

SENATE ENVIRONMENT AND ENERGY COMMITTEE

STATEMENT TO

SENATE, No. 2958

with committee amendments

STATE OF NEW JERSEY

DATED: MAY 16, 2019

The Senate Environment and Energy Committee favorably reports Senate Bill No. 2958 with committee amendments.

This bill, entitled the “Energy Infrastructure Public-Private Partnership Act,” would permit a governmental entity to enter into a public-private partnership agreement with a private entity for the purposes of developing and implementing an energy-related project.

A public-private partnership agreement would permit a qualified private entity to develop, design, build, operate, or maintain one or more energy-related projects, and to assume financial, developmental, operational, managerial, and administrative responsibility for one or more energy-related projects, in partnership with a governmental entity. The bill, as amended, defines the term “energy-related project” as a project developed, in whole or in part, for a new or existing facility or facilities, owned by a governmental entity, involving the application of energy efficiency, energy conservation, energy generation, energy optimization, renewable and non-carbon emitting energy technologies, or demand side management measures. Under the bill, an energy-related project may involve the design, construction, reconstruction, alteration, or improvement of one or more buildings, structures, or facilities owned, or to be owned, by the governmental entity. The bill would require that the private entity be responsible for the performance of each energy-related project, and that the governmental entity retain an ownership or leasehold interest in the land upon which the energy-related project is developed. No particular method or structure of project financing would be required under the bill.

The bill provides that a governmental entity may solicit a proposal for an energy-related project, or receive an unsolicited proposal for an energy-related project from a qualified private entity. An energy-related project could be proposed and selected individually or as part of a larger project involving the construction or improvement of one or more buildings or structures owned, or to be owned, by the governmental entity. The bill establishes procedures for the proposal of an energy-related project by a private entity and for the consideration of the project by a governmental entity. If a governmental entity chooses to implement an energy-related project, it

would be required to initiate and adhere to a competitive solicitation procedure established in the bill. Notwithstanding any other law, however, a governmental entity for which a private entity assumes financial, operational, developmental, managerial, or administrative responsibility for an energy-related project under a public-private partnership agreement would not be required to advertise for public bid the energy related-project prior to the private entity assuming responsibility for the project. A governmental entity would be authorized to enter into one or more public-private partnership agreements with a private entity without being subject to the requirement to advertise for public bid, provided the private entity has been selected pursuant to the solicitation process outlined in the bill. Except as otherwise provided in the bill, all solicitations for proposals would be subject to the procurement laws and procedures otherwise applicable to the governmental entity.

The bill would establish, within the New Jersey Economic Development Authority (“authority”), an Energy Public-Private Partnership Unit, or “Energy P3 Unit.” The Energy P3 Unit would be responsible for the formulation and execution of a Statewide policy for public-private partnership agreements for energy-related projects, and for the development, oversight, and approval of those agreements. The bill, as amended, provides that the costs associated with the establishment and operation of the Energy P3 Unit may be funded from revenues received by the authority from the “Global Warming Solutions Fund.” The Energy P3 Unit would also: provide technical advice, guidance, and assistance to governmental entities; review and approve proposed energy-related projects; promote informed and timely decision-making with regard to the procurement of energy-related projects; establish qualification criteria for private entities; and monitor and enforce the procurement policies and procedures established in the bill. The bill would require the authority to provide sufficient funding to the Energy P3 Unit to enable the unit to perform its duties and responsibilities. The Energy P3 Unit would be permitted to hire one or more private consultants to assist the unit. The Energy P3 Unit would be required to charge a private entity a fee as compensation for the services rendered by the unit or by any retained private consultants. The bill would permit the authority to adopt rules and regulations to implement the bill.

The bill establishes a procedure whereby the Energy P3 Unit may qualify a private entity to develop and engage in a particular type of energy-related project. The unit would establish and maintain a list of all of the qualified private entities, arranged by project type, and make that list available to governmental entities seeking to develop that type of energy-related project. For each proposed energy-related project, a governmental entity would be required to solicit proposals from the qualified private entities set forth on the list maintained by the Energy P3 Unit. Section 9 of the bill establishes a competitive process for the

awarding of energy-related projects to qualified private entities, a list of criteria the governmental entity must consider when awarding the energy-related project to a private entity, and provisions for the negotiation of public-private partnership agreements. The bill also permits a governmental entity to negotiate and execute a preliminary agreement with a private entity prior to the negotiation and execution of a public-private partnership agreement.

The bill specifies that a governmental entity and a private entity must cooperate to leverage, to the greatest extent possible, available private sector financial resources and expertise to enhance the ability of the project to obtain federal, State, local, and other funds. In order to facilitate the financing and development of an energy-related project, a governmental entity would be authorized to: become the owner or lessee of the energy-related project, or lessee of the land, or both; issue indebtedness in accordance with the governmental entity's enabling legislation, provided that the private entity guarantees the performance of the energy-related project to the governmental entity; dedicate any property interest that the governmental entity has for public use; and exercise all powers conferred on the governmental entity by law. Under the bill, a public-private partnership agreement may also provide for the sale, long-term lease, or lease-purchase of, or grant of concessions for, the existing or new assets and facilities of a governmental entity to a private entity, or for revenue sharing between the governmental entity and the private entity.

Under the bill, the development of an energy-related project would be deemed to constitute the performance of an essential public function. Any energy-related project predominantly used by, or developed in furtherance of the purposes of, a governmental entity, that is owned by or leased to a governmental entity, nonprofit business entity, or business entity wholly owned by a nonprofit business entity, would be exempt from property taxation and special assessments of the State or any municipality or other political subdivision of the State, and would not be subject to payments in lieu of taxes. Additionally, the energy-related project, and the land on which the energy-related project is located would not be subject to the provisions of P.L.1984, c.176 (C.54:4-1.10) (regarding the tax liability of private parties conducting for-profit activities on tax exempt land), or section 1 of P.L.1949, c.177 (C.54:4-2.3) (regarding the taxation of leasehold interest in exempt property that are held by nonexempt parties).

Under the bill, if no public fund has been established for the financing of an energy-related project, the governmental entity may require the private entity responsible for development of the project to post a bond guaranteeing prompt payment of funds due to the contractors, subcontractors, and all persons furnishing labor and materials. The bill also provides that all workers employed in the performance of any construction undertaken in connection with an energy-related project for which a public-private partnership

agreement has been negotiated would be paid not less than the prevailing wage rate for the worker's craft or trade.

The bill would require all energy-related projects proposed by a governmental entity to be submitted to the Energy P3 Unit for project review and approval. Section 16 of the bill sets forth the application procedures and criteria for review of energy-related projects. An energy-related project would not be permitted to proceed until the Energy P3 Unit has approved the project. The Energy P3 Unit would have the authority to revoke approval under certain circumstances. An energy-related project that is approved by the Energy P3 Unit would be required to be completed within five years after the date of approval by the Energy P3 Unit.

The bill includes provisions regarding the protection of those portions of a private entity's project proposal that the private entity deems to be confidential, competitively sensitive bid-related information. The bill also contains provisions regarding the length of time public-private partnerships entered into under the bill may last.

The bill provides that the provisions of P.L.2009, c.136 (the requirements for certain public contracts with private firms) do not apply to energy-related projects developed under the bill. The bill, as amended, also provides that nothing in the bill limits the powers of the Office of the State Comptroller or the authority of the Board of Public Utilities.

Finally, the bill provides that a contract for the sale of electricity or thermal energy, or both, produced by a combined heat and power facility, cogeneration facility, on-site generation facility, a microgrid, a district energy system, or a distributed energy resource may last for up to 25 years.

The committee amendments to the bill:

(1) specify that the term "energy-related project" includes a project developed, *in whole or in part*, for certain energy purposes, and includes energy generation as one of those purposes;

(2) expands the definition of the term "governmental entity" to include a quasi-State agency or a State-created corporation;

(3) make certain changes to the definition of the term "microgrid," and prohibit microgrids from providing electric or natural gas distribution service;

(4) provide that costs associated with the establishment and operation of the Energy P3 Unit *may* be funded from the "Global Warming Response Fund." The bill, as introduced, required that those costs be funded through the "Global Warming Response Fund";

(5) provide that the authority may negotiate and award professional service contracts for one or more private consultants without the requirement of advertisement for public bid and bidding therefor;

(6) include new provisions concerning the use of electric utility poles and distribution wires by distributed electric generation resources that are included as part of a microgrid;

(7) specify that nothing in the bill is to be construed to limit the authority of the Board of Public Utilities;

(8) specify that nothing in the bill is to be construed to permit a private entity or a governmental entity to engage in the provision of public utility distribution or transmission service, or to utilize, without the explicit, written approval of the public utility, a public utility facility;

(9) require the authority to submit to the Governor and the Legislature, within three years, an annually thereafter, a report concerning the status of energy-related public-private partnership agreements; and

(10) make technical changes to the bill.