

New Jersey's Public-Private Partnership Legislation: Opportunities for the Design and Construction Industry

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On August 14, 2018, New Jersey Senate bill No. 865 was signed into law and in February 2019 this law, which promises to transform New Jersey's design and construction industry, took effect. The legislation presents construction and design professionals with a unique opportunity to play crucial roles in solving some of the State's daunting challenges faced in rebuilding its crippled infrastructure.

Under this legislation, for the first time certain public projects may be structured as public-private partnerships (commonly known as "P3s") with qualified public agencies such as local governments, school districts, public authorities, and state and county colleges/universities (a "Qualified Public Agency"). Design and construction professionals will actually take ownership of these projects through public-private partnership agreements ("P3 Agreements") whereby the private entities will assume the financial and administrative responsibility for the development and construction of a project and the Qualified Public Agencies will make regular payments to the private entity for the duration of the P3 Agreement. At the conclusion of the P3 Agreement, the Qualified Public Agency will then assume ownership of the project.

This "P3 structure" will now be available for projects involving the development, construction, reconstruction, repair, alteration, improvement, extension, operation, and maintenance of any building, road, structure, infrastructure, or facility constructed or acquired by a local government unit to house local government functions, including any infrastructure or facility used or to be used by the public or in support of a public purpose or activity, including roadway and highway projects.

Qualified Public Agency Approval

Private firms seeking to enter into a P3 Agreement with a Qualified Public Agency will need to first be evaluated and approved by the applicable Qualified Public Agency as part of the procurement process. To that end, the Qualified Public Agencies will issue Requests For Proposals, and then rank the proposals, creating a 'short-list' of qualified private entities that will then be asked to submit a final proposal. In ranking the proposals, Qualified Public Agencies will consider factors such as: (i) professional qualifications, (ii) general business terms, (iii) innovative engineering, (iv) architectural services, and (v) the need for local government funds to deliver the project and discharge the agreement. Further, Qualified Public Agencies may require that the private entity assume responsibility for all costs incurred by the Qualified Public Agency before execution of any P3 Agreement, including the costs of retaining independent experts to review, analyze, and advise the Qualified Public Agency with respect to the P3 proposal. Project applications, including the list of private entities selected by the Qualified Public Agency, are then reviewed by the New Jersey Economic Development Authority ("NJEDA"). Once the NJEDA approves a Qualified Public Agency application for a qualifying P3 project, the procurement process begins and the Qualified Public Agencies enter into the P3 Agreement with the selected private firm.

P3 Agreement Requirements

P3 Agreements often contain strict requirements like requiring compliance with the Construction Industry Independent Contractor Act and the New Jersey Prevailing Wage Act. However, private entities may be willing to endure such restrictions as P3 projects may be very lucrative and also may confer certain tax benefits to

private entities, such as those benefits afforded private entities that conduct for-profit activities on tax-exempt land.

The Bottom Line

It is important for developers and design professionals interested in entering this market to give municipalities and counties attractive incentives to take advantage of the structure and turn over some of their projects as an alternative to the traditional “low bid” contractor route. The importance of uniting the right team for this new market cannot be understated.

Design and engineering firms that typically perform work in the public sector need to team up with contractors to figure out how to bring financing for these projects to the table. Those teams seeking to engage in a P3 project must 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. A third-party will be appointed to manage the construction account and maintain an accounting, and those funds are only returned to the private entity after all parties involved in the P3 project (e.g., contractor, construction manager, and design professionals) have each been paid in full.

Experienced legal advisors is an important imperative for P3 teams. At Wilentz, Goldman & Spitzer, we have represented private sector contractors and developers, governmental authorities and financial institutions in various public/and private projects in New Jersey for a century. Our cross disciplinary team is well-versed in all aspects of P3 projects.

Have questions? Contact [Christopher Hopkins](#) at 732.855.6067.

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