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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Unknowns Mute Buzz For NJ's Public-Private Partnership Law

By **John Kennedy**

Law360 (August 24, 2018, 3:16 PM EDT) -- New Jersey's new law aiming to encourage more public-private partnerships, or P3s, is a shiny addition to the state's project financing toolbox, but some unknown aspects of how the process will play out has tempered some experts' excitement over the government's new toy.

Generally, the law has been well-received. It passed the state Senate and Assembly in late June by votes tallied at 36-2 and 72-3, respectively. Similar proposals had the legislature's support under former Gov. Chris Christie, but didn't make it past his desk.

Now that Gov. Phil Murphy has **signed S865 into law**, though, some aren't sure how long the state's application and review process will take, and others cautioned that members of the private sector usually need to know they'll profit from a project before signing on to a P3.

"What the law needs to avoid is becoming as onerous or more onerous than traditional public contracting," said Steven G. Mlenak, an associate at Greenbaum Rowe Smith & Davis LLP. "This is supposed to streamline what has traditionally been bogged down by bureaucratic inefficiencies."

S865 requires the New Jersey Economic Development Authority to review and approve all proposed P3s, which must be completely or partially financed by a private entity. As such, the future of P3s is going to be largely determined by the NJEDA and the state treasurer, which will make the rules governing the review and approval process, Mlenak said. Nothing in the law limits the length of time the state must spend considering a project.

"As everyone who has ever had to file an application for a permit, license or approval of any kind with the state of New Jersey can tell you, things have a way of getting lost or buried in Trenton," Mlenak said.

Some, like Timothy F. Hegarty, a partner at Zetlin & De Chiara LLP, aren't sure the NJEDA is the right agency to lead the approval of every proposed P3. For example, it might make more sense for the New Jersey Turnpike Authority to take point on a highway project, he said.

"The one that has the most vested interest should be involved probably earlier rather than later," Hegarty said.

As with any new law, there will be a learning curve. Acknowledging that, Steven M. Charney, chairman of Peckar & Abramson PC, said the Associated Construction Contractors of New Jersey and the Association for the Improvement of American Infrastructure have spent the past year educating public entities and officials about P3s and how they work. He hopes this foresight will help shorten the time it takes for the public and private sectors to get used to P3s.

"Once things get rolling, our hope would be that, especially with an administration and governor that seems to have so fully embraced this delivery method in the state, that the administrative aspects of this that would follow would happen expeditiously," Charney said.

Even if the process is faster than what the state has used in the past, unless there's a way for the private sector to make money on a project, it's going to be hard to convince them to get involved, experts say.

"They're profit-driven enterprises. They're not going to operate at a perpetual deficit just because it's for the public's benefit," said Jonathan Bondy, a member of Chiesa Shahinian & Giantomasi PC. "How many companies are going to go into these things if they think it's going to be a long-term money-loser?"

The inclusion of provisions mandating that P3 workers be paid no less than the prevailing wage for their trade, as determined by the state labor commissioner, may also prove to be a sticking point, Bondy said. That, and wording that essentially advocated for the use of union labor on any P3, seemed to be the Christie administration's main hangups on previous proposals.

The cost of doing labor is going to be folded into the price and passed on to the public, and even if the job isn't financed by public money, the private sector will still run an economic analysis of a possible P3's profitability. If they can't recover those costs, companies are going to pass on P3 involvement, Bondy said.

"The bottom line is how can you make the private side make money — they're not charities," Bondy said. "If they're the ones providing the up-front financing or the up-front payment, whether they're a public company or not, they've got to make a profit."

Despite not knowing what the future may bring, most experts say the law is a welcome development, as it adds a financing mechanism that wasn't there before. While it may not make sense for a number of projects, it may work well for others.

Jack Kocsis, CEO of ACCNJ, which has worked for several years to get a bill like S865 signed into law, stressed that the new law won't replace traditional processes, but will supplement existing methods.

"We've seen many municipalities in New Jersey struggle to repair roads and bridges, build new borough facilities and redevelop their communities. This new law gives them the means to cost-effectively finance much-needed construction projects," Kocsis said. "It has the potential to create additional work opportunities for the contracting community and our labor partners that may not otherwise happen."

Charney, whose firm worked with the ACCNJ and AIAI to get the bill passed, said he expects to see more usage of alternative project delivery models like P3s and a move away from the traditional methods of building public infrastructure.

"[The law] allows New Jersey to meaningfully jump aboard the train of where public infrastructure is going," Charney said. "We're not being held back anymore."

Still, others are going to wait and see how their concerns are addressed before booking a ticket on the P3 train.

"While it is positive that the state is committed to expanding the availability of [P3s], there are questions as to whether it will truly 'streamline' the development of public projects," Mlenak said. "Time will tell."

--Editing by Rebecca Flanagan and Alanna Weissman.