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Public-Private Partnerships Provide Flexibility to Political Subdivisions in Designing and Financing Projects

Public-private partnerships (P3s) have risen in prominence in recent years due to the flexibility they provide in designing and financing projects. P3s involve the collaboration between governmental entities and private enterprises to finance, build, design, operate, and maintain projects. These alternative project delivery models allow large governmental and civic projects to be achieved that would not otherwise be possible due to the use of flexible procurement methods and access to new sources of capital that P3s unlock. While Indiana and Kentucky have statutes that explicitly provide for P3s, they are also commonly utilized by political subdivisions in Ohio and West Virginia despite the absence of local P3 statutes in those jurisdictions. In each of these states, P3s have financed a variety of large projects.

Indiana

Indiana Code § 5-23-3 permits a political subdivision to enter into an agreement with a development partner (“operator”) for the acquisition, design, development, reconstruction, repair, maintenance, and/or financing of any public facility or improvement on behalf of the governmental body. The process under this statute is commonly referred to as “Build-Operate-Transfer” or “BOT.” Under the statute, the governmental body enters into a public-private-agreement with an operator to provide an identified service or deliverable to the governmental body for a guaranteed price. The BOT statute offers an efficient alternative to traditional procurement for capital projects and has been utilized by communities across Indiana for parking garages, town and city halls, firehouses, police stations, public works facilities, roads, sewer infrastructure improvements, parks, performing arts centers, schools, pools, and jails.

Political subdivisions that wish to utilize the BOT process for projects must first have the governing body of the unit adopt the BOT statute by resolution or ordinance. After adoption, any instrumentality of the unit, such as redevelopment commissions and sanitary sewer boards, may utilize the BOT process for financing and constructing its facilities and improvements. Under the BOT process, the governmental body issues a request for proposals and qualifications (RFP/Q) seeking firms interested in a public-private partnership to deliver a project or series of projects to the governmental body. Following the selection of a preferred offeror after the required notices and hearing, the governmental body negotiates directly with the preferred offeror during the scoping period to determine the terms in which the project will be designed and operated and to finalize a guaranteed budget for the project. Following the scoping period, the governmental body may formally award the project to the preferred offeror and enter into a BOT agreement with the operator.

BOT agreements, when structured properly, may offer a streamlined design and development process with an efficient procurement process, flexible financing terms, built in cost savings, and risk mitigation. Compared to traditional procurement processes, this unique approach to design and financing has numerous advantages such as:

- the selection of the entire project team (design and construction) under one contract;
- control of the design timeline;
- oversight and authority of design elements and approvals;
- a no-cost or low-cost scoping period;
- numerous financing options;
- potential for lower issuance costs;
- assumption of construction risk by project team; and
- a guaranteed budget or maximum price with no change orders.

Kentucky

Kentucky law provides broad authorization for state and local governmental entities to enter into P3 agreements of all types. Kentucky Revised Statutes (KRS) 45A.077 and KRS 65.028 outline the respective procurement process state and local governments must follow to pursue non-transportation P3s. Both P3 statutes require publication of a request for proposals (RFP) containing specific provisions, to include scoring criteria and how each factor is weighted, and require certain approval processes. Private businesses are explicitly authorized to submit unsolicited proposals to governmental entities and these statutes outline the competitive procurement process interested governments must follow for their consideration. Title 200 of the Kentucky Administrative Regulations (KAR) 5:355 further regulates both state and local non-transportation P3s to include requiring the head of the governmental body or agency to conduct specific qualitative and quantitative analysis before entering into a P3 agreement. Transportation P3s are regulated separately under KRS 175B.005-095, 200 KAR 10:010-030, and 603 KAR 2:020.

Starting July 1, 2024, the Kentucky General Assembly must approve P3s valued at \$25 million or more unless the RFP or public notice of an unsolicited proposal have been published before that date. The State provides additional oversight of local P3s by requiring projects valued at over 30% of the local government's general fund revenue receipts from the previous year to be reviewed and approved by the Kentucky Local Government P3 Board.

Kentucky's exceptionally broad P3 statutes provide public entities with significant flexibility during the procurement process to receive creative proposals and select the proposal that provides the overall best value. The Commonwealth of Kentucky, public universities, and local governments have all taken advantage of this innovative project delivery method. Thus far, project types have included government office buildings, mixed-use parking garages, utilities, campus housing, downtown revitalization, and more.

Ohio

Ohio has one official P3 statute specifically authorizing transportation facility P3s. Pursuant to Ohio Revised Code Section

5501.70 et seq., the Ohio Department of Transportation is permitted to solicit and receive bids for the development, financing, maintenance, or operation of a transportation facility. Other political subdivisions can create P3 by utilizing local “port authorities,” governmental entities created under Chapter 4582 of the Ohio Revised Code and empowered by Sections 13 and 16 of Article VII of the Ohio Constitution. Chapter 4582 of the Ohio Revised Code is divided into two separate provisions: Sections 4582.01–4582.20 governing several older port authorities, while Sections 4582.21 et seq. govern most port authorities.

Ohio’s port authorities are powerful P3 entities because they are empowered to foster and encourage private enterprise and economic development within their individual jurisdictions (and in cooperation outside their jurisdictions), and port authorities have almost all of the development powers of a private developer. Furthermore, port authorities may enter into cooperative agreements with other political subdivisions, allowing a port authority to exercise any of its powers on behalf of the political subdivision, or even share those powers (except the powers of taxation and eminent domain) in an arrangement resembling a “joint venture” with local governments. This means that political subdivisions can do P3s with any private developer directly or in combination with the port authority. Importantly, port authorities are not subject to Ohio prevailing wage laws or restrictive procurement laws such as competitive bidding. This can lower costs of any P3 development and accelerate the timetable for project commencement and completion.

Recently, the Toledo–Lucas County Port Authority (TLCPA) was one of the driving forces behind the [University of Toledo’s innovative P3](#), utilizing tax-exempt bonds to allow for the monetization of its parking system. TLCPA created a special purpose non-profit subsidiary, ParkUToledo Inc., to enter into the concession agreement with the University of Toledo. Frost Brown Todd acted as bond counsel to the TLCPA for this project.

West Virginia

In West Virginia, there is not a specific statute governing local government P3. However, local governments may use their statutory powers to enter into contractual agreements providing for the acquisition, design, development, operation, maintenance, and/or financing of projects. When West Virginia political subdivisions consider a P3 arrangement for all or any aspect of a project, there are several legal considerations. These include:

- compliance with West Virginia Code § 5G-1, if applicable, for the procurement of architectural or engineering services;
- compliance with competitive bidding requirements for construction contracts and local labor preferences, if applicable;
- the political subdivision's authority to transfer property;
- the political subdivision's authority to lease property;
- the ability of the political subdivision to partner with other governmental entities to facilitate the P3 arrangement, which include but are not limited to building commission, county and municipal development authorities organized pursuant to West Virginia Code §7-12, and joint development entities created by two or more development authorities, counties and/or municipalities pursuant to West Virginia Code §7-12-9b, as well as governmental instrumentalities of the State of West Virginia;
- whether the project would be subject to ad valorem property taxes; and
- whether the structure being considered would be subject to business and occupation taxes.

This is not an exhaustive list but is intended to highlight issues under West Virginia law to be considered when entering into a local government P3.

West Virginia local governments have successfully partnered with a variety of public and private entities to complete projects. These projects have leveraged the expertise of private partners to achieve projects that often would not have otherwise been completed. In addition, P3 have allowed local governments to leverage additional

funding sources, such as federal grants and new market tax credits, to complete more complex projects than would otherwise have been possible using traditional project delivery structures.

Conclusion

P3s provide political subdivisions in Indiana, Kentucky, Ohio, West Virginia, and many other states with streamlined and flexible approaches for designing, building, financing, operating, and maintaining projects that benefit the public. As discussed above, there is not a one-size-fits-all model to P3s. The advantages of utilizing P3s compared to traditional procurement methods are numerous, including reducing or eliminating the possibility of change orders, lower issuance costs, more expedient approvals on financing, and reduction of risk to the governmental entity. Most importantly, P3s provide political subdivisions with greater flexibility in selecting developers for the project by enabling political subdivisions to use a variety of criteria in awarding a project as opposed to just awarding a project to the lowest bidder.

Frost Brown Todd will continue to keep abreast of changes to state and federal laws that affect P3s. Frost Brown Todd will also continue assisting our clients in adopting, utilizing, and structuring P3s that are most advantageous to accomplishing the goals for their capital public improvement and development projects.

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