another,[48] or give away certain interests in real property.[49] Other agencies have authority to permit nonfederal entities to use their real property or facilities for a fee,[50] or subject to certain conditions. The President, for example, may permit nonfederal entities to construct and operate international bridges, and require that these entities provide facilities or services to federal agencies for free as a condition of their permit.[51]

Authority to Procure Goods or Services

Procurement contracts are generally not as well suited to the formation and performance of PPPs as leases, because procurement contracts typically have shorter durations than leases,[52] and

[45] *See, e.g.*, U.S. Government Accountability Office, *Federal Real Property: Authorities and Actions Regarding Enhanced Use Leases and Sale of Unneeded Real Property*, GAO-09-283R, February 2009; David S. Schuman, Space Act Agreements: A Practitioner's Guide, 34 *J. of Space Law* 277 (2008) (discussing NASA's "EUL authority").

[46] *See, e.g.*, 51 U.S.C. §20145 (authorizing NASA to lease any non-excess real property under its jurisdiction to any person or entity for an unspecified term, and to accept in-kind consideration for leases entered into for the purpose of developing renewable energy production facilities).

[47] P.L. 89-665, 80 Stat. 915 (Oct. 15, 1966) (codified, as amended, at 16 U.S.C. §§470 *et seq*.). *Historic property* means "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register." 16 U.S.C. §470w(5).

[48] *See, e.g.*, 10 U.S.C. §18240 (authorizing the secretaries of military departments to acquire facilities needed to satisfy military requirements for a reserve component by exchanging an existing facility with an executive agency, the United States Postal Service, a State or local government, local authority, or private entity).

[49] *See, e.g.*, 38 U.S.C. §2404 (authorizing VA to convey to any state, or political subdivision thereof, in which a national cemetery is located, all right, title, and interest of the United States in and to any government-owned or -controlled approach road to such cemetery, provided certain conditions are met).

[50] *See, e.g.*, 51 U.S.C. §50504 (authorizing federal agencies to allow nonfederal entities to use their space-related facilities provided certain conditions are met (e.g., the facilities will be used to support commercial space activities)).

[51] 33 U.S.C. §§535-535*i*. *See also* Buffalo & Fort Erie Public Bridge Auth. v. United States, 106 Ct. Cl. 731, 744 (1946) (government permitted to use facilities associated with bridge for free for immigration inspections); Julián Aguilar, Dispute over Border Security Could Cause Delay for Bridge to Mexico, *New York Times*, Oct. 20, 2013, *available at* http://www.nytimes.com/2013/10/20/us/dispute-over-border-security-could-cause-delay-for-bridge-to-mexico.html?_r=0 (permit calling for the bridge builder and operator to relocate certain machinery).

[52] The prototypical federal procurement contract is for one year's requirements of goods or services, but its term could potentially be extended for up to five years through the incorporation and exercise of options provided for in the (continued...)

generally contemplate the agency paying the contractor for maintaining or operating federal real property.[53] However, there are certain provisions of federal law which authorize "long-term" procurement contracts that provide for the contractor to finance performance and then share in any savings that the agency may realize as a result of the contractor's performance. Perhaps the best known of these is Section 801 of the National Energy Conservation Policy Act (NECPA) of 1978, as amended, which permits agencies to enter long-term contracts "solely for the purpose of achieving energy savings and benefits ancillary to that purpose."[54] Such energy savings performance contracts (ESPCs) may, "notwithstanding any other provision of law, be for a period not to exceed 25 years," and

> shall provide that the contractor shall incur costs of implementing energy savings measures, including at least the costs (if any) incurred in making energy audits, acquiring and installing equipment, and training personnel, in exchange for a share of any energy savings directly resulting from implementation of such measures during the term of the contract.[55]

In other words, Section 801 of NECPA contemplates third parties financing the costs of modifications to the infrastructure of federal buildings in exchange for a share in any savings in operating costs that may result from these modifications. Previously, federal agencies had similar authority to enter into "share-in-savings" contracts for information technology, which provided for the contractor to share in any savings acquired through "solutions" that it provided for improving the agency's mission-related or administrative processes, or accelerating the achievement of agency missions.[56] However, share-in-savings authority expired in 2005.[57]

Legal Requirements as to PPPs

Federal agencies' general practice of relying on various leasing authorities when forming PPPs can lead to questions regarding the legal requirements to which such partnerships may be subject. Some have wondered, for example, whether agencies must issue solicitations for proposed PPPs and whether partners are competitively selected;[58] as well as whether workers on partnership projects must be paid locally prevailing wages and fringe benefits under the Davis-Bacon and

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(...continued)

contract. *See* 48 C.F.R. §17.103. However, agencies do have some authority to enter into multiyear procurement contracts—often of five years' duration—in certain circumstances. *See, e.g.*, 10 U.S.C. §§2306b-2306c (procurements of defense agencies); 41 U.S.C. §3903 (procurements of civilian agencies).

[53] *See, e.g.*, 48 C.F.R. §2.101 (defining *acquisition* to mean "the acquiring by contract *with appropriated funds* of supplies or services (including construction) by and for the use of the Federal Government") (emphasis added).

[54] P.L. 95-619, 92 Stat. 3206 (Nov. 9, 1978) (codified, as amended, in relevant part, at 42 U.S.C. §8287). *See infra* note 65 and accompanying text for the definition of *energy savings* for purposes of Section 801 of NECPA.

[55] 42 U.S.C. §8287(a)(1).

[56] 10 U.S.C. §2332 (procurements of defense agencies); E-Government Act of 2002, P.L. 107-347, tit. II, §210(b), 116 Stat. 2934 (Dec. 17, 2002) (procurements of civilian agencies).

[57] Agencies do not appear to have made extensive use of their authority to enter share-in-savings contracts. *See* U.S. Government Accountability Office, *Federal Contracting: Share-in-Savings Initiative Not Yet Tested*, GAO-05-736, July 2005, *available at* http://www.gao.gov/new.items/d05736.pdf (noting various reasons for agencies' non-use of this authority).

[58] *See, e.g.*, Parkridge 6 LLC v. U.S. Dep't of Trans., No. 1:09cv1312, 2010 U.S. Dist. LEXIS 34182 (E.D. Va. 2010) (plaintiffs alleging, among other things, that various government entities violated the Virginia Public-Private Partnership Act by "engineering a sole-source noncompetitive contract with a private entity" without requiring that entity to put up capital or share risks, and seeking to have the project rebid on a competitive basis).

related Acts.[59] In some cases, the statute that authorizes the lease also answers some of these questions by imposing specific requirements upon agencies' use of its leasing or other authorities (e.g., competitive selection of vendors). As previously discussed, the FAR[60]—which people generally look to for the requirements pertaining to federal contracts—does not apply to leases of real property, because the FAR governs procurement contracts, and leases of real property are not procurement contracts.[61] However, some agencies have adopted regulations which impose requirements analogous to those of the FAR upon their own acquisitions of leasehold interests in real property. Also, some federal statutes implemented, in part, through the FAR could potentially be found to apply to PPPs on the grounds that a lease is a contract,[62] or on similar grounds. In yet other cases, federal law does not appear to provide any guidance on certain questions likely to arise in the context of PPPs (e.g., selection of projects), or on the use of specific terms that potential partners are likely to seek in any partnership agreement (e.g., non-compete provisions). Some states, in contrast, have comprehensive guidance that addresses these and other requirements as to the PPPs of state agencies or local governments.

This section discusses various legal requirements that can apply to PPPs, including requirements deriving from (1) the specific statutes authorizing leases of federal real property or other actions that agencies rely upon in forming PPPs; (2) agency regulations that could be similar to the FAR; and (3) generally applicable statutory provisions pertaining to "contracts" or "public works." The section also discusses situations where federal law appears to be silent on particular issues relevant to the formation of PPPs (e.g., selection of projects, non-compete agreements). It similarly surveys the range of requirements addressed in certain—arguably comprehensive—state laws regarding PPPs to illustrate the various provisions that could potentially be made regarding agencies' formation and performance of PPPs.

Statutes Authorizing Leases or Other Agency Actions

As previously noted, agencies frequently rely upon specific statutes authorizing them to lease or otherwise convey real property, enter energy savings performance contracts, or take other actions when entering and performing PPPs. There are a number of such statutes. Few of these statutes apply government-wide, and those that do often apply only to specific properties, or for specific purposes. For example, as previously noted, agencies may rely on the authority of Section 111 of the NHPA,[63] to lease historic property only in order to "adequately insure" its preservation. Similarly, agencies may enter long-term contracts under the authority of Section 801 of the NECPA, only "for the purpose of achieving energy savings" and ancillary benefits.[64] Further, NECPA defines *energy savings* specifically to mean reductions in the cost of energy, water, or

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[59] For more on the requirements of the Davis-Bacon Act, see *infra* notes 95 to 100 and accompanying text.

[60] For more information on the FAR, see generally CRS Report R42826, *The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions*, by Kate M. Manuel et al.

[61] *See supra* note 38 and accompanying text.

[62] Whether the government is the lessor or the lessee of the property could potentially play a role in determining the applicability of particular requirements. *See, e.g.*, Res. Conservation Grp. LLC v. United States, 597 F.3d 1238 (Fed. Cir. 2010) (finding that certain requirements pertaining to contracts to acquire goods or services were inapplicable, because the Naval Academy sought to dispossess itself of an interest in real property, not acquire one, when it leased the land).

[63] 16 U.S.C. §470h-3.

[64] 42 U.S.C. §8287(a)(1).

wastewater treatment in existing federally owned buildings or facilities as the result of specified actions (e.g., improvement, lease or purchase of operating equipment), among other things.[65]

More commonly leasing and other authorities pertain to individual agencies and, often, to specific properties and purposes, as the examples in **Table 1** illustrate. Such agency-specific statutes may regulate certain aspects of any PPPs entered by the agency, most commonly (1) the duration of the agreement;[66] (2) the type[67] and amount[68] of consideration received by the agency; (3) the terms under which conveyances may be made to different types of partners (e.g., state and local governments as opposed to commercial entities);[69] and (4) the retention and use of any funds received by the agency as a result of the agreement.[70] Other guidance sometimes appears in statutes—such as guidance regarding the selection of projects and partners,[71] the terms and conditions of agreements,[72] and whether agencies must notify Congress or the public of proposed or finalized agreements[73]—but with less frequency. Conversely, in some cases, statutes expressly authorize agencies to take certain actions vis-à-vis real property "notwithstanding any other provision of law,"[74] or on such terms and conditions as the agency may determine.[75]

[65] 42 U.S.C. §8287c(2). *See* Appeal of Honeywell Int'l, Inc., No. 57779, 2013-1 B.C.A. ¶ 35,380 (Aug. 7, 2013) (finding, among other things, that the challenged contractual arrangement was void because proceeds from the sale of renewable energy certificates do not constitute *energy savings* under this definition). For more on the *Honeywell* decision and the meaning of *energy savings* for purposes of Section 801 of NECPA, see CRS Legal Sidebar, *Contract Board Decision Could Change the Way That Federal Agencies Structure Energy Savings Performance Contracts*, by Brandon J. Murrill, *available at* http://www.crs.gov/legalsidebar/details.aspx?ProdId=739&source=FeatureTopic.

[66] *See, e.g.*, 10 U.S.C. §2667 (authorizing leases of non-excess real property for five or more years); 38 U.S.C. §§8161-8169 (authorizing enhanced use leases of up to seventy-five years for purposes of "supportive housing").

[67] 51 U.S.C. §20145 (generally requiring that NASA receive cash consideration for leases of non-excess real property, but permitting it to accept in-kind consideration for leases for developing renewable energy production facilities).

[68] *Compare* 10 U.S.C. §2854a (consideration equivalent to the fair market value of the property) *with* 38 U.S.C. §8201 (leases "for such consideration and under such terms and conditions as [VA] deems appropriate").

[69] *See, e.g.*, 10 U.S.C. §18240 (exchanges of certain facilities under the control of military departments with other federal agencies, the United States Postal Service, or a State, local government, or local authority); 51 U.S.C. §50913 (encouraging the acquisition by state governments of launch or reentry property that is excess or otherwise not needed).

[70] *See, e.g.*, 38 U.S.C. §§8162-8163, 8165 (any funds remaining after the deduction of an amount sufficient to pay for expenses incurred in connection with the lease are to be deposited in a specified fund); 51 U.S.C. §20145 (NASA may use any cash consideration received to cover its full costs in connection with the lease).

[71] *See, e.g.*, 38 U.S.C. §316 (VA authorized to lease and lease-back real property for purposes of the relocation of regional offices and medical centers, but such authority may be used "at no more than seven locations").

[72] *See, e.g.*, 10 U.S.C. §2667 (lease entered into under this authority may give the lessee the first right to buy the property if the lease is revoked to allow the United States to sell the property); 51 U.S.C. §30303 (authorizing the construction of facilities for use in tracking and data relay satellite services on government-owned lands, so long as the contract includes a provision whereby the government may acquire title to the facilities when the contract expires).

[73] *See, e.g.*, 38 U.S.C. §§8164-8165 (VA to notify congressional committees of its intent to dispose of property subject to an enhanced use lease not less than 45 days in advance, and publish a notice in the *Federal Register*).

[74] *See, e.g.*, 38 U.S.C. §316(b) (authorizing VA, notwithstanding any other provision of law, to lease, with or without compensation, for a period of up to 35 years, certain property under VA's jurisdiction).

[75] *See, e.g.*, 38 U.S.C. §8201 (authorizing leases "for such consideration and under such terms and conditions as [VA] deems appropriate").

Table 1. Tabular Comparison of Selected Leasing Authorities

	10 U.S.C. §2667	10 U.S.C. §2812	38 U.S.C. §2412	38 U.S.C. §§8161-8169
Agency	DOD	DOD	VA	VA
Properties	Non-excess real property under DOD's control that is not presently needed for public use	Military installations under DOD's jurisdiction	"Undeveloped land," or any "unused" or "underutilized" facilities, which are part of the National Cemetery Administration	Property under VA jurisdiction or control
Purposes	Maintenance, repair, or environmental restoration of the property or facilities	Development of troop housing or energy production facilities, utilities, child care centers, and certain other facilities	Maintenance, protection, or restoration of the property	Development, maintenance, and operation of "supportive housing"
Maximum lease term	5 years (or longer, if a longer period will promote the national defense or be in the public interest)	32 years	10 years	75 years
Considera tion	Cash or in-kind, in an amount that is not less than fair market value, as determined by the Secretary	Not directly addressed in statute[a]	Leases to public or nonprofit organizations may provide for in-kind consideration	VA may enter leases without receiving consideration; however, any consideration must be cash at "fair value" as determined by Secretary
Terms for different types of partners	Certain unique terms and conditions apply when community support facilities and services are involved	Not directly addressed in statute[a]	Certain unique conditions apply when the lessee is a public or nonprofit organization	Not directly addressed in statute[a]
Retention and use of proceeds	Proceeds are generally deposited in a specific account in the Treasury, and are available, in such amounts as provided in appropriations acts, for specified purposes (e.g., construction)	Not directly addressed in statute[a]	Proceeds from lease of land or buildings under 38 U.S.C. §2412, and certain other funds, are deposited in a specified fund in the Treasury, and are available until expended to cover costs incurred for national cemetery operations	Funds received under an enhanced used lease remaining after the deduction of certain expenses pertaining to such leases are deposited in the VA Medical Care Collections Fund
Selection of partners	Lessees generally must be competitively selected (with narrow exceptions)	Not directly addressed in statute[a]	Not directly addressed in statute[a]	Secretary may select lessees using "such selection procedures as [he] considers appropriate"
Lease terms	Lease must generally permit the Secretary to revoke it at any time, and may grant the lessee first right to buy the property if the lease is revoked. Lease may	Lease must provide that, at the end of the term, title to the facility shall vest in the United States, and include terms and conditions "necessary or desirable to	Not directly addressed in statute[a]	Lease may not provide for any acquisition, contract, demonstration, exchange, grant, incentive, procurement, sale, other transaction authority, service agreement, use

	10 U.S.C. §2667	10 U.S.C. §2812	38 U.S.C. §2412	38 U.S.C. §§8161-8169
	not provide for a leaseback by the Secretary with an annual payment in excess of $500,000	protect [U.S.] interests." Lease must also condition obligation to pay upon availability of appropriations		agreement, lease, or lease-back by VA or the federal government
Notice to Congress & public	Not directly addressed in statute[a]	Lease may not be entered until DOD submits a justification and economic analysis to Congress, and a certain period of time has passed	VA must give "appropriate" public notice of intention to enter lease in general circulation newspaper in community where lands or buildings are located	VA must conduct public hearing in community where the property is located before entering into lease, and notify Congress, among other things
Other provisions	Interest of lessee may be taxed by State or local governments	n/a	n/a	VA may not enter lease unless Office of Management & Budget certifies in writing that it complies with these requirements. Improvements & operations on land subject to taxation

Source: Congressional Research Service, based on various sources cited in **Table 1.**

a. Other provisions of law, beyond those authorizing the lease or other conveyance, could potentially be found to apply. *See infra* "Applicability of Requirements Pertaining to "Contracts" or "Public Works"."

FAR Generally Inapplicable, but Regulations Could Impose FAR-Like Terms

The FAR is arguably the best known feature of federal contracting. Even those who know little else about federal contracting are generally aware that the FAR exists, imposes specific requirements on agencies, and prescribes "standard" terms for inclusion in certain contracts. The FAR provides specific—often detailed—guidance on a range of topics, from planning acquisitions and conducting market research for purposes of identifying potential suppliers, to tendering and acceptance of performance, to contract payments and close-out. For example, the FAR requires agencies to make information about proposed contract actions available on FedBizOpps (https://www.fbo.gov/),[76] and imposes limits upon agencies' ability to award contracts noncompetitively based on *unsolicited proposals* (which are particularly likely in the context of public-private partnerships).[77] The FAR also establishes the framework whereby agencies comply with the statutory requirement to "Buy American" when procuring supplies and construction services,[78] and prescribes the use of specific contract terms granting the government the right to terminate contracts for default or the government's convenience.[79] However, as previously discussed, because the FAR only governs the acquisition of supplies and services and defines *supplies* to exclude interests in real property, its applicability to many federal agency

[76] *See* 48 C.F.R. §5.201(a).

[77] *See generally* 48 C.F.R. Subpart 15.6. An *unsolicited proposal* is "a written proposal for a new or innovative idea that is submitted to an agency on the initiative of the offeror for the purpose of obtaining a contract with the Government, and that is not in response to a request for proposals." 48 C.F.R. §2.101.

[78] *See generally* 48 C.F.R. Subparts 25.1 and 25.2.

[79] *See generally* 48 C.F.R. Part 49.

PPPs is limited.[80] Only where an agency relies on its authority to enter a procurement contract—such as an ESPC—in forming a PPP will the FAR typically apply.[81]

On the other hand, there could potentially be cases where the FAR itself does not apply, but the agency has imposed certain requirements like those provided for in the FAR upon itself through the promulgation of regulations, or as terms of its contracts. Perhaps the most notable example of this involves the regulations governing GSA's own acquisition of leasehold interests in real property.[82] These regulations could potentially come into play in certain PPP arrangements, and frequently require GSA to comply with the FAR, absent exceptional circumstances. For example, these regulations require GSA to include "provisions or clauses that are substantially the same as the FAR provisions and clauses" regarding contract disputes in its leases.[83] The regulations similarly require that GSA generally obtain "full and open competition" through the use of "competitive procedures" when awarding contracts to obtain leasehold interests in real property,[84] and that GSA contracting officers comply with the FAR when requiring oral presentations for acquisitions of leasehold interests.[85] It is important to note, however, that GSA's regulations regarding the acquisition of leasehold interests in real property do not parallel the FAR in all ways, and other agencies may not have similar regulations regarding the acquisition or conveyance of leasehold interests in real property under their own governing statutes.

Applicability of Requirements Pertaining to "Contracts" or "Public Works"

In some cases, other statutes—beyond those that authorize the lease, conveyance, or other action that the federal agency took in entering the PPP—could impose certain requirements upon agencies' partnership activities. Often, these are statutes which are implemented, in part, through the FAR, but which could be construed as applicable outside the procurement context because they refer to "contracts" or "public works." How particular PPP projects are structured can also help determine the applicability of such requirements.[86]

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[80] *See supra* note 38 and accompanying text.

[81] *See generally* 48 C.F.R. §23.205.

[82] *See generally* 48 C.F.R. Subpart 570.1. These regulations are part of the General Services Acquisition Regulation (GSAR) and thus apply only to GSA, and only in cases where GSA is the lessee. *See* 48 C.F.R. §501.101(a) ("The ... GSAR contains agency acquisition policies and practices, contract clauses, solicitation provisions, and forms that control the relationship between GSA and contractors and prospective contractors."); 48 C.F.R. §570.101. GSA also has regulations, codified in Title 41 of the *Code of Federal Regulations,* regarding the disposition of real property. However, these regulations generally do not apply to leases or other conveyances of real property authorized under specific statutes. *See generally* 41 C.F.R. § § 102-75.110 ("[T]he provisions of this section shall not apply to transfers of real property authorized to be made ... by any special statute that directs or requires an Executive agency to transfer or convey specifically described real property in accordance with the provisions of that statute.").

[83] 48 C.F.R. §570.701(a).

[84] *See* C.F.R. §570.104 ("Unless the contracting officer uses the simplified procedures in subpart 570.2, the competition requirements of FAR part 6 apply to acquisition of leasehold interests in real property.").

[85] *See* 48 C.F.R. §570.107 ("The contracting officer may require oral presentations for acquisitions of leasehold interests in real property. Follow the procedures in FAR 15.102.").

[86] The jurisdiction in which the project is performed could potentially also help to determine the outcome in such cases. For example, subcontractors on federal construction contracts cannot maintain *mechanic's liens*—which are legal devices commonly used to secure payment on private construction projects—against federal property because the government has not waived sovereign immunity as to such claims. *See, e.g.*, F.D. Rich Co. v. United States for Use of Indust. Lumber Co., 417 U.S. 116, 122 (1974) ("Ordinarily, a supplier of labor or materials on a private construction project can secure a mechanic's lien against the improved property under state law. But a lien cannot attach to Government property, … so suppliers on Government projects are deprived of their usual security interest."). However, (continued...)

For example, insofar as leases of real property are deemed to be contracts,[87] they could potentially be subject to a range of statutory requirements that pertain to contracts,[88] as illustrated by the GAO's 2012 decision in *The Argos Group*.[89] In this case, GAO relied upon Supreme Court and other precedents holding that leases are contracts for purposes of the Anti-Deficiency Act and the CDA[90] in finding that GSA is required to accord "price evaluation preferences"[91] to Historically Underutilized Business Zone (HUBZone) small businesses when acquiring leasehold interests in real property. GSA had argued that such preferences are required only in procurements of supplies and services (i.e., procurements subject to the FAR), and a lease of real property is not a procurement contract.[92] However, GAO rejected this argument on the grounds that the relevant provisions of the Small Business Act—which requires price evaluation and other preferences for HUBZone small businesses—"do[] not limit the type of contract to which they apply."[93] Rather, according to GAO, the Small Business Act "broadly applies to *all federal contracts* that involve full and open competition."[94]

Similar logic could potentially cause public-private partnerships to be found to be subject to certain statutory requirements pertaining to "public buildings" and "public works." For example, a 2013 decision by the U.S. Department of Labor's (DOL's) Administrative Review Board (ARB or Board) affirmed an earlier determination by the Administrator of DOL's Wage and Hour Division that the CityCenterDC project is subject to the Davis-Bacon Act's requirements as to the payment of prevailing wages and fringe benefits.[95] The Davis-Bacon Act applies, in part, to the

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courts in some jurisdictions have permitted subcontractors to maintain mechanic's liens against leasehold interests in federal property specifically. *See, e.g.*, J.J. Sweet Co., Inc. v. White Cty. Bridge Comm'n, 714 N.E.2d 219 (Ind. Ct. App. 1999) (lien attached to the leasehold despite the land being owned by the federal government); Basic Refractones, Inc. v. Bright, 298 P.2d 810, 815 (Nev. 1986) (same); Tropic Builders, Ltd., v. United States, 475 P.2d 362, 366 (Haw. 1970) (same). Others have not. *See, e.g.*, North Bay Constr., Inc. v. City of Petaluma, 49 Cal. Rptr. 3d 455 (Cal. Ct. App. 2006) (declining to distinguish between property owned by the city for "government purposes," and property used "for proprietary purposes"); Hempstead Resources Recovery Corp. v. Peter Salamandre & Sons, Inc., 428 N.Y.S. 2d 146 (N.Y. Spec. Term 1980) (mechanic's lien cannot be placed on a leasehold interest in public land being improved for use as a solid waste disposal system because encumbering the leasehold would encumber the land).

[87] *See, e.g.*, Appeal of Robert J. Di Domenico, GSBCA No. 5539, 80-1 B.C.A. ¶ 14,412 (Apr. 23, 1980) (noting that "[a]lthough leasehold interests have, over the years, developed some of the incidents of real property, such interests remain personal property except where statutes have modified the common law rule," and "the modern trend has been to consider leases as contracts rather than conveyances of real property").

[88] Such leases would not, however, generally be subject to requirements pertaining to agencies' contracts to acquire supplies or services if they involve the dispossession of real property. *See supra* note 62.

[89] The Argos Group, B-406040 (Jan. 24, 2012).

[90] *See, e.g.*, Leiter v. United States, 271 U.S. 204, 206-07 (1926) (Antideficiency Act); Forman v. United States, 767 F.2d 875, 879 n.4 (Fed. Cir. 1985) (Contract Disputes Act).

[91] For purposes of the HUBZone program, a price evaluation preference generally works as follows: the procuring agency adds a factor of 10% to all bids or offers (except those from HUBZone small business that have not waived the evaluation preference and otherwise successful bids or offers from other small businesses) in determining which bid or offer is the lowest price or represents "best value" for the government. *See* 48 C.F.R. §19.1307(b)(1)-(2).

[92] The Argos Group, B-406040 (Jan. 24, 2012), at ¶ 13.

[93] *Id*. at ¶¶ 9-10 (quoting, among other things, 15 U.S.C. §657a(b)(3)(B) ("[I]n any case in which *a contract* is to be awarded on the basis of full and open competition, the price offered by a qualified HUBZone small business concern shall be deemed as being lower than the price offered by another offeror (other than another small business concern), if the price offered by the qualified HUBZone small business concern is not more than 10 percent higher than the price offered by the otherwise lowest, responsive, and responsible offeror.") (emphasis added)).

[94] *Id*. at ¶ 10 (emphasis added).

[95] *See* Application of the Davis-Bacon Act to Construction of the CityCenterDC Project in the District of Columbia,
(continued...)

"construction, alteration, and/or repair ... of public buildings and public works of the [federal] Government [and] the District of Columbia."[96] Both the developer and the District of Columbia asserted that the CityCenterDC project—which called for the construction of several types of buildings on land that had been variously conveyed by the city to the developer pursuant to special warranty deeds, 99-year ground leases, and 20-year licenses—is not a public building or work. In making this argument, the developer and the city noted, among other things, that the developer, not the city, contracted with the builders on this project; "no public funds" will be used to pay for construction; none of the buildings will be constructed for use or occupancy by the city; and the benefits the city would realize from the project are the same as those it realizes from purely private developments (e.g., employment opportunities for residents, increased tax base).[97] However, the ARB rejected these arguments, in part, because it viewed the project as falling within DOL's definition of a *public work* as "any building or work, the construction, prosecution, completion, or repair of which ... is carried on directly by authority of or with funds of a Federal agency [or the District of Columbia] to serve the interests of the general public."[98] In particular, the ARB found that the work was carried on under the city's authority because "the terms of the ground leases, the development agreements, and the Master Plan collectively provide the District with authority over what will be built and how it will be maintained during the lease terms."[99] It similarly found that the work "served the public interest," since it entailed "substantial and continuing economic gains to the District," including the construction of a park and central plaza for public use, employment opportunities for district residents, and "substantial revenues" for the District.[100] The Board further noted that, under the 99-year ground leases and other agreements, certain buildings were to become the District's property at the expiration of the lease, or at an earlier date, if the developer failed to meet specified conditions.[101]

As the case of CityCenterDC suggests, how particular PPPs are structured can also play a role in determining the legal requirements to which such partnerships are subject. With CityCenter, the ARB specifically noted the "public entanglement" in various aspects of the development in finding that the development constituted a public building or work for purposes of the Davis-Bacon Act (e.g., the city's authority to terminate the ground leases if the developer failed to meet certain conditions).[102] This suggests that the ARB could potentially have reached a different conclusion had the PPP been structured in such a way that the District did not have the same authority over what is built and how it is maintained during the course of the lease, or if the economic gains to the city had been less "substantial" or "continuing." The structure of the particular PPP in question played a similar role in a 2007 federal district court decision finding that housing units and other infrastructure constructed and maintained on Marine Corps land by a

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ARB Case Nos. 11-074, 11-078, 11-082, *available at* http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/DBA/11_074.DBAP.HTM.

[96] 40 U.S.C. §3142(a).

[97] The developer and city continued to maintain these arguments when appealing the administrative decision in federal court. *See* CCDC Office LLC v. U.S. Dep't of Labor (filed May 21, 2013, D.D.C.) (copy on file with the authors); District of Columbia v. U.S. Dep't of Labor (filed May 20, 2013, D.D.C.) (copy on file with the authors).

[98] Application of the Davis-Bacon Act to Construction of the CityCenterDC Project, *supra* note 95, at 12 (quoting 29 C.F.R. §5.2(k)).

[99] *Id*.

[100] *Id*. at 13-14.

[101] *Id*. at 3-4.

[102] *Id*. at 3.

private developer are not subject to local taxation.[103] Here, the government had conveyed the housing units, along with the "income stream from military personnel renting those ... units" to the developer under a 50-year ground lease.[104] Two local governments asserted that this was tantamount to a sale, and thus transferred title to the developer and subjected the project to local taxation.[105] The court found otherwise, noting that the "level of control retained" by the United States under the project indicated that "the government still holds the land subject to its 'primary jurisdiction and control.'"[106] However, the court expressly indicated that the outcome could have been different had the government sectioned off a portion of the land, effectively severing it from the military installation, and the developer then put the property to non-military uses.[107]

No Relevant Provisions in Federal Law

In other cases, neither the statute that the agency relied upon in entering the PPP, nor other provisions of law, provide guidance on certain topics, including topics that are likely to be particularly relevant in the formation and performance of PPPs. One such topic is the selection of projects. The primary constraints upon agencies' determinations as to which supplies or services to procure, and which properties to acquire leasehold interests in, are arguably based in appropriations law. Agencies generally cannot obligate funds in excess or advance of an appropriation;[108] and appropriations may only be used for their designated purposes[109] to meet *bona fide* agency needs.[110] Because the totality of agencies' needs typically exceed their appropriations, their ultimate decisions as to what to procure or acquire by lease typically depend upon their conceptions of their missions and the public interest. The same logic would not necessarily apply in the case of PPPs, at least insofar as these projects rely solely upon private financing.[111] Because of this potential disconnect between agency missions and the interests of

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[103] Atlantic Marine Corps Communities, LLC v. Onslow Cty., 497 F. Supp. 2d 743 (E.D. N.C. 2007).

[104] *Id*. at 748. The federal government retained title to the land, and the lease provided that title to the housing and related improvements would be transferred back to the government (or other owner of the land) upon the expiration or termination of the lease. *Id*.

[105] *Id*. at 756.

[106] *Id*. at 758. The finding of "jurisdiction and control" here is significant because the U.S. Constitution, in what is commonly referred to as the Enclave Clause, grants Congress the power "[t]o exercise exclusive Legislation in all cases whatsoever, over ... all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. Const., art. I, §8, cl. 17.

[107] 497 F. Supp. 2d at 758. *Cf.* Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 195 U.S. 375 (1904) (company's fee interest subject to state taxation where the United States conveyed land to a private dock company with instructions to construct and maintain a dry dock and grant the United States free use, and the property was to revert to the United States if these conditions were not met); Palmer v. Barnett, 162 U.S. 399 (1896) (finding that exclusive federal jurisdiction over certain property which it had leased to a city had terminated, at least during the term of the lease, because the state had ceded jurisdiction to the federal government "for the use and purposes of a navy yard and navy hospital," and the federal government had leased a portion of the land to the city of Brooklyn "for market purposes").

[108] *See* 31 U.S.C. §1341(a).

[109] *See* 31 U.S.C. §1301(a) (prohibiting the use of appropriations for purposes other than those for which they were appropriated).

[110] *See, e.g.*, Funding for Air Force Cost Plus Fixed Fee Level of Effort Contract, B-277165 (Jan. 10, 2000) (fiscal year appropriation may be obligated only to meet a legitimate—or *bona fide*—need arising or, in some cases, continuing in the fiscal year for which the appropriation was made). This is commonly known as the "*bona fide* needs rule."

[111] In some cases, agencies have express authority to use appropriated funds in performing agreements that could be characterized as PPPs. For example, Section 801 of the National Energy Conservation Policy Act was amended in 2007 to authorize agencies to use appropriated funds to partially finance energy savings performance contracts. Energy Independence and Security Act of 2007, P.L. 110-140, §512, 121 Stat. 1658 (Dec. 19, 2007) (codified at 42 U.S.C. (continued...)

potential private partners,[112] some states have enacted legislation that requires agencies to consider potential PPPs within the context of their broader priorities, and prohibits them from giving special consideration to forming and performing partnerships just because they have private financing.[113] There do not appear to be any comparable provisions in federal law.

Another example involves "noncompete agreements," or provisions which bar the government from taking certain actions that could interfere with its partner's ability to obtain the contemplated return on its investment during the term of the partnership. Such agreements are not standard features of federal procurement contracts or leases of real property, although certain *requirements contracts* could potentially be found to have been breached if the agency were to hire another vendor to perform these requirements (or perform the requirements itself).[114] However, a number of commentators have called for the inclusion of non-compete agreements in at least some PPPs, particularly those where a developer builds a facility and then operates it, relying on the revenue generated from the facility's operations to pay off the costs of construction.[115] In such situations, developers are likely to want an agreement whereby the agency promises not to develop or operate other facilities whose existence could cut into the revenue that the developer receives from operating its facilities, and commentators sometimes point to PPPs that have "failed" because they lacked such agreements.[116]

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§8287c(2)(E)(i)-(ii)).

[112] *See, e.g.*, Ellen M. Erhardt, Caution Ahead: Changing Laws to Accommodate Public-Private Partnerships in Transportation, 42 *Val. U.L. Rev.* 905, 948-49 (2008) ("By allowing the private sector to enter an unsolicited bid, many projects may become potential PPPs which would otherwise not be considered."); Karen J. Hedlund & Nancy C. Smith, "SAFETEA-LU Promotes Private Investment in Transportation," Aug. 1, 2005, *available at* http://www.transportation1.org/aashtonew/docs/pabs.doc ("Solicited bids enable the responsible public entity to communicate its transportation project priorities. Unsolicited proposals, by contrast, enable the private sector to propose projects that the public entity might not otherwise have considered.").

[113] *See, e.g.*, Cal. Ed. Code §81004(b)(1) ("If a community college requests state funding for an education building or education center constructed through a public-private partnership, funding for that facility shall not supersede community college facilities that have been previously prioritized by the board of governors and are awaiting state funding. These facilities shall be subject to the board of governors' annual prioritization process and shall not receive higher priority for state funding solely because the facilities are constructed through a public-private partnership.").

[114] *See, e.g.*, Torncello v. United States, 681 F.2d 756 (Fed. Cl. 1982) (agency obtaining goods or services from another vendor); Kalvar Corp. v. United States, 543 F.2d 1298 (Ct. Cl. 1976) (termination in bad faith so as to use an alternate source); Maya Transit Co., ASBCA 20186, 75-2 BCA ¶ 11,552 (1975) (agency's developing additional in-house capacity to perform certain work breached requirements contract which entitled the contractor to supply those goods or services "in excess of the quantities which the activity may itself furnish with its own capabilities"). A requirements contract is one "by which one party, the seller, agrees to satisfy all of the agency's requirements for services and/or items for a specified period of time." Aviation Specialists, Inc., DOTBCA 1967, 91-1 BCA ¶ 23,534 (Dec. 30, 1990).

[115] *See, e.g.*, Emilia Istrate and Robert Puentes, Moving Forward on Public Private Partnerships: U.S. and International Experience with PPP Units, Brookings-Rockefeller Project on State and Metropolitan Innovation, Dec. 2011, at 13, *available at* http://www.brookings.edu/~/media/research/files/papers/2011/12/08%20transportation%20istrate%20puentes/1208_transportation_istrate_puentes.pdf (noting that the "existence of some type of non-compete clause is attractive to the private sector because it lowers the risk of competition from substitute assets," and reporting that only five states expressly prohibited the use of such clauses).

[116] *See, e.g.*, Christopher D. Carlson, Public-Private Partnerships in State and Local Highway Transportation Projects, *The Federal Lawyer*, Nov./Dec. 2008, at 34, 37 (noting that, after the State of Virginia improved a "competing" road ahead of schedule, the developer on the Dulles Greenway project defaulted on its payments in 1996; the project had to be refinanced in 1999; and the project generated only 35% of its projected revenue in its fifth year). *But see id*. (noting that, in the case of the California State Route 91 project, the state had to purchase the road from its private partner, at a cost of $81.9 million more than the cost of building the road, in order to make improvements to non-tolled lanes of the road).

In such situations, federal agencies are currently generally left to their own devices in determining whether to take particular actions (e.g., undertake particular PPPs, consent to non-compete agreements). They are also responsible for drafting any contractual terms on their own, without the benefit of "standard" contract clauses, such as those provided in the FAR.[117] As a result, there could potentially be wide variation between agencies in terms of their willingness to enter PPPs, and the terms of any partnerships that they might perform. This variability could potentially limit parties' willingness to commit to PPPs, as well as public acceptance of PPPs, as discussed below. See "Legal Uncertainties Could Deter Use of PPPs."

Comparison to State Law

Federal law's general lack of guidance regarding the legal requirements governing agencies' PPPs is in marked contrast to state law. As of May 2013, at least 27 states had statutes which not only define *public-private partnership* and expressly authorize state agencies or local governments to form PPPs, but also provide guidance regarding specific aspects of their use.[118] In some of these states, as **Table 2** illustrates, the guidance can arguably be characterized as "comprehensive," in that it (1) addresses the powers of the state agency and its partner in such agreements; (2) generally requires the completion of feasibility studies before a partnership is undertaken; (3) prescribes procedures for the competitive selection of partners; (4) provides certain protections for offerors (including those whose proposals are not selected); (5) calls for the inclusion of specific terms in any partnership agreements; (6) establishes a framework for setting any user-fees; and (7) provides for the termination or expiration of the agreement. In other states, the guidance is more limited, and addresses only some of these topics.[119]

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[117] Because they have been reviewed by multiple people and used in various contexts, "standard" clauses may be better drafted than clauses specially drafted for inclusion in particular contracts. Some commentators have noted that well drafted contracts are essential for ensuring performance under PPPs, and that agency contracting personnel may be ill-prepared to oversee the formation and performance of PPPs. *See, e.g.*, Peter C. Halls, Issues for Designers, Contractors, and Suppliers to Public Private Partnership Projects, *30 Constr. Lawyer* 22 (2010); David W. Gaffey, Outsourcing Infrastructure: Expanding the Use of Public-Private Partnerships in the United States, 39 *Pub. Cont. L.J.* 351 (2009/2010).

[118] *See generally* CRS Congressional Distribution Memorandum, *State Laws Regarding Public-Private Partnerships for Property Management*, by Kate M. Manuel, May 28, 2013 (copy available by request from the author).

[119] Other states having "comprehensive" type guidance include Arizona, California, Connecticut, Florida, Georgia, Illinois, Louisiana, Missouri, and Virginia. States with more limited guidance, addressing only specific issues, include Alabama, Alaska, Arkansas, Massachusetts, Minnesota, New Hampshire, New Jersey, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Utah, Washington, and West Virginia. The relevant provisions of these and other states' laws can be found in CRS Congressional Distribution Memorandum, *State Laws Regarding Public-Private Partnerships for Property Management*, *supra* note 118.

Table 2. Sample Provisions in "Comprehensive" State PPP Statutes

Examples Taken from the *Indiana Code Annotated*

Topic	Selected Provisions
Powers of agency	State agency may take certain actions in developing, financing, or operating PPPs, and may use revenues arising out of PPPs to develop, finance, or operate such partnerships, or "as otherwise considered appropriate by the department" (IND. CODE ANN. §8-15.7-3-1).
Powers of agency partner	Partner may develop, finance, and operate qualifying projects, and impose user fees in connection with the use of such projects (IND. CODE ANN. §§8-15.7-3-2 to 8-15.7-3-4). Operator may also own, lease, or acquire any property interest or other right in order to develop, finance, or operate qualifying projects (IND. CODE ANN. §8-15.7-3-3), as well as make any user classifications permitted in the PPP agreement, and enforce "reasonable rules" to the same extent that the agency may make and enforce rules with respect to similar projects (IND. CODE ANN. §8-15.7-3-4).
Facilitating participation	Agency required to establish a program to "facilitate participation" in qualifying projects by small, minority, Indiana, and women-owned businesses, as well as businesses treated as disadvantaged business enterprises under federal or state law (IND. CODE ANN. §8-15.7-3-5).
Feasibility studies	Agency generally must have preliminary feasibility studies and economic impact studies conducted by one or more firms internationally recognized in the preparation of such studies on any parts of the project consisting of tollways, and must conduct public hearings on these studies in the county seat of the county where the proposed project would be located (IND. CODE ANN. §8-15.7-3-5(b)(1)). Feasibility study must be based upon a public-private financial and delivery structure, and the economic impact study must, at minimum, include an analysis of impacts on employment and commercial and industrial development (IND. CODE ANN. §8-15.7-3-5(b)(2)). After the feasibility and economic impact studies are complete, agency must schedule another public hearing on the project in the county seat of any county that is an "affected jurisdiction" (IND. CODE ANN. §8-15.7-3-5(b)(3) & (4)). Thereafter, the studies must be submitted to certain legislative committees for review before commencement of the project (IND. CODE ANN. §8-15.7-3-5(b)(5)).
Competitive proposals	Agency may pursue a competitive proposal procedure using requests for qualifications (RFQs), or proceed directly to a request for proposals (RFPs) (IND. CODE ANN. §8-15.7-4-2(b)). Qualifications must be evaluated based on requirements and criteria set forth in the RFQ (IND. CODE ANN. §8-15.7-4-2(d)). If there is no RFQ, agency must provide public notice of the RFP, and submit a copy to the budget committee for review before its issuance (IND. CODE ANN. §8-15.7-4-2(f) & (g)). Agency must determine the evaluation criteria appropriate for each project, include these criteria in the RFP, and evaluate proposals based on the criteria (IND. CODE ANN. §8-15.7-4-2(h)-(*i*)). Agency must also hold public hearings on the preliminary selection of the operator and the terms of the proposed agreement (IND. CODE ANN. §8-15.7-4-2(*l*)).
Selection of offer	Agency's decision as to operator is to be submitted to the governor and budget committee for review, and once the governor accepts the agency's determination, the agency may execute the agreement (IND. CODE ANN. §8-15.7-4-3). Agency may also withdraw the RFQ or RFP, decline to make an award and interview offerors, among other things (IND. CODE ANN. §8-15.7-4-5).
Protections for offerors	Agency may pay stipulated amounts to unsuccessful offerors who submit responsive proposals in exchange for work product contained in that proposal (IND. CODE ANN. §8-15.7-4-4). Contents of proposals may not be disclosed during discussions or negotiations with potential offerors, and all records relating to such discussions or negotiations may be treated as confidential (IND. CODE ANN. §8-15.7-4-6).
Terms of the agreement	Agreement must require the completion of any obligatory environmental analysis; ownership by the state of the property on which the project is located; and an expedited method for resolving disputes (IND. CODE ANN. §8-15.7-5-1.5). Agreement must also incorporate the duties of the operator, and any other terms and conditions that would serve the public interest, and may include provisions for notice of default and cure rights (IND. CODE ANN. §8-15.7-5-4). Agreement may provide for the delivery of performance and payment bonds or other security; review of plans for development or operation; maintenance of public liability insurance policies or self-insurance; monitoring of the operator's maintenance practices; reimbursement to the agency for services it might provide; filing of appropriate financial statements and reports; compensation or payments to the operator or others for specified purposes (e.g., development fees); compensation or payment

Topic	Selected Provisions
	to the department in the form of concession or lease payments, etc.; date and terms of the termination of the operator's authority and duties; reversion of the project to the department; and the department's rights and remedies if the operator defaults (IND. CODE ANN. §§8-15.7-5-1). Agreement may not provide that the state or department is responsible for any debt incurred by the operator in connection with the delivery of the project (*Id*).
User fees	Department may fix and revise amounts of user fees that the operator may charge (IND. CODE ANN. §8-15.7-5-2).
Financing of project	Agency may make grants or loans for development or operation of qualifying projects (IND. CODE ANN. §8-17.7-5-3). For purposes of financing qualifying projects, department may propose to use all or part of available revenues, enter into grant agreements, access any designated transportation trust funds, access any other funds available, and accept grants (IND. CODE ANN. §8-15.7-8-5). May also enter into agreements to take specified actions (e.g., issue bonds) (IND. CODE ANN. §8-15.7-8-6). Public funds may be aggregated with private funds (IND. CODE ANN. §8-15.7-8-7).
Distribution of payments	If agency receives any payment or compensation, it must be distributed to the "major moves" construction fund; the state highway fund; the alternative transportation construction fund; or the operator for debt reduction (IND. CODE ANN. §8-15.7-5-5).
Termination or expiration of agreement	Upon termination or expiration of agreement, department may take over the project and succeed to all rights, titles, and interests in it, and may take specified actions if it does so (e.g., impose, collect, retain, and use any user fees) (IND. CODE ANN. §8-15.7-5-6).
Standards for plans and specifications	Any plans and specifications developed under agreement must comply with department's standards for other projects of a similar nature, and any other applicable state or federal standards (IND. CODE ANN. §8-15.7-6-1).
Treatment as public works, and otherwise	Operator need not comply with certain provisions regarding state procurements and public works (IND. CODE ANN. §8-15.7-6-2). Projects are considered part of state highway system for purposes of maintenance and enforcement (IND. CODE ANN. §8-15.7-6-3).
Tax treatment	Operators or others purchasing tangible personal property for incorporation into or improvement of a structure constituting or becoming part of land included in a project are exempt from gross retail and use taxes (IND. CODE ANN. §8-15.7-7-2), but income received by a project operator is subject to taxation in same matter as other income (IND. CODE ANN. §8-15.7-7-3).
Resolution of claims	Department must establish an expedited method for resolving disputes between and among parties (IND. CODE ANN. §8-15.7-12-2).
Non-impairment	Department may not take any action under this chapter that would impair the partnership, nor may political subdivisions of the state (IND. CODE ANN. §§8-15.7-14-6, 8-15.7-15.1).

Source: Congressional Research Service, based on various sources cited in **Table 2**.

Considerations for Congress

In considering whether to expand federal agencies' ability to enter PPPs, or overseeing the use of existing PPP authorities, Congress may want to pay particular attention to certain topics, such as (1) the limited information currently available regarding agencies' PPP authorities and their use thereof; (2) the degree to which legal uncertainties may deter agency use, or public acceptance, of PPPs; (3) agencies' capabilities to enter and perform PPPs; (4) whether agencies should be required to develop business plans for their partnership activities; (5) whether agencies should be required to notify Congress, or obtain its approval, when entering into PPPs; (6) agencies' ability to retain and use net proceeds from PPP agreements; and (7) the interplay between PPPs and the current disposal process. Other issues could potentially arise in specific contexts, depending upon the nature of the partnership and the authorities under which it is entered and performed. However, the foregoing seven issues would appear to be common regardless of the context.

Limited Information about PPP Authorities and Their Use

Currently, there does not appear to be any comprehensive source of information about the various PPP authorities of different landholding agencies. GAO has issued reports on particular types of real property authorities that may permit agencies to enter PPPs (e.g., enhanced use lease (EUL) authority),[120] and it has conducted in-depth analyses of PPP activities at particular agencies.[121] However, GAO does not appear to have conducted a comprehensive analysis of *all* agencies' PPP authorities and practices.

Absent a more comprehensive picture of agencies' PPP authorities, it is difficult to compare various agencies' authorities, or evaluate how particular authorities have been applied, and what effect they have on reducing excess and underutilized space. Information about existing PPP authorities could be particularly useful if paired with feedback from real property managers at landholding agencies. GAO's report on EULAs, for example, included comments from agency officials regarding the benefits and limitations of particular authorities, as well as opinions on what types of authorities they would like to have and how the ability to exercise such authorities would improve real property management. One agency told GAO auditors, for example, that "budget scorekeeping rules under OMB Circular A-11 limit [its] ability to maximize usage of its EUL authority."[122] Further information of this type could help Congress draft legislation which meets specific real property needs—as identified by practitioners—and whose application is not limited by unanticipated factors, such as budget scoring rules.

Legal Uncertainties Could Deter Use of PPPs

The lack of detailed legal requirements can have certain benefits, particularly where PPPs are concerned. Some have noted that such partnerships differ from "standard" procurement contracts in that they require the parties to work together much more closely to achieve shared goals.[123] Thus, it has been suggested, flexibility as to the terms and conditions of such agreements is optimal because the agency and its partner(s) can devise an instrument that is best tailored to meet their needs.[124]

[120] *See, e.g.*, U.S. Government Accountability Office, *Federal Real Property: Improved Cost Reporting Would Help Decision Makers Weigh the Benefits of Enhanced Use Leasing*, GAO-13-14, Dec. 9, 2012.

[121] U.S. Government Accountability Office, *Defense Infrastructure: The Enhanced Use Lease Program Requires Management Attention*, GAO-11-574, June 30, 2011; U.S. Government Accountability Office, *VA Real Property: VA Emphasizes Enhanced-Use Leases to Manage Its Real Property Portfolio*, GAO-09-776T, June 10, 2009; U.S. Government Accountability Office, *NASA: Enhanced Use Leasing Program Needs Additional Controls*, GAO-07-306R, Mar. 1, 2007.

[122] U.S. Government Accountability Office, *Federal Real Property: Authorities and Actions Regarding Enhanced Use Leases and Sale of Unneeded Real Property*, GAO-09-283R, February 2009, at pg. 15. OMB Circular A-11guides the preparation and submittal of budget estimates.

[123] *See, e.g.*, Chem Sev., Inc. v. Envir. Monitoring Sys. Lab.—Cincinnati of the U.S. Envir. Protection Agency, 816 F. Supp. 328 (E.D. Pa. 1993) (characterizing one type of public-private partnership agreement—a cooperative research and development agreement (CRADA)—as "much more flexible and subtle" than a procurement contract because success with a CRADA depends upon shared goals and the parties' ability to work together with a high degree of trust toward those goals, while parties to a procurement contract often lack common interests and goals).

[124] *See, e.g.*, Avoiding the Pitfalls of Public Private Partnerships: Issues to be Aware of When Transferring Transportation Assets, 35 *Trans. L.J.* 25, 25-36 (2008) *See also* Panel Discussion: Public Oversight of Public/Private Partnerships, 25 *Fordham Urban L.J.* 1357, 1371 ("One person's oversight is another person's red tape.") (statement of Wayne Hawley, Deputy Counsel to the New York City Conflicts of Interest Board).

On the other hand, an argument could be made that, insofar as lack of detailed legal requirements results in uncertainty about what requirements apply to particular projects, it may limit parties' willingness to commit to PPPs, as well as public acceptance of PPPs. Both government agencies and prospective partners may be less likely to enter PPP agreements if they perceive there to be significant uncertainties about their rights and responsibilities under these agreements.[125] Similarly, the public could remain skeptical of PPPs if the agreements are seen as being entered into or performed in ways that contradict public expectations about how government activities are to be conducted. For example, there is a widespread expectation that the government selects its business partners competitively and impartially, after advertising its needs. This expectation could potentially be thwarted if an agency enters a PPP based on an unsolicited proposal with an entity that happens to be politically well connected.[126]

Questions about Agency Capabilities to Enter and Perform PPPs

PPPs can be complicated arrangements, requiring knowledge of a range of disciplines: real property, architecture, civil engineering, procurement, and law, to name a few. An agency that lacks a staff with expertise in these disciplines may be at risk of entering into an agreement that does not represent the best value for the government, and of making costly mistakes when implementing the agreement. According to GAO, agency expertise is one of the five key factors in the successful implementation of PPPs. Specifically, GAO reported that the "agencies we reviewed also told us that they established organizational structures and acquired the necessary expertise to interact with private-sector partners to ensure effective partnership."[127]

The monetary consequences of poorly trained staff entering into real property contracts were illustrated in 2010 when the Securities and Exchange Commission (SEC) entered into a $556 million lease for 900,000 square feet of office space in Washington, DC—600,000 square feet more than the amount of space the agency needed.[128] Among the factors that contributed to this "misguided leasing decision" was the fact that the SEC had only established a leasing office in 2009, and did not put leasing policies into place until 2010.[129] The lack of a solid real property organization within an agency can lead to poor decision making and costly mistakes. Congress

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[125] *Cf.* David W. Gaffey, Outsourcing Infrastructure: Expanding the Use of Public-Private Partnerships in the United States, 39 *Pub. Cont. L.J.* 351, 359 (2009/2010) ("[T]he expansion of PPPs is significantly hindered by lack of a clear and comprehensive regulatory framework governing the[ir] use."). The author here specifically notes the lack of comprehensive regulations for determining whether proposed partnerships are in the public interest, or how national or local interests might be affected by particular projects.

[126] *See, e.g.*, Eden Township Healthcare Dist. v. Sutter Health, 135 Cal. Rprt. 3d 802 (2011) (declining to void two contracts due to alleged conflicts of interests involving two health care district officials who had ties to the contractor); Ellen M. Erhardt, Caution Ahead: Changing Laws to Accommodate Public-Private Partnerships in Transportation, 42 *Val. U.L. Rev.* 905, 949 (2008) (noting the appearance of impropriety, and the possibility of misconduct, if "stringent" competition requirements are lacking).

[127] U.S. Government Accountability Office, *Public-Private Partnerships: Key Elements of Federal Building and Facility Partnerships*, GAO/T-GGD-99-81, April 29, 1999, at pg. 5. The other key elements were: (1) responding to a catalyst for changing agency real property management policies and practices; (2) having express statutory authority to enter into PPPs; (3) developing detailed business plans to assist in PPP decision-making (discussed below, "Potential Requirements to Develop Business Plans for PPPs"); and (4) having stakeholder support.

[128] Securities and Exchange Commission, Office of Inspector General, *Improper Actions Relating to the Leasing of Office Space*, Case No. OIG-553, May 16, 2011, at pg. 3.

[129] *Id*.

may wish to evaluate the internal structure of landholding agencies, to ensure that they have the requisite expertise, before providing them with PPP authority.

Potential Requirements to Develop Business Plans for PPPs

The likelihood of developing a PPP that results in maximum benefits to both partners may be enhanced by the use of business plans. The U.S. Postal Service (USPS) has developed and executed business plans as part of its PPP management process for years.[130] The business plans include information about the "division of risks and responsibilities between the Postal Service and its private-sector partner."[131] According to USPS officials, business plans are critical to the successful implementation of PPPs, in part due to the fact that they are drafted jointly with the private partner.[132] Based on USPS's experience, other agencies might benefit from being required to develop business plans prior to entering a PPP. At a minimum, the development of a business plan should help ensure that the agency and its nonfederal partner(s) engage in ongoing discussions about how to structure the agreement to the benefit of both partners. The process of developing business plans may also facilitate the sharing of market information and thereby improve decision-making as the agreement is being negotiated. In addition, business plans provide a road map for PPP implementation, which may help the partners meet milestones and, if made public or shared with Congress, could potentially facilitate oversight.

Potential Requirements as to Congressional Notice or Approval

One of the ways Congress maintains oversight of real property decisions that are made by GSA—which is one of the government's largest landholding agencies—is through the prospectus approval process. Congress has enacted legislation that purports to prohibit appropriations from being made for certain property management purposes unless the House Committee on Transportation and Infrastructure (T&I) and the Senate Committee on Environment and Public Works (EPW) have "adopted resolutions approving the purpose for which the appropriation is made."[133] GSA is further required, in order "[t]o secure consideration for [this] approval," to transmit to Congress a prospectus of the proposed facility that includes a brief description of the building to be constructed, altered, or acquired, or the space to be leased, among other things.[134] In addition, GSA's annual appropriations acts have frequently provided that "funds available to [GSA] shall not be available for expenses for any ... acquisition project for which a prospectus, if required by the Public Buildings Act of 1959, has not been approved."[135]

While these "requirements" are probably not legally binding,[136] GSA has historically complied with them on the grounds that "[t]he relationship between GSA and its authorizing committees is

[130] U.S. Government Accountability Office, *Public-Private Partnerships: Key Elements of Federal Building and Facility Partnerships*, GAO/T-GGD-99-81, April 29, 1999, at pg. 5.

[131] *Id*.

[132] *Id*.

[133] 40 U.S.C. §3307(a)(1)-(3)).

[134] 40 U.S.C. §3307(b)(1)-(7).

[135] *See, e.g.*, Consolidated Appropriations Act, 2010, P.L. 111-117, 123 Stat. 3189 (Dec. 16, 2009).

[136] There are two interrelated reasons for questioning whether prospectuses are required to be submitted or approved in all situations contemplated by the authorities cited in footnotes 141 through 143. First, absent a constitutional amendment, one Congress cannot bind future Congresses. *See, e.g.*, United States v. Winstar Corp., 518 U.S. 839, 872 (continued...)

paramount."[137] Similar provisions could potentially also lead to compliance, as a matter of comity, in other contexts, and requiring agencies to seek authorization before entering into PPPs could provide Congress with an opportunity to monitor agency PPP activity and evaluate the soundness of proposed partnerships. Alternatively, agencies could be required to provide Congress with, at a minimum, advance notice of proposed PPPs, as some states require.[138]

Agencies' Authority to Retain and Use Net Proceeds

Real property disposals, such as leasing federal space to nonfederal partners, often generate sufficient revenue that agencies may realize positive net cash flow. Should Congress consider expanding PPP authorities, one issue that may arise is whether agencies should be permitted to retain net proceeds, and, if so, with what limitations. Federal agencies generally say that the authority to retain net proceeds from the disposal of real property—and to use those proceeds as they see fit—is a strong incentive to lease or sell unneeded space.[139]

While permitting agencies to retain net proceeds may result in an increased willingness to use PPPs, some stakeholders believe that congressional oversight may suffer if agencies have too much latitude. Congress has many options for addressing these concerns. PPP legislation could require agencies to deposit net proceeds in the general fund of the Treasury as miscellaneous receipts, or to reduce the debt. This would establish complete congressional control over net proceeds, but could remove the primary incentive some agencies have for entering into PPPs. Alternatively, legislation could require agencies to deposit net proceeds into a fund designated for agency real property activity, and specify whether withdrawals require congressional approval

(...continued)

(1996) ("[O]ne legislature may not bind the legislative authority of its successors."). Thus, although Section 7(a) of the Public Buildings Act purports to bar Congress from enacting appropriations for public building projects whose purposes have not been approved by the committees of jurisdiction, Congress can nonetheless enact measures that permit the construction, alteration, or lease of space whose purposes have not been so approved. Perhaps most commonly, Congress appropriates funds to GSA for the construction, alteration, or lease of space for which a prospectus has not been submitted or approved, an action which is generally taken to reflect Congress's intent to fund the project notwithstanding the provisions of Section 7(a). *See* GSA, *Public Building Services Leasing Desk Guide*, last revised Sept. 2, 2011, at 11-2 (expressing the view that GSA, "[a]s a matter of strict interpretation of fiscal law, ... may obligate funds ... regardless of whether the Committees have adopted resolutions approving the project"). GSA then uses this appropriation, in conjunction with its statutory authority to acquire real property under the Federal Property and Administrative Services Act (FPASA), to undertake the project. Second, and relatedly, in situations where an appropriation has been made, GSA takes the view that the language in its appropriations acts barring it from using funds for projects for which prospectuses have not been approved constitutes a "legislative veto that violates the separation of powers provisions of the U.S. Constitution." *Id*. The term *legislative veto* is commonly used to describe a provision that authorizes one House (or committee) of Congress, acting alone, to invalidate an executive branch action. In *Immigration and Naturalization Service v. Chadha*, the Supreme Court found that legislative vetoes violate the constitutional requirement that legislative acts be passed by both houses of Congress and presented for the President's approval. 462 U.S. 919 (1983). GSA asserts, arguably correctly, that a provision that effectively permits one committee of Congress to disapprove (by declining to adopt a resolution of approval) a project the executive branch is undertaking pursuant to authority delegated to it by Congress (through FPASA and an appropriation) constitutes a legislative veto.

[137] GSA, *Public Building Services Leasing Desk Guide*, last revised Sept. 2, 2011, at 11-2 ("The Committees expect that GSA will not award any projects over the threshold unless approved, and, as a matter of comity, GSA honors that expectation. GSA's policy is not to enter into [projects] above the prospectus threshold unless the Committees adopt resolutions approving the project.").

[138] *See, e.g.*, IND. CODE ANN. §8-15.7-3-5(b)(5).

[139] U.S. Government Accountability Office, *Federal Real Property: Authorities and Actions Regarding Enhanced Use Leases and Sale of Unneeded Real Property*, GAO-09-283R, February 2009, at pg. 4.

through an appropriation law.[140] Requiring re-appropriation of net proceeds would add an additional layer of oversight, but might deter some agencies from pursuing PPPs since they would have limited control over the funds. Yet another option would be authorize agencies to use net proceeds for any real property activity they deem appropriate, without requiring congressional approval—an option which would provide agencies with considerable autonomy—or permit them to expend net proceeds for any function that the agency is authorized to perform. As this last option provides the least direct oversight, Congress could potentially also require agencies to report on how they spend their net proceeds.

Clarifying Interplay between PPPs and Current Disposal Process

As discussed earlier in this report, the real property disposal process is prescribed by statute. Once a property has been declared as "excess," it enters the disposal process and the agency that controls it must follow the required steps unless it has specific statutory authority to bypass them. Congress may consider whether underutilized and vacant properties should be evaluated as candidates for PPPs prior to being declared excess. Doing so would essentially establish a screening process whereby unneeded space was first considered for a PPP, and only if deemed unsuitable would it enter the statutory disposal process. This might result in a larger number of underutilized and vacant properties being redeveloped, but it would also reduce the number of such properties that could be offered to other federal agencies, conveyed to serve a public purpose, or sold outright. PPP legislation may also provide agencies with specific authority to bypass statutory disposal requirements. Doing so may increase the amount of interest nonfederal entities take in PPP options, because such entities know that agencies can keep a property out of the disposal process, where it might be tied up for months. It may also be the case that systematically screening properties for PPP suitability and offering them for redevelopment and renovation might take just as long as the "standard" disposal process. In the absence of data on the length of time it takes to finalize a PPP and the financial benefits that accrue to the government as a result, it is not clear whether giving agencies special authorities to dispose of unneeded space through PPPs would yield greater returns than disposing of the same properties through the existing process.

Conclusion

Congressional interest in PPPs for purposes of federal real property management seems likely to persist—and may increase—given the constraints of the current real property disposal process and of the fiscal climate. A number of potential benefits of PPPs have been identified, and the common elements of such partnerships are widely recognized. The legal framework governing federal agencies' use of PPPs, in contrast, is less clear. Federal law does not define the term *public-private partnership*; nor, with certain narrow exceptions, does it authorize agencies to enter PPPs, *per se*. Instead, federal agencies have historically relied upon their authority to lease, otherwise convey, or permit the use of federal real property, or their authority to enter certain long-term procurement contracts, when forming PPPs. However, because individual agencies have different authority to lease real property or take other actions in forming PPPs, there is often considerable variability in the types of PPPs they may enter. In addition, there can also be

[140] *See, e.g.*, 10 U.S.C. §2607 (proceeds from the sale of certain property received as a gift shall be deposited in the Treasury and be available for disbursement to the extent provided in annual appropriation acts).

uncertainty as to the legal requirements governing agencies' use of leasing and related authorities in the PPP context. In legislating to expand agencies' authority to enter PPPs, or in overseeing their use of existing PPP authorities, Congress may wish to consider, among other things, agencies' capabilities to enter and perform PPPs; whether agencies should be required to develop business plans for PPPs; and the relationship between PPPs and the current real property disposal process.

Author Contact Information

Garrett Hatch
Specialist in American National Government
ghatch@crs.loc.gov, 7-7822

Kate M. Manuel
Legislative Attorney
kmanuel@crs.loc.gov, 7-4477