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TO P₃ OR NOT TO P₃?

Bill Culton, General Counsel
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York Region Rapid Transit Corporation

ASSOCIATION OF CORPORATE COUNSEL
October 25, 2010
San Antonio, Texas

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1. INTRODUCTION

- Wide Array of Infrastructure and other Public Projects
- The Debate over the use of P3's
- Organization of today's Presentation
- Introduction of Panelists

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2. ALTERNATIVE PROJECT STRUCTURES

- **SPECTRUM OF PROJECT DELIVERY OPTIONS**



- **TYPES OF MODELS**
 - Design Build (DB)

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- TYPES OF MODELS (cont'd)
 - Design Build Finance (DBF)
 - Design Build Operate Maintain (DBOM)
 - Design Build Finance Operate Maintain (DBFOM)
 - Build Own Operate (BOO)
 - Build Own Operate Transfer (BOOT)

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- DIFFERENTIATING CHARACTERISTICS OF THE MODELS
 - Does the Public Sector prescribe exactly what it wants?
 - Who owns the asset?
 - Difference between Privatization and P3.
 - Who controls/ operates/ maintains the asset?

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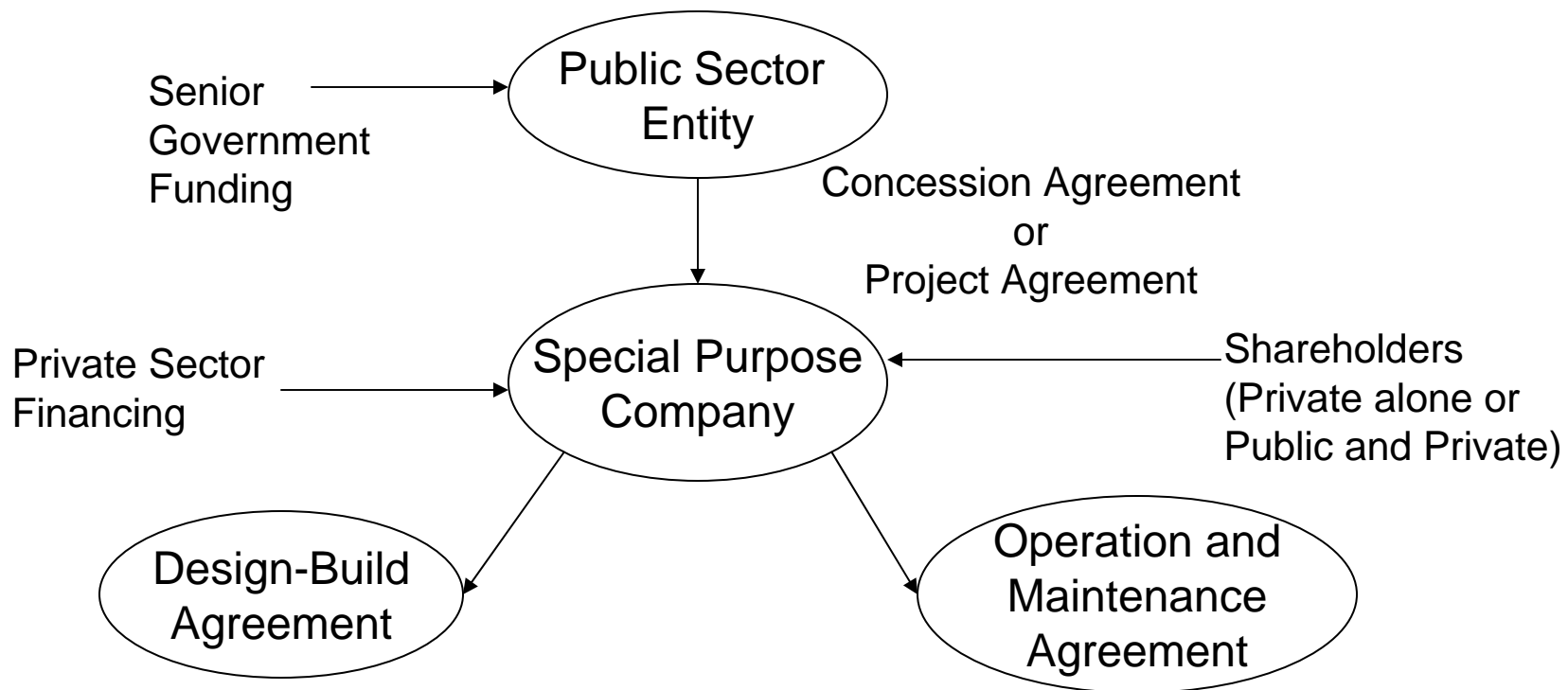
- DIFFERENTIATING CHARACTERISTICS OF THE MODELS (cont'd)
 - What happens to the asset at the expiry of the term?
 - Is the Project publicly funded or privately financed?

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• TYPICAL P3 PROJECT STRUCTURE



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- **IMPORTANCE OF EARLY PROJECT PLANNING BY THE PUBLIC SECTOR**
 - The Private Sector should not be engaged until the Public Sector has done its homework
 - Project or Contract Scope and Timing Need to be Defined
 - Project Structure Needs to be Determined
 - Is a Public Private Partnership the best Model for the Project?

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- **IMPORTANCE OF EARLY PROJECT PLANNING BY THE PUBLIC SECTOR**
(cont'd)

- What role will the Public Sector perform?
- Legal authority for Public Sector to undertake and structure the Project in the proposed manner
- Preparation of a Business Case
- Procurement Options

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3. RISK ALLOCATION AND PROJECT DOCUMENTS

- **WHAT IS RISK ALLOCATION?**
 - Optimal Risk Allocation
 - Identifying and Defining Risks
 - Developing a Risk Allocation Matrix

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- DETERMINING WHO SHOULD BEAR THE RISK?
 - Power and Authority to Manage the Risk
 - Compensating the Party Bearing the Risk
 - From Project Revenues?
 - From Funding?
 - Other Sources

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- **RISK ALLOCATION ISSUES IN POLITICALLY SENSITIVE PROJECTS**
 - Projects where Ownership or Control of an Asset are Sensitive Issues
 - Highway Tolls
 - Transit Fares
 - Water Rates
 - Statutory or Regulatory Requirements

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- PROJECT DOCUMENTS
 - Design-Build Agreement
 - Use of Standard Form Industry Construction Agreements
 - Are the Risks Appropriately Allocated?
 - Contract Prices
 - Fixed Fee
 - Guaranteed Maximum Price (GMP)

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- Design-Build Agreement (cont'd)
 - Penalties and Incentives
 - Other Key Clauses

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- Operation And Management Agreement
 - Term of Contract
 - Duties and Responsibilities of Operator/Manager
 - Termination of the Contract
 - For Cause
 - For Convenience
 - Insurance and Indemnities
 - Other Key Clauses

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- Concession Agreement
 - Term of Concession
 - Duties and Responsibilities of Concessionaire
 - Termination of Concession
 - For Cause
 - For Convenience
 - Insurance and Indemnities
 - Other Key Clauses

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- Ground Lease
 - Term of Ground Lease
 - Rent Payable
 - Default Provisions
 - Insurance and Indemnities
 - Repair and Maintenance Obligations
 - Other Key Clauses

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- Private Financing

- Part of a Proposal Team or Arranged Separately
- Paid out by Senior Government on Completion?
- Paid out through Project Revenues?
- Lender's Approval of Risk Allocation and Project Documents
- Role of Pension Funds in Project Financing

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4. MAKING IT WORK – PUBLIC SECTOR PERSPECTIVE – YORK REGION RAPID TRANSIT PROJECT

- **INCEPTION OF THE PROJECT**
 - 2001-2002 RFQ
 - 2002 RFP
 - 2002 Initial Project Agreement (“Stage One Agreement”)

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- **PROCURING THE PRIVATE SECTOR PARTNER**
 - Very Competitive RFP Process in 2002
 - Consortium of International Corporations Chosen

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- **CHANGES IN SENIOR GOVERNMENT FUNDING**
 - Evolution of “Incremental Project Financing” in 2003
 - Long Term Planning More Difficult
 - Project Development in Phases and Segments
 - Success of “Quick Start”

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- **PUBLIC/ PUBLIC RELATIONSHIP**
 - Changes over time in roles of Senior Government (the Province and the Federal Government)
 - Political Risk
 - Roles of Infrastructure Ontario and Metrolinx
 - Master Agreement between Metrolinx and YRRTC
 - Maintenance Agreements with Local Municipalities

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- RECENT CHALLENGES AND HOW THEY WERE HANDLED
 - Procurement Agreement for Continuing Role of Private Sector Partner
 - Approval of Metrolinx to the Procurement Agreement
 - Use of “Cost Confidence Process” to ensure Competitive Pricing
 - Infrastructure Ontario for specified segment project financing

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5. MAKING IT WORK – PRIVATE SECTOR PERSPECTIVE – PICERNE MILITARY'S HOUSING PARTNERSHIP WITH U.S. ARMY

- THE MILITARY HOUSING
PRIVATIZATION INITIATIVE (1996)
 - Allowed Department of Defense (DOD) to
provide:

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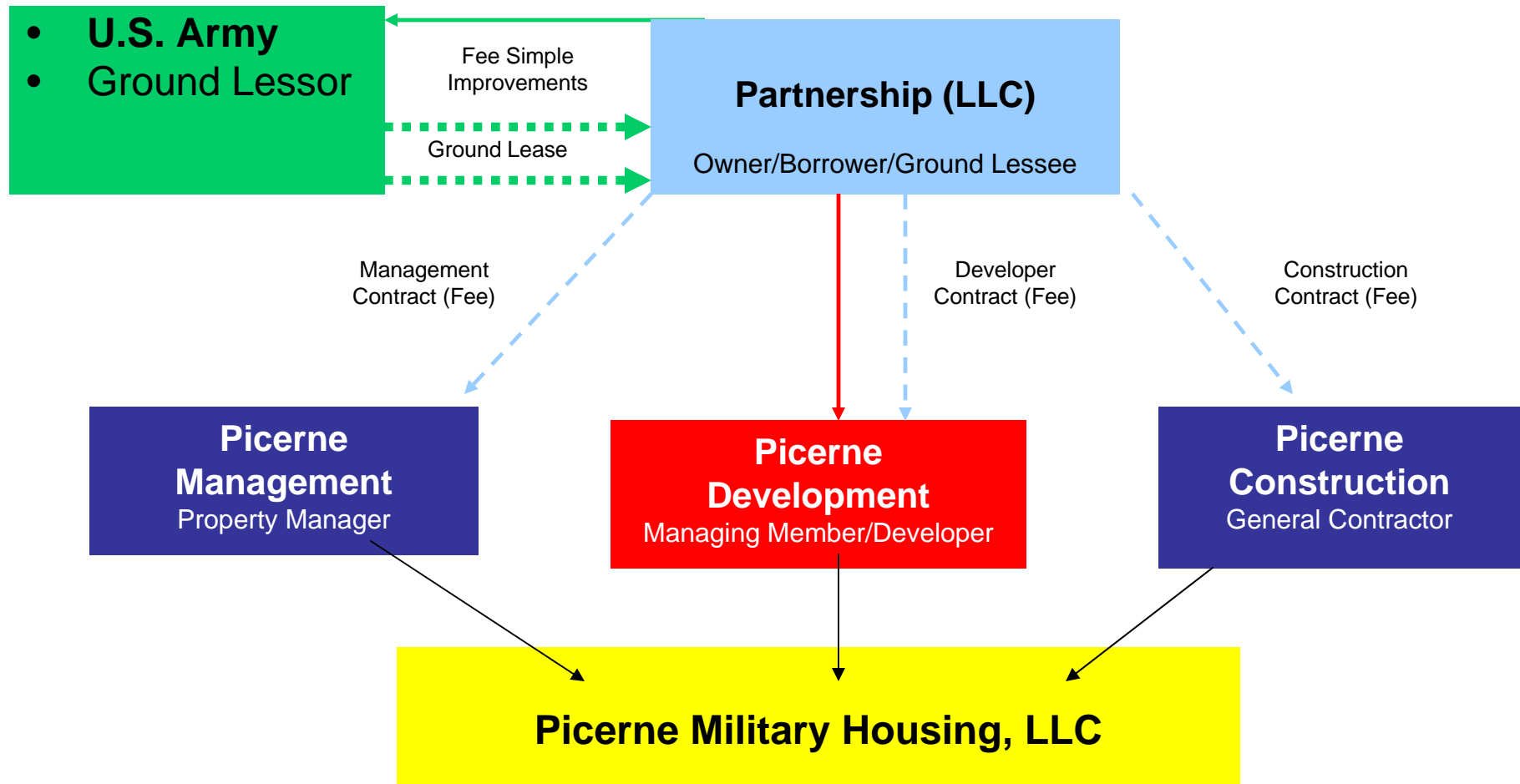
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- direct loans
 - loan guarantees
 - other incentives to encourage private sector firms to develop and manage housing
-
- **TYPICAL PICERNE/ U.S. ARMY PROJECT STRUCTURE:**

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- PROJECT DOCUMENTS
 - LLC Operating Agreement
 - Ground Lease
 - Municipal Services Agreement
 - Development Agreement
 - Construction Agreement
 - Property Management Agreement

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- CHALLENGES AND SOLUTIONS
 - Partnership with “Big Army” (DA) and “Little Army” (Installation)
 - Whose decision is it?
 - Major Decision process
 - Customer
 - Military Service Members and Families
 - Evictions
 - Exclusive Federal Jurisdiction

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6. THE P3 EXPERIENCE TO DATE

- The United Kingdom
- Australia
- Canada
 - Province of British Columbia (Partnerships B.C.)
 - Province of Ontario (Infrastructure Ontario)
 - Province of Quebec
- The United States

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7. ROUNDTABLE AND QUESTIONS FROM THE AUDIENCE