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Georgia Passes New Social P3 Legislation: Ballard Spahr.

Georgia Governor Nathan Deal signed into law new public-private partnership (P3) legislation, the Partnership for Public Facilities and Infrastructure Act (SB 59) (the Act) on May 5, 2015. The Act allows state and local government entities to partner with private entities on “qualifying projects,” broadly meaning any project deemed to meet a public purpose or public need and satisfying those requirements set forth under the Act.

The Act covers those qualifying projects pursued with local government entities, meaning any county, municipality, consolidated government, or board of education, as well as with state government entities, including institutions of the University System of Georgia.

The Act does not apply to projects procured through the State Transportation Board, the Department of Transportation, or the State Road and Tollway Authority; these state authorities are already authorized to engage in and procure P3 projects. Projects involving the generation of electric energy for sale, communication services, cable and video services, and water reservoirs, however, are not eligible to be qualifying projects under the Act.

Summarized below are some of the key terms of the Act. The procurement process and requirements for projects on the local level are similar in many respects to the procurement process the State is required to follow. Certain distinctions are worth highlighting, however, and we have addressed these in more detail below.

New P3 Committee

The Act requires the establishment of a new 10-person committee (the Committee) to prepare model guidelines for local government entities, including counties and municipalities. The Governor will appoint four members, and the Speaker of the House of Representatives and the Lieutenant Governor will each appoint three members to the Committee.

The Committee is required to issue model guidelines to local governments by July 1, 2016. These guidelines then are required to be updated every two years.

Guidelines

Local Government P3 Projects

A local government must adopt a set of guidelines prior to executing an agreement for a qualifying project with a private entity. It may adopt the model guidelines from the Committee or establish its own set of guidelines as a policy, rule, regulation or ordinance, but such guidelines must contain such information that is required to be contained in the model guidelines under the Act.

At a minimum, the model guidelines must set forth the following:

- **Key Dates:** Specific periods during the calendar year when the local government will consider unsolicited proposals for qualifying projects.

- **Financial Review:** Procedures for the financial review and analysis of an unsolicited proposal.
- **Fees:** Criteria for determining any fees that the local government elects to charge the private entity for the processing, review, and evaluation of an unsolicited proposal.
- **Issuance of an RFP:** A requirement that the local government issue a request for proposal (RFP) if it decides to proceed with a qualifying project pursuant to an unsolicited proposal.
- **Certain Procedures for Competing Proposals:** Procedures for posting and publishing notice of the opportunity to offer competing proposals, procedures for the processing, review, and consideration of competing proposals, procedures for determining whether information included in an unsolicited proposal should be released as part of any RFP to ensure fair competition, and procedures for identifying and appointing an independent owner adviser with certain expertise to assist the local government in evaluating unsolicited proposals if the local government elects to have such an adviser.

State Government P3 Projects

The Act also requires that those public entities at the state level participating in the procurement of qualifying projects adopt a set of guidelines, and designates specific entities as responsible for setting such guidelines. For qualifying projects undertaken by the State Properties Commission, guidelines for the process must be developed by the Georgia State Financing and Investment Commission. For qualifying projects undertaken by the University System of Georgia, guidelines for the process must be developed by the Board of Regents of the University System of Georgia. The Act does not specify any further guideline requirements for other state government entities.

Unsolicited Proposals

Private entities may submit for consideration, and the applicable local or state government may approve, an unsolicited proposal for qualifying projects.

Certain materials and information must be submitted as part of any unsolicited proposal, including a project description, a feasibility statement, a project schedule, a financial plan, a business case statement describing benefits to be derived from the project, and any such other materials that may be reasonably requested by the local or state government.

The private entity bears all risk in submitting an unsolicited proposal and the local government has the right to reject any such proposal at any time without providing reason for its denial.

Additional Requirements for State Level Projects

For those projects on the state level, unsolicited proposals must be submitted to a “responsible public entity” between May 1 and June 30 of each year. A responsible public entity means a public entity that has the power to contract with a private entity to develop an identified qualified project. More specifically, for any unsolicited proposal for a project at one or more institutions at the University System of Georgia, the responsible public entity is the Board of Regents of the University System of Georgia or its designees. For any unsolicited proposal for a project for one or more state entities other than an institution of the University System of Georgia, the State Properties Commission is the responsible public entity.

There is an additional notice requirement for private entities submitting proposals for qualifying projects at the state level. Any private entity submitting an unsolicited proposal to a responsible public entity must also notify each affected local jurisdiction, meaning any county, municipality, or school district in which all or a portion of a qualifying project is located, by furnishing each such jurisdiction with a copy of its proposal.

There will be a comment period for unsolicited proposals. Each affected local jurisdiction that is not a responsible public entity for such project may submit comments to the responsible public entity within 45 days of receiving such notice, indicating whether the project is compatible with local plans and budgets. For instance, a project must be consistent with zoning and land use regulations of the responsible public entity and of each affected local jurisdiction.

Determination of a Qualifying Project

Before the procurement process begins, the state or local government must decide which projects, both solicited and unsolicited, become “qualifying projects.” For unsolicited proposals, once a state or local government receives an unsolicited proposal, such public entity must review such proposal according to its guidelines adopted pursuant to, and the requirements set forth under, the Act and make a determination of whether such project meets a public purpose or public need. If a determination is made that a project is a qualifying project, the relevant state or local government entity will take the following steps:

- First, seek competing proposals for the qualifying project by issuing an RFP;
- Second, review all such proposals received in response to the RFP and rank them based on various factors, such as the cost of the project, the design of the project, the general reputation, expertise and financial capacity of the private entity, and benefits of the project to the public, among other factors; and
- Lastly, negotiate with the highest-ranked private entity, or the next-ranked private entity if it is unable to reach a comprehensive agreement or interim agreement with the highest-ranked entity.

At any time during the above process, and prior to executing a comprehensive agreement, the relevant state or local government entity may cancel its RFP or reject all proposals received in response to an RFP for any reason whatsoever without any liability to the private entities or third parties.

Comprehensive Agreement

Upon determination of a qualifying project, the relevant state or local government entity and the selected private entity may enter into a comprehensive agreement setting forth the terms and conditions of such project. In addition to any terms and conditions that the state or local government entity determines will serve the public purpose contemplated by the Act, each comprehensive agreement must include, among other provisions, the following:

- A thorough description of the duties of each party in the completion and operation of the qualifying project.
- Dates and schedules for the completion of the qualifying project.
- Any user fees, lease payments, or service payments as may be established by agreement of the parties (as well as any process for changing such fees or payments) and a copy of any service contract.
- Any reimbursements to be paid to the state or local government entity for services provided by such public entity.
- A process for reviewing the plans and specifications for the qualifying project, inspecting such, and monitoring the practices of the private entity by the relevant state or local government.
- Terms regarding performance and payment bonds and insurance policies.
- Provisions governing the rights and responsibilities of the parties in the event of termination or material default.
- In the event of a material default by the private entity, the ability of the relevant state or local government entity to terminate the comprehensive agreement and exercise any other rights and

remedies that may be available at law or in equity.

Miscellaneous

All power or authority granted under the Act to public entities is in addition to and supplemental to, and not in substitution for, the powers conferred by any other general, special, or local law. Remember, the Act does not apply to all procurement projects. For instance, state or local government entities that proceed with procurement pursuant to competitive sealed bidding or any other traditional purchasing options available under existing law are not required to comply with this Act.

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