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P3 in MD: New Day for Public-Private Cooperation

Twenty-eight states have P3 authority for building projects

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Although many companies work globally, construction is local and contractors must adhere to the state laws in which they are working. And those laws keep changing.

As a consequence of decreased revenues due to the most recent recession and slow recovery, states have increasingly turned to public financing to deal with those budget issues.

In Maryland, the Seagirt Marine Terminal and the redevelopment of the Chesapeake House and Maryland House Travel Plazas are recent P3 projects.

Many have sought to provide more flexibility to state agencies in the way they procure and deliver projects, including authorization for best-value procurements, where they look at the lowest price and at the contractorõs qualifications, expertise, and ideas.

Thirty-nine jurisdictions now have at least some form of public-private partnership (P3) authority for transportation projects, and 28 states have P3 authority for building projects.

The idea behind P3 is to leverage private financing and construction contracting to build infrastructure projects the state wants more efficiently, without adding to bond debt.

New P3 laws let states leverage private industry from a financing and project delivery standpoint to supplement funding the government might not have available. Increasingly, states are using P3 to accelerate the construction of water and wastewater treatment facilities, courthouses, schools and college dormitories, as well as roads.

In Maryland, the Seagirt Marine Terminal and the redevelopment of the Chesapeake House and Maryland House Travel Plazas are recent P3 projects, and the future development of the Purple Line was authorized as P3.

Last year, the state revised its laws concerning P3, which establishes appropriate increased use of P3 as a public policy. Maryland now gives the Board of Public Works a more prominent role and seeks to encourage innovation by providing room for businesses to pitch ideas for projects without following the usual procurement procedure.

Under the law, P3 projects are generally defined as projects that deliver public infrastructure assets using a long-term, performance-based agreement between specified state agencies and a private entity. It also designates the Maryland Department of Transportation and its associated agencies, the Department of General Services, the Transportation Authority and the University System of Maryland as ñreporting agencies,òwhich can consider both unsolicited and solicited P3 proposals.

Overall, the new P3 legislation seeks to streamline the review and approval process by implementing a more comprehensive approach to foster certainty for potential private sector partners in how projects are proposed, reviewed, and approved.

It also exempts designated P3 projects from the state procurement regulations, allows a reporting agency to reimburse private entities for the costs incurred to develop unsuccessful responses, and permits reporting agencies to establish Minority Business Enterprise (MBE) participation goals.

Additionally, the law includes a number of contract provisions that must be included in all P3 agreements, including minimum quality standards, requirements for state inspections of facilities, and audits and prohibitions against P3 agreements longer than fifty years.

Within the relationship, the private entity performs functions normally undertaken by the government, but the reporting agency ultimately remains accountable for the public infrastructure asset and its public function.

While the state may retain ownership in the public infrastructure asset, the private partner may be given additional decision-making rights in determining how the asset is financed, developed, constructed, operated, and maintained over its lifecycle.

With unsolicited proposals, reporting agencies are permitted to develop their own evaluation processes to help ensure the implementation is consistent with state policy. They also are permitted to adopt regulations implementing an application fee for submitting unsolicited proposals and to charge a higher fee if the proposal addresses a project that is not in Maryland's Capital Improvement Plan or Consolidated Transportation Program. If a reporting agency decides that an unsolicited proposal meets a need or is otherwise acceptable, it must then follow the process for solicited proposals.

If a reporting agency decides a project meets the P3 criteria and opts to solicit for a P3, the evaluation process is as follows:

- Review of pre-solicitation report to Budget committees, Comptroller, and Treasurer (45 days);
- Review and designation by Board of Public Works;
- Solicitation Process (public notice, proposal review, negotiations, reach agreement terms);
- Review and comment of P3 agreement by Budget committees, Comptroller, and Treasurer (30 days), and
- Board of Public Works approval of agreement.

P3 is a creative alternative to respond to a deficit in public funding for infrastructure projects in an environment where nationally we have gone from stimulus to sequester. P3 allows states to add to their funding mix to address infrastructure needs while giving private entities a share in the revenue and control of the asset.

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