

# Commonwealth Court Clears Path for Northampton County P3 Bridge Project

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In a recent Opinion issued in July 2017, the Commonwealth Court of Pennsylvania rejected a bid challenge from a disappointed bidder that allowed a Public-Private Partnership (P3) project for the replacement of 33 bridges in Northampton County to proceed.

The project in question involved the design, construction, and maintenance of 33 small bridges in Northampton County, which was let as a P3 project. The project was somewhat unique, as Northampton County became the first Pennsylvania local government entity to utilize Pennsylvania's P3 law for Transportation Projects (Act 88) to improve highways or bridges. Act 88 was passed by the General Assembly in 2012, to formally authorize P3 projects in Pennsylvania for "transportation facilities," which includes not only roads and bridges, but a broad range of other transportation facilities as well.

While most in the highway construction industry are familiar with PennDOT's Rapid Bridge Replacement Project and other P3 projects being undertaken by PennDOT, some may not be aware of the fact that the P3 law also allows certain public entities other than PennDOT or the Turnpike Commission to utilize Act 88 to authorize P3 transportation projects. Under Act 88, the public entities that may enter into a P3 contract for a "transportation project"

include either a Commonwealth agency, or a "municipal authority or an authority created by statute that owns a transportation facility." Thus, by its terms, Act 88 does not permit counties, townships, boroughs, or cities from entering into such agreements themselves, despite the fact that those entities often own transportation facilities. However, the Act does not specifically preclude such municipalities from temporarily transferring ownership of their facilities to a municipal authority, and allowing those authorities to enter into a P3 contract. That process is what occurred here, as Northampton County transferred ownership of 33 of its bridges to its General Purpose Authority so that the Authority could proceed with the P3 project.

The impetus for the Northampton County project occurred in late-2015, when the P3 Board evaluated an unsolicited proposal for a P3 project for the improvement of the locally owned bridges in Northampton County, which was submitted by an entity known as Northampton County Bridge Partners (Bridge Partners) that consisted of a contractor (Clearwater Construction), a design professional, and other team members. The P3 Board approved the project, and the Northampton County General Purpose Authority (Authority) subsequently advertised the P3 project for bids in the spring of 2016. After issuing an RFP in April 2016, the Authority also held a pre-bid conference and answered questions from prospective offerors. One of the questions submitted to the Authority inquired as to whether the Authority intended to assign specific weighting to the criteria it intended to utilize

to evaluate the proposals, and the Authority responded by informing proposers that it did not intend to weight the various evaluation criteria. That response was seemingly in conflict with the express language of Act 88, but no bidders opted to challenge the RFP process at that point.

In June 2016, four entities ultimately submitted proposals in response to the Authority's RFP, including Bridge Partners. The Authority ultimately asked for additional information from several of the bidders, and in August 2016, the Authority selected a team headed by Kriger Construction for negotiation of the final P3 contract. Negotiations between Kriger and the Authority were still ongoing when Bridge Partners filed an action in Northampton County Court in September 2016, challenging the award of the contract, which alleged multiple issues with the RFP process, including the fact that the Authority did not "weight" the selection criteria as Act 88 requires. Bridge Partners filed a Motion for Preliminary Injunction in Northampton County Court shortly thereafter. In response to the bid protest by Bridge Partners, both the Authority and Kriger objected to the bid challenge and argued that Bridge Partners lacked standing to file their action in Court because Bridge Partners was only an offeror, and was not considered a "development entity" under Act 88. Thus, before considering the merits of the bid challenge itself, the Court had to consider whether Bridge Partners even had the ability to bring such an action. Following oral argument on the standing question, the Court of Common

Pleas of Northampton County ruled that Bridge Partners lacked standing to bring the bid protest, and Bridge Partners appealed the case to Commonwealth Court.

The question on appeal was essentially what rights does a disappointed bidder have, if any, to protest the award of a P3 project by a municipal authority under Act 88? For virtually all construction projects in Pennsylvania there is a distinct difference between the bid protest rights on Commonwealth agency projects versus local government projects. In 1998, the General Assembly passed the Commonwealth Procurement Code that, for the first time, created an administrative bid protest remedy on Commonwealth agency contracts, with appeal rights to Commonwealth Court. The Procurement Code, however, did not create such a remedy on local government projects. Thus, if a disappointed bidder believes it has been wronged in the bid and award process on a local government project, its only remedy is to file a taxpayer suit (by a taxpayer in the jurisdiction bidding the project) to challenge an alleged wrongful expenditure of funds.

The question in the instant case was whether the language of Act 88 created bid protest rights for disappointed bidders on P3 projects that do not currently exist on other municipal projects.

Bridge Partners argued that Section 9109(n) of Act 88 provided a basis for a disappointed bidder to file a challenge in court to a contract award on a municipal authority P3 project. That section provides:

*"If a development entity is aggrieved by a selection under this Section and the proprietary public entity in the contract is an entity other than the Commonwealth, a development entity may file a claim with the Court of Common Pleas where the proprietary public entity is located. The process for the filing and resolution of claims, including rights, contents,*

*timing, evaluation, determination and remedies, which are established in 62 Pa. C.S. Chapter 17, shall apply insofar as they are practicable."*

Bridge Partners argued that Section 9109 clearly provided it a remedy, because it was purportedly "aggrieved by a selection" of the public entity, and therefore could file a "claim" with the Court of Common Pleas,

and that the term "claim" should include bid protests. Conversely, the Authority and Kriger argued that the term "development entity" is expressly defined by the statute as an entity which has already entered into a P3 contract with the government entity. Thus, the Authority and Kriger argued that Section 9109(n) only referred to the filing of claims (i.e. for money damages) by "development

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entities" that already have a contract with the owner rather than creating bid protest rights for offerors. The Authority also argued that its interpretation was supported by the remaining language of Section 9109(n), which referenced those same remedies in the Procurement Code for Commonwealth contracts (as opposed to municipal authority contracts).

In rejecting the appeal of Bridge Partners and denying standing to Bridge Partners, Commonwealth Court first noted that disappointed bidders on municipal projects generally lack standing, unless there is a statutory provision which provides them with a private cause of action. The Court then considered the argument proffered by Bridge Partners that the context of the statute should be considered in interpreting the term "development entity," and that the phrase "aggrieved by a selection" reflected the intent of the General Assembly to provide a disappointed bidder with a bid protest remedy. However, the Court noted that, as a matter of statutory construction, it must give effect to all of the words of the statute, and found that there were a number of provisions in Act 88 that weighed heavily in favor of the Authority and Kriger's interpretation of the statute. For example, the Court pointed to the language of Section 9109(n) which addressed controversies that a "development entity" may have with a "proprietary public entity

in the contract." By using not only the phrase "development entity," but also using the phrase "in the contract," the Court found that the interpretation suggested by the Authority and Kriger was indeed what the General Assembly intended.

Continuing in its statutory construction analysis, Commonwealth Court noted that there are also a number of other factors to consider when the language of a statute is ambiguous, including – among other things – the contemporaneous legislative history of the statute and the circumstances under which the law was enacted. When considering all of the extrinsic factors, the Court ruled that it was clear that the "General Assembly intended the statutory definition of 'development entity' to control in Section 9109(n)." One of the extrinsic factors the Court considered was the language of Section 9109(m), which is the section of Act 88 immediately preceding the section at issue in the lawsuit. Section 9109(m) addresses bid protest rights on Commonwealth projects, as opposed to municipal projects. Section 9109(n) provides: "If a prospective offeror, offeror or development entity is aggrieved by the selection under this section, and the public entity or proprietary public entity in the invitation or contract is a Commonwealth agency, the prospective offeror, offeror or development entity may file a protest or a claim as appropriate in accordance with 62 Pa.

C.S. Chapter 17..." The Court noted that the General Assembly obviously contemplated the bid protest rights of offerors in Section 9109(m) on Commonwealth contracts by using the term "protest," and that by opting not to use the term "protest" in Section 9109(n) for municipal projects, it was clear that the General Assembly intended to maintain the existing dichotomy between bid protest rights on Commonwealth contracts and municipal contracts in Act 88 (i.e. that disappointed bidders do not have standing to bring bid protest rights on municipal projects, but rather their only remedy is a taxpayer suit). Commonwealth Court noted that this interpretation of Section 9109(n) was further supported by the legislative history of Act 88, as the General Assembly added an amendment fairly late in the statutory enactment process to eliminate the bid protest rights of prospective offerors on municipal projects under Act 88. Thus, the Court ruled that Bridge Partners was not a "development entity," but rather was merely an offeror, and found that the Court of Common Pleas of Northampton County properly dismissed the Petition filed by Bridge Partners challenging the Authority's RFP process.

In summary, as more municipal authorities consider P3 transportation projects, bidders should be mindful that their bid protest remedies may be limited.

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