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The District of Columbia and Georgia Join the Growing Number of States to Enact P3 Legislation: Seyfarth Shaw.

Funding the maintenance or expansion of existing infrastructure and the development of new infrastructure is one of the key bottlenecks to global infrastructure development and has resulted in governments and the private sector turning to alternative project procurement methods. One such alternative is the public-private partnership.

Public-private partnerships, or P3s, are gradually becoming a mainstream form of large project procurement in the United States.

The District of Columbia and Georgia have recently joined in the momentum of support for P3 legislation. The DC P3 Act took effect as of March 11, 2015 and the Georgia P3 Act took effect on May 5, 2015.

DC P3 Act

The DC P3 Act establishes the Office of Public-Private Partnerships (P3 Office) which will be responsible for “facilitating the development, solicitation, evaluation, award, delivery and oversight of public-private partnerships that involve a public entity in the District”. The P3 Office, which is headed up by an Executive Director, is entitled to retain consultants and enter into contracts to provide financial, legal or other technical expertise necessary to assist in such administrative role. The P3 Office will essentially be the main point of contact for parties involved, or looking to become involved, in a public-private partnership.

Public-private partnerships are defined in the DC P3 Act as “a long-term, performance-based agreement between a public entity and a private entity or entities where appropriate risks and benefits can be allocated in a cost-effective manner between the public and private entities in which (A) a private entity performs functions normally undertaken by the government, but the public entity remains ultimately accountable for the qualified project and its public function, and (B) the District of Columbia may retain ownership or control in the project asset and the private entity may be given additional decision-making rights in determining how the asset is financed, developed, constructed, operated and maintained over its life-cycle.”

Projects that qualify as a potential public-private partnership include education facilities, transportation (e.g. roads, highways, public transit systems and airports), cultural or recreational facilities (e.g. libraries, museums and athletic facilities), buildings that are of beneficial interest to the public and are developed or operated by a public entity, utilities (e.g. water treatment, telecommunications, information technology), improvements to District-owned real estate or any other facility, the construction of which would, in the P3 Office’s opinion, be beneficial to the public interest.

A public-private partnership may be procured by process of a request for proposals or as a result of an unsolicited proposal. Via the process of requested proposals, a proposal will be evaluated against, among other criteria, the proposed cost and delivery time for the project, the financial commitment

required of public entities, the capabilities and related experience of the proposer, a value-for-money and public sector comparator analysis, the inclusion of novel methods, approaches or concepts in the proposal, the scientific, technical or socioeconomic merits of the proposal, how the proposal benefits the public and other factors the P3 Office deems appropriate to obtain the best value for the District.

The District may consider, evaluate and accept unsolicited proposals from a private entity if the proposal addresses a need of the District, is independently developed and drafted by the proposer without District supervision, demonstrates the benefit of the proposed project to the District, includes a financing plan to allow the proposed project to move forward pursuant to the District's budget and finance requirements and includes sufficient detail and information to allow the P3 Office to evaluate the proposal and make a worthwhile determination.

The DC P3 Act also sets out various terms required in any public-private partnership agreement, including the legal rights of the District with respect to the takeover or termination of a public-private partnership agreement.

Georgia P3 Act

On May 5, 2015, Georgia Governor Nathan Deal signed into law Senate Bill 59, known as the "Partnership for Public Facilities and Infrastructure Act" (the "P3 Act"). In simplest terms, the P3 Act amends the public works bidding portion of the existing Georgia Code to allow private companies to propose projects to the local and state governments. The local governments that may participate in the P3 Act partnerships are any county, municipality, consolidated government, or board of education. The state governments that may participate in the P3 Act partnerships are any department, agency, board, bureau, commission, authority, or instrumentality of the State of Georgia, including the Board of Regents of the University System of Georgia.

The projects proposed by the private entity must be "qualifying projects" meaning they must meet a public purpose or public need, as determined by the local or state government. The P3 Act does not apply to projects for generation of electric energy for sale, communication services, cable and video services, and water reservoir projects.

Guidelines and oversight for P3 Act projects take different approaches depending whether the partnership is with a local or state government. For partnerships with local governments, the P3 Act provides that a P3 Act Committee will be created to prepare model guidelines for local governments to use in implementing P3 Act projects. The P3 Act Committee is composed of 10 persons with varying backgrounds and qualifications as provided in the P3 Act. The appointments to the P3 Act Committee will be made by August 1, 2015, and the P3 Act Committee has until July 1, 2016, to issue model guidelines to local governments. With respect to partnerships with state governments, for qualifying projects undertaken by the State Properties Commission, the Georgia State Financing and Investment Commission will be solely authorized to develop guidelines, and for qualifying projects undertaken by Board of Regents, the Board of Regents will be solely authorized to develop guidelines for those projects.

For a project to become a reality under the P3 Act, it must proceed through the following series of steps outlined in the P3 Act:

1. For a local government, it must adopt the model guidelines or create its own guidelines including the required contents outlined in the P3 Act. A state government must use the guidelines established by the State Properties Commission or the Board of Regents.
2. To participate, a local government must adopt a rule, regulation or ordinance affirming its

participation in the P3 Act process.

3. A private entity may submit an unsolicited proposal for a project to the applicable local or state government for review and determination as a qualifying project in accordance with its respective guidelines and the submittal requirements outlined in the P3 Act. For state government P3 Act projects, the unsolicited proposal must be submitted between May 1, and June 30, of each year.

4. A private entity submitting an unsolicited proposal to a state government must also notify each local jurisdiction and allow 45 days for the local government to comment on whether the proposed project is compatible with local plans and budgets.

5. The local or state government approves or rejects the unsolicited proposal. A local or state government may reject any proposal at any time and is not required to give reasons for its denial. If an unsolicited proposal is accepted as a qualifying project, the local or state government must seek competing proposals by issuing a request for proposals for not less than 90 days.

6. The local or state government will rank the proposals received by utilizing a variety of factors outlined in the P3 Act, such as cost, reputation and experience of the private entity, and the private entity's plan to employ local contractors and residents. 7. The local or state government will negotiate with the first-ranked private entity and will continue to negotiate with subsequent-ranked private entities until an agreement is reached. Prior to entering into an agreement, the local or state government may cancel the requests for proposals or reject all proposals for any reason whatsoever.

8. The local or state government and the private entity enter into a comprehensive agreement. The terms of the comprehensive agreement include, but are not limited to, description of duties, timeline for completion, financing, and plans and specifications and the project begins.

Conclusion

By allowing partnerships between the private and public sector, P3 Acts create opportunities for governments to engage in new projects that would previously have been cost prohibitive. Under this new law, the private entities can take on design and construction costs previously borne by the government. Beyond that, P3 Acts will encourage investment in infrastructure and aid urban renewal.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.