

New Law Expands P3 Access in New Jersey

by Aaron S. Brotman

After a long wait and a few false starts, public-private partnerships (P3s) are coming to New Jersey. This August, Governor Phil Murphy signed into law New Jersey's first comprehensive public-private partnership law (S-865/A-1299), entitled "An Act Concerning Public- Private Partnerships for Certain Building and Highway Infrastructure Projects, and Amending and Supplementing Various Parts of the Statutory Law." The act becomes effective Feb. 10, 2019. It authorizes any local government unit subject to the Local Public Contracts Law, school district, and any state government entity or any state/county college (collectively public entities) to enter into a P3 contract with a private entity. Under the act, the P3 contract is "to be referred to as a publicprivate partnership agreement, that permits the private entity to assume financial and administrative responsibility for a project of, or for the benefit of, the local government unit."

Like many other states, New Jersey is seeking ways to fund a wide scope of projects at all levels of government, from small recreational facilities to larger infrastructure. To overcome budgetary gaps, the Legislature has elected to allow public entities to 'partner' with private businesses to construct, operate, and/or maintain these projects. How such partnerships will function is broadly outlined in the act but will necessarily take greater shape as public/private projects are conceived, commenced, and completed.

The Act Seeks to Promote Private Investment through Flexibility and Incentives

The act seeks to lure private investment for public projects by making the process, and hopefully the result, more business friendly. Unlike New Jersey's prior, half-measure iterations of P3, including the existing but limited right for state/county colleges to enter into

P3s, the act does not limit the type of facility subject to the agreement. Infrastructure projects, office buildings, athletic facilities, and other structures built for some public benefit are all included. While the state and quasi-independent agencies have significant flexibility to consider factors beyond price to enter into the most advantageous contract under the act, municipalities will now have similar freedom, so long as it is a P3 rather than a standard procurement.

The act does not require that private entities wait for public entities to seek out private partners. A private entity can take the initiative and propose a project that a public entity may have overlooked. The Legislature is betting that the private sector will see projects and opportunities that the public sector may not. One cannot know, of course, how many projects go undeveloped because a private developer cannot consolidate the land, develop its funding, or manage its operation without a dedicated public sector partner, but the act contemplates—probably correctly based on the popularity of P3 projects around the world, the nation, and even quasi-P3 projects in New Jersey—that the private sector will see the public sector as a reliable partner and will proceed where the development may otherwise have stalled.

The act also gives public entities remarkable freedom when entering into P3 arrangements. For example, the standard for determining the method by which the private entity will recover its initial investment is whatever arrangement is "deemed to be in the best interests of the public and the [public entity]" so long as the private entity operates the facility in accordance with the public entity's standards. Additionally, the act is designed to facilitate and promote P3s by easing restrictions and limitations on project financing and cost recovery. So long as the private entity provides financing in whole or

in part, the agreement may provide for the public entity to lease back the site and make routine payments to the private entity so long as the project remains available for public use or allow the private entity to collect some or all of the revenue generated by the facility.

A P3 arrangement provides another distinct procedural advantage: The private partner that assumes financial and administrative responsibility for a project need not comply with the strict procurement and contracting requirements of the Local Public Contracts Law or other statutes that would otherwise apply to the public entity were it to undertake the project on its own. The potential benefit can be significant in accelerating the partnering process and in freeing up the private entity to more efficiently bring construction trades online and operating. The state is relaxing the more formalized process otherwise required in order to attract a larger pool of private partners—perhaps even those who might normally not consider working on public projects due to bureaucracy.

The act seeks to encourage private financing of projects that serve the public by allowing public entities, including the Economic Development Authority (EDA), to be the landlord or tenant on a project and issue bonds without having to adhere to procurement protocols and contracting requirements that would otherwise apply to the public entity. Additionally, because the P3 project is an essential public function, the act seeks to alleviate or eliminate tax liability, plus the P3 project is exempt from mechanic's lien liability.

Then there is the effort to incentivize not just private capital, but private ingenuity—and spark private entity interest. The act provides, at the public entity's option, for remuneration to the unsuccessful bidders where the public entity sees the opportunity for innovative but costly proposal development. The act understands that the private entity will not take part, may not even submit a proposal, without some clear way to recover its sunk costs.

The Act Seeks to Retain Real Public Benefits and Oversight

Lest the Legislature be accused of selling out the public trust to private interests, the act is not all probusiness. In exchange for tax benefits and eased restrictions, the act demands that benefits flow down to the labor force. All

individuals employed in the construction, rehabilitation, or maintenance of a P3-related facility must be paid at least the prevailing wage. Also, all building construction projects must contain a project labor agreement designed to promote employment opportunities for local residents. Construction professionals and firms must also be approved to work on P3 projects by the Division of Property Management and Construction or the New Jersey Department of Transportation, as applicable. The general contractor, construction manager, or design-build team must post a performance bond and a payment bond for the project in exchange for lien immunity. Additionally, if stipends are paid to unsuccessful bidders on more unique, complex projects, the public entity will then own that work product. Finally, the P3 agreement must be reasonably able to be completed within five years of approval.

Strong, focused oversight by the public is a key component of the scheme contemplated by the act. The public entity does not have total freedom to enter into a P3 agreement, and significant EDA oversight and involvement is anticipated. All proposed projects must be approved by the EDA prior to procurement and should—though they are not required to—meet green and/or sustainable building standards and construction initiatives. The act sets out the required components of the application to the EDA when seeking approval. The minimum requirements are: 1) a description of the P3 agreement; 2) a description of the lease, including any lease of a revenue-producing facility; 3) the estimated costs; and 4) a timetable for completion. Plus, of course, whatever else the EDA deems necessary. The EDA also has the authority to revoke approval should it feel the project has deviated too far from what was approved. Because the P3 projects anticipated by the act tend to be larger, the act permits the public entity to dedicate an existing property interest—whether it be land, improvements, or tangible property—for use on the project. Eminent domain rights may not be delegated to the private partner, but nothing in the act precludes the public entity from using eminent domain to secure property in anticipation of a P3 or as part of it.

Though a private entity may propose an opportunity to the public sector, the potential windfall to the eagle-eyed private entity is not as great as it may seem. Before the public entity can partner with a private entity—even one that has reached out to it—it must turn around and seek

proposals from other private entities to ensure a fair, open, and competitive bidding process. This represents a balancing of the public interests; reasonably, the state must further the interests of the public by ensuring that, at the very least, the public entity makes its selection of a project and private partner in a reasonable, responsible manner that represents the best value to the public. However, this is balanced against the interest of incentivizing private entities to come forward with viable, interesting, workable projects, as the first mover loses its edge on the competition with a more public process and the incentives tilt towards entities who sit and wait for others to do their research for them. The first mover will likely retain significant advantages, such as a more complete proposal and grasp of the project economics. Additionally, because the procurement process is much less rigid, P3s will effectively always be a negotiated procurement, even where there are multiple proposals and bidders for the same project. This leaves the public entity in position to determine what solution—and what partner—provides the best value long term, not just what is the least expensive at the time of proposal.

What to Make of it All

With the scarcity of large, developable parcels in high-demand areas across the state, a greater P3 presence should facilitate development by combining private ingenuity and capital with the governmental capability to coherently combine land into a format and circumstance that can spark the next great round of development across the state. The act is, like much legislation, a balancing act between private incentive, public flexibility, and oversight in the public interest. Whether it will encourage new, significant development projects around the state remains to be seen.

This author expects there will be significant private sector activity to take advantage of the act. P3 projects work best where there is a clear, relatively confident revenue stream discernable to the private entity, whose motivation is financial. From the public entity's perspective, while overall cost to the public is, and should be, a factor in the decision-making process, the review of potential projects will be much more holistic.

Finally, something to keep in mind is that the act directs the EDA to promulgate rules to support the implementation of a P3 scheme in New Jersey. Until those rules are firmly in place, the availability of P3

projects remains uncertain. The act is fairly clear in its purpose and general outline, but regulations will make or break the process.

Ultimately, this author believes, the act represents a positive step for the state. Some uncertainty remains, particularly how involved the EDA may become and how much cajoling and convincing public entities may need to not just accept that a P3 may be the best solution for a particular problem, but that they will need to treat them differently than a regular, competitive bid procurement. The potential for true, meaningful partnerships is real, and private entities that can see the opportunities and persuade the public side to take advantage of it may be in a position to create tremendous value for themselves and New Jersey as a whole.

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The views and opinions expressed in this article are those of the author and do not necessarily reflect those of Sills Cummis & Gross P.C.