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## **New Hampshire Enacts P3 Legislation.**

New Hampshire has joined a growing number of jurisdictions in the United States that have enacted legislation enabling public-private partnerships (P3) for transportation infrastructure projects. According to Governor Maggie Hassan, the P3 Law is expected to play an important role in advancing New Hampshire's transportation goals, including, among other projects, bringing commuter rail from Boston to Nashua and Manchester, New Hampshire. The P3 Law, [Senate Bill 549](#), was approved on June 16, 2016 and will take effect on August 15, 2016.

The P3 Law authorizes the Commissioner of the State's Department of Transportation (DOT) to enter into certain types of contracts with private entities for transportation infrastructure projects, and establishes a public-private partnership transportation infrastructure oversight commission to recommend and advise on requests for P3 proposals.

### **DOT's Authority to Enter into P3 Contracts with Private Entities**

P3s allow for certain risks and rewards to be shifted and shared between the private and public sectors. Specifically, according to the P3 Law, "public-private partnerships allow for the sharing of resources to finance, design, build, operate, and maintain transportation infrastructure projects and are especially effective when limited financial resources are available." The responsibilities of the private and public entities involved and associated risks and rewards will generally depend on how the P3 project is structured among various alternatives. Pursuant to the P3 Law, the Commissioner, with the approval of the Governor, Council, and Capital Budget Overview Committee, may now enter into agreements with private entities for design-build-finance-operate-maintain (DBFOM) or design-build-operate-maintain (DBOM) services for transportation infrastructure projects.

- **DBFOM:** Under this P3 structure, the private entity will generally be responsible for the design, building, finance, operation, and maintenance of the project for a specified period of time, while the public entity simply retains title to the asset.
- **DBOM:** Under this P3 structure, the private entity will generally be responsible for the design, building, operation, and maintenance of the project, while the public entity retains title in the asset and secures the funds.

Each P3 project must be approved as part of the State's 10-year transportation improvement program in accordance with Section 240 of the New Hampshire Revised Statutes Annotated.

### **P3 Transportation Infrastructure Oversight Commission**

The P3 Law establishes a public-private partnership transportation infrastructure oversight commission (the Commission) to consider and recommend suitable P3 projects to the Commissioner. The Commission will act as an advisory board during the execution of a P3 project, and support the DOT in the development of a request for proposals and in the preparation of agreements for P3 projects.

#### **Members**

The Commission will consist of the following members, each for an initial term of two years: two members residing in different geographic regions of the state to be appointed by the Governor; two members to be appointed by the President of the Senate; two members to be appointed by the Speaker of the House of Representatives; and one member to be appointed by the State Treasurer who will not be an employee of the State Treasurer's office. The Commissioner will serve as a non-voting member of the Commission. Note that there are additional qualifications and conditions to appointment and reappointment specified under the P3 Law.

### Duties

The P3 Law sets forth the various duties of the Commission, which include the following:

- Establish a general framework for P3 contracts and a process for the submission and evaluation of all such projects and forms to enable the bidder to comply with the requirements, including terms and conditions;
- Provide for the submission of unsolicited proposals, and establish qualification criteria and evaluation standards for unsolicited proposals;
- Provide a method and structure for engaging public advisers for strategic planning, proposal evaluations, and project monitoring on a case-by-case basis;
- Perform an analysis to determine whether a project is suitable for P3 whenever DOT notifies the Commission of its intent to pursue a P3 contract;
- Hold a minimum of two publicly noticed hearings per project to establish whether P3 is the appropriate procurement method;
- Make recommendations to the Commissioner, subject to the approval of the Governor, Council, and Capital Budget Overview Committee, concerning the use of P3 for certain projects;
- Upon approval of the Governor and Council and the Capital Budget Overview Committee, support DOT in the development of a request for proposals;
- Provide criteria for qualifications to bid per project, including but not limited to adequate equipment to perform, financial stability, and proven record on projects of this type; and
- Assure that any P3 agreement is advanced in accordance with DOT's design, permitting, and right of way acquisition process and complies with all federal and state design criteria.

### Procedures

The P3 Law sets forth certain procedures that must be followed in approving any P3 proposal. The DOT must first notify the Commission of its intent to use a P3 contract for DBFOM or DBOM services by submitting a written request to the Commission for its consideration. The Commission must provide an initial written response within 15 days. No request for proposal may be issued by the DOT without the Commission's written recommendation and concurrence by the Governor and Council of both the procurement method and content of such request for proposal.

### Reports

Under the P3 Law, the Commission will be responsible for issuing certain reports, including the following:

- An initial report on the framework for submission and evaluation of P3 projects;
- Annual reports on the work of the Commission, including the number of projects reviewed, recommendations for such projects and the number of requests for proposals being developed; and
- A report for each P3 contract relating to the project's impact on current state employees; policy and regulatory structure for overseeing a privately operated transportation facility; taxation, profit-

sharing and resolution of new revenue producing ideas; advertising and marketing; use of new technologies; lease terms and termination clauses; additional responsibilities by both the private infrastructure operator and the State during the lease period; financial valuation of the state transportation facility; issues of public concern; and anticipated advantages of entering into such P3 contract.

### Contributions from Other States

A P3 project in New Hampshire may involve one or more neighboring states. For such a project under the P3 Law, the Commissioner may receive and accept capital contributions and funding from other states and may approve the transfer of support personnel and experts.

New Hampshire's P3 Law is limited to transportation infrastructure projects and does not allow for social infrastructure projects, such as schools, hospitals, and housing, which have become more popular throughout the country. The P3 Law also limits the delivery methods in which P3 projects can be procured.

Attorneys in Ballard Spahr's P3/Infrastructure and Public Finance Groups will continue to monitor and report on new developments in public-private partnerships in New Hampshire and other states. The Groups are recognized leaders in representing government and private sector developers, investors, and lenders in innovative public-private projects.

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