

Fredric W. Kessler

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In over 42 years with the Firm, Fred Kessler has gained national recognition as a guiding force for public agencies in the field of transportation public-private partnerships (P3s). Clients benefit from his vast experience with innovative procurement, project delivery and financing as well as with negotiated agreements. He is skilled in structuring successful toll concessions, availability payment agreements and design-build and design-build-maintain contracts – and advising on the strategic business decisions behind them.

Helping to advance the nation's sorely needed infrastructure upgrades through non-traditional methods, Fred assisted U.S. Congressional staff in drafting important 2012 changes in federal transportation law that improved and expanded federal credit assistance and tolling programs (MAP-21).

Fred leads or plays an integral role on Nossaman teams assisting major public agencies in creating and implementing P3 programs involving a wide array of award-winning projects. He has served in this capacity for state transportation departments in Texas, Arizona, California, Virginia and Washington, as well as the Los Angeles County Metropolitan Transportation Authority.

EXPERIENCE

Arizona Department of Transportation – P3 Program. Leader of the legal team advising on the transportation agency's P3 program covering a range of projects such as new freeways, freeway and state highway expansions, highway lighting, ancillary operations and facilities and other transportation facilities. Our services included developing programmatic guidelines and manuals, counseling on legislation, initial project screening, feasibility assessments and implementation of project procurements using a variety of delivery methods. Fred's work included the following:

- **I-17 Flex Lanes Project.** Leader of the legal team that advises on an estimated \$320 million project to add lanes along 23 miles of I-17 between Anthem Way and Sunset Point. ADOT will deliver the project under its public-private partnership procurement statute, and is in the process of procuring a design-build-operate-maintain contract. Flex lanes along 8 miles of I-17 north of Black Canyon City will operate as a separate two-lane facility to carry one direction of traffic at any one time depending on need, with movable gates at both ends to control access. Fred is assisting with all aspects of the procurement, including advice on commercial and legal issues, document preparation, evaluation and selection, and negotiations.
- **South Mountain Freeway.** Leader of the legal team that advised on all aspects of a procurement for the first highway project developed under Arizona's public-private partnership statute. The largest single contract in ADOT's history, the development is also the agency's first DBM project. Besides serving in a key role for all steps in the procurement, Fred advised on determination of risk allocations, a comparative quantitative and

qualitative assessment of several project delivery alternatives, financial structuring, various other legal and commercial issues, and an RFI together with an industry forum. He is currently assisting with contract administration and claims disputes.

- **Flagstaff Facilities.** Co-leader of the legal team that advised on an innovative project to replace the agency's Flagstaff DMV and maintenance facilities. In the Department's first public-private partnership project, ADOT solicited proposals to relocate and consolidate its offices to reduce agency costs in exchange for its existing property available for commercial development. The agency entered into a pre-development agreement with a developer in 2013 and implementation agreement in 2020, completing the transaction.
- **Rest Area P3s.** Co-leader of the legal team that advised on a procurement and contract covering the management of 14 Arizona rest areas under a single P3. The contract with ADOT had a five-year term with an ADOT option to extend an additional five years. The private company was responsible to maintain and operate the rest areas and implement a sponsorship and advertising program to generate revenue. The contract guaranteed ADOT at least \$1 million over 10 years from revenues generated from advertising and sponsorship.

California Department of Transportation – Presidio Parkway. Key member of the legal team that advised on a \$1.1 billion project that rebuilt a natural gateway connecting the Golden Gate Bridge with the City of San Francisco. The parkway was the first procurement under California's public-private partnership (P3) law and the third highway project developed under an availability payment P3 in the U.S. It opened to traffic in July 2015 and captured many honors. Fred advised on the DBFOM procurement and contract documents, and helped structure the contract terms and financing arrangement including a successful application for a \$150 million TIFIA loan. He also negotiated two vital amendments to the contract.

City of Los Angeles – Convention Center Expansion. Co-leader of legal team retained by the City to help negotiate and draft an implementation agreement for the Los Angeles Convention Center (LACC) expansion P3 project, for which the City entered into an Exclusive Negotiation Agreement with a developer in January 2019. The resulting expansion is anticipated to add at least 190,000 square feet of additional contiguous exhibit space, 55,000 square feet of meeting room space and at least 95,000 square feet of multi-purpose space to the existing facility, and includes the renovation of the Gilbert Lindsay Plaza. Fred is assisting with negotiating strategies, issues analysis and preparation of contract documents.

Los Angeles County Metropolitan Transportation Authority. Key member of legal team advising LA Metro and its Office of Extraordinary Innovation on implementation of its P3 program. Fred's work has included the following:

- **Legal Framework** – Prepared a complete analysis of federal and state laws, including Public Contract Code § 22160 et seq. and Government Code §§5956 et seq., affecting LA Metro's P3 procurement and contracting authority for transit and highway projects, as well as federal and state tolling laws.
- **Organizational Structure** – Assisted with analysis and advice to LA Metro on best practices and steps for effectively structuring LA Metro's internal organization to take advantage of P3 delivery opportunities, including advice on a policy statement; procedures for screening and selecting candidate projects; adapting CEQA/NEPA, conceptual and preliminary engineering scopes of work to maintain opportunities for later private sector innovation; interdepartmental P3 training; and organization of a P3 steering committee.
- **Union Station Commercial Development** – Lead legal advisor on the prospective procurement of an exclusive negotiating agreement (ENA) for potential major commercial development of LA Metro and City of Los Angeles properties near LA Union Station. Services include assisting with organizing an industry forum and meetings with major industry players to gauge interest in the project and with preparing an RFQ for the ENA.
- **Grand Central Square Joint Development** – Lead legal advisor in all legal aspects of LA Metro's involvement in the \$42 million, privately held mixed use project located adjacent to the Red Line's Hill Street station in downtown Los Angeles. Fred negotiated and prepared a complex set of agreements governing the financing, renovation, construction, leasing and operation of the project, including subsequent modifications. The transaction included revenue sharing for LA Metro and promoted a private project important to urban revitalization, air quality attainment, affordable housing goals and increased ridership.
- **Sepulveda Pass** – Assisting with preparation for procurement of a PDA for a major transit project (est. \$5-8 billion) through the Sepulveda Pass.

Metro Gold Line Construction Authority – Gold Line LRT. Special outside counsel in the joint development of parcels at four rail stations and implementation of the Authority's fiber-optic leasing program. The agency entered into a program to generate revenues from station-site joint development and a fiber-optic transaction to support issuance of

debt essential to financing rail transit construction. Fred's role involved preparing RFPs; negotiating site purchase, sale agreements and CC&Rs; and preparing detailed contract provisions on coordination with freight rail operations within the rail corridor extending from Los Angeles through eastern Pasadena.

Texas Department of Transportation (TxDOT) – Comprehensive Development Agreement. Key member of the legal team that assists TxDOT with negotiating and administering tolling services agreements for providing back office tolling services for TxDOT projects, including its public-private partnership projects. Fred's services include leadership and assistance with procurement, exclusive negotiations, contract documents, concession agreements, DBOM contracts, tolling services agreements, innovative financing arrangements (including applications to the federal TIFIA credit assistance program), contract administration and federal issues.

- **North Tarrant Express Segments 1 & 2W.** Key member of the legal team that advised on the first phase of a project to improve mobility in the Dallas/Fort Worth region. Segments 1 & 2W comprise a \$2.05 billion piece of North Tarrant Express public-private partnership – a managed lanes project that fixed existing highway infrastructure and double existing road capacity. We handled the procurement of a 52-year DBFOM concession agreement to complete Segments 1 & 2W and a pre-development agreement to develop plans and concession agreements for the development of additional segments. The segments opened in October 2014 – six months ahead of schedule. Fred assisted with procurement and drafting of the 52-year toll concession comprehensive development agreement and a pre-development agreement.
- **North Tarrant Express Segments 3A & 3B.** Key member of the legal team that advised on the second phase of an innovative highway improvement and managed lanes public-private partnership to alleviate heavy congestion in the Dallas/Fort Worth area. We assisted TxDOT in negotiating a 2013 concession agreement for the award-winning \$1.5 billion Segments 3A & 3B portion of North Tarrant Express, which rebuilds general-purpose lanes and doubles the existing roadway. Construction of both segments was completed in 2018. Fred assisted with negotiation and closing of a major change order to add the \$750 million, 7-mile Segment 3C to the concession agreement.
- **North Tarrant Express Segment 3C.** Leader in an exclusive negotiation with the NTE Segments 3A & 3B developer to add a \$750 million expansion segment to the public-private partnership agreement. Fred has advised TxDOT on legal authority to proceed by negotiated change order under federal and state law, negotiating strategies, alternatives analysis, and numerous commercial and financial negotiating issues, and prepared a change order agreement and amended and restated concession agreement. The parties achieved commercial and financial close in 2019, with a private activity bond and equity financing structure. The project is now under design and construction.
- **LBJ Express.** Key member of the legal team that advised on a critical project to relieve pressure on a congested 17-mile corridor in the Dallas Metropolitan area. We guided procurement of a DBFOM toll concession for the \$2.7 billion upgrade, one of the largest public-private partnership undertakings in U.S. history. The award winning LBJ Express, the first transportation upgrade to receive federal tolling authorization under the Express Lanes Demonstration Program, reached financial close ahead of schedule in 2010 and completion in 2015. Fred assisted with issue analysis and resolution and helped draft the contract documents.
- **SH 130, Segments 5 & 6.** Lead attorney who advised on the first toll concession agreement in Texas history – a \$1.36 billion 41-mile stretch of tolled lanes and frontage roads between San Antonio and Austin. The award-winning roadway, which opened ahead of schedule in late 2012, extended the SH 130 portion of the Central Texas Turnpike Project to Austin-Bergstrom International Airport. Fred served as a key contract negotiator for the client, recommending negotiating positions and issue resolutions and drafting contract documents.
- **Tolling Service Agreements.** Assisted TxDOT with negotiation of various agreements with the North Texas Tollway Authority for tolling services and related collateral arrangements for TxDOT's projects in the Dallas-Ft. Worth region. The NTTA provides tolling services throughout the region. Fred's work includes advising on agreements for back-office services for the North Tarrant Express, LBJ Express and DFW Connector projects.
- **Concession Contract Administration.** Member of the legal team that currently advises and assists TxDOT with numerous contract administration issues for TxDOT's toll concession projects.

Virginia Department of Transportation – Elizabeth River Crossing Concession Project. Lead legal advisor for VDOT's 2020 analysis and planning for potential exercise of its right to terminate for convenience the concession for this project and a potential retender of the concession. In lieu of termination, the parties agreed to a one-year freeze on toll rates, improvements in operating procedures, and a plan for rectification of tunnel conditions. Thereafter, Fred assisted with negotiation and preparation of an agreement and consent regarding a sale and transfer of all membership interests in the concessionaire.

Virginia Department of Transportation – Pocahontas Parkway (SH 895). Key member of the legal team that advised on the original \$353 million nonprofit financing of the Pocahontas Parkway, the first procurement under its public-private partnership program, and the related design-build and long-term operations and maintenance contracts. Four years later, Fred helped VDOT negotiate and close an asset transfer and refinancing of the Parkway allowing it to recoup its investment, eliminate future liability and obtain a commitment to build and finance an extension to the Richmond airport.

Washington State Department of Transportation – Tacoma Narrows. Lead special counsel who advised on procurement of the second Tacoma Narrows Bridge and highway improvements and seismic strengthening of the existing bridge. The \$849 million project was initially procured through a pre-development agreement. However, a state court decision and new legislation resulted in the project becoming the state's first major design-build transportation deal. Fred negotiated and drafted the original DBFOM agreement and the ultimate design-build contract for completion of the project.

Washington State Department of Transportation – Innovative Partnerships Program. Key member of the legal team that negotiated five precedent-setting agreements for private financing and development of transportation infrastructure projects. These projects addressed some of the state's largest and most pressing transportation needs, including planning for the SR 520 floating bridge replacement, park-and-ride lots on the I-5 for the Puget Sound region, and the Tacoma Narrows Bridge project. The template comprehensive agreement was the forerunner of modern public-private partnership agreements now used throughout the country. Fred worked closely with the client and other advisors to develop template agreements while simultaneously negotiating and drafting individual P3 contracts.

INSIGHTS

SPEAKING ENGAGEMENTS

Faculty Member, "Indo-Pacific Public-Private Partnership Consultations," Infrastructure Transaction Advisory Network Program, U.S. Department of Commerce Commercial Law Development Program, Denver, CO, 05.13.2019

Moderator, "Risky Business, Risk Allocation in P3 Contracting," P3 Bulletin's P3 Hub USA, Santa Monica, CA, 04.09.2019

Faculty Member, "Identifying and Developing a P3 Project; The Procurement Process," National Council for Public-Private Partnerships' 2018 P3Bootcamp, Phoenix, AZ, 10.22.2018

Moderator, "A New Kind of "Water" P3: Linking Water and Transportation Projects," P3 Water Summit, San Diego, CA, 04.03.2018

Faculty Member, "First Steps in the Process; Identifying and Developing a P3 Project," National Council for Public-Private Partnerships' 2017 P3 Bootcamp, Los Angeles, CA, 12.04.2017

Faculty Member, "First Steps in the Process; Identifying and Developing a P3 Project; and The Procurement Process," National Council for Public-Private Partnerships' 2016 P3Bootcamp, Phoenix, AZ, 09.27.2016

Speaker, "The Future of Alternative Delivery in California," Mobility 21 Conference, Anaheim, CA, 08.28.2015

Moderator, "The Extending Reach of P3's Newest Adopters," InfraAmericas US P3 Infrastructure Forum, 06.17.2014

Speaker, "P3s in California," California Foundation for the Environment and the Economy Roundtable Conference on California's Transportation Infrastructure, Sonoma, CA, 05.16.2014

Speaker, "MAP-21 – What's Next: Federal Tolling Law?," International Bridge, Tunnel and Turnpike Association, Transportation Finance and Mileage-Based User Fee Symposium, Philadelphia, PA, 04.15.2013

Speaker, "The TIFIA Story: Meaningful Reforms Under MAP-21," American Council of Engineering Companies Webinar, 04.02.2013

Speaker, "Availability Payment P3s: Owner, Equity and Design-Builder Perspectives," Design-Build Institute of America Design-Build in Transportation Conference, Orlando, FL, 03.18.2013

Speaker, "Federal Tolling Law Under MAP-21," American Association of State Highway and Transportation Officials Annual Meeting, Pittsburgh, PA, 11.18.2012

Speaker, "Webinar: MAP-21 - Meaningful Reforms and Practical Implications," Nossaman Infrastructure Webinar, 07.19.2012

Speaker, "Federal Funding: The Case for an Expanded TIFIA Program," California Transportation Foundation Transportation Forum, Sacramento, CA, 02.22.2011

Speaker, "Public-Private Partnerships for California Transportation," National Council for Public-Private Partnership's Implementing Partnerships in California Conference, Sacramento, CA, 01.20.2011

Speaker, "Public-Private Partnerships Forum – PPP Law, Structures and Contracting," Associated General Contractors California Fall Conference, Indian Wells, CA, 11.04.2010

PUBLICATIONS

Author, "Hiking Back Up the Recovery Mountain," *P3 Bulletin*, 04.20.2020

Author, "Will the FAST Act Revitalize Interstate Reconstruction?," *Reason Foundation's Surface Transportation Innovations newsletter*, Issue 148, 02.2016

Author, "Arizona Wades Into P3 Mainstream With South Mountain Freeway \$916M DBM Deal," *Public Works Financing*, 02.2016

Author, "DBOMs Away," *P3 Bulletin*, Spring 2015

Author, "Models for Transportation Project Delivery," *Right of Way*, 03/04, 2015

Author, "DBFOM vs. DBOM," *Public Works Financing*, 02.2015

Author, "Interstate Tolling Policy Must Change," *Public Works Financing*, 09.2012

Author, "TIFIA Loans: Long, Patient, Flexible," *Public Works Financing*, 07.2012

Author, "Nossaman Analysis: TIFIA Will Remain Oversubscribed," *Public Works Financing*, 06.2012

Author, "Why TIFIA Matters for Transportation," *Public Works Financing*, 02.2011

Expert Panelist, "Transportation: Invest In Our Future – A New Vision for the 21st Century," *Funding Vision Panel*, *American Association of State Highway and Transportation Officials*, 07.2007

Co-Author, "Public-Private Partnerships: A Sea Change in the US Transportation Sector," *Privatisation & Public Private Partnership Review* 2006/07, 07.01.2006

COMMUNITY & PROFESSIONAL

Women's Transportation Seminar – Los Angeles Chapter, Member
American, California and Los Angeles County Bar Associations, Real Property Sections

PRACTICES

Infrastructure
Procurement & Contracting
Project Financing
Regulatory & Compliance Matters
Legislation & Policy
Dispute Resolution

Real Estate

INDUSTRIES

Government & Public Sector
Transportation

EDUCATION

University of California, Hastings College of the Law, J.D., 1978, *Order of the Coif*
Wesleyan University, B.A., 1974, *magna cum laude*

ADMISSIONS

California