

Bond Case Briefs

Municipal Finance Law Since 1971

New P3 Legislation To Take Effect in Washington, D.C.: Ballard Spahr

A new law intended to encourage more widespread use of public-private partnerships (P3s) in the District of Columbia is set to become a reality in the coming weeks. The Public-Private Partnership Act of 2014 (P3 Act) was approved by the Mayor on December 29, 2014, after its unanimous passage by the Council of the District of Columbia. The P3 Act provides specific authority for the development, solicitation, evaluation, award, delivery and oversight of P3 projects by the District. It will take effect upon the expiration of the 30-day congressional review period required under the District of Columbia Home Rule Act.

Adoption of the P3 Act adds the District to a growing list of jurisdictions (including neighboring Maryland and Virginia) that have enacted laws seeking to encourage innovative types of public financing. While the use of P3s is not a new concept in the District (several P3 projects have been developed under existing procurement laws and special legislation), P3s have been limited by the absence of comprehensive legislative and regulatory guidance.

The establishment of a specific P3 program will provide a more predictable, flexible, and effective framework for the District to work with potential private partners in developing projects that will benefit the District. The P3 Act formalizes the process for evaluating both solicited and unsolicited proposals and clarifies the essential requirements for any P3 agreement. It is designed to offer increased transparency, efficiency, and predictability in an effort to attract private investors.

A summary of the law's key provisions follows.

P3 Office

The P3 Act establishes a new Office of Public-Private Partnerships (Office) within the Office of the City Administrator, as the primary District government entity to carry out the intent of the P3 Act. Under the leadership of an Executive Director, the Office will facilitate the development, solicitation, evaluation, award, delivery, and oversight of P3 projects involving the District. The Office will be the point of contact for both private sector entities and District agencies interested in pursuing P3 projects.

The Office is required to develop rules, policies, and procedures for implementing the P3 Act in consultation with the Office of the Chief Financial Officer. Within 90 days of the appointment of the Executive Director, the Office must submit proposed rules to the Council. The proposed rules will be deemed approved if the Council takes no action on them within 45 days.

The Office will not have the power to pledge the full faith and credit of the District (or any revenue of the District) or issue any general obligation of the District for the financing of any P3 project, unless authorized by an act of the Council.

The Office may charge fees for the costs of processing, reviewing, and evaluating pre-qualification applications and unsolicited proposals submitted by private entities. Such administrative fees are

required to be deposited into the Public-Private Partnership Administration Fund, a special fund to be administered by the Executive Director.

P3 Projects

The P3 Act authorizes a broad range of P3 projects to be developed within the District. Specifically, a qualified P3 project includes the planning, acquisition, financing, development, design, construction, reconstruction, rehabilitation, replacement, improvement, maintenance, management, operation, repair, leasing, or ownership of:

- Transportation facilities, including roads, highways, bridges, tunnels, parking lots or garages, public transit systems, and airports
- Utility facilities, including sewer, water treatment, storm water management, energy, telecommunications, information technology, recycling, and solid waste management facilities
- Education facilities
- Cultural or recreational facilities, including parks, libraries, theaters, museums, convention centers, community centers, stadiums, athletic facilities, golf courses, or similar facilities
- A building or other facility that is beneficial to the public interest and is developed or operated by or for a public entity
- Improvements necessary or desirable to any District-owned real estate
- Any other facility, the construction of which will be beneficial to the public interest as determined by the Office

Procurement Process

The P3 Act sets forth a detailed process for the procurement of P3 projects, including procedures for solicitation of proposals by the Office and unsolicited proposals. Although parties to P3 agreements are exempted from most aspects of the Procurement Practices Reform Act of 2010 (PPRA), the law governing procurement practices in the District, PPRA provisions regarding Council review of contracts, prohibition of collusion between the government and vendors, bonding of contractors, and the jurisdiction of the Contract Appeals Board regarding disputes will apply.

Proposals Solicited by the P3 Office

For P3 projects initiated by the District, the Office can only solicit private entities through a competitive bid process by issuing a request for information (RFI), a request for qualifications (RFQ) and/or a request for proposals (RFP).

Requests for Information. The Office may, but is not required to, issue an RFI from companies that may be interested in a potential P3 project. This will help guide the Office in formulating the scope of the P3 project that will ultimately be procured through an RFP.

Requests for Qualifications (Prequalification). The Office may, but is not required to, provide for a prequalification process for private entities by issuing an RFQ. If the Office determines that a prequalification process is appropriate, it will prequalify a certain number of bidders during the RFQ stage, and only RFP responses submitted by prequalified private entities will be considered.

To be prequalified, a private entity must demonstrate that, among other things, it has the financial resources, capacity, and expertise necessary to carry out the P3 project and is qualified to conduct business in the District.

Requests for Proposals. An RFP must contain a detailed description of the scope of the proposed P3 project, the material terms and conditions for the procurement and resulting contract, and the

criteria to be considered by the Office in evaluating the bids received, including the relative weight given to each criterion (including, for example, cost, value, delivery time, financial commitment required for public entities, expertise, technical merits, and public benefit).

Generally, the Office must provide public notice of an RFP and allow respondents 30 days to submit proposals. Before the award of the P3 agreement, an executive summary of each responsive proposal will be made available to the public. After the award of the P3 agreement, the proposal will be subject to the Freedom of Information Act. Information that has been designated as confidential or proprietary strictly in accordance with the P3 Act will not be made available to the public.

The Office may pay a stipend to an unsuccessful proposer in certain circumstances. All conditions for a stipend must be clearly set forth in the RFP.

Prior Approval by the Council. Council approval is required before the issuance of an RFP. Before submitting any request for approval to the Council, the Office must hold at least one public hearing, with notice of the hearing to be provided to affected Advisory Neighborhood Commissions at least 30 days in advance, and to be published in the District of Columbia Register at least 15 days in advance.

A proposed RFP for a P3 project expected to cost \$50 million or more or extend for a term of 10 years or more will be deemed approved by the Council upon the expiration of a 45-day review period, unless the Council adopts a resolution to approve or disapprove the proposed RFP.

A proposed RFP for a P3 project expected to cost less than \$50 million or extend for a term of less than 10 years will be deemed approved by the Council upon either of the following:

- The expiration of a 10-day review period, during which no member of the Council has introduced a resolution to approve or disapprove the proposed RFP
- If such resolution has been introduced, the expiration of a 45-day review period during which the Council has not approved or disapproved the proposed RFP

Following the Council's approval of an RFP, a P3 agreement must be entered into within two years, at which time the Council approval will expire if not extended by a further act of the Council.

Unsolicited Proposals

The Office may consider, evaluate, and accept an unsolicited proposal for a P3 project if the unsolicited proposal addresses an identified need of the District, is independently prepared without District supervision, demonstrates a public benefit, includes a financing plan that complies with applicable District budget and finance requirements, and includes sufficient detail and information necessary for an objective and timely evaluation by the Office.

Within 90 days of receipt of an unsolicited proposal that meets the above criteria, the Office must complete a preliminary evaluation. If the preliminary evaluation is favorable, the Office will notify the proposer that the Office will comprehensively evaluate the unsolicited proposal and publish the unsolicited proposal in the District of Columbia Register for a period of at least 30 days, during which time other potential proposers may submit alternative proposals.

After a comprehensive evaluation of the unsolicited proposal and any alternatives submitted, the Office may commence negotiations with a proposer, provided the proposal meets strict criteria. Such criteria include whether the P3 project duplicates existing or pending projects or services, whether the proposal demonstrates a unique approach or concept, certification by the Office of the Chief Financial Officer regarding the availability of District funds to be contributed and that the P3 project will not adversely affect the District's bond ratings, and certification by the Office of the Attorney

General concerning legal sufficiency.

P3 Agreements

After selecting a solicited or unsolicited proposal from an offeror for a P3 project, the Office or a designated public entity will enter into a public-private partnership agreement (P3 Agreement) with the selected offeror for a term of up to 99 years. The P3 Act sets forth a number of provisions that must be included in P3 Agreements, including detailed descriptions of the project; the responsibilities of the public and private entities; the terms of the planning, acquisition, financing, design, construction, maintenance, operation, ownership, and leasing of the facilities; the rights the public and private entities have in facility revenue; terms by which the private entity may charge fees to the public for use of the facilities; liability insurance coverage if the private entity operates the facility; disposition of the facility at the end of the term of the agreement; grounds for termination; defaults and remedies; and reporting requirements.

If the P3 Agreement authorizes the collection and use of user fees, no new fees may be imposed, or approved fees amended, unless authorized by subsequent action of the Council.

The P3 Act also authorizes the District to enter into regional P3 Agreements with other local and state government agencies.

Before entering into any P3 Agreement, the Office must submit a comprehensive report to the Council outlining the details of the selected proposal. Such details include the identity of the participating private entities, significant terms of the P3 Agreement, total cost of the P3 project, cost to be borne by the District, value-for-money analysis and public sector comparator analysis, time for completion, delivery method, a list of all respondents to the RFP, how those responses were scored, and the selection methodology. The Office must provide public notice of the report submitted to the Council.

Compliance with Federal and District Laws

The P3 law identifies a number of other laws that will apply to P3 projects. These include laws that would otherwise be generally applicable to most projects and other government procurement matters in the District:

- The First Source Employment Agreement Act of 1984 (requiring that District residents are given priority for new jobs created by municipal financing and development programs)
- The Living Wage Act of 2006 (or the rate established by a project labor agreement the Office receives notice of prior to its solicitation of proposals)
- The Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005
- Subchapter II of Chapter 28 of Title 47 of the D.C. Official Code (requiring clean hands before receiving a license or permit)
- The Green Building Act of 2006
- The Anacostia Waterfront Environmental Standards Act of 2008
- The Hotel Development Projects Labor Peace Agreement Act of 2002

Additionally, private participants in P3 projects in the District must comply with the federal Davis-Bacon Act of 1931 (requiring contractors to pay locally prevailing wages).

by Brian Walsh, Steve T. Park, Pauline A. Schneider, and Rebecca S. Flynn

Attorneys in Ballard Spahr's P3/Infrastructure Group routinely monitor and report on new developments in federal and state infrastructure programs. For more information, please contact

P3/Infrastructure Practice Leader Brian Walsh at 215.864.8510 or walsh@ballardspahr.com, Steve T. Park at 215.864.8533 or parks@ballardspahr.com, Pauline A. Schneider at 202.661.2249 or schneiderpa@ballardspahr.com, Rebecca S. Flynn at 202.661.2233 or flynnr@ballardspahr.com, or the member of the Group with whom you work.

Copyright © 2015 by Ballard Spahr LLP.

www.ballardspahr.com

(No claim to original U.S. government material.)

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, including electronic, mechanical, photocopying, recording, or otherwise, without prior written permission of the author and publisher.

This alert is a periodic publication of Ballard Spahr LLP and is intended to notify recipients of new developments in the law. It should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own attorney concerning your situation and specific legal questions you have.

Copyright © 2024 Bond Case Briefs | bondcasebriefs.com