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New Jersey P3 Legislation Expands Opportunities for Major Infrastructure Projects, Including Roads: Ballard Spahr

New Jersey has enacted legislation that greatly expands the pool of public agencies authorized to enter into public-private partnerships (P3s) for capital projects in the state, in order to address growing infrastructure needs.

Only public colleges and universities were authorized to use P3s in New Jersey prior to Governor Phil Murphy signing Senate Bill No. 865 on August 14.

SB 865 authorizes local governments, school districts, public authorities, and state and county colleges to enter into P3s for capital projects. The new law also allows for statewide road or highway P3 projects, as long as a project includes an expenditure of at least $10 million in public funds or any expenditure of solely private funds.

With billions in upgrades needed throughout the state, the new law is expected to generate a significant number of new projects. New Jersey has 21 counties, 565 municipalities, and nearly 600 school districts in addition to hundreds of public authorities. The state recently ranked as one of the country's 10 worst for infrastructure.

Projects proposed under SB 865 must be submitted to the New Jersey Economic Development Authority (NJEDA) for review and approval, and are also subject to review and approval by the State Treasurer. NJEDA and the State Treasurer's Office will oversee New Jersey P3 projects. In accordance with the new law, NJEDA will post on its website the status of each P3 project.

SB 865 requires local public input and finance controls for any project proposed under the legislation, as well as land use and financial approvals. The process begins when a public agency issues a Request for Proposals (RFP).

Solicitation, Procurement, and Criteria

Under SB 865, a public entity, which may include a local government unit, school district, state government entity, and state or county college, will issue a request for proposals (RFP) with no more than a 45-day response period. The public entity must have qualifying proposals from at least at least two private entities in order to select one.

NJEDA will review all completed project applications and request additional information as needed. The application must include, among other things, a long-range maintenance plan and a long-range maintenance bond, and must specify the expenditures that qualify as an appropriate investment in maintenance.

The criteria for assessing the projects described in the application include:

feasibility and design of the project;
experience and qualifications of the private entity;

soundness of the financial plan;
adequacy of the required exhibits;
adequacy of the long-range maintenance plan;
evidence of a clear public benefit; and
a resolution by the applicable public entity of its intent to enter into P3 agreement for the project.

The procurement process cannot begin until NJEDA approves the application.

After the proposals have been received, and any public notification period has expired, the applicable public entity will rank the proposals in order of preference. The public entity will consider professional qualifications, innovative engineering, architectural services, cost-reduction terms, finance plans, and the need for public funds to deliver the project.

Following the procurement process, but before the public entity enters into a P3 agreement, the project and the resultant short list of private entities is submitted to NJEDA for final approval. NJEDA shall retain the right to revoke approval if it determines that the project has "substantially deviated" from the plan submitted, and retains the right to cancel a procurement after a short list of private entities is developed if deemed in the public interest to do so.

P3 Agreements

SB 865 establishes specific requirements for P3 agreements, including provisions that building construction projects contain a project labor agreement and affirming that the agreement and any work performed under it is subject to the provisions of the Construction Industry Independent Contractor Act. Each worker employed for the construction, rehabilitation, or building maintenance service of facilities by a private entity under a P3 agreement must be paid not less than the prevailing wage rate for such worker's craft or service in accordance with the New Jersey Prevailing Wage Act.

A project with an expenditure of under $50 million developed under a P3 agreement includes a requirement that precludes contractors from engaging in the project if the contractor has contributed to the private entity's financing of the project in an amount of more than 10 percent of the project's financing costs. If the agreement includes the lease of a new project in exchange for upfront or structured financing by the private entity, the term of the lease may not be for a period greater than 30 years.

Tax-Exemption

SB 865 provides that as long as a P3 project used in furtherance of the purposes of the applicable public entity is owned by or leased to a public entity, foreign or domestic nonprofit business entity, or a business entity wholly owned by the nonprofit business entity, then P3 projects under SB 865 are exempt from property taxes. The law further states that, notwithstanding any section of law to the contrary, P3 projects are not required to make payments in lieu of taxes. The project and land where it's located are not subject to the applicable provisions of law regarding the tax liability of private parties conducting for-profit activities on tax-exempt land, or the applicable provisions of law regarding the taxation of leasehold interests in exempt property that are held by nonexempt parties.

Costs

SB 865 requires that prior to the commencement of work on a project, the private entity establish a project-specific construction account that includes the funding and/or financial instruments that will be used to fully capitalize and fund the project. The legislation requires that the private entity appoint a third-party financial institution to act as a collateral agent, manage the construction account, and maintain a full accounting of the funds and instruments in the account. The funds and instruments in the construction account must be held in trust for the benefit of the contractor, construction manager, and design-build team involved in the project, and will not be the property of the private entity unless all amounts due to the construction account beneficiaries are paid in full.

The legislation states that, if required by the applicable public entity, the private entity shall assume responsibility for all costs incurred by the applicable public entity before execution of the P3 agreement, including costs of retaining independent experts to review, analyze, and advise the applicable public entity on the RFP.

SB 865 provides that, when there is a substantial opportunity for innovation for a particular P3 project and the costs for developing a proposal are significant, stipends may be used. The public entity may elect to pay unsuccessful proposers for the work product they submit in response to an RFP. The public entity's use of any design element contained in an unsuccessful proposal will be at the sole risk and discretion of the public entity unit and shall not confer liability on the recipient of the stipulated stipend amount.

After payment of the stipulated stipend amount, the applicable public entity and the unsuccessful proposer shall jointly own the rights to, and may make use of any work product contained in the proposal, including the technologies, techniques, methods, processes, ideas, and information contained in the proposal, project design, and project financial plan. The use by the unsuccessful proposer of any part of the work product contained in the proposal shall be at the sole risk of the unsuccessful proposer and shall not confer liability on the applicable public entity.

Ballard Spahr's P3/Infrastructure Group is a leader in representing government and private sector developers, investors, and lenders in innovative public-private projects that range from transportation systems and energy facilities to military and public housing.

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