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Legislation Update: S-865 Public-Private Partnerships in New Jersey Passed by Both Houses-Awaiting Governor's Signature

New Jersey is finally close to being among the many states with broad authority to develop or improve public projects through a Public-Private Partnership (P3) delivery method. This contracting model has stimulated growth and improvements in other States and led to the delivery of projects that may not otherwise have happened. Senate Bill 865 ("S-865"), after undergoing some last-minute amendments in a frenzied legislature dealing with budget and other critical issues, has passed in both houses of the Legislature and is waiting for Governor Murphy's signature, which is expected shortly. The law will be effective 180 days from formal enactment. The administrative framework is now in place to make Public-Private Partnerships a reality in New Jersey.

S-865 sets forth the mechanism for Public-Private Partnerships for public building and highway infrastructure projects under the oversight of the Department of Treasury. Governor Christie conditionally vetoed similar legislation a few years ago, objecting to the prevailing wage and project labor agreement requirements, which are both included in S-865. And, unlike the prior short-lived P3 legislation in New Jersey, this version is not limited to State and County Colleges and does not contain a sunset provision.

For those unfamiliar with the Public-Private Partnership concept, commonly called both PPPs and P3s, a P3 is a project delivery system that departs from the traditional Publicly Funded Design-Bid-Build methodology. In its most general and broadest form, the design, construction, financing, operations and maintenance of a public facility is handled by the private sector when delivering assets and services for the benefit of the public. The private sector often assumes financial, technical and operational risk, while the public sector sets policy and retains ownership and control of the asset, all coupled with a repayment mechanism suited to the facility – including set payments to the private sector or assignment of revenue generated by the asset to the private entity. There are modified P3 models that allow the approach to be tailored to individual projects, which this legislation allows, including 50-year sale leasebacks for heavy highway projects and 30-year leasebacks for building projects.

With S-865's enactment and implementation, the State, any of its instrumentalities, political subdivisions such as counties and municipalities, as well as schools and colleges, will be able to solicit private businesses to

provide public building or highway infrastructure projects through a P3 or utilize the lease/purchase modified P3, to finance smaller-scale projects over a longer duration.

Specifically, S-865 amends the procurement laws that currently govern public bodies in their procurement and bidding processes, i.e., the State Bidding Law, the Local Public Contracts Law, the Public School Contracts Law, the State College Contracts Law and the County College Contracts Law. These public entities will be authorized to accept solicited or unsolicited proposals through public/private business arrangements between the public body and one or more private entities. Nonetheless, many of the standards and protections of traditional public contracting have been retained including:

- Contractors must obtain contractor registration, and classification and/or prequalification from either the New Jersey Division of Property Management & Construction or the New Jersey Department of Transportation, depending on the nature of the project
- Contractors must post performance and payment bonds and, in some instances, a maintenance bond
- Private entities that employ workers must pay prevailing wages for the worker's craft or trade
- Project labor agreements are required

Provisions that are unique to P3 projects include:

- The private entity is required to establish a construction account managed by a third-party financial institution to hold the project funding in trust for the benefit of the contractor, construction manager and design-build team involved
- Department of Treasury approval is required for all projects
- A fund is being created, set at 1% of project value, that would allow for the administration of P3s in the State
- "When practicable," projects are encouraged to adhere to the Leadership in Energy and Environmental Design Green Building Rating System or LEEDs
- Certain dollar thresholds are imposed on the various public entities to qualify for P3s depending on which bidding statute governs their procurement. For roadway or highway projects under the Local Public Contracts Law there must be an expenditure of at least \$10 million in public funds or any dollar amount in private funds.
- Bundling of projects under the same procurement is prohibited since it discourages competition

The bill also allows the government unit to accept unsolicited proposals from private entities if the standards and qualifications are met. The public body may require the private entity to assume responsibility for all costs incurred by the government unit before execution of the P3 agreement, including costs to retain independent experts to review, analyze, and advise the government unit with respect to the proposal. In addition, stipends



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may be used where there is substantial opportunity for innovation and the costs for developing proposals are significant.

P3s have been utilized for some time, with Canada, the UK and elsewhere across Europe leading the way. The use of P3s is on the rise in the United States as the clear majority of states now have authorizing legislation in place. In New Jersey, the Associated Construction Contractors has been in the forefront of developing and lobbying for the legislation. With the state looking for innovative ways to balance the budget, P3s can provide the solution for expensive infrastructure projects that would otherwise remain on the drawing board. The benefits to the public are many, including obtaining financing for projects, innovation, superior facilities designed for long term use and cost savings, while the public still retains control of the asset. Notably, the Port Authority of NY & NJ has been increasingly active in deploying P3s, for example in connection with the Goethals Bridge and LaGuardia Airport projects. Worldwide, P3s have been successfully utilized on transportation; utility; education; sewage and water treatment plants, court houses, sports facilities, health care and administrative projects.

New Jersey's reauthorization of a broader P3 model as an accelerated project delivery procurement alternative has the potential to bring additional mass transit and much needed infrastructure repair projects into the pipeline. The opportunities are vast, given the well documented fact that the United States' investment in infrastructure is long overdue.

P&A worked closely with the ACCNJ, AIAI and others in helping bring this legislation to New Jersey and we are available to provide additional insight and support regarding its application to New Jersey projects. Please contact partners Steve Charney or Charles Kenny if you have questions or we can be of assistance.

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