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Updates to North Carolina P3 Law

Introduction

Public-Private Partnerships, commonly referred to as P3s, are contractual agreements between public and private entities that provide for significant involvement of private entities in the delivery and financing of public buildings and infrastructure projects. Under a P3 agreement, the private entity assumes the project's financing and is entitled to either the revenue generated from project activities or performance-based government payments.

Public-Private Partnerships enable public entities to undertake projects which they might otherwise postpone or ignore due to lack of funds. P3 projects also create a vast number of jobs, and dramatically accelerate project completion when compared to traditional Design-Bid-Build projects. There are several different types of P3 delivery options; however, the most common P3 system is a Design-Build-Finance-Operate-Maintain (DBFOM) transaction.

North Carolina Background on P3 Law and Process of Current Law

Historically in North Carolina, local municipalities and state agencies required approval from the State Building Commission to engage in any type of procurement for construction other than traditional procurement methods such as separate-prime bidding, single-prime bidding, dual bidding, and construction management at risk contracts. *See* G.S. § 143-128(a1) & § 143-128(9). On August 23, 2013, Governor Pat McCrory of North Carolina signed into law HB 857, which empowered these entities to engage in alternative delivery methods, such as design-builds and public-private partnerships.

As a result, North Carolina amended G.S. § 143-128, thus allowing local government and state agencies to use P3s and design-build contracts to construct a wide range of projects. Although unsolicited proposals are not contemplated under the statute, public entities may still pursue alternative procurement vehicles subject to the stringent criteria set forth in the new statutory framework. *See, e.g.*, § 143-128.1A. (establishing criteria regarding design-build contracts); § 143-128.1B (establishing criteria for design-build bridging); § 143-128.1C. (establishing criteria for P3s). This new framework creates a mechanism whereby the government entity must also submit a detailed report explaining why it chose the alternative delivery system over traditional procurement methods.

Despite the criteria and reporting requirements contained therein, this new law recognizes that that North Carolina is "not wholly satisfied by existing procurement methods" for the design, construction, improvement, renovation and expansion of public buildings. This new enabling legislation therefore provides opportunities for government entities to become more creative in their approach.

Overview of Key Points of New Legislation

- A “government entity” is defined as “[e]very officer, board, department, commission, or commissions charged with responsibility of preparation of specifications or awarding or entering into contracts for the erection, construction, alteration, or repair of any buildings for the State or for any county, municipality, or other public body.” § 143-128.1B (a)(6). However, this new law is not meant to affect the existing statutes, regulations, or practices for projects administered by the North Carolina Department of Transportation, nor is it meant to apply to any contract between the University of North Carolina or one of its constituent institutions. It is also not meant to apply to a private, nonprofit corporation established under Part 2B of Article 1 of Chapter 116 of the General Statutes.
- A P3 project is defined as: “A capital improvement project undertaken for the benefit of a governmental entity and a private developer pursuant to a development contract that includes construction of a public facility or other improvements, including paving, grading, utilities, infrastructure, reconstruction, or repair, and may include both public and private facilities.” § 143-128.1C(a)(8) (emphasis added).
- Government entities can now to engage in P3 work if it is determined that there is “a critical need for a capital improvement project,” and in such a case, the entity “may acquire, construct, own, lease as lessor or lessee, and operate or participate in the acquisition, construction, ownership, leasing, and operation of a public private project, or of specific facilities within such a project, including the making of loans and grants from funds available to the governmental entity for these purposes.” § 143-128.1C(b).
- In order to engage in such P3 delivery systems, the government entity will determine the scope of what facilities should be built according to the P3 model, and the form in which developers can apply to win such work. The entity must advertise a notice of interested private developers to submit qualifications in a newspaper having circulation in the county where the entity is located. § 143-128.1C(h).
- The private developer is chosen based upon qualifications such as evidence of financial stability (exclusive of “trade secrets”), experience with similar projects, explanation of the proposed project team, a statement of availability to undertake the project and a projected timeline for completion, and any other information required by the government entity. § 143-64.31(h) & (i).
- Small business entities and resident companies are favored and even given preference under this framework. See § 143-128.1C(e) & § 143-64.31(a1).

- The Secretary of Administration will oversee the P3 procurement process, the design-build process, and contracts with construction managers at risk, all of which are contemplated under the new legislation. Government entities have reporting requirements that include justifying why such processes were used over traditional procurement processes. § 143-64.31(b) & (c).
- Statute 143-128.1C (a)(4) provides that in any P3 deal, the private entity is required to finance at least 50% of the project.
- As set forth in Sections 8(a), (b), & (c) of the new bill, there is now established a Purchase and Contract Study Committee to study prequalification on public non-transportation construction work for both local and State government projects. The Committee is required to report its findings to the General Assembly on or before the convening of the 2014 Session of the 2013 General Assembly. The Purchase and Contract Study Committee includes:
 - Two Senators, appointed by the President Pro Tempore of the Senate.
 - Two Representatives, appointed by the Speaker of the House of Representatives.
 - Three licensed general contractors, appointed by the President Pro Tempore of the Senate.
 - One professional engineer, appointed by the Speaker of the House of Representatives.
 - One registered architect, appointed by the Speaker of the House of Representatives.
 - One person upon recommendation of the North Carolina League of Municipalities, appointed by the Speaker of the House of Representatives.
 - One person upon recommendation of the North Carolina County Commissioners Association, appointed by the President Pro Tempore of the Senate.
 - A representative from the State Construction Office.