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Act May Hold Answer To Crumbling Infrastructure

STATE FINALLY JOINS OTHERS IN INNOVATIVE WAY TO FINANCE PROJECTS

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The financing of large-scale public construction projects through partnership with private entities first emerged in the United States back in the 1990s. So-called public-private partnerships or “P3” projects have met with a measure of success across the United States. Only a handful of states in this country are without any form of legislation authorizing P3 projects for state infrastructure. Our neighbor to the north, Massachusetts, has a broad enabling statute for P3 transportation projects that has been in place since 2009. To our west, New York lawmakers have been clamoring for a law to allow public-private partnerships to help finance and construct highway infrastructure projects, and New York Gov. Andrew Cuomo has an ambitious P3 plan that involves billions of dollars in bridge and highway infrastructure advancement. Connecticut has only just begun to dabble in the P3 realm.

Buried within Connecticut’s consensus jobs legislation (HB 6801, “An Act Promoting Economic Growth and Job Creation in the State”), signed into law Oct. 27, 2011, is a provision

opening the door for Gov. Dannel P. Malloy to approve up to five P3 projects over the next three years. Specifically, the change in law authorizes state executive branch agencies and quasi-public agencies to “finance, design, construct, develop, operate or maintain” certain public facilities that generate revenue as a public infrastructure. These facilities include educational, health, early childcare or housing facilities, as well as transportation systems, including ports, transit-oriented development and related infrastructure.

The new law sets forth an evaluation and approval process for each proposed P3 project to determine whether the project qualifies as such. Each agency must go through an evaluation process to determine if a project is suitable for a P3 agreement. The public agency must determine if a P3 project is feasible, desirable and convenient to the public, and furthers public policy goals. The agency must specifically consider, among other things, the project’s operation or tech-



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nological risk, an analysis of the benefit to the agency’s customers and the public, and a “value for money review and analysis.” The determination of P3 status cannot be based solely upon the revenue a proposed project generates.

The new law exempts P3 contractors from the Connecticut’s construction prequalification laws for public works projects, including highway and bridge projects. It does, however, provide for a prequalification process for private entities in order to evaluate sources of funding, technical capacity and experience, qualification to do business within Connecticut and

whether any controlling member has ever been convicted of fraud or corruption. Selection of contractors for a P3 project still must be done through the competitive procurement process.

The Advantages Of P3

It is not surprising that the P3 component of the jobs legislation was met with objection from state employees who oversee capital projects since the design of state projects usually has its genesis on the drafting tables of these employees. While these are legitimate concerns for state employee unions seeking to protect their constituents, P3 affords the state with an option that lessens the burden upon state coffers. Connecticut's infrastructure is undeniably in need of repair. According to the American Society of Engineers' Report Card for America's Infrastructure, published in 2009, 35 percent of Connecticut's bridges are "structurally deficient" or "functionally obsolete" and 47 percent of Connecticut's major roads are in poor or mediocre condition. Public-private partnerships offer Connecticut a potential tool to remedy this situation during these tough economic times.

In addition to solving budgetary issues that have stalled infrastructure projects, another advantage of public-private partnerships from the state's perspective is the shedding of risk for design deficiencies and cost overruns. Under the traditional design-bid-build construction model, the state's design is put out for public bid. Under a federal contracting doctrine known as the Spearin Doctrine, which our courts have recognized as part of Connecticut common law since the mid-1970s, the state, as owner of the project, is responsible to the contractor for the costs attributable to deficiencies, errors and omissions in its design. With P-3, the state is not nec-

essarily the "owner" of the design and therefore may not have sole liability for design deficiencies.

Contractor's Perspective

Since contractors often play an essential role throughout the P-3 process, contractors who have performed only design-bid-build projects must have a complete understanding of the risks involved in public-private partnerships. Therefore, it is critical for contractors getting involved in public-private-partnerships to measure and understand their potential risk exposure. This should include direct involvement of legal counsel as well as

design review, geotechnical analysis, financing — shift to the consortium members, including the contractor. Moreover, the public-private partnership enabling legislation bars an agreement waiving the state's sovereign immunity or the granting of sovereign immunity to a contractor or private entity, which forecloses the government contractor defense. Thus, evaluation of the risk-shifting between the P3 participants should be one of, if not the central focus for the P3 contractor.

The enabling legislation does not guarantee that a single P3 project will be built. Agencies interested in a P3

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insurance and bonding agents to aid the contractor in assessing whether a P-3 project is a sound business decision. The contractor's legal team should also be diversified to handle not only construction-related issues, but also potential zoning and banking issues.

A P-3 contractor must also be an active participant in the negotiation of the memorandum of understanding of the consortium members (the developer, design team and contractor) as well as negotiation of the contract with the public entity "owner."

Many of the tasks and associated risks traditionally handled by the public entity — major permitting,

project must first consult with Department of Economic and Community Development and Department of Transportation commissioners, the state treasurer, OPM secretary, must gain approval of the governor and will also be subject to public hearings. The legislation contains a sunset provision of Jan. 1, 2015. Whether a P3 project is actually constructed before the legislative sunset remains to be seen. It is hoped the state and private entities can seize the opportunity and give P3 a try in Connecticut. It just might be the answer to Connecticut's crumbling infrastructure in these times of economic austerity.

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