

Real Estate & Construction Law

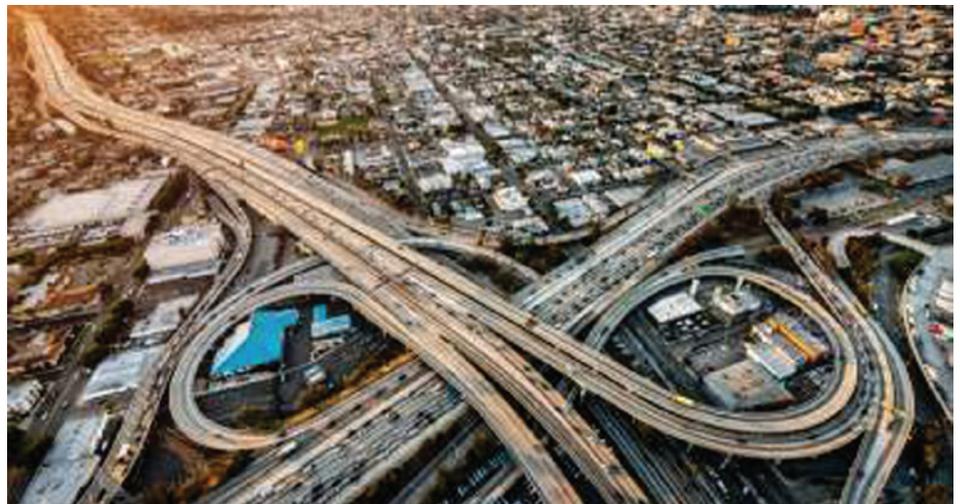
Public-Private Partnerships and the President's Infrastructure Draft Bill

By Timothy F. Hegarty

Earlier this year, President Trump released his long-awaited infrastructure plan (the “Plan”). The 53-page document can be found [here](#).

Among other things in the Plan, the President expressly requested that Congress act on an “infrastructure bill that will stimulate at least \$1.5 trillion in new investment over the next 10 years.” By infrastructure, the President means more than traditional infrastructure, e.g., roads, bridges, and airports, but also drinking- and waste-water systems, waterways, water resources, energy, rural infrastructure, public lands, veterans’ hospitals, and Brownfield and Superfund sites.

To stimulate the \$1.5 trillion in new investment needed to repair and upgrade America’s infrastructure, the President’s proposal included the fol-



lowing three key components: Congress would raise an additional \$200 billion in revenues; state and local governments would use available resources to fund 80 percent of federal projects; and private groups would be attracted to invest in public infrastructure. The Plan acknowledges that states and localities are best equipped to understand the infrastructure investments needs of their communities.

The proponents of the Plan highlight targeted federal investments, encouraged innovation, streamlined project delivery, and help for transform-

ing the way infrastructure is designed, built and maintained, incentives the President believes will encourage across-the-board investment in infrastructure. The Plan calls for states and localities to receive incentives in the form of grants. However, the “private investment” aspect of the Plan may prevent New Jersey from participating.

Public-Private Partnerships

Private investment is essentially code for public-private partnerships (“P3s”), which can cover a broad range of innovative contracting, project deliv-

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ery and financing arrangements, so a singular definition is difficult to establish. Generally speaking, a P3 is a type of project-delivery method that involves an agreement between a public owner and a private-sector group (often a consortium of entities that form a special purpose vehicle with particular skills and assets, financial or otherwise) for the design, construction, financing, and often long-term operations and maintenance of one or more infrastructure assets by the private-sector partner over a specified term.

One of the underlying premises of a P3 is to take advantage of private sector incentives and specialized expertise to design and build facilities in a way that will minimize operation and maintenance costs. Under the P3 delivery method, the public owner transfers to the private sector partner risks that are typically retained by the public owner under a traditional delivery model such as design-bid-build. For example, the two more significant problems on any construction project are cost overruns and delays. Under a P3 agreement, both risks are shifted in the contract from the public entity to the private entity.

Infrastructure projects are not garden variety construction and typically bring more risks beyond extra costs and delays such as innovative design, complex construction, unforeseen conditions, land entitlements and land use. The allocation of these risks to the public and private entities will be negotiated and memorialized as part of the P3 agreement. The process typically begins when the relevant government agency seeks competitive proposals from teams that would design, build, finance and possibly operate and maintain (DBFOM) a bridge, highway or tunnel project over a long term. Unlike true privatization,



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the government retains ownership and control of the infrastructure project, and the private company is essentially an investor, paid back by the project's revenue.

By design, P3s blur the line between public and private interests. There is no proverbial free lunch, i.e., other than possible federal grants or matching funds, and state taxpay-

be used as intended), the public entity would pay the P3 what are known as "availability payments." These payments are the public entity's commitment of annual payments to the P3 over the life of the long-term agreement and are not dependent on revenue. Here, P3s act as a financing mechanism rather than a funding source.

Prior P3 Infrastructure Related Legislation

New Jersey is not a complete stranger to P3 projects. As a result of the New Jersey Economic Stimulus Act of 2009, which was thereafter amended in 2010, state and county colleges were authorized to enter into P3 agreements. N.J.S.A. 18A:64-85. There is, however, no current law in New Jersey permitting private investment in connection with infrastructure projects. New Jersey did come close in 2015 when a joint Assembly/Senate bill was presented to then Governor Christie. The 2015 legislation would have allowed local and state government units and school

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ers will pay in the end regardless whether it is a P3 or public funding. For example, toll revenues could serve as the funding source that would support long-term financing at the outset of a project. Alternatively, the public entity could keep the toll revenues or user fees, if any, and in exchange for designing, building, financing and operating the project (and provided the project continues to meet the various performance criteria, that is, it can

districts to enter into the partnerships with private entities in which the private entity would assume administrative and partial or full financial responsibility for a project. Governor Christie conditionally vetoed the bill calling for, among other things, the removal of provisions mandating prevailing wage requirements and project labor agreements.

Pending P3 Infrastructure Related Legislation

In January of this year, representatives from the State Assembly and Senate introduced bi-partisan legislation that calls for an increase in the use of public-private partnerships including infrastructure projects. On the Assembly side, the bill (A1299) is sponsored by Louis Greenwald; Craig Coughlin; Jon Bramnick; Joseph Lagana and co-sponsored by: Assemblywomen Amy Handlin, BettyLou DeCroce and Annette Chaparro, and Assemblymen Tim Eustace, Anthony Bucco, Edward Thomson and Daniel Benson.

On the Senate side, the bill (S865) is sponsored by Senate President Steve Sweeney and Senator Steven Oroho, and co-sponsored by Senators Troy Singleton and Nilsa Cruz-Perez.

Specifically, the joint bill permits certain government entities to enter into P3 agreements with private entities for undertaking certain building and highway infrastructure projects, and provides for oversight of these agreements by the New Jersey Economic Development Authority (EDA). More specifically, under the bill, local government units, school districts and state government entities would be eligible to enter into P3 agreements with private entities. As noted above, under current law, a state college or county college is already authorized to enter into public-private partnership agreements under the provisions of N.J.S.A.18A:64-85

so under that statute pursuant to N.J.S.A.18A:64M-9.1). This bill authorizes the New Jersey Institute of Technology to also enter into public-private partnership agreements under N.J.S.A.18A:64-85.

Key Components of the Joint Bill

- *Scope.* The government entity can enter into a P3 agreement under which the private entity assumes financial and administrative responsibility for the development, construction, reconstruction, repair, alteration, improvement, extension, operation and maintenance of a project of, or for the benefit of, the government entity, provided that the project is financed in whole or in part by the private entity.

- *Prevailing Wage.* Must comply with the applicable provisions of the New Jersey Prevailing Wage Act.

- *PLA.* Must contain a project labor agreement.

- *Licensing.* General contractor, construction manager, design-build team or subcontractor for a project is registered and classified by the State to perform work on a project.

- *Financing/Payments/Minimum Threshold/Bonds/Preclusion.* The bill permits using availability payments as a financing method. For roadway or highway projects to qualify, they must include an expenditure of at least \$10 million in public funds or any expenditure in private funds. A private entity would be required to establish a construction account to fully capitalize and fund the project, while the general con-

build team would be required to post performance and payment bonds, instead of the chief financial officer of the public entity. A contractor would be precluded from engaging in a project having an expenditure of under \$50 million if the contractor contributed more than 10 percent of the project's financing.

- *Procurement Process.* All projects would be required to undergo a procurement process established under the bill.

- *Applications and Approvals.* All applications for agreements authorized under the bill are to be submitted to the EDA for its review and approval prior to commencing the procurement process. The EDA would have the power to cancel procurement after a short list of private entities is developed, if deemed in the public interest. The bill also requires the EDA to post on its official website the status of each public-private partnership agreement subject to its consideration, review, amendment or approval, indicating the status of each agreement by designating it as a proposed, under review or active public-private partnership project.

On April 5, the bill was transferred to Senate Budget and Appropriations Committee and was reported from Senate Committee, 2nd Reading. If the bill stalls and P3s are not permitted beyond the university setting, New Jersey will have to seek other solutions to ensure the state's participation in the federal government's infrastructure plan. ■

Zetlin & De Chiara LLP

Zetlin & De Chiara LLP provides sophisticated, innovative legal representation and business counsel to real estate owners, commercial and residential developers, architects and engineers on all aspects of complex construction projects and disputes. The firm's attorneys bring a rare blend of expertise to their work including in-house construction counsel experience, LEED accreditation, and education in architecture and engineering. Zetlin & De Chiara has been involved with many iconic projects in the education, healthcare, hospitality, infrastructure, transportation, cultural, environmental and energy sectors.

Zetlin & De Chiara provides counsel throughout the construction planning, design and building process, from drafting and negotiating contracts to developing risk management strategies. Well-known for its courtroom prowess, the firm also represents clients in mediation and alternative dispute resolution. Zetlin & De Chiara represents domestic and international clients in high-stakes, bet-the-company matters. Many of the lawsuits in which the firm has been involved have concerned projects outside of the United States.

Zetlin & De Chiara also assists clients with business formation, licensing and corporate issues. Clients also seek the firm's guidance on the benefits and challenges of new technologies, innovative methodologies, alternative construction delivery methods and industry trends. Zetlin & De Chiara serves as general counsel to numerous design, construction and real estate professional associations.

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Timothy F. Hegarty, Partner, is based in the firm's Caldwell New Jersey office. Mr. Hegarty is known for his successful litigation and transactional practice in the area of construction law with an emphasis on construction contracts, claims, arbitration, mediation, and surety law. Mr. Hegarty counsels owners, developers, institutional clients, lenders, private equity firms, owner's representatives, architects, engineers, construction managers, general contractors, and various trade contractors. He has drafted and negotiated complex design and construction contracts involving traditional delivery methods as well as construction management, design-build, integrated project delivery and public private partnerships. Mr. Hegarty helps clients negotiate contracts and prevent and resolve large construction claims for projects located across the United States and internationally. Mr. Hegarty also has litigated construction cases in Federal and State Courts. Mr. Hegarty assists clients with their design and construction related legal issues from concept design through post-project completion by anticipating and addressing issues, outcomes and consequences that could impact their project.

Mr. Hegarty teaches "Legal Issues in Building Construction" in his role as an adjunct professor at Columbia University and advises on issues relating to the design and construction of major projects including redevelopment, adjacent property issues such as license agreements and disputes concerning change orders, additional services, liquidated damages, delays, payment and performance bond issues, mechanic's liens, cumulative impact claims, lost productivity, acceleration and inefficiency claims for projects of all types including large office and mixed-use commercial developments, residential communities, universities, healthcare, pharmaceutical, casinos and public projects, among others.

Prior to attending law school, Mr. Hegarty worked as a civil engineer on complex construction projects and developed a keen ability to read and understand plans and specifications - a highly specialized skill that provides him with a distinct advantage perspective when evaluating claims and preventing and resolving disputes.

In addition, Mr. Hegarty is General Counsel to the American Council of Engineering Companies of New Jersey. He also serves as a member of the Glen Ridge Planning Board where he has also served as the Acting Chairman of the Board. Mr. Hegarty is a frequent speaker before professional audiences including the ASCE, ACEC, AIA, PANYNJ and The New York City Bar Association. He has also written numerous articles for various publications including the New Jersey Law Journal. Mr. Hegarty has also served as a visiting lecturer at Columbia University, Manhattan College, Pratt Institute, Brooklyn Polytech University and New York Institute of Technology.