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Florida Government Law & Policy/Public Finance | Alert

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Florida Passes Legislation That Will Facilitate Public-Private Partnership (P3) Projects

The State of Florida, a longtime leader among states in facilitating Public Private Partnership projects (P3s), has recently passed legislation that will expand available options for the tax-exempt financing of P3 projects. On April 4, 2016, the Governor of Florida signed into law House Bill 7027 (the Act)[1], which, among other things, created the Florida Department of Transportation Financing Corporation (the Corporation), a nonprofit corporation which has the power to serve as a financing mechanism for P3s of the Florida Department of Transportation (the FDOT) across the state.

Unlike traditional design-build projects, a P3 is a contractual arrangement between a public agency (federal, state or local) and a private party, in which the private party provides a public service or project and assumes substantial risk and management responsibility.

The Corporation is to be governed by a board of directors consisting of the Director of the Office of Policy and Budget within the Executive Office of the Governor, the director of the Division of Bond Finance (the DBF) of the State Board of Administration and the Secretary of Transportation. The Director of the DBF shall be the chief executive officer of the Corporation, shall direct and supervise the administrative affairs of the Corporation and shall control, direct, and supervise the operation of the Corporation.[2]

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[1] Codified as Chapter No. 2016-181, Laws of Florida, and § 339.0809, Fla. Stat. (2015)
[2] § 339.0809(2), Fla. Stat. (2015)

It is anticipated that the Corporation will assist in the financing of needed transportation projects by incurring indebtedness payable from, and secured by, contractually committed payments from the FDOT. This will provide the FDOT, which already has statutory authority to enter into long-term public-private partnership contracts with private entities for the design, construction, operation or financing of transportation projects, the ability to fund significant, currently needed projects that might otherwise have to wait for traditional funding sources to become available.[3] The interest and income on such obligations, as well as all security agreements, letters of credit, liquidity facilities or other obligations arising out of, entered into in connection with or given to secure the payment of such obligations, will be exempt from taxation under Florida law (other than Florida's corporate net income tax).[4] While the impact of the state tax exemption on borrowing rates is not expected to be significant, obligations issued under the Act could potentially be structured in a manner that would cause the interest on such obligations to be excludable from gross income for federal income tax purposes. The ability of the Corporation to borrow on a federally tax-exempt basis could reduce interest rates associated with its obligations below those of other available financing alternatives customarily associated with P3 transactions. "We've had to rely on the private sector" for P3 financing, FDOT Secretary Jim Boxold told *The Bond Buyer* after the Governor signed HB 7027. "This [bill] gives us the option to do public-sector financing with bonds and presumably obtain lower interest rates."[5]

The Corporation is authorized to issue notes, bonds or other forms of indebtedness, with a term not exceeding thirty (30) annual maturities, secured by payments from the FDOT.[6] The Act authorizes the Corporation to enter into one or more service contracts with the FDOT to provide services to the FDOT in connection with projects approved in the FDOT work program, which approval specifically provides that the FDOT may enter into service contracts for such projects. The Act further authorizes the FDOT to enter into one or more such service contracts with the Corporation and to provide for payments under such contracts, subject to annual appropriation by the Legislature. The proceeds from such service contracts may be used for the administrative costs and expenses of the Corporation after payments under such contracts made in respect of debt service on obligations of the Corporation. Each service contract may have a term of up to 35 years.[7]

The obligations of the FDOT under any service contract will not constitute a general obligation of the State or a pledge of the full faith and credit or taxing power of the State, but will be payable solely from amounts available in the State Transportation Trust Fund (the STTF), subject to annual appropriation by the State Legislature.[8] Each service contract must include an explicit statement stating the State's performance and obligation to pay under the service contract is contingent upon annual appropriation by the Legislature.[9] The STTF is funded from receipts of fuel taxes, motor vehicle fees, tolls and federal grants. Currently no more than 15 percent of total projected state and federal revenues from the STTF may be obligated collectively for P3s of the FDOT.[10] Current law

[3] *See* the *Bill Analysis and Fiscal Impact Statement*, December 4, 2015, prepared for the Florida Senate, https://www.flsenate.gov/Session/Bill/2016/0756/Analyses/2016s0756.tr.PDF

[4] § 339.0809(7), Fla. Stat. (2015)

[5] Shelly Sigo, Florida Launches Bond Program to Finance P3s, The Bond Buyer, April 6 2016, http://www.bondbuyer.com/news/regionalnews/florida-launches-bond-program-to-finance-p3s-1100703-1.html

[6] § 339.0809(5), Fla. Stat. (2015)

[7] § 339.0809(4), Fla. Stat. (2015)

[8] *Id.*

[9] *Id.*

[10] § 334.30(12), Fla. Stat. (2015)

requires the FDOT to manage all levels of debt to ensure that by the beginning of the 2017–2018 fiscal year, not more than 20 percent of total projected available state and federal revenues from the STTF, together with any local funds committed to projects of the FDOT, are committed to obligations payable from the STTF.[11]

The Corporation is authorized to validate in a judicial proceeding its obligations to be incurred pursuant to the Act and the validity and enforceability of any service contracts providing for payments pledged to the payment of such obligations.[12]

Until now, projects the FDOT could finance with bonds were limited to purchasing rights of way, building bridges and constructing certain tolled projects.[13] The creation of the Corporation will not replace these traditional funding mechanisms, but will provide another tool for the FDOT to maximize the use of existing revenue for the purposes of financing much needed transportation projects. FDOT also will retain the ability to undertake P3s using more traditional methods, including private party financing.

The Act will also have an impact on the procurement process for P3s of the FDOT by requiring the FDOT to take additional steps prior to pursuing projects through public-private partnerships. Until now, the DBF has not played a formal role in the financing for P3 projects of the FDOT. The new legislation requires the FDOT to consult with and provide information to the DBF in connection with any proposal to finance or refinance a transportation facility P3 project.[14] In addition, the DBF is authorized (though not required) to make an independent recommendation to the Governor in advance of a proposed bond issuance.[15] These requirements are being added to the FDOT's existing obligation to provide a summary to the Governor, the chair of each legislative appropriations committee, the President of the Senate and the Speaker of the House of Representatives about any effects a proposed P3 project may have on the FDOT's and the State's debt load limit.[16] The DBF will oversee the structuring and sale of all bonds issued on behalf of the Corporation.

The law will take effect on July 1, 2016.

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[11] § 339.139(3), Fla. Stat. (2015)
[12] § 339.0809(8), Fla. Stat. (2015)
[13] Sigo, supra note 5; Florida Launches Bond Program to Finance P3s, The Bond Buyer, April 6 2016
[14] § 334.30(13), Fla. Stat. (2015)
[15] *Id.*
[16] § 339.2825(1), Fla. Stat. (2015)

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