



# nerej

## **2013 is the year for public private partnerships in Connecticut**

January 17, 2013 - Connecticut

Public private partnerships may be the vehicle of choice to plan and execute much-needed development projects that neither private nor public sector participants can perform on their own in Connecticut this year. The opportunity for the private sector to partner with the government in repairing, maintaining and developing our state's infrastructure has never been greater. With the passage of the law "An Act Promoting Economic Growth and Job Creation in the State" approximately one year ago Connecticut joined many other states in enacting legislation for public-private-partnerships. A public private partnership or "P3" is a relationship between a private entity and a state agency to design, develop, finance, construct, operate or maintain a state-owned facility. Essentially the private partner will provide funding to build or upgrade a facility, operate and maintain it at an agreed-upon profit margin throughout the term of the agreement at little or no cost to the state. The state will continue to own the facility and get it back at the end of the agreement.

The P3 law, among other things, authorizes state executive branch agencies including quasi-public agencies to enter into P3 agreements with private entities. Up to five P3 projects can be approved through January 1, 2015. Typically P3 projects have included parking garages, university student housing, ports, stadiums, toll roads and toll bridges elsewhere in the country. The P3 law contemplates several types of projects in Connecticut, including educational, health, early childcare, transportation systems and any other project proposed by the legislature.

One concern for any potential private investor thinking about a P3 proposal is the bureaucracy that has been built into the P3 approval process. A state agency proposing a P3 project must perform a comprehensive analysis of the feasibility of a P3 project, consult with other state agency commissioners, and submit the proposal to two legislative committees for public hearings before submitting the P3 proposal to the Governor for approval. Approval for a P3 project will require political will at both the elected official and administrative levels and a commitment from a high level agency administrator to push it through the process.

Some of the provisions that the P3 law requires in any P3 agreement will also require a close look by potential investors. Each P3 project will be subject to either the state prevailing wage requirements or rates established in a project labor agreement. A P3 agreement cannot include non-compete provisions limiting the ability of the state to perform its functions, and it cannot include additional user fees allowed beyond those specified in the P3 contract. The state cannot waive sovereign immunity or grant sovereign immunity to a contractor or private entity. This means that the private P3 partner will have to get permission from the state claims commissioner to bring any action against the state under the P3 agreement or otherwise. The P3 law also subjects agreements to the state's environmental policy, set aside laws for small contractors, and state and local permitting and inspection requirements. The state will also have strong remedies if a contractor "defaults" under a P3 agreement.

P3 agreements extend over a long period of time, up to 50 years under Connecticut's new law, and must be flexible enough to respond to a changing landscape, including technological advancements. It is imperative that a P3 agreement clearly define the goals of the project and the roles each party will play to achieve the goals. Proper collaboration between the public and private entities to a P3 as well as between the private investor and its team of local professionals including lawyers, architects, engineers and construction companies will be essential for the success of any P3 agreement.

Information on potential P3 opportunities should be well publicized by the state agency proposing the P3 project well before proposals are solicited. The state agency proposing a P3 project will likely establish its own prequalification process and only those parties prequalified will be able submit proposals. Prequalification requires a private proposer to show it has the financial resources, experience and capabilities to carry out a P3 project. The proposing agency will use either a competitive bidding or negotiation process similar to way the state has handled other state projects. A P3 project should be an opportunity not only for potential investors/developers, but also for other service and material providers common to any construction project.

William Wilson, II is a partner at Halloran & Sage, LLP, Hartford, Conn.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540