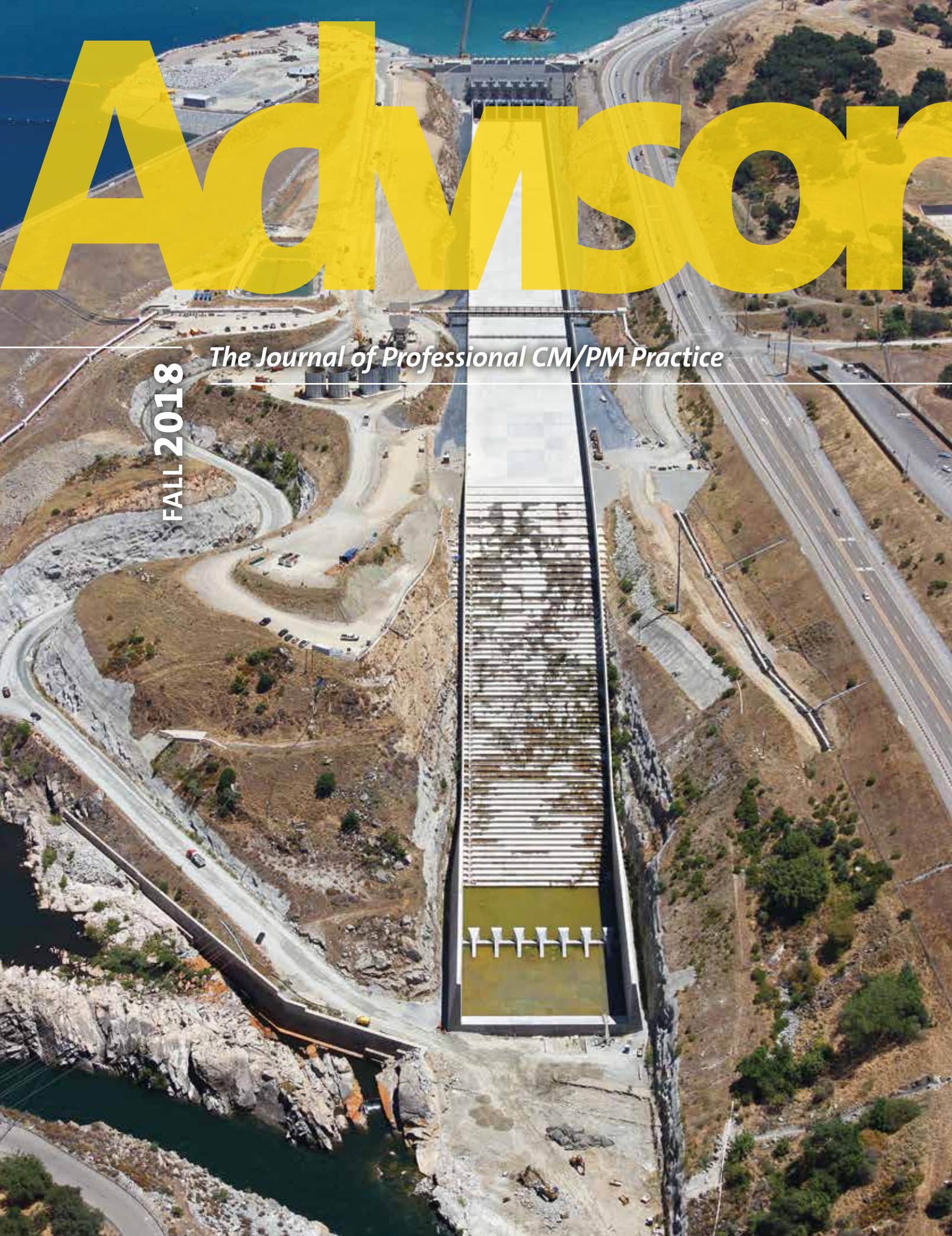

Advisor

The Journal of Professional CM/PM Practice

FALL 2018

Advisor

CMAA Advisor, published quarterly by the CMAA, reports on and follows the industry as a service to its members. Submission of articles, ideas and suggestions is appreciated and encouraged.

The Mission of CMAA is to promote the profession of Construction Management and the use of qualified Construction Managers on all capital projects and programs

The Vision of CMAA is that all owners will realize capital project and program success by using professionally qualified Construction Managers.

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FROM THE CHAIR

Promoting Careers in Construction with More than Beer

A common topic of conversation at CMAA Board meetings over the past few years has been the shortage of available, qualified people in construction management, or in construction in general. A number of prominent news stories in the past few weeks have highlighted this issue:

- 91% of contractors report having difficulty hiring workers.
- The share of young construction workers has declined nearly 30% since 2005.
- A survey indicates only 3% of young workers are interested in construction.

Then, just this week, I heard a media account of a construction company that has found it necessary to provide beer for its people just to assemble a full crew!

While most of these dire stories are focused on the construction labor force, particularly in the housing sector, we see the same issues in the CM world on larger commercial, institutional, and infrastructure projects. While automation is threatening the future of jobs in every sector of the economy, perhaps no industry is more ripe for further automation than construction. Yet we can all see a critical need for experienced, capable managers to help drive project success, particularly at a time when the supply of labor trades is so constrained.

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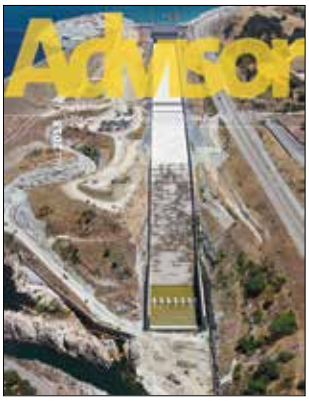
ON THE COVER



Folsom Dam Auxiliary Spillway Phase IV, Folsom, CA
2017 Project Achievement Award Winner
Environmental: Construction Value Greater than $50 Million
Owner: U.S. Army Corps of Engineers
CM: Kiewit Infrastructure West Co.

BACK COVER

Transportation Investment Act – Band One, GA
2017 Project Achievement Award Winner
Transportation: Construction Value Greater than $50 Million
Owner: Georgia Department of Transportation
CM: HDR Engineering, Inc.

CHRIS PAYNE, PE, CCM

Mr. Payne is Executive Vice President/ Chief Operating Officer with MBP. He has more than 30 years of experience in construction management and design, performing a wide variety of services such as construction project management, inspection, CPM scheduling, and cost estimating. He has specialized experience in the resolution of construction disputes to include analysis of delays and expert testimony. He began his career as a structural engineer performing bridge design and consults on a variety of building and transportation programs, providing direct client coordination and strategic counsel.

TEAM BUILDING IN AN INTER-ORGANIZATIONAL MATRIX

BY DAN HARRIS, CCM, PMP, LEED GREEN ASSOC.

CONSTRUCTION MANAGERS are accustomed to juggling tight budgets, impossible schedules and fluctuating market influences under the ever-present shadow of legal risk. With the analytical skills required to address these demands, it's often overlooked that the soft skills of team building and people management are equally important to project delivery—particularly in a multi-organizational environment—and because these skills are non-algorithmic, they can be even more challenging.

A matrix structure is generally recognized as the most efficient approach to intra-organizational program and project management. The system has a set of innate challenges, including conflicts in accountability and competing interests among both managers and staff. The effort can be made even more difficult when it involves staff who aren't accustomed to working in a project setting. These challenges are further magnified in long term endeavors in establishing and maintaining lines of authority, communication and coordination in cross-functional teams between multiple organizations.

BACKGROUND

Loudoun Water's Potomac Water Supply Program (PWSP) afforded managers an opportunity to sharpen teambuilding skills in the first phase of the 10-year, $400-million effort. Headquartered in Ashburn, Virginia, Loudoun Water initiated the design of the PWSP in 2011. The goal of the program was to provide a safe and plentiful source of drinking water to meet Loudoun County's growth projections through 2040.

Construction of the first phase began in early 2014, starting with a raw water intake and pumping station on the Potomac River, five miles of 42" raw water pipeline, and the centerpiece project, the $133-million Trap Rock Water Treatment Facility, designed to produce 20-million gallons per day of potable water through state-of-the-art treatment technology. The PWSP also included construction of a bridge and access road to the Trap Rock site, and conversion of a nearby retired quarry for "water banking" during drought conditions.

The program hit the ground at full throttle with three contractors, three consulting engineers providing services during construction, Loudoun Water program and project managers and quality control staff and a program management consultant mobilizing in field offices at the Trap Rock site. While the various kickoff meetings were attended with the usual exuberance and optimism, the complexity and aggressive schedule of the Trap Rock project demanded that certain difficulties be acknowledged and reckoned with immediately. As time passed, additional circumstances arose requiring an iterative approach to team management.

DEFINING HIERARCHY

Establishing who is in charge of whom in a matrixed environment is always tricky business. When the "boss" is an employee of a subordinate organization, it gets even trickier.

At the initial partnering session for Trap Rock, hierarchies were outlined as part of an issue resolution process. A protocol was laid out that encouraged field staff—inspectors and contractor supervisors—to settle disagreements within their own subset. If agreement on a particular issue couldn't be reached, it was to be escalated systematically through

the ranks to the corporate executive levels of the three primary stakeholders: Owner, Engineer and Contractor.

To better define the issue resolution protocols as well as to identify lead staff, an issue resolution workflow chart was devised to focus on specific actions to be taken through the project and program command chain when problems arose. This also reinforced the command structure without the use of an organizational chart.

A side issue was that unemployment in Loudoun County was nearly two percentage points below the national unemployment level at project inception, and it continued to drop in the years that followed. The strong labor market made attracting and retaining qualified consultant inspections staff a challenge. Each new recruit or replacement was faced with a learning curve which became steeper as the project progressed, as well as the sometimes intimidating task of finding his or her niche in the framework of the team. At times, Tuckman's familiar forming-storming-norming-performing group development model seemed a bit like the movie "Groundhog Day," but the issue resolution hierarchy and workflow diagram became part of the required reading list for all new inductees.

ASSIGNING OWNERSHIP

The Trap Rock project was comprised of twelve individual structures supporting four processes in the water treatment operation. In addition, a 16,400 square foot administration building designed to LEED® Gold standards was constructed to house office staff. A 2mgd wastewater pumping station provided sewage conveyance not only from Trap Rock, but also for the surrounding service area. Beneath and between these buildings was a complex network of process and utility piping as well as power, data and chemical duct banks, most of it in trenches that were blasted or hammered from hard diabase rock.

The work was overseen by as many as seven full time inspections staff working under a consultant construction manager, representing a mix of Loudoun Water and consultant employees. This group consisted of a mix of training and experience levels.

Work divisions were initially made on a discipline basis according to background and experience. The Loudoun Water team had extensive experience in pipeline construction and earthwork, so that team was assigned to the underground aspect. The consultant provided a structural engineer, an engineer-in-training and a seasoned construction representative to oversee concrete and structural steel work. A second senior construction representative oversaw

the early process and mechanical installations throughout the project geography site.

As the project progressed, more trades mobilized and the work became more technically specialized, and assignments were reallocated by process area. Each member of the QA team was given bumper-to-bumper responsibility for his or her area, to include all trades and design disciplines, but with support as necessary from the discipline design leads and specialty inspectors. This approach not only leveraged the inspection team to explore and learn the engineering complexities of the project, but also reinforced the notion that each area or building was a project unto itself, which brought a sense of ownership to the individual team members. The onsite engineering, administration and controls staff provided support for the field team.

DEVELOPING A KNOWLEDGE BASE

The diverse and dynamic staffing mix at the Trap Rock project made it essential that a common foundation of knowledge and expectations be established. The onsite construction management team developed a quality assurance plan based on the contract documents, various professional standards and experience from past projects. This helped to bolster the inter-organizational hierarchy and provided a graphic representation of contractor personnel with whom the CM team would be expected to interact on a daily basis. The plan also reiterated processes for issue resolution and escalation.

Many of the QA team members needed to build or expand upon vertical treatment facility construction experience. To help facilitate this, the design consultant brought in subject matter experts from the engineering group, who gave presentations to explain the theory and design approach for the various treatment processes. These sessions were enlightening to both the construction management group and the contractor's onsite staff. The LEED® project administrator educated the CM team and Loudoun Water's managers on the labyrinth of requirements involved in that certification process.

As the project progressed, more trades mobilized and the work became more technically specialized, and assignments were reallocated by process area.

The Loudoun Water contingent also contributed to the knowledge sharing effort. Like most large utilities, Loudoun Water has a specific set of design and construction standards it employs on its projects. Having team members involved in the construction who were intimately familiar with these requirements saved both the design consultant and the contractor considerable time and effort through the course of the project.

Aside from technical subjects, team members also received instruction on various administrative topics. Effective documentation was an important discussion item on several occasions. Staff also received tutorials in critical path methodology and use of the program's web-based document management system.

BACK TO THE BASICS

For the Trap Rock team, the project was an opportunity not only to sharpen new skills, but also to renew acquaintances with the basic tools and techniques of effective construction management.

Frequent meetings with small, limited agendas were organized. For discussions specific to the construction management and QA groups, participation from those in the management ranks was restricted in order to promote candor and a collaborative approach to problem solving. Planning for significant tasks was detailed, documented and thoroughly critiqued. Outstanding individual performance was recognized by the group. Disagreements between leadership staff were taken offline. Team successes and project milestones were celebrated, and "success spotlight" was a routine agenda item for regular progress meetings. The inevitable pitfalls and missteps were recorded in a lessons learned file, and departing team members received an appreciative sendoff.

The most significant takeaways from the Trap Rock project was construction management leadership competencies that involved the need to establish the matrix structure in advance of project commencement, and to gain acceptance among team members.

A thorough familiarity with the advantages and disadvantages of the approach is necessary, and a willingness to retool plans as rapidly changing circumstances require is essential. Most importantly, the successful CM will reinforce his role as servant leader whose chief responsibility is to provide both guidance and support to the inter-organizational team with all the tools in his professional arsenal.

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SIX COMPONENTS OF SUCCESSFUL PUBLIC-PRIVATE PARTNERSHIPS

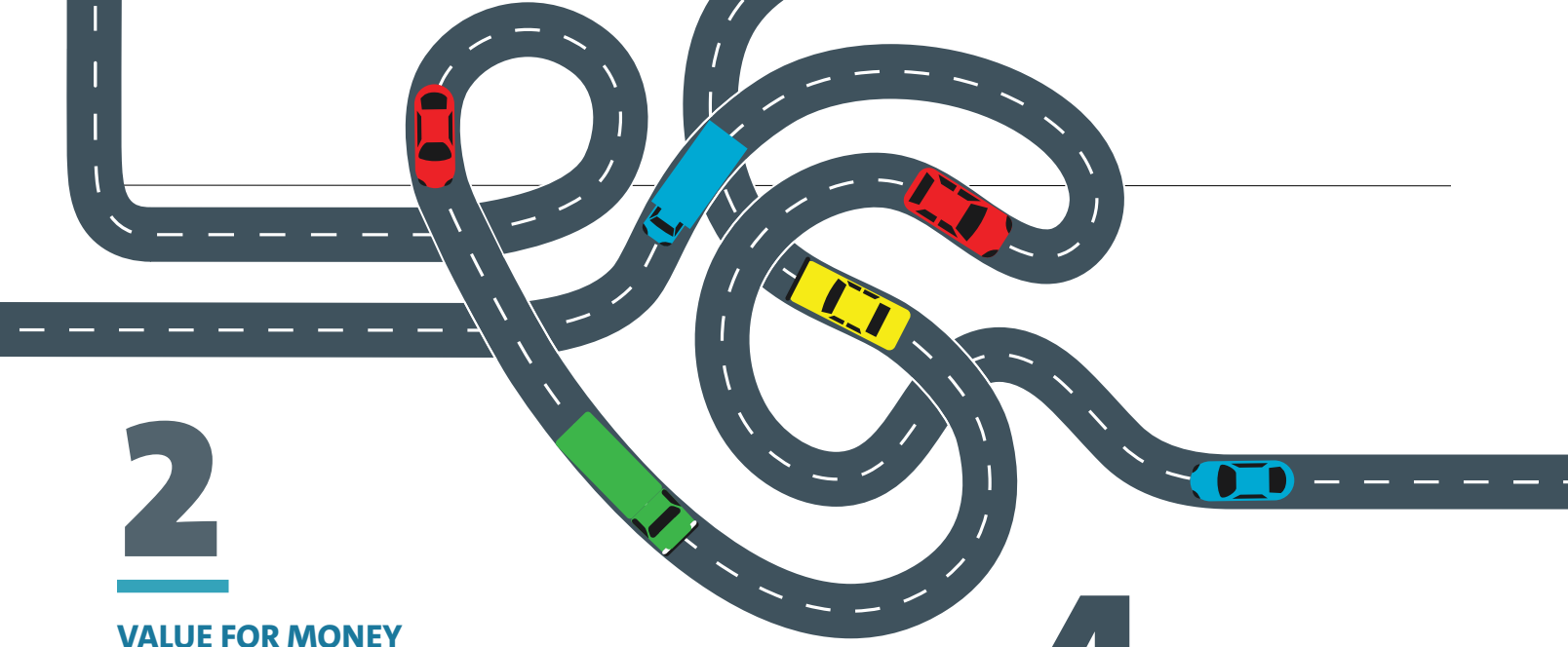
BY GUY SMITH

PUBLIC-PRIVATE PARTNERSHIPS (P3s) were first developed in the late 1990s as an approach to enhance flexibility for public entities in the procurement, construction, and management of public facilities. Since then, much debate has arisen regarding the conditions that must exist for the P3 approach to be successful. Although P3 arrangements can be used to deliver a wide range of economic infrastructure (roads, bridges, dams, electrical transmission lines, etc.) and social infrastructure (schools, hospitals, courthouses, museums, etc.), the delivery method should not be considered a cure-all for every public infrastructure development opportunity. Although each public-private partnership project is unique, there are common criteria that should be reviewed prior to a jurisdiction moving forward with the complex and challenging processes of a P3 procurement. Six points for consideration for potential P3 arrangements include:

1

POLITICAL AND LEGISLATIVE SUPPORT

The political leadership for the area of the proposed P3 development must be prepared to provide the team responsible for procurement, development, and delivery with support at all stages of the project. Examples of support include developing enabling legislation, bridge financing for the procurement phase, and communications support. In addition, financial guarantees must be made, demonstrating the jurisdiction is prepared to make payments to the successful P3 project "special purpose" corporation ("ProjectCo") for the duration of the project agreement, which could be 30 to 40 years. In some cases, enabling legislation may not be in place to allow a jurisdiction to grant a license to the ProjectCo to operate or maintain the facilities over the term of the P3 agreement. In other cases, the jurisdiction may lack the capacity to enter into a long-term agreement with the ProjectCo, or to raise sufficient capital through bond issues to support the project from initiation through execution. These are key criteria that must be thoroughly analyzed prior to the jurisdiction moving too far forward along the road to procurement.



2

VALUE FOR MONEY COMPARED TO TRADITIONAL PROCUREMENT

A key component of a jurisdiction's readiness to move forward with a P3 is developing a business case outlining the potential benefits and risks of proceeding with the project as a P3, compared to the benefits and risks of a traditional design-bid-build approach. The value in a P3 arrangement is often derived from the economies of scale of the P3 contractor assuming operations and/or maintenance of the proposed facility. As a result, the party preparing the business case must include the cost of operations and/or maintenance of the proposed facility under a traditional procurement approach for direct comparison. Once the business case has been completed with a risk-adjusted cost comparison of the traditional approach to a P3 approach, the decision-makers are able to make a reasonable assessment of the value of a P3 and determine whether the risks deemed inherent in the P3 arrangement are mitigated by cost savings over the term of the agreement.

3

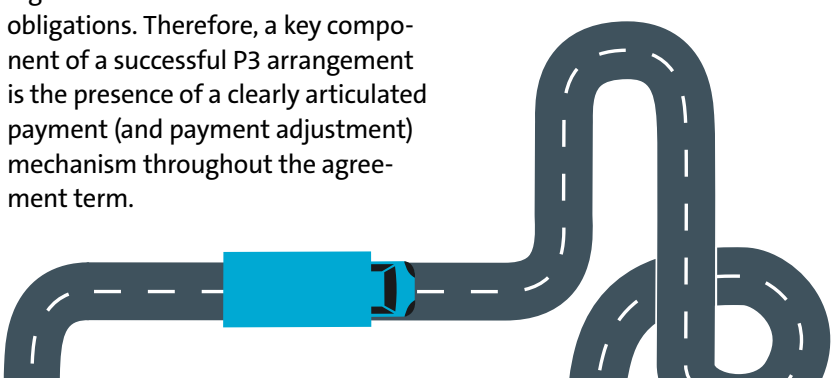
MEASUREMENT OF PRIVATE-PARTNER PERFORMANCE

The success of a P3 arrangement often depends on the ability of the private partner, or ProjectCo, to manage the risks it assumes when agreeing to perform work on the project over the term of the agreement. This risk management approach takes the form of economies of scale during the design and construction process, or efficiencies during the operations and maintenance stage. The key success factor for the jurisdiction lies in its ability to measure objectively the work of the ProjectCo throughout all stages of the project. If the ProjectCo does not meet its obligations, the jurisdiction may be enabled by the agreement to make adjustments to the ProjectCo's payments reflecting the failure to meet contractual obligations. Therefore, a key component of a successful P3 arrangement is the presence of a clearly articulated payment (and payment adjustment) mechanism throughout the agreement term.

4

SEPARATION OF PRIVATE PARTNER PERFORMANCE FROM OTHER ACTIVITIES RELATED TO THE PROJECT

When deciding whether to proceed with a P3 arrangement, the complexity of the proposed project is a fundamental consideration. The jurisdiction must determine in the early stages whether the proposed project includes a significant amount of renovation or rehabilitation work, or whether the project is on a greenfield or brownfield site. There should also be a determination of whether the work of a P3 ProjectCo can be separated from other work that may not be the responsibility of the ProjectCo. We strongly recommend that the P3 project be developed with minimum complexity. Complexity introduces risk into the relationship, which can significantly erode the potential value for money of the proposed project.



5

SUFFICIENT MARKET INTEREST AND CAPACITY

The level of interest in the proposed project from the private-partner community is a key success factor; the public-sector entity does not want to be in the position of throwing a party nobody wants to attend. Therefore, we strongly recommend that the jurisdiction engages in a robust market-sounding process prior to publicly announcing the project. This market sounding will allow the jurisdiction to determine not only the level of interest of potential private-sector partners, but also their capacity to engage in and complete the project in the manner and to the schedule specified by the jurisdiction. Market sounding is an important component of the communications strategy adopted by the jurisdiction to ensure it receives sufficient coverage and interest from the right potential private-sector partners. This exercise will also give the jurisdiction certainty on whether or not the proposed project is large enough (or small enough) to attract the appropriate private-sector partners to pursue the project. Pursuit costs for P3 projects can often be quite high. As a result, private-sector companies tend to be selective about potential public-sector partners in order to achieve optimum yield on their pursuit efforts.

6

SUFFICIENT OPERATIONS AND/OR MAINTENANCE COMPONENT

The ability of the public sector to benefit from efficiencies of the private-sector partner from the operations and/or maintenance component of the proposed project directly affects the success of the project. The public-sector jurisdiction must have a clear understanding of what elements of the maintenance and operations it is prepared to transfer to the private-sector partner, or ProjectCo. In addition, the jurisdiction must clearly articulate in the agreement its expectations of the ProjectCo and the prescribed payment adjustments that will be imposed if those expectations are not met. The operations and maintenance component of the project must be sufficient enough to allow the ProjectCo to leverage the efficiencies that can be passed along to the public sector.

Although the above issues are important when a public-sector jurisdiction is contemplating using a P3 approach toward developing a public facility, this is by no means an exhaustive accounting. A full list of considerations can only be developed through a comprehensive risk-management workshop prior to engaging in the procurement process. These will vary among project types; it is unlikely a $5 billion highway project, a $250 million school project, or a $100 million water treatment plant would share the same considerations. However, the fundamentals remain the same; the goal is for the public-sector jurisdiction to procure a public asset in a timely and cost-effective manner, while allocating the risks implicit in the project to the party best equipped to manage them. It therefore behooves the representatives of the public entity to review the above considerations as they embark on this challenging course of action.

Guy Smith is a P3 Advisor at Rider Levett Bucknall (RLB) and can be reached at guy.smith@ca.rlb.com.

FROM THE CHAIR

Continued from page 3

CMAA has recognized that workforce development is one of the key components of our strategy going forward. This will involve not only continuing to promote construction management education at the university level, but in reaching students at a much earlier age—down to elementary and secondary schools. All of us realize that construction management can be an immensely rewarding experience, requiring creativity and teamwork while offering variety and responsibility. In an era when people spend an increasing portion of their days staring at some form of a screen, the chance to build something real, not virtual, is a rare one.

As we look forward, we know that we will need to update our standards and expectations for CMs as technology changes and as construction becomes less reliant on direct physical labor. No doubt CMs will be increasingly challenged to integrate technology with people and problem-solving skills to deliver projects faster. I hope that CMAA, along with the entire industry, will be able to portray an interesting and rewarding career with benefits well beyond free beer to the next generation workforce.

LEGAL
CORNER

MECHANIC'S LIENS FOR PRE-CONSTRUCTION SERVICES

BY HENRY L. GOLDBERG, ESQ. & ROBERT FRYMAN, ESQ.

With the expanding acceptance and use of design-build project delivery in both the public and private sectors, the availability of a mechanic's lien to secure payment for design and other pre-construction services increases in importance. Construction managers (CMs) may be more regularly called upon to provide pre-construction services, even before project-wide financing is fully secured. This raises the risk of non-payment.

PRE-CONSTRUCTION SERVICES

Pre-construction services can include a wide range of activities such as preliminary planning, as well as design and engineering services. This often involves defining the project scope, schedule, and cost, as early as possible, so as to develop a firm cost estimate and to assist in securing financing and required permits or regulatory approvals.

In many states, pre-construction services are broadly considered as any services before actual, physical construction work begins. This expansive definition raises issues as to mechanic's lien rights regardless of whether the physical construction has, or ever will, commence.

Pre-construction services have also been argued to encompass services such as management or supervision, for example, "aiding or assisting in procuring subcontracts or subcontractors." Such sweeping inclusions have led to disputes as to the validity and/or priority of mechanic's liens for pre-construction services.

STATUTORY AND JUDICIAL TREATMENT OF LIENS FOR PRE-CONSTRUCTION SERVICES

Mechanic's liens are a creature of state law, and the rules and requirements vary from state to state. Many states have addressed the issue of what types of pre-construction services are lienable, and when they become lienable. This has typically been done on an ad hoc basis, by judicial interpretation of mechanic's lien statutes that, when enacted, did not expressly contemplate pre-construction services. Other states have attempted to expressly define pre-construction services, and whether (or when) they are lienable, via specific new legislation.

For example, Utah Code 38-1-2, amended in 2011, defines pre-construction services as the following:

> (a) means to plan or design, or to assist in the planning or design of, an improvement or a proposed improvement: (i) before construction of the improvement commences; and (ii) for compensation separate from any compensation paid or to be paid for construction service for the improvement; and (b) includes consulting, conducting a site investigation or assessment, programming, preconstruction cost or quantity estimating, preconstruction scheduling, performing a preconstruction construction feasibility review, procuring construction services, and preparing

> a study, report, rendering, model, boundary or topographic survey, plat, map, design, plan, drawing, specification, or contract document. Utah Code Title 38, Chapter 1, Mechanic's Liens.

Nevada's mechanic's lien laws were amended in 2003 so that a contractor or design professional seeking to enforce its lien would no longer need to demonstrate that 'visible work' existed at the project site in order to have a valid lien preconstruction services and to have priority over a subsequently recorded lender's deed of trust . Nev. Rev. Stat. Ann. §108.225.

However, notwithstanding the changes to the Nevada lien law, in *J.E. Dunn Northwest, Inc. v. Corus Constr. Venture, LLC*, in 2011, the Nevada Supreme Court again considered the revised statutory scheme of "visibility" as to pre-construction services. The pre-construction services involved included preparing project schedules, review and coordination of architect's and subcontractors' drawings, holding meetings with subcontractors and other "planning related work." The lender for the project acknowledged that the contractor had performed the claimed pre-construction work. It even approved the contractor for the project, and entered into an agreement with the contractor, in which the lender sought to have the contractor agree to subordinate its mechanic's lien rights to the lenders deed of trust. However, the contractor refused and the subordination clause was removed from the final version of the agreement.

Subsequently, the contractor filed a mechanic's lien and commenced an action to establish that its lien had priority over the lender's lien. The lender argued that its lien had priority over the pre-construction services

Mechanic's liens are a creature of state law, and the rules and requirements vary, accordingly, from state to state.

The law regarding mechanic's liens presents a state by state technical minefield, with numerous statutory definitions.

mechanic's lien "because 'no visible work had been performed on the property and no visible equipment or materials had been furnished to the property' as of the date it recorded its deed of trust, [and] construction had not commenced". *J.E. Dunn Northwest, Inc. v. Corus Constr. Venture, LLC*, 249 P.3d 501, 504, 127 Nev. 72, 76-77, 2011 Nev. LEXIS 6, 127 Nev. Adv. Rep. 5 (2011).

The Nevada Court of Appeals held, notwithstanding the lender's actual notice of the contractor's pre-construction services and the legislature's 2003 amendment to the lien law, that the amended statute still "requires visibility for work performed, including pre-construction services, in order for a mechanic's lien to take a priority position over a deed of trust." J.E. Dunn, 249 P.3d at 506-7.

In Washington state, although having a statutory "visibility" scheme regarding notice of pre-construction work similar to Nevada, the Court of Appeals ruled in favor of an architecture firm against a lender which sought to disregard its actual notice of the pre-construction services to claim priority over the architect's mechanic's lien. In *Zervas Grp. Architects, PS v. Bay View Tower, LLC*, the court found:

> The plain meaning of the statute is that when a subsequent mortgagee has reason to know of the professional services, its lien is subordinate. Such is the case here. Indeed, the Bank admits it had actual notice that architectural services had been provided. And at the time it recorded its deeds of trust, the Bank had ample information from which to deduce, through implication or inquiry, the existence of a potential professional services lien claimant, to wit, the architect on the project. *Zervas Grp. Architects, PS v. Bay View*

Tower, LLC, 161 Wn. App. 322, 328, 254 P.3d 895, 898, 2011 Wash. App. LEXIS 870, *8-10 (2011)

Thus, Washington takes a more pre-construction contractor friendly view to the realities of the construction and development industries than Nevada, i.e. that many valuable pre-construction services are rendered prior to the start of physical construction work, and often before the securing of financing. Indeed, many of those pre-construction services are necessary to obtain construction financing, initial zoning and regulatory approvals and CMs should be afforded the recognition of the value of the pre-construction services provided, and the same ability to secure themselves with regard to the property.

New York is among those states that do not have express statutory provisions defining or authorizing liens for pre-construction services. However, in New York, although design professionals' services in preparing plans and drawings are expressly recognized as qualifying for mechanic's lien protection (N.Y. Lien Law §2(4)), the N.Y. Lien Law is otherwise silent on other types of pre-construction services. New York's Lien Law instead focuses, generally, on whether any particular labor, services, or materials assisted in "improving" the property.

In a recent New York case, the court was required to look back almost a century for legal precedent. In *Matter of Old Post Rd. Assoc. LLC*, the court considered the application of a project owner to discharge the mechanic's lien filed by a contractor retained to provide "pre-construction management services."

The project owner did not dispute that it engaged the contractor to perform certain pre-construction management services. Indeed, the owner acknowledged that the contractor provided services for the project and attended meetings with the owner's consultants in connection with the site plan approval application. However, the owner claimed that the contractor provided those services "gratis in an ultimately unsuccessful effort to earn the position of CM for petitioner's upcoming construction project." The owner argued that the lien should be discharged because the services the lien was based upon, "pre-construction management services," did not fall within the lien law's definition of services which "improve" the property. Old Post Rd. Assoc. LLC, *Matter of Old Post Rd. Assoc. LLC (LRC Constr., LLC)*, 60 Misc. 3d 391, 293 77 N.Y.S.3d 283, 2018 N.Y. Misc. LEXIS 1778, 2018 NY Slip Op 28148392 (Supreme Court, Westchester County, 2018).

The court observed that, "[l]ittle guidance is provided in the case law as to what types of work fall within and outside the category of 'improvements' under the Lien Law. Notably, no case has been cited or found by this court explicitly considering the term 'pre-construction management services,' or discussing the definition, nature and extent of such services." The court then turned to the 1929 decision of the New York Court of Appeals (New York State's highest court) in *Goldberger-Raabin, Inc. v. 74 Second Ave. Corp.*

The lower court in *Old Post* noted that in *Goldberger-Raabin*, the Court of Appeals drew a distinction between "[lienor's] services in aiding or assisting in procuring subcontracts or subcontractors," which it held was *not* an improvement of property, and services managing the demolition of the old building and construction of the new building which it held was an "improvement of the real property" for which it was entitled to file a mechanic's lien. *Old Post Rd. Assoc. LLC*, 60 Misc. 3d at 393-394.

The *Old Post* court then turned to a more recent trial court decision,[1] observing that while the New York Lien Law did not cover merely "applying for permits and approvals," it would apply to the "professional engineering and professional surveying services rendered in connection with obtaining municipal approvals for the development," even though "no actual physical permanent improvement [took] place." The court observed that "the primary purpose of the Lien Law is to afford protection for workmen who at the request or with the consent of the owner of real property enhance its value by performing labor for the improvement thereof. If a landowner fails to take a project through to completion, for whatever reason, the claims for work done to improve the property are no less entitled to the benefits of this statute." Id.

Having concluded that a lien could, in fact, be filed for "pre-construction" services, the *Old Post* court then considered the specific labor and services provided. The CM explained in that case that as part of its pre-construction services, it recommended changes to the structural system for the project; provided finish selections, facade recommendations and mechanical, electrical and plumbing system recommendations required for the high end condominium market; prepared for and attended planning board meetings; prepared site logistics and access plans; performed a constructability review for the project; attended meetings with consultants and officials to assist the approval process; and prepared construction budgets to assist in the design development process for the project.

As a result, the *Old Post* court found the CM's lien for pre-construction services was valid, stating, "[w]hile some of the foregoing may be comparable to the non-lienable work of procuring bids or permits, some of the other described tasks, such as preparing site logistics and access plans for the property and performing a constructability review for the project at the property, appear to be comparable to the category of engineering planning work held to be covered by the Lien Law." Id. at 396.

COMMENTARY:

The law regarding mechanic's liens presents a state by state technical minefield, with numerous statutory definitions, deadlines and substantive and procedural pitfalls which, without care, could operate to waive or forfeit a CM's rights. This could occur even before work on a project has begun. In projects involving significant pre-construction work, a CM providing any pre-construction services must carefully consider the sources of project funding (public or private), and their rights and remedies under the applicable state law for the project's "venue."

Lien Law remedies for securing payment of fees must be reviewed and considered before problems arise to assure all statutory deadlines (which could be as short as a matter of months) are met. It is best to consult with experienced construction counsel in the particular state, before expending large amounts of time or money on a project in which you have concerns regarding payment.

CMs, as construction professionals, are frequently called upon to render pre-construction services for projected projects which are not fully funded. They often do so in an effort to maintain a client relationship and to facilitate chances of securing the eventual engagement as the construction manager for the planned project. The pressure to cooperate can be considerable.

Mechanic's liens were designed decades ago to provide cost-effective protection for construction contractors, materialmen, and workers against the more powerful, "monied" class of owners and developers. Such liens are designed to help "level the playing field," and protect your interests. You may want to consider this remedy, particularly where there is no formal contract in place to define and protect your interests.

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1 Citing *Chas. H. Sells, Inc. v Chance Hills Joint Venture*, 163 Misc 2d 814, 816, 622 N.Y.S.2d 422 (Sup Ct, Westchester County 1995)

CMAA NEWS

CMAA TO HOST 1ST ANNUAL DEANS' FORUM

The CMAA Deans' Forum will connect a small group of CMAA leaders with deans, department chairs, and program directors of academic CM programs offered in U.S. colleges and universities to collaborate and brainstorm ways to improve the industry's workforce.

Held just before CMAA's National Conference in Las Vegas, this focus group will inform and engage leaders from the profession and academia in what will be the first stages of a regular dialogue regarding mutual responsibilities for the long-term success of early-career construction management professionals.

CMAA

Advancing Professional Construction and Program Management Worldwide

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