

If you have any questions about this Advisory, please contact:

SUSAN BRYSON
203.498.4337
sbryson@wiggin.com

CHRISTINE OWENS
MORGAN
203.498.4494
cmorgan@wiggin.com

ELLIOT KAIMAN
203.498.4309
ekaiman@wiggin.com

ANIKA SINGH LEMAR
203.498.4325
alemar@wiggin.com

MICHAEL MILLER
203.498.4496
mmiller@wiggin.com

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

Connecticut Legislation Authorizes State Public-Private Partnership Agreements

THE ACT

Recognizing Connecticut's need for an economic boost in the current business climate, last session the legislature—with support from Governor Malloy—enacted "An Act Promoting Economic Growth and Job Creation in the State" (the "Act"). [1] The Act authorizes state and quasi-public agencies to enter into partnerships ("public-private partnerships" or "P3s") with private entities for the finance, design, construction, development, operation or maintenance of eligible "facilities[2] Only certain types of public works and transportation projects are eligible:

- (1) educational, health, early childcare or housing facilities;
- (2) transportation systems, including ports, transit-oriented development and related infrastructure; and
- (3) any other type of facility the legislature identifies or proposes as a project[3]

The Act makes Connecticut one of several states to take legislative action to promote P3s as a way of addressing the country's need to upgrade and modernize infrastructure. A P3 arrangement permits public and private entities to allocate and share the risks and rewards in the delivery of the service and/or facility. Proponents of P3s cite increased efficiency and innovation, access to additional capital, reduced cost and the ability to shift risks,

such as cost overruns to the private entities. Critics of P3s point to weak accountability on the part of the private entities, the potential for job elimination and the distribution of otherwise public revenues to private entities. The Act endeavors to address concerns on both sides, delineating a process for approval of the private entities and each project, as well as mandating specific contract terms and remedies in the event of a material default by the private entity contractor.

The Governor has ultimate approval of the P3s authorized by this Act, and his approval may not be given unless he determines that the project will result in job creation and economic growth. He is to approve no more than five projects by January 1, 2015. As required by the Act, the Governor submitted an initial report to the legislature on January 15, 2013 on the status of P3s authorized by the Act.

THE ACT'S REQUIREMENTS – APPROVAL OF A PROJECT

The process of securing approval of a P3 begins with analysis by a state agency of the project's "feasibility, desirability, and the convenience to the public of the project" and of its furtherance of stated policy goals, taking into consideration a wide range of factors, including:

- The essential characteristics of the proposed facility;

CONTINUED ON NEXT PAGE

Connecticut Legislation Authorizes State Public-Private Partnership Agreements CONTINUED

- The projected demand and its economic and social impact;
- The technical feasibility of the project and its conformity with the state plan of conservation and development;
- The benefit to clients of the agency and the public;
- A cost-benefit analysis of the project that includes an assessment of opportunity costs and nonfinancial benefits;
- Any operational or technological risk associated with the project;
- The project's cost and its economic and financial feasibility;
- An analysis of public versus private financing and the eligibility of the project for other public funds;
- The impact to the state's finances of undertaking the project; and
- The advantages and disadvantages of using a P3 rather than having the state agency perform the function[4]

THE ACT'S REQUIREMENTS – APPROVAL OF A PRIVATE ENTITY

The Act spells out the process by which an agency may prequalify private entities for P3 projects:

A private entity must (1) have an available source of funding that, in the judgment of the State Department of Economic and Community Development ("DECD"), is sufficient to complete and operate a project; (2) possess, either in-house or through

joint venture or consortium arrangements, sufficient capacity; (3) be qualified to transact business in Connecticut, and (4) certify that no controlling entity has been convicted of corruption or fraud in any jurisdiction of the United States[5]

The agency must conduct a competitive procurement process to select a specific private entity to be the contracting party to a P3 agreement, with various notice and bid specifications spelled out in the Act[6]

STATE CONTRACT ISSUES

The Act imposes multiple requirements for the terms and conditions of P3s, including specific details on the facility to be developed and its financing (including limitations on user fees). Most notably for those private entities seeking to enter into such agreements, the Act provides, among other things, that:

- The term of the P3 agreement shall not exceed fifty years;
- The state's sovereign immunity cannot be waived nor can it be granted to a private entity;
- Noncompete provisions shall not limit the state's ability to perform its functions;
- All P3s are subject to Connecticut's prevailing wage (or negotiated wages in a project labor agreement) and set-aside laws, as well as environmental policies and local land use requirements; and
- Specific remedies are provided to the state agency in the event of a material default, including termination of the agreement for cause and the state's

ability to take over the contractor's responsibilities, subject to existing liens on revenue previously granted. [7]

P3 PROJECT APPROVAL PROCESS - SUMMARY

The Act prescribes the procedure by which an agency submits a P3 project for approval. The procedure consists of four principal steps: (1) agency analysis; (2) consultation; (3) submission; and (4) Governor review. The following schematic maps out the procedure, with a brief explanation of each step, as described in the statute:

- Step One: Agency Analysis. The agency must analyze all P3 proposals pursuant to the requirements set forth in Conn. Gen. Stat. §§ 4-256 through 258.
- Step Two: Consultation. The agency consults with the construction services, DECD and Department of Transportation commissioners, the State Treasurer, and the Office of Policy and Management ("OPM") Secretary.
- Step Three: Submission. The agency submits the P3 proposal to the governor and to the Finance, Revenue and Bonding Appropriations committees of the General Assembly, subject to public hearing requirements.
- Step Four: Governor Review. The governor must find that the project will "result in job creation and economic growth" in order to approve the P3 project. Conn. Gen. Stat. § 4-256(a).

Upon approval of any project, the Governor must notify the agency and include the project in the annual P3 status report to the

CONTINUED ON NEXT PAGE

Connecticut Legislation Authorizes State Public-Private Partnership Agreements CONTINUED

legislature, a report required under the statute.[8]

CONCLUSION – STATUS TO DATE

Governor Malloy recently released the first status report required under the Act, identifying several possible P3 project candidates.[9] These projects were identified as meriting further analysis by OPM and a consulting team engaged to provide legal, financial and technical advice with respect to P3 opportunities. The proposed projects were evaluated against the standards set forth in the Act, with a focus on the likelihood of success of the project as measured by potential investor interest, private sector industry expertise, and market depth (e.g. critical mass of qualified bidders). OPM and the consultant team rated the viability of the proposed projects: high probability projects represent some of Connecticut's most viable P3 initiatives; moderate probability projects while potentially viable present some legal or investor hurdles. This list is not exhaustive, however, and Connecticut may consider the feasibility of other eligible P3 projects. Going forward, the OPM, the joint venture and appropriate state agencies will coordinate the agency-level review of the most viable project candidates.

The report highlighted the following potential P3 projects:

- A lease-concession of the New London State Pier (high probability);
- Design-build contract and/or concession agreement for the development and/or renovation of dormitories within the State University System, including the Storrs,

Stamford and Avery Point campuses of the University of Connecticut and Central Connecticut State University (high probability);

- Development and concession arrangement for transit-oriented (mixed use) development around the CT Fastrak (New Britain to Hartford) and New Haven-Hartford-Springfield Commuter Line Stations (high probability);
- Renovation, redevelopment, replacement and operations of the XL Center, an arena and convention space in Hartford (moderate probability); and
- Renovation, reconstruction and operations of a State-Financed and Owned Affordable Housing Portfolio (moderate probability).

The analytic framework presented in the report will guide future evaluations of P3 projects proposed by state agencies prior to final mandated review by the legislature and the Governor.

[1] Public Act No. 11-1, now codified at Conn. Gen. Stat. § 4-255.

[2] The Act provides that a "facility" is "any public works or transportation project that generates revenue as a function of its operation." Conn. Gen. Stat. § 4-255(a)(7). The definition of "public-private partnership" includes the requirement that the revenue generated, in combination with other funding sources, must be sufficient to fund the cost of the project with state support capped at 25% of the project cost. Conn. Gen. Stat. § 4-255(a)(3).

[3] Conn. Gen. Stat. § 4-255(c)(1) – (3).

[4] Conn. Gen. Stat. § 4-256(b)(1) – (10).

[5] Conn. Gen. Stat. § 4-257.

[6] Conn. Gen. Stat. § 4-258.

[7] Conn. Gen. Stat. § 4-262.

[8] Aside from the requirements set forth above, the project must also comply with the cost-benefit and business case requirements for privatization contracts set forth in Conn. Gen. Stat. §§ 4-261(c) and 4e-16(a).

[9] Status Report: Preliminary Evaluation of Potential Public Private Partnership Opportunities Pursuant to Public Act No. 11-1, October Special Session, State of Connecticut Office of Governor Dannel P. Malloy (2013).