

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 85 Public-Private Partnerships
SPONSOR(S): Steube and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 84

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee		Harrington	Williamson
2) Appropriations Committee			
3) State Affairs Committee			

SUMMARY ANALYSIS

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

This bill creates an alternative procurement process and requirements for public-private partnerships to facilitate the construction of public-purpose projects. The bill specifies the requirements for such partnerships, which include provisions that require responsible public entities to provide notice of unsolicited proposals, conduct independent analyses of proposed partnerships, notify other affected local jurisdictions, and enter into comprehensive agreements for qualifying projects. The bill provides that responsible public entities may approve a qualifying project if 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.

The bill does not appear to have a fiscal impact on state government; however, the bill has an indeterminate fiscal impact on local governments.

The bill provides an effective date of July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Public-Private Partnerships

Public-private partnerships (PPP) 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 the use of the general public.² In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service or facility.³

There are different types of PPPs each with varying levels of private sector involvement. The most common is called a Design-Build-Finance-Operate (DBFO) transaction, where the government contracts with a private vendor, granting the private sector partner the right to develop a new piece of public infrastructure.⁴ The private entity takes on full responsibility and risk for the delivery and operation of the public project in accordance with the terms of the partnership. The private entity is paid through the revenue stream generated by the project, which could take the form of a user charge (such as a highway toll) or, in some cases, an annual government payment for performance (often called a "shadow toll" or "availability charge"). Any increases in the user charge or payment for performance typically are set out in advance and regulated by a binding contract.⁵

Another PPP procurement process is the Unsolicited Proposal Procurement Model (UPPM). This procurement process allows for the receipt of unsolicited bids from private entities to contract for the design, construction, operation, and financing of public infrastructure.⁶ Generally, the public entity requires a processing or review fee to cover costs of the technical and legal review.⁷

Florida Department of Transportation Public-Private Partnership

The Florida Department of Transportation (FDOT) currently operates a public-private partnership program.⁸ The Florida Legislature declared that there is a public need for rapid construction of safe and efficient transportation facilities for the purpose of travel within the state, and that it is in the public's interest to provide for the construction of additional safe, convenient, and economical transportation facilities.⁹

Florida law provides that a private transportation facility constructed pursuant to s. 334.30, F.S., must comply with all requirements of federal, state, and local laws; state, regional, and local comprehensive plans; FDOT rules, policies, procedures, and standards for transportation facilities; and any other conditions that FDOT determines to be in the public's best interest.¹⁰

Current law allows FDOT to advance projects programmed in the adopted 5-year work program using funds provided by public-private partnerships or private entities to be reimbursed from FDOT funds for

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 February 28, 2013).

² See generally The National Council for Public-Private Partnerships website, How PPPs Work, available at: <http://ncppp.org/howpart/index.shtml#define> (last visited on February 28, 2013).

³ *Id.*

⁴ See The Oregon Department of Transportation, the Power of Public-Private Partnerships, available at: <http://www.oregon.gov/ODOT/HWY/OIPP/docs/PowerofPublicPrivate050806.pdf> (last visited on February 28, 2013).

⁵ *Id.*

⁶ See *Innovative Models for the Design, Build, Operation and Financial of Public Infrastructure*, John J. Fumero, at 2.

⁷ *Id.*

⁸ See s. 334.30, F.S.

⁹ *Id.*

¹⁰ Section 334.30(3), F.S.

the project.¹¹ In accomplishing this, FDOT may use state resources to participate in funding and financing the project as provided for under FDOT's enabling legislation for projects on the State Highway System.¹²

FDOT may receive or solicit proposals and, with legislative approval as evidenced by approval of the project in the department's work program, enter into agreements with private entities, or consortia thereof, for the building, operation, ownership, or financing of transportation facilities.¹³ If FDOT receives an unsolicited proposal, it is required to publish a notice in the Florida Administrative Weekly¹⁴ and a newspaper of general circulation stating that FDOT has received the proposal and it will accept other proposals for the same project.¹⁵ In addition, FDOT requires that an initial payment of \$50,000 accompany any unsolicited proposal to cover the costs of evaluating the proposal.¹⁶

Current law governing FDOT's PPP provides for a solicitation process that is similar to the Consultants' Competitive Negotiation Act.¹⁷ FDOT may request proposals from private entities for public-private transportation projects.¹⁸ The partnerships must be qualified by FDOT as part of the procurement process outlined in the procurement documents.¹⁹ These procurement documents must include provisions for performance of the private entity and payment of subcontractors, including surety bonds, letters of credit, parent company guarantees, and lender and equity partner guarantees.²⁰ FDOT must rank the proposals in the order of preference.²¹ FDOT may then begin negotiations with the top firm. If that negotiation is unsuccessful, FDOT must terminate negotiations and move to the second-ranked firm. If negotiation with the second ranked firm is unsuccessful, FDOT must move to the third-ranked firm.²² FDOT must provide independent analyses of the proposed PPP that demonstrates the cost effectiveness and overall public benefit prior to moving forward with the procurement and prior to awarding the contract.²³

Current law authorizes FDOT to use innovative finance techniques associated with PPP's, including federal loans, commercial bank loans, and hedges against inflation from commercial banks or other private sources.²⁴ PPP agreements under s. 334.30, F.S., must be limited to a term not to exceed 50 years.²⁵ In addition, FDOT may not utilize more than 15 percent of total federal and state funding in any given year to fund PPP projects.²⁶

¹¹ Section 334.30(1), F.S.

¹² *Id.*

¹³ *Id.*

¹⁴ The Florida Administrative Weekly was renamed the Florida Administrative Register during the 2012 Session. Chapter 2012-63, L.O.F.

¹⁵ Section 334.30(6)(a), F.S.

¹⁶ See chapter 14-107.0011, F.A.C.

¹⁷ See s. 287.055, F.S.

¹⁸ Section 334.30(6)(a), F.S.

¹⁹ Section 334.30(6)(b), F.S.

²⁰ Section 334.30(6)(c), F.S.

²¹ See s. 334.30(6)(d), F.S. In ranking the proposals, the FDOT may consider factors that include, but are not limited to, professional qualifications, general business terms, innovative engineering or cost-reduction terms, finance plans, and the need for state funds to deliver the project.

²² Section 334.30(6)(d), F.S.

²³ Section 334.30(6)(e), F.S.

²⁴ Section 334.30(7), F.S.

²⁵ Section 334.30(11), F.S.

²⁶ Section 334.30(12), F.S.

Procurement of Personal Property and Services

Chapter 287, F.S., regulates state agency²⁷ procurement of personal property and services. The Department of Management Services (department) is responsible for overseeing state purchasing activity including professional and contractual services as well as commodities needed to support agency activities, such as office supplies, vehicles, and information technology.²⁸ The department establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.²⁹

Current law requires contracts for commodities or contractual services in excess of \$35,000 to be procured utilizing a competitive solicitation process.³⁰ Section 287.012(6), F.S., provides that competitive solicitation means "the process of requesting and receiving two or more sealed bids, proposals, or replies submitted by responsive vendors in accordance with the terms of a competitive process, regardless of the method of procurement."

The Consultants' Competitive Negotiation Act

In 1972, Congress passed the Brooks Act (Public Law 92-582), which codified Qualifications-Based Selection (QBS) as the federal procurement method for design professional services. The QBS process entails first soliciting statements of qualifications from licensed architectural and engineering providers, selecting the most qualified respondent, and then negotiating a fair and reasonable price. The vast majority of states currently require a QBS process when selecting the services of design professionals.

Florida's Consultants' Competitive Negotiation Act (CCNA), was enacted in 1973,³¹ to specify the procedures to follow when procuring the services of architects and engineers. The CCNA did not prohibit discussion of compensation in the initial vendor selection phase until 1988, when the Legislature enacted a provision requiring that consideration of compensation occur only during the selection phase.³²

Currently, the CCNA specifies the process to follow when state and local government agencies procure the professional services of an architect, professional engineer, landscape architect, or registered surveyor and mapper.³³ The CCNA requires that state agencies publicly announce, in a consistent and uniform manner, each occasion when professional services must be purchased for one of the following:

- A project, when the basic construction cost is estimated by the agency to exceed \$325,000.
- A planning or study activity, when the fee for professional services exceeds \$35,000.

The CCNA provides a two-phase selection process.³⁴ In the first phase, the "competitive selection," the agency evaluates the qualifications and past performance of no fewer than three bidders. The agency selects the three bidders ranked in order of preference that it considers most highly qualified to perform the required services. The CCNA requires consideration of several factors in determining the three most highly qualified bidders, including willingness to meet time and budget requirements; past performance; location; recent, current, and projected firm workloads; volume of work previously awarded to the firm; and whether the firm is certified as a minority business.³⁵

The CCNA prohibits the agency from requesting, accepting, and considering, during the selection process, proposals for the compensation to be paid. Current law defines the term "compensation" to

²⁷ Section 287.012(1), F.S., defines agency as "any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. 'Agency' does not include the university and college boards of trustees or the state universities and colleges."

²⁸ See ss. 287.032 and 287.042, F.S.

²⁹ *Id.*

³⁰ Section 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold provided in s. 287.017, F.S., to be competitively bid.

³¹ Chapter 73-19, L.O.F.

³² Chapter 88-108, L.O.F.

³³ Section 287.055, F.S.

³⁴ Section 287.055(4) and (5), F.S.

³⁵ See s. 287.055(4)(b), F.S.

mean “the amount paid by the agency for professional services,” regardless of whether stated as compensation or as other types of rates.³⁶

In the second phase, the “competitive negotiation,” the agency then negotiates compensation with the most qualified of the three selected firms. If a satisfactory contract cannot be negotiated, the agency must then negotiate with the second most qualified firm. The agency must negotiate with the third most qualified firm if the negotiation with the second most qualified firm fails to produce a satisfactory contract. If a satisfactory contract cannot be negotiated with any of the three selected, the agency must begin the selection process again.

Procurement of Construction Services

Chapter 255, F.S., regulates construction services³⁷ for public property and publically owned buildings. The Department of Management Services is responsible for establishing, through administrative rules, the following:

- Procedures for determining the qualifications and responsibility of potential bidders prior to advertisement for and receipt of bids for building construction contracts;
- Procedures for awarding each state agency construction project to the lowest qualified bidder;
- Procedures to govern negotiations for construction contracts and modifications to contract documents when such negotiations are determined by the secretary of the Department of Management Services to be in the best interest of the state; and
- Procedures for entering into performance-based contracts for the development of public facilities when the Department of Management Services determines the use of such contracts to be in the best interest of the state.³⁸

State contracts for construction projects that are projected to cost in excess of \$200,000 must be competitively bid.³⁹ In addition, such projects must be advertised in the Florida Administrative Weekly at least 21 days prior to the bid opening.⁴⁰ State construction projects that are projected to exceed \$500,000 are required to be published 30 days prior to a bid opening in the Florida Administrative Weekly, and at least once in a newspaper of general circulation in the county where the project is located.⁴¹ Counties, municipalities, special districts,⁴² or other political subdivisions seeking to construct or improve a public building must competitively bid the project if the projected cost is in excess of \$300,000.⁴³

Effect of the Bill

The bill creates s. 287.05712, F.S., specifying requirements for public-private partnerships.

Definitions

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

- “Affected local jurisdiction” means a county, municipality, or special district in which all or a portion of a qualifying project is located.
- “Qualifying project” means either:
 - 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, power-generating facility, rail facility or project, fuel supply facility, oil or gas pipeline, medical

³⁶ Section 287.055(2)(d), F.S.

³⁷ Section 255.072(2), F.S., defines construction services as “all labor, services, and materials provided in connection with the construction, alteration, repair, demolition, reconstruction, or any other improvements to real property.” The term does not include contracts or work performed by the Department of Transportation.

³⁸ Section 255.29, F.S.

³⁹ See chapters 60D-5.002 and 60D-5.0073, F.A.C.; see also s. 255.0525, F.S.

⁴⁰ Section 255.0525(1), F.S.

⁴¹ *Id.*

⁴² Section 189.403(1), F.S., defines special district as a “local unit of special purpose, as opposed to general-purpose, government within a limited boundary, created by general law, special act, local ordinance, or by rule of the Governor and Cabinet.”

⁴³ See s. 255.20(1), F.S.

- 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,⁴⁴ 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; or
 - A water, wastewater, or surface water management facility or other related infrastructure.
- “Responsible public entity” means a county, municipality, school board, or university, 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.

Legislative Intent

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

Procurement Procedures

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

Unsolicited Proposals

The bill provides the following requirements for unsolicited proposals:

- The responsible public entity may establish a reasonable application fee to accompany unsolicited proposals sufficient to pay the costs of evaluating the proposal.
- If an unsolicited proposal is received, the responsible public entity must publish notice in the Florida Administrative Register and a newspaper of general circulation at least once a week for two weeks stating that the entity has received a proposal and will accept other proposals for the same project for 21 days after the initial publication. The scope of the proposal may be published in the notice, but the financial terms of the offer may not be disclosed.

Project Approval Requirements

Before project approval, the responsible public entity must determine that the proposed project is in the public's best interest; is for a facility that is owned by a responsible public entity or for a facility for which ownership will be conveyed to the responsible public entity; has adequate safeguards to ensure that additional costs or service disruptions are not imposed on the public in the event of material default or cancellation of the agreement by the responsible public entity; has adequate safeguards in place to ensure that the responsible public entity or the private entity has the opportunity to add capacity to the proposed project; and will be owned by the responsible public entity upon completion or termination and upon payments of the amounts financed.

An unsolicited proposal from a private entity for approval of a qualifying project 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 any necessary property interests that are required for the qualifying project;

⁴⁴ Inclusion of equipment appears to conflict with s. 287.063, F.S.

- A description of the private entity's general plans for financing the qualifying projects, 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; and
- Any additional material or information the responsible public entity reasonably requests.

Project Qualification and Process

The private entity must meet the minimum standards contained in the responsible public entity's guidelines for qualifying professional architectural, engineering, and contractual services for traditional procurement projects.

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

After the notification period has expired for unsolicited proposals, the responsible public entity must rank the proposals received in order of preference. For purposes of ranking, the responsible public entity may consider professional qualifications, general business terms, innovative engineering or cost-reduction terms, and finance plans. If negotiations with the first ranked firm are unsuccessful, the responsible public entity may begin negotiations with the second ranked firm. The bill does not require the responsible public entity to choose any of the firms that apply or for more than one firm to respond to the solicitation.

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.

The bill provides that 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.

Notice to Affected Local Jurisdictions

The bill requires the responsible public entity to notify each affected local jurisdiction when considering a qualifying project. The bill provides that 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.

Comprehensive Agreement

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

- Delivery of performance and payment bonds, letters of credit, and other security in connection with the development or operation of the qualifying project.

- Review of plans and specifications for the project by the 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 public entity.
- Maintenance of a policy or policies of public liability insurance.
- Monitoring the practices of the private entity to ensure the 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 agreement or a material default.
- User fees, lease payments, or service payments as may be established by agreement of parties.
- Duties of the private entity, including terms and conditions that the public entity determines serve the public purpose of the project.

The bill provides that 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 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, including, but not limited to, a provision regarding unavoidable delays.
- A provision that terminates the authority and duties of the private entity and dedicates the qualifying project to the responsible public entity.

Fees

The bill provides that the comprehensive agreement may authorize the private entity to impose fees for the use of the facility.

Financing

The bill provides multiple financing options for public-private partnerships, which 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 private-public partnerships.

Powers and Duties of the Private Entity

The bill requires the private entity to develop, operate, and maintain the qualifying project in accordance with the comprehensive agreement. The private entity must cooperate with the 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

The bill provides that, upon the expiration or termination of a comprehensive agreement, the responsible public entity may use revenues from the qualifying project to pay 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. The bill provides that the assumption of the development or operation of the qualifying project does not obligate the responsible public entity to pay any obligation of the private entity from sources other than from revenues from the qualifying project unless stated otherwise in the comprehensive agreement.

Sovereign Immunity

The bill provides that sovereign immunity is not waived by the state, any responsible public entity, any affected local jurisdiction, or any officer or employee with respect to the qualifying project. In addition, it

provides that cities, counties, and towns possess sovereign immunity with respect to the design, construction, and operation of the project.

Construction

The bill provides that it must be liberally construed to effectuate its purposes. In addition, the bill provides that it does not waive any requirement in s. 287.055, F.S., which is the Consultants' Competitive Negotiation Act.

Effective Date

The bill provides an effective date of July 1, 2013.

B. SECTION DIRECTORY:

Section 1. creates s. 287.05712, F.S., providing definitions; providing legislative findings and intent relating to the construction or improvement by private entities of facilities used predominately for a public purpose; providing procurement procedures; providing requirements for project approval; providing project qualifications and process; providing for notice to affected local jurisdictions; providing for comprehensive agreements between a public and private entity; providing for use fees; providing for financing sources for certain projects by a private entity; providing powers and duties for private entities; providing for expiration or termination of agreements; providing for the applicability of sovereign immunity for public entities with respect to qualified projects; providing for construction of the act.

Section 2. provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to impact state governments.

2. Expenditures:

The bill does not appear to impact state governments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The fiscal impact on local governments is unknown.

2. Expenditures:

The fiscal impact on local governments is unknown.

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 does not appear to have a fiscal impact on state government; however, the bill may have an indeterminate fiscal impact on local governments that enter into public-private partnerships. Local government expenditures would be based on currently unidentified agreements with public-private partnerships.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill references guidelines that responsible public entities must adopt to guide the procurement process and selection of proposals from private entities.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues:

On line 492, the bill references "the state" for purposes of sovereign immunity and, on line 503, the bill references "state agency" for purposes of construction of the section. The state is not otherwise included in the bill and these references could lead to confusion.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES