

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 541 Public-Private Partnerships
SPONSOR(S): Government Operations Subcommittee; Steube
TIED BILLS: CS/HB 543 **IDEN./SIM. BILLS:** SB 900

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Higher Education & Workforce Subcommittee	9 Y, 0 N	Thomas	Sherry
2) Government Operations Subcommittee	11 Y, 0 N, As CS	Harrington	Williamson
3) Appropriations Committee			
4) Education Committee			

SUMMARY ANALYSIS

Public-private partnerships are contractual agreements formed between public entities and private sector entities that allow for greater private sector participation in the delivery and financing of public buildings and infrastructure projects. Through these agreements, the skills and assets of each sector, public and private, are shared in delivering a service or facility for the use of the general public.

The bill authorizes public-private partnerships between state universities and private entities. The purpose of the public-private partnership is to provide for the construction or upgrade of state university facilities that are used predominantly for public purposes and that is in the public's interest to provide for the construction or upgrade.

The bill:

- Provides definitions, procurement procedures, project qualifications, and legislative findings and intent relating to the construction or improvement of facilities that will be principally used by a state university in serving the university's core mission.
- Outlines project approval requirements and instructions for interim and comprehensive agreements, including agreement termination.
- Identifies the duties and responsibilities of both the private entities and the state universities relating to public-private partnership agreements.
- Specifies that public-private partnership agreements are subject to the approval of the Board of Governors (BOG).
- Identifies BOG as the entity responsible for developing public-private partnership guidelines for the state universities.

The fiscal impact of the bill is indeterminate at this time. See Fiscal Comments Section.

The bill provides an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Public Education Capital Outlay

The State University System (SUS) currently relies on state Public Education Capital Outlay (PECO) dollars as the primary source of both university construction and building maintenance.¹ The institutions utilize PECO not just for new teaching and research facilities, but to keep existing buildings functional with deferred maintenance spending. PECO also can be utilized to retrofit older buildings into new uses, such as the comprehensive research labs critical to building a more stable, knowledge-based Florida economy.² However, PECO funds cannot be used to construct student life facilities, such as student unions, cafeterias, recreational fields, and wellness centers or fitness centers.

PECO funds have decreased significantly since fiscal year 2010-11 from over \$300 million to less than \$10 million in fiscal year 2012-13.³ The SUS estimates it needs between \$200 million and \$400 million each year to maintain and modernize the existing state investment in university buildings and utility infrastructure, according to national norms that evaluate factors such as square footage and age of assets. For fiscal year 2012-13, total appropriations for this purpose were less than \$9 million to be shared across the system.⁴ The Board of Governors indicated that further PECO reductions will severely limit growth and student access to the SUS, and will translate to reductions in the amount of usable space available by institutions.⁵

Public-Private Partnerships

Public-private partnerships (P3s) are contractual agreements formed between public entities and private sector entities that allow for greater private sector participation in the delivery and financing of public building and infrastructure projects.⁶ Through these agreements, the skills and assets of each sector, public and private, are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service or facility.⁷

There are different types of P3s each with varying levels of private sector involvement. The most common is called a Design-Build-Finance-Operate transaction, where the government contracts with a private vendor, granting the private sector partner the right to develop a new piece of public infrastructure.⁸ The private entity takes on full responsibility and risk for the delivery and operation of the public project in accordance with the terms of the partnership. The private entity is paid through the revenue stream generated by the project, which could take the form of a user charge (such as a highway toll) or, in some cases, an annual government payment for performance (often called a shadow toll or availability charge). Any increases in the user charge or payment for performance typically are set out in advance and are regulated by a binding contract.⁹

¹ Florida Board of Governors, Facilities Task Force, *Report to the Florida Board of Governors*, November 7, 2012, available at <http://www.flbog.edu/about/taskforce/facilities.php> (last visited March 7, 2014).

² State University System, Board of Governors, *FACT SHEET: Public Education Capital Outlay (PECO)*, July 17, 2012, available at http://flbog.edu/pressroom/_doc/7.2012-PECO-Fact-Sheet-Press-Room.pdf (last visited March 7, 2014).

³ *Id.*

⁴ *Supra* at FN 1.

⁵ *Supra* at FN 2.

⁶ See The Federal Highway Administration, United States Department of Transportation, Innovative Program Delivery website, available at: <https://www.fhwa.dot.gov/ipd/p3/defined/index.htm> (last visited March 7, 2014).

⁷ *Id.*

⁸ See The Oregon Department of Transportation, the Power of Public-Private Partnerships, available at <http://www.oregon.gov/ODOT/HWY/OIPP/docs/PowerofPublicPrivate050806.pdf> (last visited March 7, 2014).

⁹ *Id.*

Another P3 procurement process is the Unsolicited Proposal Procurement Model. This procurement process allows for the receipt of unsolicited bids from private entities to contract for the design, construction, operation, and financing of public infrastructure.¹⁰ Generally, the public entity requires a processing or review fee to cover costs of the technical and legal review.¹¹

While minimal P3s exist between various entities and individual state universities, existing statutory authority does not directly address university P3s. Although the Legislature adopted the Public Facilities and Infrastructure Act in 2013, which established a framework for P3s for specified local governments, the legislation did not authorize state universities to enter into such agreements.¹²

Effect of Proposed Changes

The bill creates a P3 process for state universities for the purpose of raising funds to build, upgrade, operate, own, or finance facilities. The bill provides a process for the receipt of solicited or unsolicited proposals for qualifying projects and establishes definitions.

Definitions

The bill provides for definitions to be used in this section, including the following:

- “Board” means a state university board of trustees.
- “Private entity” means a natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public-benefit corporation, nonprofit entity, or other private business entity.
- “Qualifying project” means a facility or project that serves a public educational, research, housing, parking, infrastructure, recreational, or cultural purpose that is used or will be used by a state university or an improvement, including equipment, of a facility that will be principally used by a state university in serving the university’s core mission.

Legislative Intent

The bill provides legislative finds to support the need for P3s in Florida, which includes a need for timely and cost-effective acquisition, design, construction, and maintenance of projects that serve a public purpose and that such need may not be wholly satisfied by existing methods of procurement. The bill provides that it is the intent of the Legislature to encourage investment in the state by private entities and to provide the greatest possible flexibility to public and private entities contracting for the provision of public services.

Procurement Procedures

The bill provides that a board may receive unsolicited proposals or may solicit proposals for qualifying projects and may thereafter enter into an agreement with a private entity, or a consortium of private entities, for the building, upgrading, operation, ownership, or financing of such facilities.

Unsolicited Proposals

The bill provides the following requirements for unsolicited proposals:

- The board may establish a reasonable application fee to accompany the submission of an unsolicited proposal, which must be sufficient to pay the costs of evaluating the proposal. The board may engage the services of a private consultant to assist in the evaluation.
- If an unsolicited proposal is received and the board intends to enter into a comprehensive agreement for the project described in such unsolicited proposal, the board must publish notice in a newspaper of general circulation at least once a week for 2 weeks stating the board has received a proposal and will accept other proposals for the same project. The timeframe within which the board may accept other proposals must be determined on a project-by-project basis based upon the complexity of the project and the public benefit to be gained by allowing a longer or shorter period of time within which other proposals may be received; however, the

¹⁰ See *Innovative Models for Design, Build, Operations and Financing of Public Infrastructure*, John J. Fumero, at 2.

¹¹ *Id.*

¹² Section 287.05712, F.S.

timeframe for allowing other proposals must be at least 21 days, but no more than 120 days, after the initial date of publication.

Project Approval Requirements

The bill requires the board, before project approval, to determine that the proposed project:

- Is in the public's best interest;
- Is for a facility that is owned by the board or for a facility for which ownership will be conveyed to the board;
- Has adequate safeguards in place to ensure that additional costs or service disruptions are not imposed on the public in the event of material default or cancellation of the agreement by the board;
- Has adequate safeguards in place to ensure that the board or private entity has the opportunity to add capacity to the proposed project or other facilities serving similar predominantly public purposes;
- Will be owned by the board upon completion or termination of the agreement and upon payment of the amount financed; and
- Is supported by a reasonable finance plan; available financing; major assumptions; internal rate of return on private investments, if governmental funds are assumed in order to deliver a cost-feasible project; and a total cash-flow analysis beginning with the implementation of the project and extending for the term of the agreement.

The board may require the private entity to provide a technical study prepared by a nationally recognized expert with experience in preparing analyses for bond rating agencies.

An unsolicited proposal from a private entity for approval of a qualifying project must, unless waived by the board, be accompanied by the following:

- A description of the qualifying project, including the conceptual design of the facilities or a conceptual plan for the provision of services, and a schedule for the initiation and completion of the qualifying project;
- A description of the method by which the private entity proposes to secure the necessary property interests that are required for the qualifying project;
- A description of the private entity's general plans for financing the qualifying project, including the sources of the private entity's funds and the identity for a dedicated revenue sources or proposed debt or equity investment on behalf of the private entity;
- The name and address of the person who may be contacted for additional information concerning the proposal;
- The proposed user fees, lease payments, or other services payments over the term of a comprehensive agreement, and the methodology for and circumstances that would allow changes to the user fees, lease payments, and other service payments over time; and
- Any additional material or information that the board reasonably requests.

Project Qualification and Process

The private entity must meet the minimum standards contained in the board's regulation or guidelines for qualifying professional services and contracts for traditional procurement projects.

The bill requires the board to ensure that provisions are made for the private entity's performance and payment of subcontractors, the most efficient pricing of the security package that provides for the performance and payment of subcontractors, and for the transfer of the private entity's obligations if the comprehensive agreement is terminated or a material default occurs. Before the procurement process is initiated or before the contract is awarded, the board must perform an independent analysis of the proposed P3 that demonstrates the cost-effectiveness and overall public benefit.

After the public notification period has expired for unsolicited proposals, the board must rank the proposals received in order of preference. For purposes of ranking, the board may consider factors that include professional qualifications, general business terms, innovative design techniques or cost-reduction terms, and finance plans. The board may then begin negotiation for a comprehensive agreement with the highest-ranked firm. If the board is not satisfied with the results of the negotiations,

the board may terminate negotiations with the highest ranked firm and negotiate with the second-ranked or subsequent-ranked firms. The bill does not require the board to choose any of the firms that apply or for more than one firm to respond to the solicitation. The board may reject all proposals at any point in the process until a contract is executed.

The board may charge a reasonable fee to cover the cost of processing, reviewing, and evaluating the request. Such costs include reasonable attorney fees and fees for financial and technical advisors or consultants and for other necessary advisors or consultants.

The bill provides that the board may approve the development or operation of a qualifying project, or the design or equipping of a qualifying project that is developed or operated, if:

- There is a public need for or benefit derived from the project that the private entity proposes as the qualifying project and the project is included in the university's master plan;
- The estimated cost of the qualifying project is reasonable in relation to similar facilities; and
- The private entity's plan will result in the timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project.

Approval of a qualifying project by the board is subject to entering into a comprehensive agreement with the private entity. Upon approval of a qualifying project, the board must establish a date for the commencement of activities related to the qualifying project.

Interim Agreement

The bill provides that before, or in connection with the negotiation of a comprehensive agreement, the board may enter into an interim agreement with the private entity, which does not obligate the board to enter into a comprehensive agreement. The interim agreement must be limited to provisions that:

- Authorize the private entity to commence activities for which it may be compensated related to the proposed qualifying project;
- Establish the process and timing of the negotiation of the comprehensive agreement; and
- Contain other provisions related to an aspect of the development or operation of a qualifying project that the board and the private entity deem appropriate.

Comprehensive Agreement

The bill requires the private entity and board to enter into a comprehensive agreement prior to developing or operating the qualifying project. The comprehensive agreement must provide for:

- Delivery of performance and payment bonds, letters of credit, and other security in connection with the development or operation of the qualifying project;
- Review of plans and specifications for the project by the board. This does not require the private entity to complete the design of the project prior to executing the comprehensive agreement;
- Inspection of the qualifying project by the board;
- Maintenance of a policy of public liability insurance;
- Monitoring of the practices of the private entity by the board to ensure the project is properly maintained;
- Filing of financial statements on a periodic basis by the private entity;
- Procedures governing the rights and responsibilities of the board and private entity in the course of the construction and operation of the qualifying project and in the event of a termination of the agreement or a material default;
- Fees, lease payment, or service payments; and
- Duties of the private entity, including terms and conditions that the board determines serve the public purpose.

The comprehensive agreement may include the following:

- An agreement by the board to make grants or loans to the private entity from amounts received from federal, state, or local government or an agency or instrumentality thereof, or private donors.
- A provision under which each entity agrees to provide notice of default and cure rights for the benefit of the other entity, including, but not limited to, a provision regarding unavoidable delays.

- A provision that terminates the authority and duties of the private entity and dedicates the qualifying project to the board.

Fees

The bill provides that the comprehensive agreement may authorize the private entity to impose fees to members of the public for the use of the facility. The following provisions apply to the comprehensive agreement:

- The board may develop new facilities or increase capacity in existing facilities through the agreements with P3s;
- The facility must be properly operated, maintained, or improved in accordance with standards set forth in the agreement;
- The board may lease new facilities or existing fee-for-use facilities through the agreement;
- Any revenue must be regulated by the board pursuant to the comprehensive agreement; and
- A negotiated portion of revenues from fee-generating uses must be returned to the board over the life of the agreement.

Financing

The bill provides financing options for P3s that include the private entity entering into a private-source financial agreement between financing sources and the private entity. A financing agreement and any liens on the property or facility must be paid in full at the applicable closing that transfers ownership or operation of the facility to the board at the conclusion of the term of the comprehensive agreement. The board may use innovative finance techniques associated with a P3 including federal loans, commercial bank loans, and hedges against inflation from commercial banks or other private sources. In addition, the board may provide its own capital or operating budget to support a qualifying project. The budget may be from any legally permissible funding sources of the board, including the proceeds of debt issuances. A financing agreement may not subject the boards' facility to liens in violation of s. 11.066(5).F.S.¹³

Powers and Duties of the Private Entity

The bill requires the private entity to develop, operate, and maintain the qualifying project in accordance with the comprehensive agreement. The private entity must cooperate with the board in making best efforts to establish interconnection between the qualifying project and other facilities and infrastructure. It must maintain, or provide by contract for the maintenance or improvement of, the qualifying project if required by the comprehensive agreement. Finally, the private entity must comply with the terms of the comprehensive agreement and a lease or service contract.

Expiration or Termination of Agreements

The bill provides that, upon the expiration or termination of a comprehensive agreement, the board may use revenues from the qualifying project to pay current operation and maintenance costs of the qualifying project. If the private entity materially defaults under the comprehensive agreement, the compensation that is otherwise due to the private entity is payable to satisfy all financial obligations to investors and lenders on the qualifying project in the same way that is provided in the comprehensive agreement or any other agreement involving the qualifying project, if the cost of operating and maintaining the project are paid in the normal course.

The full faith and credit of the board may not be pledged to secure the financing of the private entity. The bill specifies that the assumption of the development or operation of the qualifying project does not obligate the board to pay any obligation of the private entity from sources other than from revenues from the qualifying project unless stated otherwise in the comprehensive agreement.

Sovereign Immunity

The bill provides that sovereign immunity is not waived by a board, or any officer or employee thereof, with respect to participation in, or approval of, any part of a qualifying project or its operation.

¹³ Section 11.066(5), F.S., provides that the property of the state, the property of any state agency, or any monetary recovery made on behalf of the state or any state agency is not subject to a lien of any kind.

Construction

The bill provides that it must be liberally construed to effectuate its purpose. In addition, it does not:

- Affect an agreement or existing relationship with a supporting organization involving a board in effect as of January 1, 2014;
- Amend existing laws by granting additional powers to, or further restricting, a board from regulating and entering into cooperative arrangement with the private sector for the planning, construction, or operation of a facility; or
- Waive any requirements of s. 1013.45, F.S., which pertains to educational facility contracting and construction techniques.

B. SECTION DIRECTORY:

Section 1. Creates s. 1013.505, F.S., to create a P3 process for state universities.

Section 2. Provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may provide for more opportunities for the private sector to enter into contracts for construction services with state universities.

D. FISCAL COMMENTS:

The bill provides that the comprehensive agreement may authorize the private entity to impose fees to members of the public for the use of the facility. Any fee must be regulated by the board pursuant to the comprehensive agreement, and a negotiated portion of the revenue generated from the fee must be returned to the board over the life of the agreement. The fee imposed on the public using the facility is not specified in the bill therefore, the revenue generated from the fee is indeterminate.

The BOG also anticipates that there will be an increased workload associated with the development of system-wide guidelines and BOG review and approval of partnership agreements. However, the BOG believes that current staffing resources will be sufficient to address the increased workload.¹⁴

III. COMMENTS

¹⁴ *Id.*

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require municipalities or counties to expend funds or to take any action requiring the expenditure of funds, reduce the authority that municipalities or counties have to raise revenues in the aggregate, or reduce the percentage of state tax shared with municipalities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill requires the Board of Governors to adopt guidelines governing P3 transactions.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments: Board of Governors (BOG)

According to the BOG, SUS institutions have generally issued tax-exempt bonds to finance the construction of auxiliary facilities such as parking garages, and the state has issued tax-exempt PECO bonds to construct educational facilities. It is not expected that P3s will result in lower interest rates. Rather, potential savings may be realized in that P3 agreements commit both parties to the long-term maintenance of the subject facilities. Making repairs on a scheduled basis can result in long-term cost savings. The ability to defer critical maintenance items due to short-term budget obligations will be significantly reduced if P3 agreements are properly structured and adequately enforced.¹⁵

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 12, 2014, the Government Operations Subcommittee adopted one technical amendment and reported the bill favorably with a committee substitute.

This analysis is drafted to the committee substitute as approved by the Government Operations Subcommittee.

¹⁵ Staff of the Board of Governors, *Legislative Bill Analysis for HB 541* (2014).