

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Fiscal Policy

BILL: CS/SB 124

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Evers

SUBJECT: Public-private Partnerships

DATE: February 23, 2016 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cochran</u>	<u>Yeatman</u>	<u>CA</u>	Favorable
2.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	Fav/CS
3.	<u>Jones</u>	<u>Hrdlicka</u>	<u>FP</u>	Pre-meeting

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 124 implements many of the recommendations of the statutorily created Partnership for Public Facilities and Infrastructure Act Guidelines Task Force to create a uniform process for public entities to engage in public-private partnerships (P3s). The bill clarifies that the P3 process must be construed as cumulative and supplemental, or alternative, to any other authority or power vested in the governing body of a county, municipality, special district, or municipal hospital or health care system.

The bill revises the list of entities authorized to conduct P3s to include special districts and school districts (rather than school boards).

The bill provides increased flexibility to the responsible public entity by permitting a responsible public entity to deviate from the provided procurement timeframes if approved by majority vote of the entity's governing body.

The bill requires that an unsolicited proposal be submitted concurrently with an initial application fee established by the responsible public entity. The bill authorizes a responsible public entity to request additional funds if the initial fee does not cover the costs to evaluate the unsolicited proposal. It also requires the responsible public entity to return the initial application fee if the responsible public entity does not review the unsolicited proposal.

The bill provides that if an unsolicited proposal involves architecture, engineering, or landscape engineering, the professional hired to evaluate or create the design criteria packaged must be retained until the entire project is completed.

The bill authorizes the Department of Management Services to accept and maintain copies of comprehensive agreements received from responsible public entities.

The bill is expected to have a minimal fiscal impact on the Department of Management Services. See Section V. Fiscal Impact Statement.

II. Present Situation:

Partnership for Public Facilities and Infrastructure Act Guidelines Task Force

Section 287.05712(3), F.S., created the Partnership for Public Facilities and Infrastructure Act Guidelines Task Force (task force). The task force was created to recommend guidelines for the Legislature to consider for purposes of creating a uniform public-private partnership (P3) process across the state.¹ The seven-member task force was comprised of the Secretary of the Department of Management Services (department) and six members appointed by the Governor representing county government, municipal government, district school boards, and the business community. The department provided administrative and technical support to the task force.

In July 2014, the task force completed its duties and submitted a final report of its recommendations.² The task force was disbanded on December 31, 2014.³

Background

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 building 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 use by 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.⁴

Section 287.05712, F.S., governs the procurement process for P3s for public purpose projects. It authorizes a responsible public entity to enter into a P3 for a specified qualifying project if the responsible public entity determines the project is in the public's best interest.⁵

¹ Section 287.05712(3)(a), F.S.

² Partnership for Public Facilities and Infrastructure Act Guidelines Task Force, *Final Report and Recommendations* (July 2014) available at

http://www.dms.myflorida.com/agency_administration/communications/partnership_for_public_facilities_infrastructure_act (last visited February 9, 2016).

³ Section 287.05712(3)(f), F.S.

⁴ United States Department of Transportation, The Federal Highway Administration, Innovative Program Delivery, *P3 Defined*, available at <http://www.fhwa.dot.gov/ipd/p3/defined/index.htm> (last visited on February 9, 2016).

⁵ Section 287.05712(4)(d), F.S.

A “responsible public entity” is defined as a county, municipality, school board, or any other political subdivision of the state; a public body politic and corporate; or a regional entity that serves a public purpose and is authorized to develop or operate a qualifying project.⁶

A “qualifying project” is defined as:

- A facility or project that serves a public purpose, including any ferry or mass transit facility, vehicle parking facility, airport or seaport facility, rail facility or project, fuel supply facility, oil or gas pipeline, medical or nursing care facility, recreational facility, sporting or cultural facility, or educational facility or other building or facility that is used or will be used by a public educational institution, or any other public facility or infrastructure that is used or will be used by the public at large or in support of an accepted public purpose or activity;
- An improvement, including equipment, of a building that will be principally used by a public entity or the public at large or that supports a service delivery system in the public sector;
- A water, wastewater, or surface water management facility or other related infrastructure; or
- For projects that involve a facility owned or operated by the governing board of a county, district, or municipal hospital or health care system, or projects that involve a facility owned or operated by a municipal electric utility, only those projects that the governing board designates as qualifying projects.⁷

Procurement Procedures

Responsible public entities may receive unsolicited proposals or may solicit proposals for qualifying projects and may, thereafter, enter into a comprehensive agreement with a private entity for the building, upgrading, operation, ownership, or financing of facilities.

Unsolicited proposals from private entities must include certain material and information, unless waived by the responsible public entity, including:

- A description of the qualifying project, including the conceptual design and schedule for initiation and completion of the qualifying project;
- A description of the private entity’s general plans for financing the qualifying project, including the sources of the funds and identification of any dedicated revenue source or proposed debt or equity investment on behalf of the private entity; and
- The proposed user fees, lease payments, or other service payments over the term of a comprehensive agreement, and the methodology and circumstances for changes to the user fees, lease payments, and other service payments over time.⁸

If the responsible public entity receives an unsolicited proposal and intends to enter into a P3 agreement for the qualifying project, the responsible public entity must publish a notice in the Florida Administrative Register (FAR) and a newspaper of general circulation at least once a week for two weeks stating the entity has received a proposal and will accept other proposals. The responsible public entity must establish a timeframe in which to accept other proposals that must be at least 21 days, but not more than 120 days, after the initial date of publication.⁹

⁶ Section 287.05712(1)(j), F.S.

⁷ Section 287.05712(1)(i), F.S.

⁸ Section 287.05712(5), F.S.

⁹ Section 287.05712(4)(b), F.S.

After the notification period has expired, the responsible public entity must rank the proposals received in order of preference. If negotiations with the first ranked firm are unsuccessful, the responsible public entity may begin negotiations with the second ranked firm. The responsible public entity may reject all proposals at any point in the process.¹⁰

A responsible public entity may establish a reasonable fee to accompany an unsolicited proposal that is sufficient to pay the costs of evaluating the proposals.¹¹ The fee may cover the costs of processing, reviewing, and evaluating the requests, including, but not limited to, reasonable attorney fees and fees for financial and technical advisors or consultants and for other necessary advisors and consultants.¹²

The responsible public entity may approve a qualifying project if:

- There is a public need for or benefit derived from the project that the private entity proposes;
- The estimated cost of the qualifying project is reasonable in relation to similar facilities; and
- The private entity's plans will result in the timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project.¹³

Notice to Affected Local Jurisdictions

A responsible public entity must notify each affected local jurisdiction when considering a qualifying project by furnishing a copy of the proposal to each affected local jurisdiction.¹⁴ The affected local jurisdictions may, within 60 days, submit written comments to the responsible public entity. The responsible public entity is required to consider the comments submitted by the affected local jurisdiction. In addition, a responsible public entity must mail a copy of the notice that is published in the FAR to each local government in the affected area.¹⁵

Agreements

Comprehensive Agreement

The responsible public entity and private entity must enter into a comprehensive agreement prior to developing or operating a qualifying project which must include certain provisions, such as:

- 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 public entity;¹⁶
- Inspection and monitoring of the qualifying project, including related financial statements, by the responsible entity;
- Policies and procedures governing the rights and responsibilities of the public and private entities in the event of a termination of the comprehensive agreement or a material default;

¹⁰ Section 287.05712(6)(c), F.S.

¹¹ Section 287.05712(4), F.S.

¹² Section 287.05712(6)(f), F.S.

¹³ Section 287.05712(6)(e), F.S.

¹⁴ Section 287.05712(7), F.S.

¹⁵ Section 287.05712(4)(b), F.S.

¹⁶ This does not require the private entity to complete the design of the project prior to executing the comprehensive agreement. Section 287.05712(9)(a)2., F.S.

- User fees, lease payments, or service payments as may be established;¹⁷ and
- Duties of the private entity.¹⁸

Financing

Section 287.05712(11), F.S., authorizes the use of multiple financing options for P3s. The options include the private entity obtaining private-source financing, the responsible public entity lending funds to the private entity, or the use of other innovative finance techniques associated with P3s.¹⁹

Performance Bond Requirements

A governmental entity contracting for services with a private sector contractor may require the contractor to post a surety or performance bond. This type of bond is intended to protect the buyer by ensuring the contractor will perform the work as specified by the contract. The level of the bond is intended to allow the governmental entity to guard against the risk of nonperformance by the contractor and provide funds necessary to hold the governmental entity (and taxpayers) harmless to the greatest extent possible.

Requirements

Section 255.05, F.S., requires any person contracting with the state or any county, city, or other political subdivision to construct a public building, complete a public work, or repair a public building or work, to execute, deliver, and record a payment and performance bond with a surety insurer authorized to do business in this state in the public records of the county where the public building or work is located. The surety bond must be recorded before the contractor begins work or restarts the work after a default or abandonment. The statute specifies some exceptions and the form for the bond.

III. Effect of Proposed Changes:

Section 1 transfers s. 287.05712, F.S., and renumbers it as s. 255.065, F.S., to incorporate many of the recommendations contained in the task force report, which include best practice recommendations as well as recommendations relating to needed clarification of s. 287.05712, F.S., which may facilitate the implementation of P3s.

Responsible Public Entity Definition

The bill modifies the definition of “responsible public entity” to include special districts and school districts (rather than school boards).²⁰

¹⁷ Section 287.05712(10), F.S.

¹⁸ Section 287.05712(12), F.S.

¹⁹ Section 287.05712(11), F.S.

²⁰ *Supra* note 2 at 18.

Task Force

The bill deletes the provisions relating to the task force because the task force was disbanded on December 31, 2014.

Application Fees

The bill provides that when a private entity submits an unsolicited proposal, the private entity must concurrently submit the initial application fee.²¹ The application fee must be paid by cash, cashier's check, or other noncancelable instrument. If the initial fee, as determined by the responsible public entity, is not sufficient to cover the costs associated with evaluating the unsolicited proposal, the responsible public entity must request in writing the additional amount required. If the private entity fails to pay the additional amount requested within 30 days of the request, the responsible public entity may stop reviewing the proposal. The bill requires the responsible public entity to return the application fee if the responsible public entity does not evaluate the unsolicited proposal.

When evaluating an unsolicited proposal that involves architecture, engineering, or landscape architecture, a Florida licensed architect, engineer, or landscape architect must review the project and be retained through the completion of the design and construction of the project.

Solicitation Timeframes

The bill provides flexibility to the responsible public entity for accepting proposals if an alternative timeframe is approved by majority vote of the entity's governing body.²² It also removes the requirement that a school board obtain the approval of the local governing body.²³

Contents of Solicitation – Design Criteria Package

The bill requires a solicitation to include a design criteria package prepared by an architect, engineer, or landscape architect licensed in Florida which is sufficient to allow private entities to prepare a bid or a response. The design criteria package must include reasonably specific criteria for the project, including:

- The legal description of the site, with survey information;
- Interior space requirements;
- Material quality standards;
- Schematic layouts and conceptual design criteria for the project;
- Cost and budget estimates;
- Design and construction schedules; and
- Site development and utility requirements.

²¹ *Id.* at 9. The task force recommended amending the fee provisions to ensure that the fees were related to actual, reasonable costs associated with reviewing an unsolicited proposal and not revenue generation.

²² *Id.* at 7. The task force discussed that increased flexibility may be necessary when dealing with complex proposals to ensure sufficient time is allowed for the receipt of competing proposals.

²³ *Id.* at 18. The task force recommended removing this provision because school boards are not subject to governance by a local governing body.

Responsible public entities must retain the design professional who prepared the design criteria until the project is completed.

Ownership by the Responsible Public Entity

The bill clarifies that the project must be owned by the responsible public entity upon expiration of the comprehensive agreement, rather than solely upon completion or termination of the agreement.²⁴

Unsolicited Proposal

The bill clarifies that any pricing or financial terms included in an unsolicited proposal must be specific as to when the pricing or terms expire.²⁵

Project Qualification

The bill alters the parties that must meet the minimum standards contained in the responsible public entity's guidelines for qualifying professional services and contracts for traditional procurement projects to allow the applicable party (or parties) of the private entity's team to be a qualifying entity, rather than just the private entity itself.²⁶

The bill deletes a requirement that a responsible public entity ensure that provision is made for the transfer of a private entity's obligations if the comprehensive agreement is terminated and replaces it with a requirement that the responsible public entity ensure that the comprehensive agreement addresses termination upon a material default.²⁷

Notice to Affected Local Jurisdictions

The bill deletes the requirement that a responsible public entity notify each affected local jurisdiction of an unsolicited proposal by furnishing a copy of the proposal to each affected local jurisdiction.²⁸ The responsible public entity must still provide each affected local jurisdiction a copy of the notice published in the FAR concerning solicitations for a qualifying project.

Financing

The bill clarifies that a financing agreement may not require the responsible public entity to secure financing by a mortgage on, or security interest in, the real or tangible personal property of the responsible public entity in a manner that could result in the loss of the fee ownership of the property by the responsible public entity.²⁹

²⁴ *Id.* at 13.

²⁵ *Id.* at 7.

²⁶ *Id.* at 21.

²⁷ *Id.* at 14.

²⁸ *Id.* at 12. The report stated that notice is already provided to affected local jurisdictions through the permitting process and stated a mandatory P3 notice process could delay project timelines.

²⁹ *Id.* at 20.

The bill also deletes a provision that provides for the responsible public entity to appropriate on a priority basis a contractual payment obligation from the government fund from which the qualifying project will be funded.³⁰ Current law raised concerns regarding infringement upon a responsible public entity's appropriation powers.

Department of Management Services

The bill provides that the department may accept and maintain copies of comprehensive agreements received from responsible public entities for the purpose of sharing the comprehensive agreements with other responsible public entities.³¹ Responsible public entities are not required to provide copies to the department; however, if a responsible public entity provides a copy, the responsible public entity must first redact any confidential or exempt information from the comprehensive agreement.

Construction

The bill clarifies that the P3 process must be construed as cumulative and supplemental to any other authority or power vested in the governing body of a county, municipality, special district, or municipal hospital or health care system. The bill provides that the P3 process is an alternative method that may be used, but that it does not limit a county, municipality, special district, or other political subdivision of the state in the procurement or operation of a qualifying project pursuant to other statutory or constitutional authority.³²

Miscellaneous

The bill transfers and renumbers s. 287.05712, F.S., as s. 255.065, F.S. Chapter 255, F.S., relates to procurement of construction services, and P3s are primarily construction-related projects.

The bill also makes conforming changes to provide for the consistent use of terminology and to provide clarity.

Section 2 provides that the bill is effective July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of a state tax shares with counties and municipalities.

³⁰ *Id.* at 14.

³¹ *Id.* at 11. The report recommended authorizing a state agency to provide assistance to responsible public entities concerning P3s.

³² *Id.* at 19. The report discussed the need for flexibility in the creation of P3s and noted that clarification is needed to ensure that the process is considered supplemental and alternative to any other applicable statutory authority.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill may provide more opportunities for the private sector to enter into contracts for construction services with local governments.

The entity submitting an unsolicited proposal must pay the full cost of the evaluation to the responsible public entity.

C. Government Sector Impact:

The bill will have an insignificant negative fiscal impact on the Department of Management Services for the purpose of receiving comprehensive agreements and acting as a depository for such comprehensive agreements. According to the department, the costs can be absorbed within current resources.

The bill requires the responsible public entity to retain a licensed professional to evaluate certain unsolicited proposals. However, the entity submitting the unsolicited proposal must pay the full cost of the evaluation.

VI. Technical Deficiencies:

None.

VII. Related Issues:

CS/SB 126 is the related public records bill linked to this bill.

VIII. Statutes Affected:

This bill substantially amends section 287.05712 of the Florida Statutes and transfers and renumbers it as section 255.065 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability on February 1, 2016:

- Removes Florida College Systems from the definition of a “responsible public entity;”
- Adds provisions stating that if the responsible public entity evaluates an unsolicited proposal involving architecture, engineering or landscape architecture, the project must meet standards consistent with public projects and be required to retain the professional until the project is complete;
- Provides that if a responsible public entity requests a proposal from a private entity which includes design work, the solicitation must include reasonably specific criteria and the licensed design profession who prepares the design criteria must be retained through the completion of the project;
- Removes s. 287.0935, F.S., from the bill; and
- Makes editorial changes.

- B. **Amendments:**

None.