Together, we move P3s forward >

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Attn: Public Private Partnership Rule Proposal
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New Jersey State Treasurer's Public-Private Partnership Regulations
Authority: P.L. 2018, c.90   Proposal Number: PRN 2019-086

Dear Assistant Treasurer Keyes-Maloney:

Thank you for this opportunity to provide comments regarding the New Jersey State Treasurer's Public-Private Partnership (P3) Regulations governing the review process for P3 projects in the State of New Jersey as authorized under P.L. 2018, c.09. AIAI has been involved with the New Jersey P3 legislation from the very beginning providing guidance to State elected and appointed leaders. The regulations proposed by the Department of the Treasury are the next step in that process. The Department of the Treasury's regulations focus on the steps to be followed for the Department to approve any P3 agreement in the State as directed by law.

AIAI commends the Department of the Treasury for the hard work and dedication to the New Jersey P3 law that is shown through the detail within these proposed regulations. In response to the New Jersey Treasure's Office request for comments regarding these regulations – due on August 16 – AIAI submits the comments below. We appreciate your time in considering these comments. If your office has any questions, or require any additional information, please feel free to contact the AIAI team at your convenience.

Thank you,

The Association for the Improvement of American Infrastrucure (AIAI)

General Comments Regarding the Regulations
The P3 procurement process is a lengthy and expense undertaking for all parties involved. The private sector participants choose which market to investment in based on certain criteria: clear and enforced guideline, timely approval process, and project certainty are among the key factors in their decision-making process. The public agencies benefit the most when there is robust competition for their projects. In AIAI's view these guidelines do not completely address the process around P3 in which a local government could procure a project and focus more on regulations that if implemented could hinder the development of a quality project pipeline that would deliver value to the taxpayers. Key concerns include a difficult approval process, high costs associated with the approval process, and lengthy timelines. The goal of good guidance or regulations is to provide a pathway to deliver projects in a manner that is consistent with state and local law but, encourages innovation. This roadmap should include clear and consist direct to government entities on how they can utilize alternative delivery in an effective way. While AIAI applauds the effort and diligence of the New Jersey Treasurer's Office in preparing this guidance, we would greatly appreciate an opportunity to share best practices from across several P3 offices in an effort that will effectively meet the requirements of the Department of the Treasury while supporting the vision of the law makers.

Document Reference	***Regulation Text***	***Comment to New Jersey Treasurer***
17:49-2.1	*"Availability payment" means fixed payments to a private entity by a public entity in return for the design, construction, long-term operation and maintenance, and financing of the project. Availability payments shall only be permitted where a State or county college or university or State governmental entity is an applicant.*	AIAI would suggest that the availability payment model be opened to all public entities. Availability payment agreement structures can, when structured correctly, powerful tools for governments at all levels.
17:49-2.1	*"Bundling" means the use of a solicitation for multiple projects in one single contract, through a public-private partnership project delivery method. A project shall include only one project focus, operations, financing plan, and financial structure in order to seek project approval. Bundling is not permitted across multiple applicants.*	While AIAI understands that project bundling is not allowed under the P3 legislation, we encourage boarder scope of regulatory definition within these regulations that allows public owners to reach a better value-for-money through economies of scale.
17:49-2.1	*Where a highway or transportation element is considered, regardless of the type of public entity involved, a private*	AIAI is concerned that this regulation adds an additional level of approval, please clarify if this pre-qualification is the existing standard pre-qualification for all

	entity shall also be pre-qualified by the Department of Transportation.	transportation projects in New Jersey or a separate, new pre-qualification listing will add a great deal of time to the process.
17:49-2.1-2.2	*For a school district, the planning, acquisition, demolition, construction, improvement, alteration, modernization, renovation, reconstruction, and/or capital maintenance of all or any part of a school facility, infrastructure, or any other personal property necessary for, or ancillary to, any school facility, and shall include fixtures, furnishings, and equipment, and shall also include, … provided that the project is financed in whole by the private entity.*	Clarification is needed on this section as how it is currently written would preclude utilization of Federal funding and financing to support best value in the delivery of schools' projects. It should also be updated to state that public real estate used to generate revenue for the project through private activity, but not transferred to the private partner, does not count against the 100% rule.
17:49-3.1 (a)	*The Office of Public Finance shall pre-qualify third-party financial institutions that shall act as collateral agents and manage construction accounts for public-private partnership agreements.*	This point is not clear. If this is an existing New Jersey law or regulation requiring this pre-qualification, please cite. If this point is not an existing law, please provide clarification of the process and intent.
17:49-3.2 (b)	*Counsel to an entity, except a State government entity, shall possess the following minimum experience to provide legal representation and support for purposes of a public-private partnership agreement*	Please define 'minimum experience' in this case.
17:49-3.2 (c)	*All other professionals, including planners, financial analysts, and other consultants shall, at a minimum, have participated or worked on at least five public-private partnership agreements or complex lease or lease back arrangements or other complex transactions, within the last five years and possess relevant credentials for the task assigned.*	While New Jersey government entities should also seek the most experienced professionals, this requirement is unrealistic in the still new United States market.

17:48-4.1	*An application review fee of $ 75,000 shall be paid upon submission of an application for approval of a public-private partnership project to the Office of Public Finance by the local government unit, school district, State government entity, or county or State college or university.*	The fee structure is very high for a project review. The advisors hired by New Jersey Treasury are only reviewing the project applications, not helping develop the structure and approach. $75,000 appears also to be a base fee with expectations that the review process could cost more, that additional cost would be paid by the submitting public entity. It is suggested that the Treasury consider a phased fee, regarding a phased engagement with the Treasurer's Department.
17:40-6.2 (a)	*A local government unit, via a finding by the governing body, shall determine whether to apply for approval to enter into a public-private partnership and shall document in its application to the Office of Public Finance, its analyses based upon the following threshold criteria*	The risk of late stage approval processes can be costly and onerous and could deter the private sector from engaging in projects. Requiring public owners to complete the project agreement and request approval at the very end of the procurement process without rules in place to guide them is not a best practice methodology. Milestone approvals throughout the entire process can offer both the public and private sector a level of comfort to which they are willing to bear the risk. Procurement processes can take years and incur high costs for all parties. Having the appropriate steps in place can mitigate issues.
17:49-6.4	*A local government unit may accept unsolicited proposals from private entities for public-private partnership agreements. A local government unit shall develop a process for accepting unsolicited proposals in expectation of receipt of an unsolicited proposal.*	Local governments should be given guidance as to how to manage the unsolicited proposal process depending on the need to follow existing state regulations. Also, local government should be given the authority to charge an unsolicited proposal fee to increase the quality of unsolicited proposals received and to help off-set some of the process costs.
17:49-6.5 (b) 1	*Upon receipt of a complete proposed project*	Based on earlier statements, if the Office was to utilize milestone approvals the final approval timeframe would be shorter.

17:49-7.4 (a)	*A school district may accept unsolicited proposals from private entities for public-private partnership agreements. A school district shall develop a process for accepting unsolicited proposals in expectation of receipt of an unsolicited proposal.*	School district should be given guidance as to how to manage the unsolicited proposal process depending on the need to follow existing state regulations. Also, they should be given the authority to charge an unsolicited proposal fee to increase the quality of unsolicited proposals received and to help off-set some of the process costs.
17:49-8.4	*A State governmental entity may accept unsolicited proposals from private entities for public-private partnership agreements. A State government entity shall develop a process for accepting unsolicited proposals in expectation of receipt of an unsolicited proposal.*	State agencies should be given guidance as to how to manage the unsolicited proposal process depending on the need to follow existing state regulations. Also, they should be given the authority to charge an unsolicited proposal fee to increase the quality of unsolicited proposals received and to help off-set some of the process costs.
17:49-9.4	*A county college, State college, or State university may accept unsolicited proposals from private entities for public-private partnership agreements. A county college, State college, or State university shall develop a process for accepting unsolicited proposals in expectation of receipt of an unsolicited proposal.*	Colleges should be given guidance as to how to manage the unsolicited proposal process depending on the need to follow existing state regulations. Also, they should be given the authority to charge an unsolicited proposal fee to increase the quality of unsolicited proposals received and to help off-set some of the process costs.
17:49-10.1	*Revoke approval for a project, if it comes to the attention of the State Treasurer, after investigation, that a project has significantly deviated from the project approved; or*	Please define, in more detail, what would be considered a significant deviation by the Department of the Treasury. It is the belief of AIAI that the legislator intent of the P3 act was for the State Treasurer to have the ability to cancel a procurement after a short listing of private entities, much earlier in the process than is implied in this section of the rules.

17:49-11.1	*A local government unit, school district, State governmental entity or county college, State college or State university shall set aside one percent of a project and remit that amount upon execution of the project documentation to the Office of Public Finance for deposit within the Public-Private Partnership Fund.*	While we understand that the law allows for the Treasurer's Office to cover its cost for life-cycle monitoring of each project it will be difficult for most public owners to identify an additional 1% of the project value. P3s can provide a great value when implemented correctly however there is a skill set needed to monitor these project – many agencies do not have this skill set. As it is mandated to the Treasurer's Office to support the monitoring of these projects this skill set needed to fulfill this mission should be budgeted accordingly, as passing along these costs to local governments will certainly deter the utilization of innovative project delivery in the State of New Jersey impacting the delivery of much needed capital projects.