

GLASSBORO PUBLIC SCHOOLS
GLASSBORO, NEW JERSEY

TO: Mark Silverstein
FROM: Scott Henry
DATE: October 30, 2018
RE: Discussion Item November 7, 2018

On August 14, 2018 Governor Murphy signed a significant expansion of Public Private Partnership (P3) into law. A P3 can be used by governmental entities including School Districts to design, finance, construct, operate and/or maintain many types of public infrastructure.

Attached is the law and an executive summary for your review and discussion.



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October 25, 2018

File No. 13813-0001

VIA E-MAIL

Scott D. Henry, Business Administrator
Glassboro Board of Education
560 Joseph Bowe Boulevard
Glassboro, NJ 08028

**Re: New P3 Legislation Allows Public/Private Partnership
District Capital Projects**

Dear Mr. Henry:

As you may be aware, new legislation has recently been signed into law concerning the new procurement options for public entities considering construction projects. Please allow this letter to highlight some of the relevant portions of the new law, and its potential benefit for your School District. A more detailed explanatory memo is attached for your ongoing reference.

P.L.2018, c. 90, which was signed into law on August 14, 2018 allows public entities, including School Districts, to enter into agreements with private entities to finance, design, and construct public facilities. This new legislation creates a significant expansion of the pre-existing Public Private Partnership (P3) law. This law will take effect 180 days after enactment, in February of 2019. It allows for a substantial deviation from standard "lowest responsible bidder" procurement method, providing certain conditions are met. Compared to traditional School District project procurement, a P3 is an innovative project-delivery method, which would potentially allow greater flexibility in both procurement and funding. In a P3 arrangement, public money can be leveraged with private investment to fast track critical projects for which the long-term responsibility to maintain the infrastructure falls to private partners. Benefits of P3s are that they take advantage of the private sector expertise, and transfer the risk that comes with complex construction projects. The private partner is responsible for delivering the project on-time and on-budget regardless of weather, construction costs, and other issues which negatively impact public owner construction projects.

The new P3 Act is not one-size fits all. It contains certain requirements familiar to traditional school construction projects. Project Labor Agreements (PLAs), which are optional under current law, are now required where statutory parameters are met. The new law also

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provides for enhanced employment opportunities for persons residing in the county where the project is located. Like other school projects, any work performed on a P3 is subject to New Jersey's prevailing wage law. Performance and payment bonds are required, as well as contractor prequalification to work on P3 projects. On the other hand, contrary to traditional public school projects, there will be substantial oversight via New Jersey's Economic Development Authority (NJDEA) and State Treasurer. Ultimately, the applicant-School District must be able to demonstrate to the CEO of the School's Development Authority that a school facility is necessary due to overcrowding or is in need of replacement. The new law anticipates companion regulations related to the different types of public entities, and these regulations are not yet in place. For large Districts that have major construction needs, but face difficult funding situations, a P3 may provide an answer to funding problems. Private partners can provide the design, construction, financing and on-going maintenance for the building, with the District making payments in accordance with its agreed-on terms. We do not anticipate that P3s will take over as the sole, or even the dominant procurement method for School Districts, but certainly they can be a significant factor.

Thus, for our School District clients, P3s can mean a new and creative alternative to traditional project procurement. Parker McCay and its attorneys in the Construction, Public Finance, and Real Estate Practice Groups have thoroughly studied and are conversant with this new legislation, and we are prepared to counsel and work with Glassboro School District regarding this new innovation. Please contact me at your convenience to learn about this new legislation and explore whether a P3 is in your District's future.

Very truly yours,

s/ Richard W. Hunt

RICHARD W. HUNT

RWH/dml

cc: Dr. Mark Silverstein, Superintendent

**HIGHLIGHTS FROM NEW JERSEY'S NEW
PUBLIC-PRIVATE PARTNERSHIP (P3) LAW (S-865/A-1299)**

On August 14, 2018, Governor Murphy signed a significant expansion of Public Private Partnership (P3) into law. The law takes effect 180 days after enactment. A P3 can be used by governmental entities including School Districts to design, finance, construct, operate and/or maintain many types of public infrastructure.

What is a P3?

In a traditional public works project, a School District designs the project through an Architect or Engineer, as the case may be. The parameters of the project have been set, and construction bids from contractors are solicited. Through New Jersey's long-standing procurement process, once the lowest responsible bidder has been chosen, they undertake the project. The District is then responsible for the maintenance and operation of the project after construction. Although P3s have been available in New Jersey since 2009, the new law expands the role of P3s to include public projects previously not subject to P3s.

A P3 is an innovative project-delivery method, in which there is an agreement between a public owner and a private-sector group for the design, construction, and financing, (and often long-term operations and maintenance of a public asset) by the private-sector partner over a specified term. Benefits of P3s are that they take advantage of the private sector expertise and transfer the risk that comes along with complex construction projects.

Why choose a P3?

Some compelling reasons for making a public-works project a P3 are size, complexity and cost. Often, in a traditional project, the District's budget is stretched to pay for an entire project due to the unexpected costs, Change Orders, and overruns. P3s offer financial flexibility to the public entity. In P3s, the private entity is responsible for administration for the development, construction, repair, alteration, improvement, extension, operation and maintenance of a project of or for the benefit of the public entity provided that the project is financed in whole or in part by the private entity.

The P3 Agreement can include a provision where the public and private entities enter into a lease of a public asset (i.e., a building or highway) in exchange for up-front or structured financing by the private entity for the project. The lease terms can be no more than 30 years (except for a project with a highway component in which case the lease agreement shall not exceed 50 years). Under the lease agreement, the private entity may be responsible for the management, operation, and maintenance of the asset, but the asset is still owned by the government entity. The private entity may receive some or all of the revenue generated by the asset, and may operate the building or highway in accordance with State government entity standards. At the end of the lease term, any subsequent revenue generated by the public asset along with management, operation and maintenance responsibility and full ownership reverts back to the public entity.

Who can enter a P3?

The P3 process appears to be uniform across all applicable public entities. However, the legislature have yet to promulgate regulations specific to various public entities, and Districts and their projects will be subject to specific regulatory provisions. Briefly explained below are the general categories of P3 public entities and their general eligibility requirements.

- **Private Entity-** A General Contractor, construction manager, design-build team or subcontractor for a project must be registered and classified by the State to perform on the project. Classification requirements depend on the P3 entity and project. Presumably, this would be similar to DPMP pre-classification.
- **School Districts-** A local school district, regional school district, county special services school, district, or a county vocational school that can demonstrate to the satisfaction of the Commissioner of Education and CEO of the SDA that a school facility is necessary due to overcrowding or is in need of replacement is an eligible entity? Renaissance and charter schools are not eligible entities.
- **State and County Colleges-** Can enter into a P3 for the on-campus or off-campus construction, reconstruction, repair, alteration, improvement, extension, management or operation of a building, structure, or facility for the benefit of the institution so long that the project is financed in whole or part by the private entity and that the State or institution retains full ownership of the land where the project is located.
- **Local Governments-** A county, municipality or any board commission, committee authority or agency subject to the provisions of Local Public Contracts Law, and any housing authority or redevelopment authority. It does not include a private firm or public authority under the New Jersey Wastewater Treatment Public-Private Contracting Act. Eligible projects include but are not limited to: development, construction and maintenance of any building, road, structure, infrastructure or facility acquired by a local governmental unit to house local government functions, including any infrastructure or facility used or to be used by the public or in support of a public purpose. The qualifying project shall include an expenditure of at least \$10 million in public funds or any expenditure in solely private funds.

How to enter P3s and other related considerations.

- **Prior to entering into a P3 Agreement,** a School District must determine:
 1. The benefits to be realized by the project;
 2. The cost of the project if developed by the public sector;
 3. The maximum public contribution allowable;
 4. A comparison of the financial and nonfinancial benefits of the P3 Agreement as compared to the other delivery methods (i.e., public sector development);
 5. A list of risks, liabilities and responsibilities to be transferred to the private entity and to be retained by the public entity;

6. Whether the project has a high, medium or low level of project delivery risk and how the public is protected from these risks.

- Public Hearing- the District must then hold a public hearing or through Notice to the public conclude that it is in the public's best interest by making six specific findings which include but is not limited to: that the P3 will cost less than delivery by the public sector, there is a public need for the project consistent with long-term plans and the risks, liabilities and responsibilities transferred to the private entity provide sufficient benefits to warrant not using other means of procurement.
- Project Labor Agreement- All P3s must contain a Project Labor Agreement (in accordance with N.J.S.A. 52:38-1 *et. seq.*) and must provide, "to the greatest extent possible," the enhancement of employment opportunities for persons residing in the county of the project location. Currently, PLAs can only be required on "buildings" which cost \$5,000,000 or more – this requirement is not changed. Not surprisingly, the work performed on the project is still subject to New Jersey's prevailing wage rates.
- Procurement- School Districts seeking private partners would be required to follow a procurement process through a solicitation for proposals or qualifications for the selection of the private entity. The public entity may receive unsolicited proposals, which they can accept or reject, but in either case, solicited or unsolicited, must provide public notice of the same. To promote fair competition, there is a strict prohibition of "bundling" of projects which means that a District cannot use a solicitation for multiple projects in one single contract. Importantly, throughout the P3 process, there is State oversight and consultation by New Jersey's State Treasurer, the Economic Development Authority (EDA), Department of Transportation, Department of Community Affairs and/or Educational Facilities Authority. The law sets forth the minimum requirements for each application as well as the criteria and timing for the review of applications by the State Agencies. The EDA will post on its website the status of each P3 subject to its consideration, review, amendment or approval.