

# **HOUSE OF REPRESENTATIVES FINAL BILL ANALYSIS**

**BILL #:** CS/CS/HB 95

## **FINAL HOUSE FLOOR ACTION:**

**SPONSOR(S):** State Affairs Committee;  
Appropriations Committee; Steube  
and others

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## **COMPANION BILLS:** HB 97; CS/SB 124

**GOVERNOR'S ACTION:** Approved

## SUMMARY ANALYSIS

CS/CS/HB 95 passed the House on March 8, 2016, as CS/SB 124.

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 buildings and infrastructure projects. Current law authorizes P3s for specified public purpose projects if the responsible public entity determines the project is in the public's best interest, there is a need for or benefit derived from the project, the estimated cost of the project is reasonable, 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.

Current law also establishes the Partnership for Public Facilities and Infrastructure Act Guidelines Task Force (task force) for the purpose of recommending guidelines for the Legislature to consider for creating a uniform P3 process across the state. This bill incorporates many of the recommendations contained in the task force's final report.

The bill clarifies that the P3 process is an alternative process that 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. It also clarifies that the list of entities authorized to conduct P3s includes 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 an unsolicited proposal to be submitted concurrently with an initial application fee, which the responsible public entity may establish, and authorizes a responsible public entity to request additional funds if the initial fee does not cover the costs to evaluate the unsolicited proposal. The bill requires the responsible public entity to return the initial application fee if it 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 for the purpose of sharing them with other responsible public entities.

The bill has an indeterminate fiscal impact on the state and local governments.

The bill was approved by the Governor on March 30, 2016, ch. 2016-153, L.O.F., and will become effective on July 1, 2016.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### **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.<sup>1</sup> 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 reward potential in the delivery of the service or facility.<sup>2</sup>

#### **Public-private Partnerships Generally**

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.<sup>3</sup>

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 corporate and politic; 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.<sup>4</sup> Responsible public entities may establish a reasonable application fee for the submission of unsolicited proposals. The fee must be sufficient to pay the costs of evaluating the proposals.<sup>5</sup>

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<sup>1</sup> See Federal Highway Administration, United States Department of Transportation, Innovative Program Delivery, *P3 Defined*, <http://www.fhwa.dot.gov/ipd/p3/defined/index.htm> (last visited Sept. 23, 2015).

<sup>2</sup> *Id.*

<sup>3</sup> Section 287.05712(4)(d), F.S.

<sup>4</sup> Section 287.05712(4), F.S.

<sup>5</sup> Section 287.05712(4)(a), F.S.

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

- 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 identification of any dedicated revenue source or proposed debt or equity investment on behalf of the private entity.
- The name and address of a 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 for and circumstances that would allow changes to the user fees, lease payments, and other service payments over time.
- Any additional material or information the responsible public entity reasonably requests.<sup>6</sup>

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 for the same project.<sup>7</sup> The responsible public entity must establish a timeframe within which to accept other proposals that is at least 21 days, but not more than 120 days, after the initial date of publication.<sup>8</sup>

After the period for accepting proposals has expired, the responsible public entity must rank the proposals received in order of preference.<sup>9</sup> Next, the responsible public entity may begin negotiations for a comprehensive agreement with the highest-ranked firm. If negotiations with the highest-ranked firm are unsuccessful, the responsible public entity may terminate the negotiations and begin negotiations with each subsequent-ranked firm in order of preference.<sup>10</sup> The responsible public entity may reject all proposals at any point in the process.<sup>11</sup>

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 or consultants.<sup>12</sup>

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 as the qualifying project.
- 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.<sup>13</sup>

#### Notice to Affected Local Jurisdictions

A responsible public entity must notify each affected local jurisdiction when considering a proposal for a qualifying project by furnishing a copy of the proposal to each affected local jurisdiction.<sup>14</sup> The affected

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<sup>6</sup> Section 287.05712(5), F.S.

<sup>7</sup> Section 287.05712(4)(b), F.S.

<sup>8</sup> *Id.*

<sup>9</sup> Section 287.05712(6)(c), F.S.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Section 287.05712(6)(f), F.S.

<sup>13</sup> Section 287.05712(6)(e), F.S.

<sup>14</sup> Section 287.05712(7)(a), F.S.

local jurisdictions may, within 60 days, submit written comments to the responsible public entity.<sup>15</sup> The responsible public entity must consider the comments submitted by the affected local jurisdiction before entering into a comprehensive agreement with a private entity.<sup>16</sup> 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.<sup>17</sup>

## 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.<sup>18</sup> 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.<sup>19</sup>

### *Comprehensive Agreement*

The responsible public entity and private entity must enter into a comprehensive agreement prior to developing or operating a qualifying project.<sup>20</sup> The comprehensive agreement must provide for:

- Delivery of performance and payment bonds, letters of credit, or other security in connection with the development or operation of the qualifying project.
- Review of plans and specifications for the project by the responsible 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.
- Monitoring the maintenance practices of the private entity to ensure the qualifying project is properly maintained.
- Filing of financial statements on a periodic basis.
- Procedures governing the rights and responsibilities of the responsible public entity 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 the terms and conditions that the responsible public entity determines serve the public purpose of the qualifying project.<sup>21</sup>

The comprehensive agreement may include the following:

- An agreement by the responsible public entity to make grants or loans to the private entity from amounts received from the federal, state, or local government or an 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.<sup>22</sup>

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<sup>15</sup> Section 287.05712(7)(b), F.S.

<sup>16</sup> *Id.*

<sup>17</sup> Section 287.05712(4)(b), F.S.

<sup>18</sup> Section 287.05712(8), F.S.

<sup>19</sup> *Id.*

<sup>20</sup> Section 287.05712(9)(a), F.S.

<sup>21</sup> *Id.*

<sup>22</sup> Section 287.05712(9)(b), F.S.

## Fees

The comprehensive agreement may authorize the private entity to impose fees to members of the public for use of the facility.<sup>23</sup>

## 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. 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.<sup>24</sup>

## 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. If the private entity materially defaults, 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 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.<sup>25</sup>

## Partnership for Public Facilities and Infrastructure Act Guidelines Task Force

Section 287.05712(3), F.S., creates 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.<sup>26</sup> The seven-member task force was comprised of the Secretary of the Department of Management Services (department) and six members appointed by the Governor who represented the county government, municipal government, district school board, and business community.<sup>27</sup> The department provided administrative and technical support to the task force.<sup>28</sup>

In July 2014, the task force completed its duties and submitted a final report of its recommendations.<sup>29</sup> The task force was terminated on December 31, 2014.<sup>30</sup>

## EFFECT OF THE BILL

This bill incorporates 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 that the definition of “responsible public entity” includes special districts and school districts, rather than school boards.<sup>31</sup>

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<sup>23</sup> Section 287.05712(10), F.S.

<sup>24</sup> Section 287.05712(12)(a), F.S.

<sup>25</sup> Section 287.05712(13), F.S.

<sup>26</sup> Section 287.05712(3)(a), F.S.

<sup>27</sup> Section 287.05712(3)(b), F.S.

<sup>28</sup> Section 287.05712(3)(c), F.S.

<sup>29</sup> The task force report can be found online at:

[http://www.dms.myflorida.com/agency\\_administration/communications/partnership\\_for\\_public\\_facilities\\_infrastructure\\_act](http://www.dms.myflorida.com/agency_administration/communications/partnership_for_public_facilities_infrastructure_act) (last visited Sept. 23, 2015).

<sup>30</sup> Section 287.05712(3)(f), F.S.

## **Task Force**

The bill deletes the task force provisions, as the task force was terminated on December 31, 2014.

## **Application Fee**

The bill provides that when a private entity submits an unsolicited proposal, the private entity must concurrently submit the initial application fee. The application fee must be paid by cash, cashier's check, or other noncancelable instrument. The bill provides that 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.<sup>32</sup>

## **Unsolicited Proposals**

The bill requires a responsible public entity that evaluates an unsolicited proposal involving architecture, engineering, or landscape architecture to ensure a professional review and evaluation of the design and construction proposed by the initial or subsequent proposers to assure that certain standards are met. The review must be performed by an architect, a landscape architect, or an engineer licensed in the state and qualified to perform the review, and such professional must be retained to advise the responsible public entity through 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.<sup>33</sup>

## **Design Criteria Package**

The bill requires a responsible public entity that solicits proposals for a project that includes design work to include in the solicitation a design criteria package prepared by a licensed architect, engineer, or landscape architect. The design criteria package must provide reasonably specific criteria for the project. The licensed design professional who prepares the design criteria package must be retained to serve the responsible public entity through completion of the design and construction of the project.

## **School Projects**

The bill removes the provision that requires a school board to obtain the approval of the local governing body.<sup>34</sup>

## **Ownership by the Responsible Public Entity**

The bill clarifies that the project will be owned by the responsible public entity upon expiration of the comprehensive agreement, rather than solely upon completion or termination of the agreement.<sup>35</sup>

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<sup>31</sup> 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. *Id.* at 18.

<sup>32</sup> 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. *Id.* at 9.

<sup>33</sup> The task force determined that increased flexibility may be necessary when dealing with complex proposals to ensure sufficient time is allowed for the receipt of competing proposals. *Id.* at 7.

<sup>34</sup> The task force recommended striking this provision because school boards are not subject to governance by a local governing body. *Id.* at 18.

<sup>35</sup> This change was recommended by the task force. *Id.* at 13-14.

## **Pricing or Financial Terms**

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.<sup>36</sup>

## **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.<sup>37</sup> 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.<sup>38</sup>

The bill also deletes a provision that requires 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.<sup>39</sup> The provision 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.<sup>40</sup> 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, 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 the process does not limit a county, municipality, district, or other political subdivision of the state in the acquisition, design, or construction of a public project pursuant to other statutory or constitutional authority.<sup>41</sup>

## **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.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

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<sup>36</sup> This change was recommended by the task force. *Id.* at 7.

<sup>37</sup> 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. *Id.* at 12.

<sup>38</sup> This change was recommended by the task force. *Id.* at 20.

<sup>39</sup> The report recommended the current provision regarding the appropriating of funds be revised, not deleted. *Id.* at 14-15. Even though the report recommended that the Legislature consider specifically authorizing the State University System to utilize P3s as a project delivery method, it does not specifically address the applicability of an appropriations requirement to universities. *Id.* at 16.

<sup>40</sup> The report recommended authorizing a state agency to provide assistance to responsible public entities concerning P3s. *Id.* at 11.

<sup>41</sup> 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. *Id.* at 19.

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

**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 local governments.

**D. FISCAL COMMENTS:**

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.<sup>42</sup>

The bill has an indeterminate fiscal impact on local governments that enter into P3s. State and local government expenditures would be based on currently unidentified P3s.

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<sup>42</sup> Department of Management Services, Agency Analysis of House Bill 63, p. 5 (Feb. 11, 2015) (on file with the Government Operations Subcommittee). The provision of HB 95 authorizing the department to accept and maintain copies of comprehensive agreements from responsible public entities was also included in HB 63 from the 2015 Session.