

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 Governmental Oversight and Accountability

BILL: SB 124

INTRODUCER: Senator Evers

SUBJECT: Public Procurement Practices

DATE: January 29, 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>	Pre-meeting
3.	_____	_____	<u>FP</u>	_____

I. Summary:

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, improved process for engaging in public-private partnerships (P3s) across the state. 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, district, or municipal hospital or health care system. It also provides that the P3 process is an alternative method that may be used.

The bill clarifies the list of entities authorized to conduct P3s includes special districts, school districts (rather than school boards), and Florida College System institutions.

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 provides that an unsolicited proposal must be submitted concurrently with an initial application fee, which may be 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 authorizes the Department of Management Services to accept and maintain copies of comprehensive agreements received from responsible public entities.

The bill expands the limitation on state agencies' and local governments' ability to refuse surety bonds issued by surety companies that meet specific criteria.

The bill goes into effect July 1, 2016.

II. Present Situation:

Background

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.¹ 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.²

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.³

Section 287.05712(1)(j), F.S., defines "responsible public entity" 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.

Section 287.05712(1)(i), F.S., defines "qualifying project" as:

- A facility or project that serves a public purpose, including, but not limited to, 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.

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.⁴ Responsible

¹ See The Federal Highway Administration, United State Department of Transportation, Innovative Program Delivery website, available at: <http://www.fhwa.dot.gov/ipd/p3/defined/index.htm> (last visited on September 14, 2015).

² *Id.*

³ Section 287.05712(4)(d), F.S.

⁴ Section 287.05712(4), F.S.

public entities may establish a reasonable fee to accompany unsolicited proposals. The fee must be sufficient to pay the costs of evaluating the proposals.⁵

Unsolicited proposals from private entities must be accompanied by the following material and information, unless waived by the responsible public entity:⁶

- 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 any 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 identification of any dedicated revenue source or proposed debt or equity investment on behalf of the private entity.
- The name and address of the person who may be contacted for further information concerning the proposal.
- 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.
- Any additional material or information the responsible public entity reasonably requests.

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.⁷ The responsible public entity must establish a timeframe in which to accept other proposals; however, the timeframe for allowing other proposals must be at least 21 days, but not more than 120 days after the initial date of publication.⁸

After the notification period has expired, the responsible public entity must rank the proposals received in order of preference.⁹ If negotiations with the first ranked firm are unsuccessful, the responsible public entity may begin negotiations with the second ranked firm.¹⁰ The responsible public entity may reject all proposals at any point in the process.¹¹

The responsible public entity may charge a reasonable fee to 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

⁵ Section 287.05712(4)(a), F.S.

⁶ Section 287.05712(5), F.S.

⁷ Section 287.05712(4)(b), F.S.

⁸ *Id.*

⁹ Section 287.05712(6)(c), F.S.

¹⁰ *Id.*

¹¹ *Id.*

¹² Section 287.05712(6)(f), F.S.

The responsible public entity may approve a qualifying project if:¹³

- 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.
- The private entity's plans will result in the timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project.

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

Interim Agreement

Before entering into a comprehensive agreement, the responsible public entity may enter into an interim agreement with the private entity, which does not obligate the responsible public entity to enter into a comprehensive agreement.¹⁶ Interim agreements 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.
- Contain any other provision related to any aspect of the development or operation of a qualifying project.

Comprehensive Agreement

The responsible public entity and private entity must enter into a comprehensive agreement prior to developing or operating a qualifying project.¹⁷ The comprehensive agreement must provide for:¹⁸

- 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. 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 responsible public entity.
- Maintenance of a policy or policies of public liability insurance.

¹³ Section 287.05712(6)(e), F.S.

¹⁴ Section 287.05712(7), F.S.

¹⁵ Section 287.05712(4)(b), F.S.

¹⁶ Section 287.05712(8), F.S.

¹⁷ Section 287.05712(9), F.S.

¹⁸ Section 287.05712(9)(a), F.S.

- Monitoring the practices of the private entity to ensure the qualifying project is properly maintained.
- Filing of financial statements on a periodic basis.
- Policies and procedures governing the rights and responsibilities of the public and private entity in the event of a termination of the comprehensive agreement or a material default.
- User fees, lease payments, or service payments as may be established.
- Duties of the private entity, including terms and conditions that the responsible public entity determines serve the public purpose of the qualifying project.

The comprehensive agreement may include the following:¹⁹

- An agreement by the responsible public entity to make grants or loans to the private entity from amounts received from federal, state, or local government or any agency or instrumentality thereof.
- A provision under which each entity agrees to provide notice of default and cure rights for the benefit of the other entity.
- A provision that terminates the authority and duties of the private entity and dedicates the qualifying project to the responsible public entity.

Fees

The comprehensive agreement may authorize the private entity to impose fees on the public entity for use of the facility.²⁰

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.

Powers and Duties of the Private Entity

The private entity must develop, operate, and maintain the qualifying project in accordance with the comprehensive agreement.²¹ The private entity must cooperate with the responsible public entity in making best efforts to establish interconnection between the qualifying project and other facilities and infrastructure. The private entity must comply with the terms of the comprehensive agreement and any other lease or contract.

Expiration or Termination of Agreements

Upon the expiration or termination of a comprehensive agreement, the responsible public entity may use revenues from the qualifying project to pay the current operation and maintenance costs of the qualifying project.²² If the private entity materially defaults, the compensation that is

¹⁹ Section 287.05712(9)(b), F.S.

²⁰ Section 287.05712(10), F.S.

²¹ Section 287.05712(12), F.S.

²² Section 287.05712(13), F.S.

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 costs of operating and maintaining the project are paid in the normal course. The full faith and credit of the responsible public entity may not be pledged to secure the financing of the private entity.

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 P3 process across the state.²³ 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.²⁴ The task force was disbanded on December 31, 2014.²⁵

Performance Bond Requirements and Limitations

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 that 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 entering into a formal contract with the state or any county, city, or other political subdivision, for the construction of a public building, for the completion of a public work, or for repairs upon a public building or public work, before commencing the work or before recommencing the work after a default or abandonment, to execute, deliver, and record in the public records of the county where the improvement is located, a payment and performance bond with a surety insurer authorized to do business in this state as surety. The statute specifies some exceptions and the form for the bond.

Limitations

Section 287.0935, F.S., limits the authority of a state agency or political subdivision of the state to refuse a surety issued by a surety company that meets certain criteria if the contract amount does not exceed \$500,000 and public funds are used for the project. The criteria that the surety company must meet include:

²³ Section 287.05712(3)(a), F.S.

²⁴ The task force report can be found online at: http://www.dms.myflorida.com/agency_administration/communications/partnership_for_public_facilities_infrastructure_act (last visited September 14, 2015).

²⁵ Section 287.05712(3)(f), F.S.

- Licensed to do business in Florida;
- Holds a certificate of authority to issue surety bonds in Florida;
- Complies with the provisions of the Florida Insurance Code;
- Holds a valid certificate of authority issued by the United State Department of the Treasury under 31 U.S.C. ss. 9304-9308 (federal regulation of corporations providing sureties for persons required or permitted to provide a surety bond with the federal government); and
- Has twice the minimum surplus and capital required by the Florida Insurance Code at the time the invitation to bid is issued.

Under the Florida Insurance Code, differing levels of surplus are required based upon the type of insurance the insurer writes in Florida. Specifically, s. 624.408, F.S., requires, in pertinent part, an insurer to maintain surplus as to policyholders at least the greater of:²⁶

- \$1.5 million;
- \$4 million for property and casualty insurers, except for property and casualty insurers authorized to underwrite any line of residential property insurance;
- \$15 million for residential property insurers not holding a certificate of authority before July 1, 2011; or
- For residential property insurers holding a certificate of authority before July 1, 2011, and until June 30, 2016, \$5 million; on or after July 1, 2016, and until June 30, 2021, \$10 million; on or after July 1, 2021, \$15 million.²⁷

A.M. Best’s Financial Strength Rating

A.M. Best’s Financial Strength Rating is an independent opinion of an insurer’s strength and ability to meet its ongoing insurance policy and contract obligations.²⁸ The rating is based on a comprehensive quantitative and qualitative evaluation of a company’s balance sheet strength, operating performance and business profile. The rating system uses certain methodologies to review Property/Casualty (Non-life), Life/Annuity, and Health/HMO industry segments all over the world. The table below shows the highest tier (“Secure”) of financial ratings.

Best’s Financial Strength Ratings²⁹			
	Rating	Descriptor	Definition
Secure	A++, A+	Superior	Assigned to companies that have a superior ability to meet their ongoing insurance obligations
	A, A-	Excellent	Assigned to companies that have an excellent ability to meet their ongoing insurance obligations
	B++, B+	Good	Assigned to companies that have a good ability to meet their ongoing insurance obligations

²⁶ Section 624.408(3), F.S., does not require an insurer to have surplus as to policyholders greater than \$100 million.

²⁷ Section 624.408(g), F.S., also provides that the Office of Insurance Regulation may reduce the surplus requirements in paragraphs (f) and (g) if the insurer is not writing new business, has premiums in force of less than \$1 million per year in residential property insurance, or is a mutual insurance company.

²⁸ See AM Best Ratings and Criteria Center webpage, available at <http://www.ambest.com/ratings/guide.asp> (last visited on September 14, 2015).

²⁹ Id.

Administrative Commission’s Uniform Rules of Procedure

The Administrative Commission³⁰ has adopted Uniform Rules of Procedures. These procedures include rules governing bid protests under specified Florida Laws. Chapter 28-110, F.A.C., supplements the laws on bid protests that arise from the contract procurement process under chapters 24, 255, 287, 334 through 349, sections 282.303 through 282.313, F.S., and other statutes applicable to agencies as defined in s. 120.52(1), F.S.³¹

Rule 28.110.005, F.A.C., governs bond requirements for certain bid protests, such as procurement of commodities, contractual services, professional services and insurance, and for procurement of leases of space in privately-owned buildings.

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 clarifies the definition of “responsible public entity” to include special districts, school districts (rather than school boards), and Florida College System institutions.³²

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.³³ 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 notice, 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.

³⁰ Section 14.202, F.S. The Administrative Commission consists of the Governor and members of the Cabinet.

³¹ See Rule 28-110.001, F.A.C.

³² *Id.* at 18. The task force recommended amending the definition of “responsible public entity” to reference school district, rather than board, as the district is the unit that provides public primary education. It also recommended clarifying that the definition includes both special districts and the Florida College System.

³³ *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.

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.³⁴ It also removes the requirement that a school board obtain the approval of the local governing body.³⁵

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 that is sufficient to allow private entities to prepare a bid or a response to the solicitation. The design criteria package must specify performance-based 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, with budget estimates;
- Design and construction schedules; and
- Site development and utility requirements.

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.³⁶

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.³⁷

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.³⁸

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

³⁴ *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.

³⁵ *Id.* at 18. The task force recommended striking this provision because school boards are not subject to governance by a local governing body.

³⁶ *Id.* at 13.

³⁷ *Id.* at 7.

³⁸ *Id.* at 21.

replaces it with a requirement that the responsible public entity ensure that the comprehensive agreement addresses termination upon a material default.³⁹

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 when considering it.⁴⁰ 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.⁴¹

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.⁴² Current law raised concerns regarding infringement upon a responsible public entity's appropriation powers. Additionally, had the provision remained in current law, it is unclear how this provision would apply to state universities or Florida College System institutions.

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.⁴³ 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

³⁹ *Id.* at 14.

⁴⁰ *Id.* at 12. The report provided a discussion on the notice that is already provided to affected local jurisdictions through the permitting process and stated a mandatory P3 notice process could delay project timelines.

⁴¹ *Id.* at 20.

⁴² *Id.* at 14.

⁴³ *Id.* at 11. The report recommended authorizing a state agency to provide assistance to responsible public entities concerning P3s.

other political subdivision of the state in the procurement or operation of a qualifying project pursuant to other statutory or constitutional authority.⁴⁴

Miscellaneous

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

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

Section 2 amends s. 287.0935, F.S., to expand the limitation on state agencies and local governments to refuse surety bonds issued by surety companies that meet specific criteria. Specifically, the statute is amended to expand the limitation to include projects worth up to \$5 million (rather than \$500,000) and to prohibit a governmental entity from refusing a surety bond issued by a company that has an A- rating or higher from A.M. Best Company. Any surety company that does not maintain at least two times the minimum surplus and capital required under the Florida Insurance Code may rely on its AM Best rating, if at least an A-, to preclude a governmental entity from refusing its surety bonds for particular projects.

In practical application, this modification may reduce the level of surplus and capital available in Florida of a surety company writing performance bonds on publicly funded projects. This may reduce the ability of governmental entities to ensure the timely completion of public projects if a contractor fails to comply with a contract.

Section 3 provides an effective date of 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.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

⁴⁴ *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.

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 state universities and local governments.

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 should be absorbed within current resources.

VI. Technical Deficiencies:

None.

VII. Related Issues:

SB 126 is presumably 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.

This bill substantially amends section 287.0935 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.