

July 9, 2012

Practice Group(s):

*Projects/Public
Private Partnerships*

*Energy &
Infrastructure
Projects and
Transactions*

Pennsylvania Takes an Important Step Forward on Public-Private Partnerships

By Andrew L. Swope, R. Timothy Weston

On July 5, 2012, Pennsylvania Governor Tom Corbett approved a key first step toward modernizing the procurement of infrastructure projects in Pennsylvania by signing legislation that expressly authorizes public-private partnerships (P3) for road, transit and other transportation related projects. The Pennsylvania legislation focuses on transportation projects for both new and existing infrastructure. The General Assembly viewed the P3 legislation as a means to fund and promote transportation projects to help provide the estimated \$3.5 billion per year additional investment needed for transportation infrastructure without relying exclusively on tax revenue to fund those projects. Whether Pennsylvania's P3 legislation stimulates new transportation infrastructure projects remains to be seen, but the law provides some interesting new options to private and public parties seeking to develop transportation infrastructure in Pennsylvania.

The Pennsylvania P3 Act (Act 88 of 2012)¹ is limited to transportation projects, but takes an expansive view of this term. The Act authorizes the creation or improvement of a "transportation facility." A "transportation facility" includes typical transportation structures such as bridges, roads and parking lots, but also includes multimodal facilities, airports, terminals and ports, together with their associated structures. The term also includes intelligent transportation systems and other property needed to operate or related to the operation of the transportation facility. Thus, the Act would appear to authorize use of P3 approaches in a rather expansive range of projects related to transportation.

Under the Act, a P3 project is characterized by a binding agreement to transfer the rights for use or control of a transportation facility from the Pennsylvania Department of Transportation (PennDOT) or another public owner to a development entity. Public owners who may consider use of P3 approaches include PennDOT, a Commonwealth Agency (as defined in 62 Pa.C.S. § 103) which includes the Pennsylvania Turnpike Commission, municipal authorities and other authorities created by statute.

The counterparty development entity can be a private party or another public entity, excluding a public entity building or improving its own facilities. The term of a P3 agreement can be for a term of up to 99 years. The development agreement can include the following transportation related services: (1) operations and maintenance, (2) revenue collection, (3) user fee collection or enforcement, (4) design, (5) construction, (6) development and other activities that enhance traffic throughput, reduce congestion, improve safety or otherwise manage or improve a transportation facility, and (7) financing. Through the P3 agreement, the development entity is authorized to charge a user fee for the use of the transportation facility. Although not expressly provided in the Act, the periodic adjustment of the user fee can be provided for in the P3 agreement.

The P3 Act also breaks new ground in the area of public infrastructure procurement in Pennsylvania by authorizing the use of "nontraditional" project delivery methods beyond the typical design, bid,

¹ The text of the Act can be found at <http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2011&sind=0&body=H&type=B&BN=0003>.

Pennsylvania Takes an Important Step Forward on Public-Private Partnerships

build model. The Act specifically authorizes agreements for design-build, operate, maintain and finance in essentially any combination. The Act also authorizes concessions and any other “innovative or nontraditional project delivery method or agreement or combination of methods or agreements that the public entity determines will address the transportation needs of the Commonwealth and the public entity and serve the public interest.” The inclusion of these non-traditional project delivery methods will give developers and partnering public agencies options that previously were largely unavailable for public sector procurements.

P3 projects will be subject to approval by a newly-created Public-Private Transportation Partnership Board (P3 Board). The P3 Board will have seven members: the Secretary of Transportation, the Secretary of the Budget, a member appointed by the Governor and four legislative appointees. The Board is responsible for evaluating and approving P3 projects. P3 projects can be presented to the Board by both public and private entities and proposals may be submitted on an unsolicited basis. The Act provides very little guidance for the standard by which projects will be evaluated stating only that projects can be approved when the Board finds that the project is in the best interests of the Commonwealth and the public entity that is the owner of the facility. The General Assembly has retained the power to rescind the Board’s approval of a project that would be owned by the Commonwealth, but must act within 20 calendar days or 9 legislative days, whichever is longer.

PennDOT also will play an integral role with respect to the Act and the P3 projects that are subject to the Act. When a P3 project proposal is submitted to the Board, PennDOT is charged with reviewing the proposal and providing the Board a detailed analysis. PennDOT will retain oversight responsibilities with respect to certain projects. PennDOT also is required to provide the Board with the technical, legal and financial expertise it requires in carrying out its duties under the Act. Clearly, PennDOT will have a great deal of influence over the approval of projects and the implementation of the Act.

Once approved by the Board, the applicable facility-owning public entity can proceed to procure the transportation related services for the project. The Act provides for a variety of methods to procure the relevant services including: requests for proposals, requests for qualifications, short-listing of qualified proposers, negotiations, best and final offers or any combination of the foregoing. The Act provides an extensive list of possible selection criteria, but the process is required to focus on best value and best interests of the public entity. The selection criteria and the weight given to each element must be made known before proposals are submitted. The Act’s use of best value as the selection criteria marks a much-needed departure from Pennsylvania’s traditional lowest responsible bidder approach to public contracting. However, as the P3 Act is implemented, the concepts of “best value” evaluation will need to be fleshed out and refined as transportation agencies seek to implement a fair and competitive process. Experience in other jurisdictions has shown that confidence in that evaluation process is important to maintaining public confidence and support for the P3 approach.

The Act specifies certain types of contractual provisions that must be set forth in the P3 agreement, including a description of the project and the work to be performed, the term of the agreement, events of default and dispute resolution procedures. The Act mandates provisions requiring that the transportation facility be in a state of proper maintenance and repair when it is returned to the public entity. The P3 Act stipulates that projects must comply with the Separations Act, a state statute that requires multiple prime contracts for the performance of different aspects of a public building project (e.g., electrical, plumbing and HVAC). The Act’s simultaneous authorization of design-build contracting and a mandate to follow the Separations Act is somewhat at odds. Again, depending on the nature of the project, this will present a developer with challenges in structuring the delivery of construction services.

Pennsylvania Takes an Important Step Forward on Public-Private Partnerships

Labor related issues were an important element in the legislative formulation of the P3 Act. The project developer is obligated to offer jobs to displaced public employees with salary and benefits that are identical to what they enjoyed prior to the execution of the P3 agreement. Given the unique nature of some of the public employment benefits, *e.g.*, public pension program, this requirement could present developers with challenges depending on the number of affected employees. The Act also requires compliance with applicable prevailing wage laws.

The P3 Act contains a somewhat eclectic mix of innovative provisions such as the creation of a stable tax environment that will help increase financial predictability for P3 projects with vestiges of traditional public procurement such as the Separations Act. Nevertheless, the Act represents a substantial step forward for P3 projects in Pennsylvania. Prior to passage of the Act, implementation of a P3 structure in Pennsylvania was difficult at best, and simply not possible in some situations. To be sure, the P3 Act leaves unanswered questions and details regarding its implementation will need to be developed. In addition, the Board and its authority to approve projects will have a significant impact on the success of the P3 Act. The Board will need to balance an appropriate level of oversight with the need to approve worthwhile projects. The road ahead remains to be mapped out, but the pathway is certainly promising.

Authors:

Andrew L. Swope

andrew.swope@klgates.com

+1.717.231.4512

R. Timothy Weston

tim.weston@klgates.com

+1.717.231.4504

K&L GATES

Anchorage Austin Beijing Berlin Boston Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt Harrisburg
Hong Kong London Los Angeles Miami Milan Moscow Newark New York Orange County Palo Alto Paris Pittsburgh Portland Raleigh
Research Triangle Park San Diego San Francisco São Paulo Seattle Shanghai Singapore Spokane Taipei Tokyo Warsaw Washington, D.C.

K&L Gates includes lawyers practicing out of more than 40 fully integrated offices located in North America, Europe, Asia, South America, and the Middle East, and represents numerous GLOBAL 500, FORTUNE 100, and FTSE 100 corporations, in addition to growth and middle market companies, entrepreneurs, capital market participants and public sector entities. For more information about K&L Gates or its locations and registrations, visit www.klgates.com.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2012 K&L Gates LLP. All Rights Reserved.