

41st Annual AAEE
Airport Law Workshop
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Session #5

Transactions with Airport Developers



Speakers

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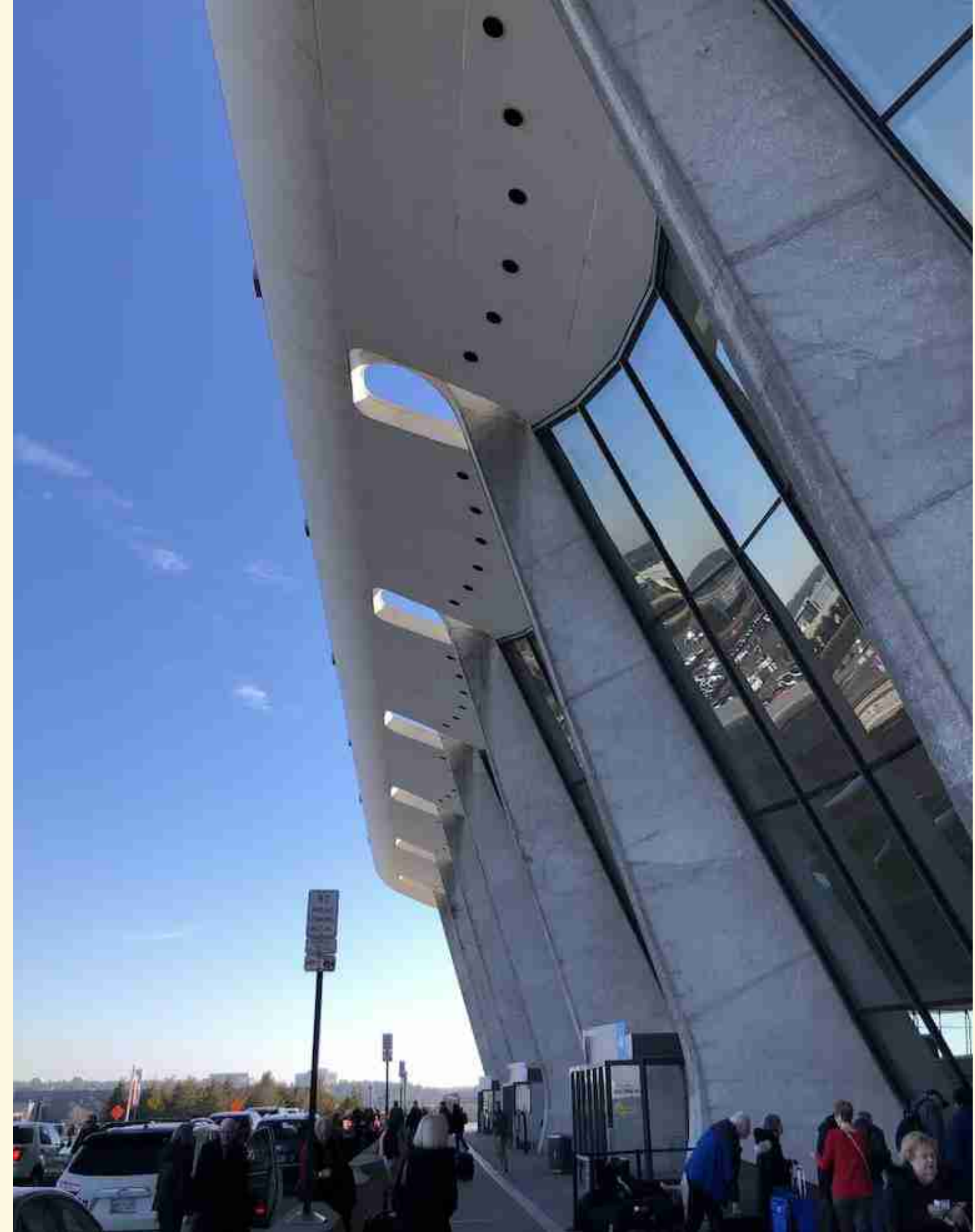
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Session goals / agenda

- **Stakeholder perspectives**
 - What the airport sponsor wants
 - What the developer wants
- **Contracting models**
 - Leases and concession agreements
 - Privatization
 - Public-Private Partnerships (P3s)
 - Construction delivery methods
- **Legal and regulatory concerns**
- **Considerations/risk allocation**



Stakeholder perspectives: What the sponsor wants

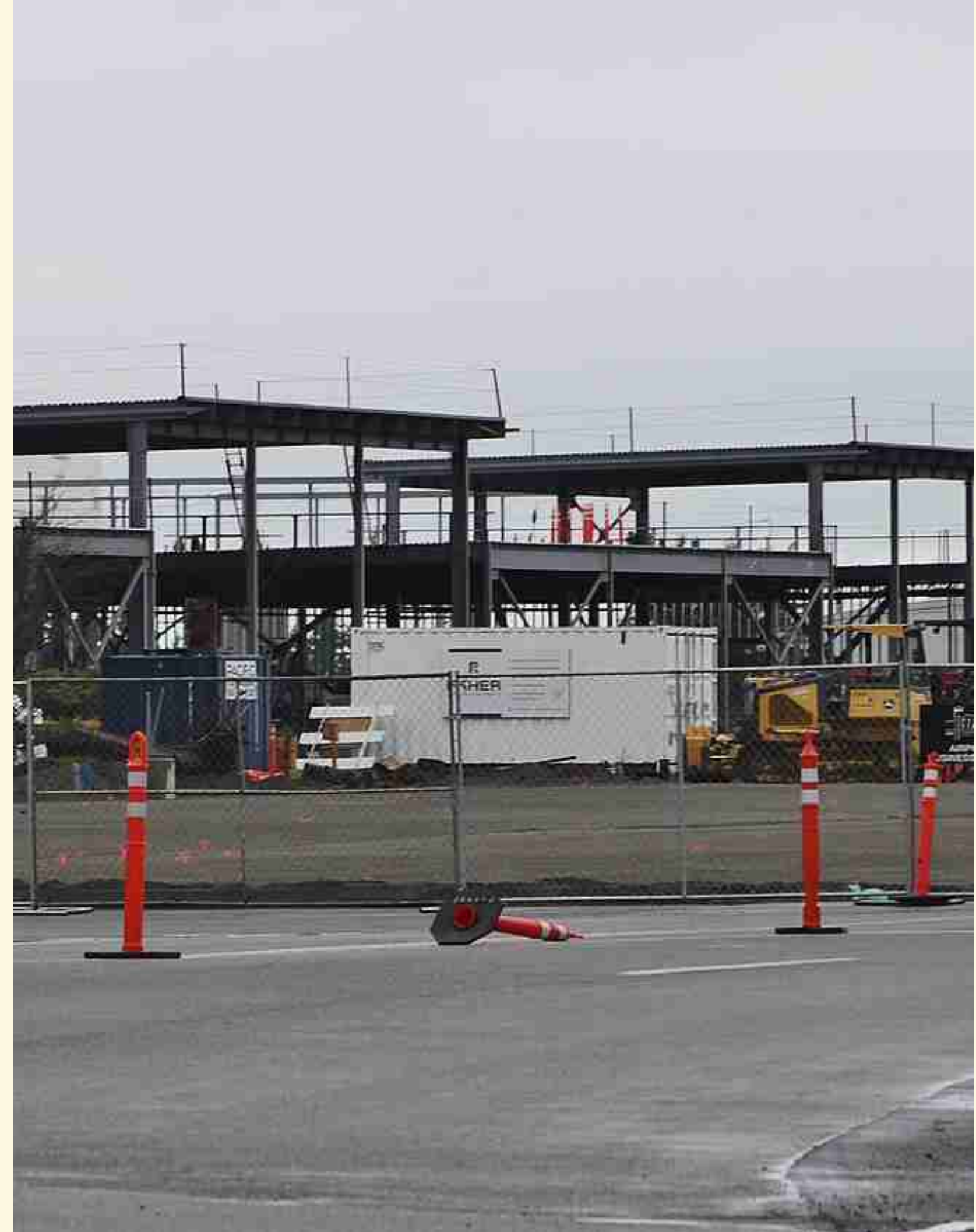
- **Regulatory compliance** with FAA grant assurances and airport development rules
- **Revenue protection** and fair market value for non-aeronautical property
- **Flexibility** to adapt to future needs, technology, and policy changes
- **Operational continuity and passenger experience**, attract air service, develop amenities, and improve facilities
- **Risk mitigation** including financial, operational, reputational
- **Alignment with airport mission** and long-term master plan



LaGuardia Airport Terminal B

Stakeholder perspectives: what the developer wants

- **Control over project scope and schedule** and any operational duties
- **Return on investment** through rent, revenue share, or long-term rights
- **Certainty of financing and approvals** including bankable contracting documents
- **Clear risk allocation** in construction, operations, regulatory requirements
- **Long-term stability** in use and revenue streams to recover investment
- **Operational flexibility** to adapt to market conditions



Paine Field Airport Terminal

Stakeholder perspectives: prioritizing needs

Key areas requiring prioritization/tradeoffs

- Risk allocation
- Control & oversight
- Revenue & return
- Duration of commitment
- Change management

Leases

What is a lease?

- A lease conveys the right to occupy property
- Tenant has possession and control of the property
- Fixed period of time
- In exchange for payment of rent
- Leases are a real property conveyance and lessee has a real property interest
- Might be subleased or assigned depending on lease terms
- Lessee is responsible for maintenance of its premises and liabilities



Ground and building leases

- Tenant can design, construct, operate, maintain, and finance development
 - Sponsor might have limited input or apply airport-wide standards
- Useful for a wide variety of facilities
 - Confers long term control to developer
 - Fuel farms, MRO facilities, offices, warehouses, hangars, hotels
- Concessions agreements
 - FAA defines as those that “provide goods and services to the traveling public”
 - “Concession” can also mean any contract to provide a service or facility more broadly, especially in the international context

Benefits and risks of leases

Sponsor benefits:

- Less sponsor involvement in design, construction, and operations/maintenance
 - Leverage expertise for specialized development
- Long-term, predictable revenue stream
- Clear division of responsibility
- Might not need to be procured through a competitive procurement

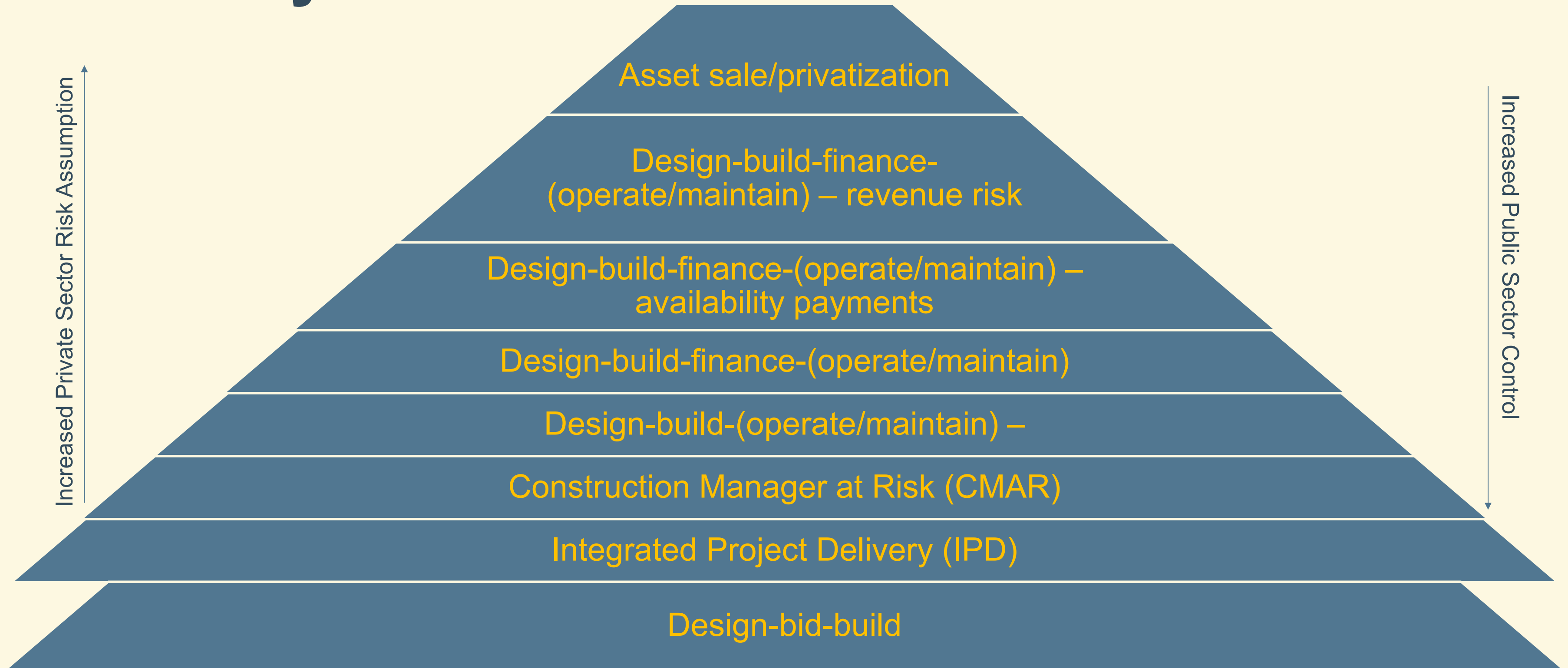
Sponsor risks:

- Can be a fine line between a lease and a public-private partnership
- Sponsor loss of control and involvement
- FAA, State, and local law limitations on leases (public entity lease term, termination, default, and eviction)
- Potential for misalignment with airport planning later in the lease term
- Revenue upside may not align with rent payments over time

Development agreement

- Used for development of public facilities on behalf of the sponsor
 - Terminals/concourses, rent-a-car facilities, parking, cargo
 - Sponsors want input on facilities serving passengers and employees on behalf of the airport
- Tailored contracts for specific capital projects
- Address design, construction, financing, and turnover
- Can involve pre-development agreements and/or subleasing after development
- PFC, CFC, TIFIA loans, and grant funding might be available

Delivery methods



Privatization

- Sale of land or other asset
 - Relinquishes ownership and control except for any contractual or legal restrictions
 - May require FAA approval or other regulatory compliance
- Airport investment partnership program
 - FAA program for privatization of airport operations and management
 - Sponsor retains ownership and ultimate responsibility
 - 2018 FAA Reauthorization Act modified the existing privatization pilot program
 - Codified at 49 U.S.C. § 47134
 - 2 approved programs so far

What is not privatization

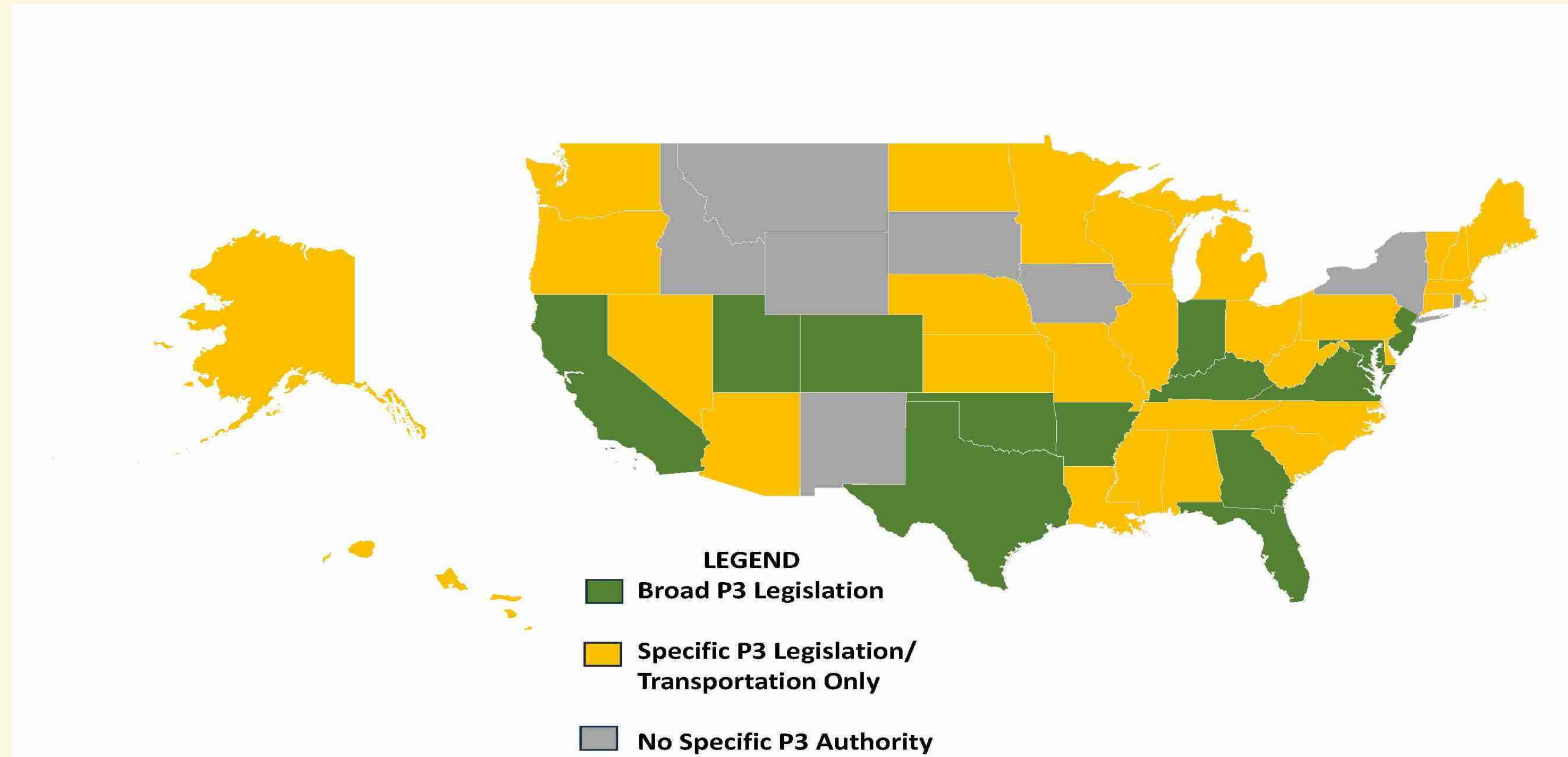
- Contracts where:
 - Rights to contractor are limited in scope and time
 - There is no significant private capital investment by the contractor
 - There is no requirement for high level of responsibility or long-term performance of the contractor
- Examples:
 - Terminal management contracts
 - Ground leases for private use facilities
 - Design-build contracts with no long-term operation or maintenance

Public-Private Partnerships (P3s)

- Public-Private Partnerships – What are they even?
 - Definition depends on state or local law
 - According to the National Council for Public-Private Partnerships, a P3 is defined as:

“A contractual agreement between a public agency (federal, state or local) and a private sector entity. Through this agreement, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service and/or facility.”
- Long term agreement transfers risk and responsibility for the contracted work to the private entity
 - Sometimes includes a pre-development agreement
 - Public entity often retains some measure of control or participation over the project
 - Might include a lease or other right to use property

State P3 laws



Types of P3s

Method of finance impacts owner level of involvement and control

- Revenue Risk
 - Revenue generating facilities
- Availability Payment
 - Non-revenue generating facilities
 - Sponsor might want the facility revenue

Private role can vary:

- DBFOM
- DBF + (O or M)

Traditional construction delivery

Design-build

- Owner hires one company to be responsible for both design and building the project
- Can be for set price or construction price can be determined at some point during design

Construction Manager at Risk (CMAR)

- Owner contracts with designer and hires construction contractor before or during design
- Contractor provides professional services and input on design cost and feasibility

Design-bid-build

- Owner contracts with designer, who completes design
- Owner bids project based on design
- Owner contracts with contractor who builds design

Integrated project delivery

- Also called “Alliance” contracting
- More popular in Europe, Australia, and Canada
- 1 contract signed by the owner, designer, and contractor
- High level of integration and collaboration among parties
- Characterized by cooperative decision-making, risk sharing, and dispute resolution
- Waiver of claims and limited opportunities for litigation
- 2024 FAA Reauthorization Act creates pilot grant-funded projects using IPD



Legal and regulatory concerns

Research is required to ensure that the delivery method is permitted

- Does the sponsor have legal authority to undertake the proposed delivery method?
 - Are there required terms?
- Does the project need to be procured?
 - Is the project a “public building” or facility subject to procurement and other requirements?
- Do state construction laws impact the delivery method?
 - Laws requiring certain trades (electrical, plumbing, mechanical) to be procured separately
 - Project labor agreements?
- Does federal law or regulations permit the proposed delivery method?
 - 2 C.F.R. Part 200
 - FAA requirements
- Length of term for a contract or lease?

Considerations/risk allocation

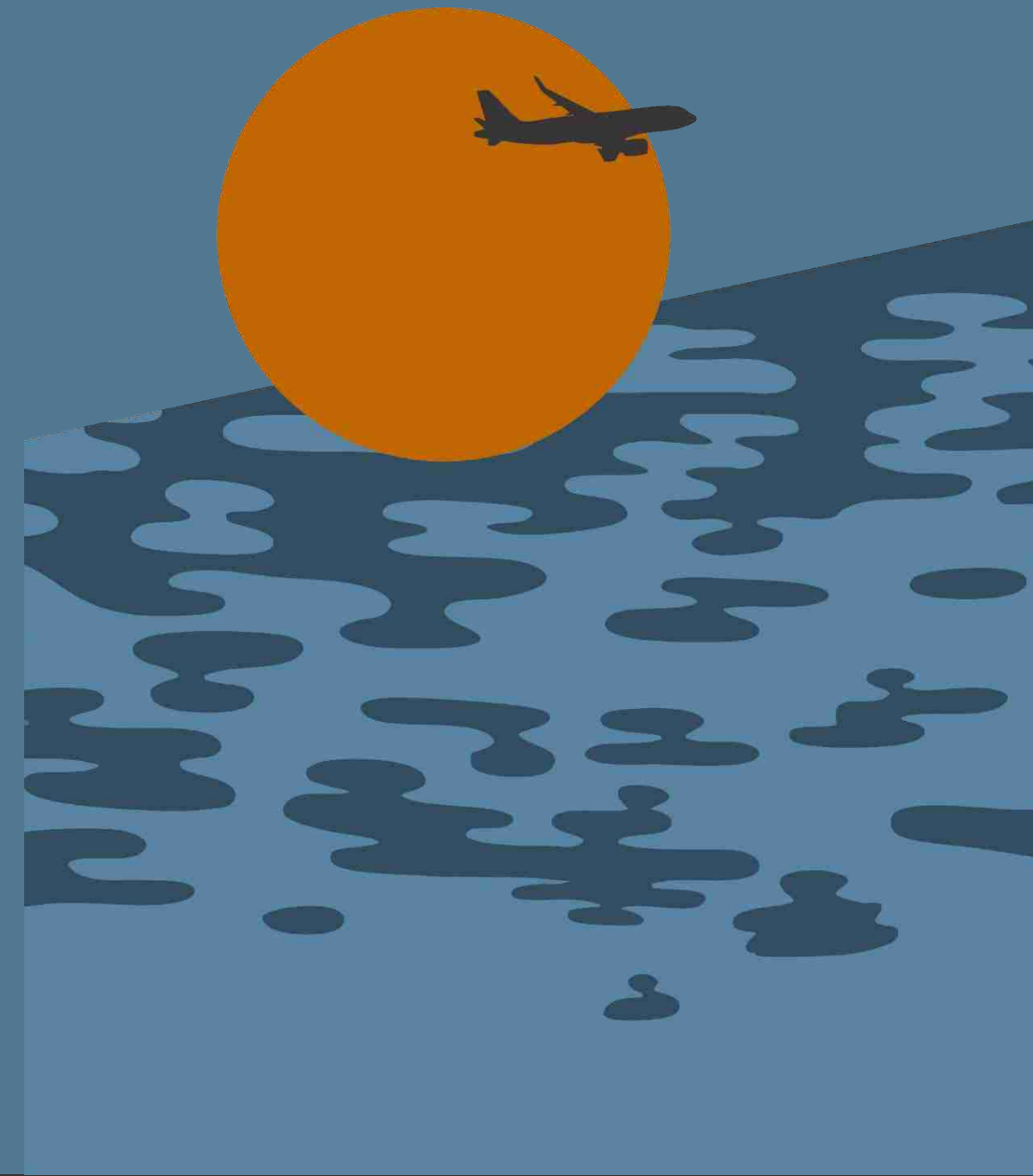
Considerations

- Can the facility generate revenue to support investment?
- What level of control does the sponsor want over the project?
- Does the sponsor want to operate and/or maintain the project?
- Does the sponsor's bond funding contain terms that impacts possible delivery methods?

Risk allocation themes

- Control vs. flexibility tradeoffs
- Long-term revenue predictability vs. private sector performance risk
- Compliance with FAA grant assurances and federal regulations (e.g., revenue diversion)
- Insurance, indemnity, and default remedies

Questions?



Thank You!

