

By Senator Diaz de la Portilla

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1 A bill to be entitled
2 An act relating to public-private partnerships;
3 creating s. 287.05712, F.S.; providing definitions;
4 providing legislative findings and intent relating to
5 the construction or improvement by private entities of
6 facilities used predominantly for a public purpose;
7 providing procurement procedures; providing
8 requirements for project approval; providing project
9 qualifications and process; providing for notice to
10 affected local jurisdictions; providing for
11 comprehensive agreements between a public and a
12 private entity; providing for use fees; providing for
13 financing sources for certain projects by a private
14 entity; providing powers and duties for private
15 entities; providing for expiration or termination of
16 agreements; providing for the applicability of
17 sovereign immunity for public entities with respect to
18 qualified projects; providing for construction of the
19 act; providing an effective date.

20
21 Be It Enacted by the Legislature of the State of Florida:

22
23 Section 1. Section 287.05712, Florida Statutes, is created
24 to read:

25 287.05712 Public-private partnerships.-

26 (1) DEFINITIONS.-As used in this section, the term:

27 (a) "Affected local jurisdiction" means a county,
28 municipality, or special district in which all or a portion of a
29 qualifying project is located.

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30 (b) "Develop" means to plan, design, finance, lease,
31 acquire, install, construct, or expand.

32 (c) "Fees" means charges imposed by the private entity of a
33 qualifying project for use of all or a portion of such
34 qualifying project pursuant to a comprehensive agreement.

35 (d) "Lease payment" means any form of payment, including a
36 land lease, by a public entity to the private entity of a
37 qualifying project for the use of the project.

38 (e) "Material default" means a nonperformance of its duties
39 by the private entity of a qualifying project which jeopardizes
40 adequate service to the public from the project.

41 (f) "Operate" means to finance, maintain, improve, equip,
42 modify, or repair.

43 (g) "Private entity" means any natural person, corporation,
44 general partnership, limited liability company, limited
45 partnership, joint venture, business trust, public-benefit
46 corporation, nonprofit entity, or other private business entity.

47 (h) "Proposal" means a plan for a qualifying project with
48 detail beyond a conceptual level for which terms such as fixing
49 costs, payment schedules, financing, deliverables, and project
50 schedule are defined.

51 (i) "Qualifying project" means:

52 1. A facility or project that serves a public purpose,
53 including, but not limited to, any ferry or mass transit
54 facility, vehicle parking facility, airport or seaport facility,
55 power-generating facility, rail facility or project, fuel supply
56 facility, oil or gas pipeline, medical or nursing care facility,
57 recreational facility, sporting or cultural facility, or
58 educational facility or other building or facility that is used

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59 or will be used by a public educational institution, or any
60 other public facility or infrastructure that is used or will be
61 used by the public at large or in support of an accepted public
62 purpose or activity;

63 2. An improvement, including equipment, of a building that
64 will be principally used by a public entity or the public at
65 large or that supports a service delivery system in the public
66 sector; or

67 3. A water, wastewater, or surface water management
68 facility or other related infrastructure.

69 (j) "Responsible public entity" means a county,
70 municipality, school board, or university, or any other
71 political subdivision of the state; a public body politic and
72 corporate; or a regional entity that serves a public purpose and
73 is authorized to develop or operate a qualifying project.

74 (k) "Revenues" means the income, earnings, user fees, lease
75 payments, or other service payments relating to the development
76 or operation of a qualifying project, including, but not limited
77 to, money received as grants or otherwise from the Federal
78 Government, a public entity, or an agency or instrumentality
79 thereof in aid of the qualifying project.

80 (l) "Service contract" means a contract between a public
81 entity and the private entity which defines the terms of the
82 services to be provided with respect to a qualifying project.

83 (2) LEGISLATIVE FINDINGS AND INTENT.—The Legislature finds
84 that there is a public need for the construction or upgrade of
85 facilities that are used predominantly for public purposes and
86 that it is in the public's interest to provide for the
87 construction or upgrade of the facilities.

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88 (a) The Legislature also finds that:

89 1. There is a public need for timely and cost-effective
90 acquisition, design, construction, improvement, renovation,
91 expansion, equipping, maintenance, operation, implementation, or
92 installation of public projects, including educational
93 facilities, transportation facilities, water or wastewater
94 management facilities and infrastructure, technology
95 infrastructure, roads, highways, bridges, and other public
96 infrastructure and government facilities within the state which
97 serve a public need and purpose, and that such public need may
98 not be wholly satisfied by existing procurement methods.

99 2. There are inadequate resources to develop new
100 educational facilities, transportation facilities, water or
101 wastewater management facilities and infrastructure, technology
102 infrastructure, roads, highways, bridges, and other public
103 infrastructure and government facilities for the benefit of
104 residents of this state, and that a public-private partnership
105 has demonstrated that it can meet the needs by improving the
106 schedule for delivery, lowering the cost, and providing other
107 benefits to the public.

108 3. There are state and federal tax incentives that promote
109 partnerships between public and private entities to develop and
110 operate qualifying projects.

111 4. A procurement under this section serves the public
112 purpose of this section if such action facilitates the timely
113 development or operation of a qualifying project.

114 (b) It is the intent of the Legislature to encourage
115 investment in the state by private entities; to facilitate
116 various bond financing mechanisms, private capital, and other

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117 funding sources for the development and operation of qualifying
118 projects, including expansion and acceleration of such financing
119 to meet the public need; and to provide the greatest possible
120 flexibility to public and private entities contracting for the
121 provision of public services.

122 (3) PROCUREMENT PROCEDURES.—A responsible public entity may
123 receive unsolicited proposals or may solicit proposals for
124 qualifying projects and may thereafter enter into an agreement
125 with a private entity, or a consortium of private entities, for
126 the building, upgrade, operation, ownership, or financing of
127 facilities.

128 (a) The responsible public entity may establish a
129 reasonable application fee for the submission of an unsolicited
130 proposal under this section. The fee must be sufficient to pay
131 the costs of evaluating the proposal. The responsible public
132 entity may engage the services of a private consultant to assist
133 in the evaluation.

134 (b) The responsible public entity may request a proposal
135 from private entities for a public-private project or, if the
136 public entity receives an unsolicited proposal, the public
137 entity shall publish notice in the Florida Administrative Weekly
138 and a newspaper of general circulation at least once a week for
139 2 weeks stating that the public entity has received a proposal
140 and will accept for 21 days after the initial date of
141 publication other proposals for the same project. A copy of the
142 notice must be mailed to each local government in the affected
143 area. The scope of the proposal may be publicized for the
144 purpose of soliciting competing proposals; however, the
145 financial terms of the proposal may not be disclosed until the

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146 terms of all competing bids are simultaneously disclosed in
147 accordance with the applicable law governing procurement
148 procedures for the qualifying project.

149 (c) A responsible public entity that is a school board may
150 enter into a comprehensive agreement only with the approval of
151 the local governing body.

152 (d) Before approval, the responsible public entity must
153 determine that the proposed project:

154 1. Is in the public's best interest;

155 2. Is for a facility that is owned by the responsible
156 public entity or for a facility for which ownership will be
157 conveyed to the responsible public entity;

158 3. Has adequate safeguards in place to ensure that
159 additional costs or service disruptions are not imposed on the
160 public in the event of material default or cancellation of the
161 agreement by the responsible public entity;

162 4. Has adequate safeguards in place to ensure that the
163 responsible public entity or the private entity has the
164 opportunity to add capacity to the proposed project or other
165 facilities serving similar predominantly public purposes; and

166 5. Will be owned by the responsible public entity upon
167 completion or termination of the agreement and upon payment of
168 the amounts financed.

169 (e) Before signing any comprehensive agreement, the
170 responsible public entity must consider a reasonable finance
171 plan that is consistent with subsection (9), the project cost,
172 revenues by source, available financing, major assumptions,
173 internal rate of return on private investments, if any
174 governmental funds are assumed in order to deliver a cost-

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175 feasible project, and a total cash-flow analysis beginning with
176 the implementation of the project and extending for the term of
177 the agreement.

178 (f) In considering an unsolicited proposal, the responsible
179 public entity may require from the private entity an investment-
180 grade technical study prepared by a nationally recognized expert
181 who is accepted by national bond rating agencies. In evaluating
182 the technical study, the responsible public entity may rely upon
183 internal staff reports prepared by personnel familiar with the
184 operation of similar facilities or the advice of external
185 advisors or consultants having relevant experience.

186 (4) PROJECT APPROVAL REQUIREMENTS.—An unsolicited proposal
187 from a private entity for approval of a qualifying project must
188 be accompanied by the following material and information, unless
189 waived by the responsible public entity:

190 (a) A description of the qualifying project, including the
191 conceptual design of the facilities or a conceptual plan for the
192 provision of services, and a schedule for the initiation and
193 completion of the qualifying project.

194 (b) A description of the method by which the private entity
195 proposes to secure any necessary property interests that are
196 required for the qualifying project.

197 (c) A description of the private entity's general plans for
198 financing the qualifying project, including the sources of the
199 private entity's funds and identification of any dedicated
200 revenue source or proposed debt or equity investment on behalf
201 of the private entity.

202 (d) The name and address of a person who may be contacted
203 for further information concerning the proposal.

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204 (e) The proposed user fees, lease payments, or other
205 service payments over the term of a comprehensive agreement, and
206 the methodology and circumstances for changes to the user fees,
207 lease payments, and other service payments over time.

208 (f) Any additional material or information that the
209 responsible public entity reasonably requests.

210 (5) PROJECT QUALIFICATION AND PROCESS.—

211 (a) The private entity must meet the minimum standards
212 contained in the responsible public entity's guidelines for
213 qualifying professional architectural, engineering, and
214 contracting services for traditional procurement projects.

215 (b) The responsible public entity must:

216 1. Ensure that provisions are made for the private entity's
217 performance and payment of subcontractors, including, but not
218 limited to, surety bonds, letters of credit, parent company
219 guarantees, and lender and equity partner guarantees. For the
220 components of the qualifying project which involve construction
221 performance and payment, bonds are required and are subject to
222 the recordation, notice, suit limitation, and other requirements
223 of s. 255.05.

224 2. Ensure the most efficient pricing of the security
225 package that provides for the performance and payment of
226 subcontractors.

227 3. Ensure that provisions are made for the transfer of the
228 private entity's obligations if the comprehensive agreement is
229 terminated or a material default occurs.

230 (c) After the public notification period has expired in the
231 case of an unsolicited proposal, the responsible public entity
232 shall rank the proposals received in order of preference. In

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233 ranking the proposals, the responsible public entity may
234 consider factors that include, but are not limited to,
235 professional qualifications, general business terms, innovative
236 engineering or cost-reduction terms, and finance plans. If the
237 responsible public entity is not satisfied with the results of
238 the negotiations, the responsible public entity may terminate
239 negotiations with the proposer and negotiate with the second-
240 ranked or subsequent-ranked firms, in the order consistent with
241 this procedure. If only one proposal is received, the
242 responsible public entity may negotiate in good faith, and if
243 the public entity is not satisfied with the results of the
244 negotiations, the public entity may terminate negotiations with
245 the proposer. Notwithstanding this paragraph, the responsible
246 public entity may reject all proposals at any point in the
247 process until a contract with the proposer is executed.

248 (d) The responsible public entity shall perform an
249 independent analysis of the proposed public-private partnership
250 which demonstrates the cost-effectiveness and overall public
251 benefit before the procurement process is initiated or before
252 the contract is awarded.

253 (e) The responsible public entity may approve the
254 development or operation of an educational facility, a
255 transportation facility, a water or wastewater management
256 facility or related infrastructure, a technology infrastructure
257 or other public infrastructure, or a governmental facility
258 needed by the responsible public entity as a qualifying project,
259 or the design or equipping of a qualifying project that is
260 developed or operated, if:

261 1. There is a public need for or benefit derived from a

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262 project of the type that the private entity proposes as the
263 qualifying project.

264 2. The estimated cost of the qualifying project is
265 reasonable in relation to similar facilities.

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

270 (f) The responsible public entity may charge a reasonable
271 fee to cover the costs of processing, reviewing, and evaluating
272 the request, including, but not limited to, reasonable attorney
273 fees and fees for financial and technical advisors or
274 consultants and for other necessary advisors or consultants.

275 (g) Upon approval of a qualifying project, the responsible
276 public entity shall establish a date for the commencement of
277 activities related to the qualifying project. The responsible
278 public entity may extend the commencement date.

279 (h) Approval of a qualifying project by the responsible
280 public entity is subject to entering into a comprehensive
281 agreement with the private entity.

282 (6) NOTICE TO AFFECTED LOCAL JURISDICTIONS.—

283 (a) The responsible public entity must notify each affected
284 local jurisdiction by furnishing a copy of the proposal to each
285 affected local jurisdiction when considering a proposal for a
286 qualifying project.

287 (b) Each affected local jurisdiction that is not a
288 responsible public entity for the respective qualifying project
289 may, within 60 days after receiving the notice, submit in
290 writing any comments to the responsible public entity and

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291 indicate whether the facility is incompatible with the local
292 comprehensive plan, the local infrastructure development plan,
293 the capital improvements budget, or other governmental spending
294 plan. The responsible public entity shall consider the comments
295 of the affected local jurisdiction before entering into a
296 comprehensive agreement with a private entity. If an affected
297 local jurisdiction fails to respond to the responsible public
298 entity within the time provided in this paragraph, the
299 nonresponse is deemed an acknowledgement by the affected local
300 jurisdiction that the qualifying project is compatible with the
301 local comprehensive plan, the local infrastructure development
302 plan, the capital improvements budget, or other governmental
303 spending plan.

304 (7) COMPREHENSIVE AGREEMENT.—

305 (a) Before developing or operating the qualifying project,
306 the private entity must enter into a comprehensive agreement
307 with the responsible public entity. The comprehensive agreement
308 must provide for:

309 1. The delivery of performance and payment bonds, letters
310 of credit, or other security acceptable to the responsible
311 public entity in connection with the development or operation of
312 the qualifying project in the form and amount satisfactory to
313 the responsible public entity. For the components of the
314 qualifying project which involve construction, the form and
315 amount of the bonds must comply with s. 255.05.

316 2. The review of the plans and specifications for the
317 qualifying project by the responsible public entity and, if the
318 plans and specifications conform to standards acceptable to the
319 responsible public entity, the approval by the responsible

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320 public entity. This subparagraph does not require the private
321 entity to complete the design of the qualifying project before
322 the execution of the comprehensive agreement.

323 3. The inspection of the qualifying project by the
324 responsible public entity to ensure that the private entity's
325 activities are acceptable to the public entity in accordance
326 with the comprehensive agreement.

327 4. The maintenance of a policy of public liability
328 insurance, a copy of which must be filed with the responsible
329 public entity and accompanied by proofs of coverage, or self-
330 insurance, each in the form and amount satisfactory to the
331 responsible public entity and reasonably sufficient to ensure
332 coverage of tort liability to the public and employees and to
333 enable the continued operation of the qualifying project.

334 5. The monitoring by the responsible public entity of the
335 maintenance practices to be performed by the private entity to
336 ensure that the qualifying project is properly maintained.

337 6. The periodic filing by the private entity of the
338 appropriate financial statements that pertain to the qualifying
339 project.

340 7. The procedures that govern the rights and
341 responsibilities of the responsible public entity and the
342 private entity in the course of the construction and operation
343 of the qualifying project and in the event of the termination of
344 the comprehensive agreement or a material default by the private
345 entity. The procedures must include conditions that govern the
346 assumption of the duties and responsibilities of the private
347 entity by an entity that funded, in whole or part, the
348 qualifying project or by the responsible public entity, and must

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349 provide for the transfer or purchase of property or other
350 interests of the private entity by the responsible public
351 entity.

352 8. The fees, lease payments, or service payments. In
353 negotiating user fees, the fees must be the same for persons
354 using the facility under like conditions and must not materially
355 discourage use of the qualifying project. The execution of the
356 comprehensive agreement or a subsequent amendment is conclusive
357 evidence that the fees, lease payments, or service payments
358 provided for in the comprehensive agreement comply with this
359 section. Fees or lease payments established in the comprehensive
360 agreement as a source of revenue may be in addition to, or in
361 lieu of, service payments.

362 9. The duties of the private entity, including the terms
363 and conditions that the responsible public entity determine
364 serve the public purpose of this section.

365 (b) The comprehensive agreement may include:

366 1. An agreement by the responsible public entity to make
367 grants or loans to the private entity from amounts received from
368 the federal, state, or local government or any agency or
369 instrumentality thereof.

370 2. A provision under which each entity agrees to provide
371 notice of default and cure rights for the benefit of the other
372 entity, including, but not limited to, a provision regarding
373 unavoidable delays.

374 3. A provision that terminates the authority and duties of
375 the private entity under this section and dedicates the
376 qualifying project to the responsible public entity or, if the
377 qualifying project was initially dedicated by an affected local

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378 jurisdiction, to the affected local jurisdiction for public use.

379 (8) FEES.—An agreement entered into pursuant to this
380 section may authorize the private entity to impose fees for the
381 use of the facility. The following provisions apply to the
382 agreement:

383 (a) The responsible public entity may develop new
384 facilities or increase capacity in existing facilities through
385 agreements with public-private partnerships.

386 (b) The public-private partnership agreement must ensure
387 that the facility is properly operated, maintained, or improved
388 in accordance with standards set forth in the comprehensive
389 agreement.

390 (c) The responsible public entity may lease existing fee-
391 for-use facilities through a public-private partnership
392 agreement.

393 (d) Any revenues must be regulated by the responsible
394 public entity pursuant to the comprehensive agreement.

395 (e) A negotiated portion of revenues from fee-generating
396 uses must be returned to the public entity over the life of the
397 agreement.

398 (9) FINANCING.—

399 (a) A private entity may enter into a private-source
400 financing agreement between financing sources and the private
401 entity. A financing agreement and any liens on the property or
402 facility must be paid in full at the applicable closing that
403 transfers ownership or operation of the facility to the
404 responsible public entity at the conclusion of the term of the
405 comprehensive agreement.

406 (b) The responsible public entity may lend funds to private

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407 entities that construct projects containing facilities that are
408 approved under this section.

409 (c) The responsible public entity may use innovative
410 finance techniques associated with a public-private partnership
411 under this section, including, but not limited to, federal loans
412 as provided in Titles 23 and 49 C.F.R., commercial bank loans,
413 and hedges against inflation from commercial banks or other
414 private sources. In addition, the responsible public entity may
415 provide its own capital or operating budget to support a
416 qualifying project. The budget may be from any legally
417 permissible funding sources of the responsible public entity,
418 including the proceeds of debt issuances. A responsible public
419 entity may use the model financing agreement provided in s.
420 489.145(6) for its financing of a facility owned by a
421 responsible public entity. A financing agreement may not require
422 the responsible public entity to indemnify the financing source,
423 subject the responsible public entity's facility to liens in
424 violation of s. 11.066(5), or secure financing by the
425 responsible public entity with a pledge of security interest,
426 and any such provisions are void.

427 (d) A responsible public entity shall appropriate on a
428 priority basis as required by the comprehensive agreement a
429 contractual payment obligation, annual or otherwise, and the
430 required payment obligation must be appropriated before other
431 noncontractual obligations of the responsible public entity.

432 (10) POWERS AND DUTIES OF THE PRIVATE ENTITY.—

433 (a) The private entity shall:

434 1. Develop or operate the qualifying project in a manner
435 that is acceptable to the responsible public entity in

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436 accordance with the provisions of the comprehensive agreement.

437 2. Maintain, or provide by contract for the maintenance or
438 improvement of, the qualifying project if required by the
439 comprehensive agreement.

440 3. Cooperate with the responsible public entity in making
441 best efforts to establish interconnection between the qualifying
442 project and any other facility or infrastructure as requested by
443 the responsible public entity.

444 4. Comply with the comprehensive agreement and any lease or
445 service contract.

446 (b) Each private facility that is constructed pursuant to
447 this section must comply with the requirements of federal,
448 state, and local laws; state, regional, and local comprehensive
449 plans; the responsible public entity's rules, procedures, and
450 standards for facilities; and any other conditions that the
451 responsible public entity determines to be in the public's best
452 interest and that are included in the comprehensive agreement.

453 (c) The responsible public entity may provide services to
454 the private entity. An agreement for maintenance and other
455 services entered into pursuant to this section must provide for
456 full reimbursement for services rendered for qualifying
457 projects.

458 (d) A private entity of a qualifying project may provide
459 additional services for the qualifying project to the public or
460 to other private entities if the provision of additional
461 services does not impair the private entity's ability to meet
462 its commitments to the responsible public entity pursuant to the
463 comprehensive agreement.

464 (11) EXPIRATION OR TERMINATION OF AGREEMENTS.—Upon the

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465 expiration or termination of a comprehensive agreement, the
466 responsible public entity may use revenues from the qualifying
467 project to pay current operation and maintenance costs of the
468 qualifying project. If the private entity materially defaults
469 under the comprehensive agreement, the compensation that is
470 otherwise due to the private entity is payable to satisfy all
471 financial obligations to investors and lenders on the qualifying
472 project in the same way that is provided in the comprehensive
473 agreement or any other agreement involving the qualifying
474 project, if the costs of operating and maintaining the
475 qualifying project are paid in the normal course. Revenues in
476 excess of the costs for operation and maintenance costs may be
477 paid to the investors and lenders to satisfy payment obligations
478 under their respective agreements. A responsible public entity
479 may terminate with cause and without prejudice a comprehensive
480 agreement and may exercise any other rights or remedies that may
481 be available to it. The full faith and credit of the responsible
482 public entity may not be pledged to secure the financing of the
483 private entity. The assumption of the development or operation
484 of the qualifying project does not obligate the responsible
485 public entity to pay any obligation of the private entity from
486 sources other than revenues from the qualifying project unless
487 stated otherwise in the comprehensive agreement.

488 (12) SOVEREIGN IMMUNITY.—This section does not waive the
489 sovereign immunity of the state, any responsible public entity,
490 any affected local jurisdiction, or any officer or employee
491 thereof with respect to participation in, or approval of, any
492 part of a qualifying project or its operation, including, but
493 not limited to, interconnection of the qualifying project with

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494 any other infrastructure or project. A county or municipality in
495 which a qualifying project is located possesses sovereign
496 immunity with respect to the project, including, but not limited
497 to, its design, construction, and operation.

498 (13) CONSTRUCTION.—This section shall be liberally
499 construed to effectuate the purposes of this section.

500 (a) This section does not limit any state agency or
501 political subdivision of the state in the acquisition, design,
502 or construction of a public project pursuant to other statutory
503 authority.

504 (b) Except as otherwise provided in this section, this
505 section does not amend existing laws by granting additional
506 powers to, or further restricting, a local governmental entity
507 from regulating and entering into cooperative arrangements with
508 the private sector for the planning, construction, or operation
509 of a facility.

510 (c) This section does not waive any requirement of s.
511 287.055.

512 Section 2. This act shall take effect July 1, 2013.