

## HOUSE OF REPRESENTATIVES FINAL BILL ANALYSIS

<b>BILL #:</b>	CS/CS/HB 85	<b>FINAL HOUSE FLOOR ACTION:</b>	
<b>SPONSOR(S):</b>	Appropriations Committee; Government Operations Subcommittee; Steube and others	111 Y's	4 N's
<b>COMPANION BILLS:</b>	(CS/CS/CS/SB 84)	<b>GOVERNOR'S ACTION:</b>	Pending

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### SUMMARY ANALYSIS

CS/CS/HB 85 passed the House on April 25, 2013. The bill was amended by the Senate on May 3, 2013, and subsequently passed the House on May 3, 2013. The bill authorizes public-private partnerships for certain purposes and establishes requirements for such partnerships.

The bill:

- Authorizes public-private partnerships to contract for public service work with a not-for-profit-organization or charitable youth organization, and provides certain requirements for contracts specific to park land and public education buildings.
- Creates an alternative procurement process and requirements for public-private partnerships to facilitate the construction of public-purpose projects.
- Creates a Partnership for Public Facilities and Infrastructure Act Guidelines Task Force to recommend guidelines for the Legislature to consider for the purpose of creating a uniform process for establishing public-private partnerships.
- Authorizes the use of public-private partnerships for purposes of county road projects, and permits counties to receive or solicit proposals and enter into agreements with private entities to construct, extend, or improve a county road if certain requirements are met.
- Extends the terms for leases that the Orlando-Orange County Expressway Authority may enter into from 40 years to 99 years.

The bill has an insignificant negative fiscal impact on the Department of Management Services related to administrative support costs associated with the Partnership for Public Facilities and Infrastructure Act Guidelines Task Force. The bill has an indeterminate fiscal impact on local governments. See Fiscal Comments section for further discussion.

Subject to the Governor's veto powers, the effective date of this bill is July 1, 2013.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### **BACKGROUND**

##### **Public-Private Partnerships**

###### Overview

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.<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 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.<sup>2</sup>

There are different types of PPPs each with varying levels of private sector involvement. The most common is called a Design-Build-Finance-Operate transaction, where the government contracts with a private vendor, granting the private sector partner the right to develop a new piece of public infrastructure.<sup>3</sup> 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.<sup>4</sup>

Another PPP procurement process is the Unsolicited Proposal Procurement Model. 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.<sup>5</sup> Generally, the public entity requires a processing or review fee to cover costs of the technical and legal review.<sup>6</sup>

###### Florida Department of Transportation

The Florida Department of Transportation (FDOT) currently operates a public-private partnership program.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup>

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<sup>1</sup> See The Federal Highway Administration, United States Department of Transportation, Innovative Program Delivery website, available at: <http://www.fhwa.dot.gov/ipd/p3/defined/index.htm> (last visited on May 7, 2013).

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

<sup>3</sup> 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 May 7, 2013).

<sup>4</sup> *Id.*

<sup>5</sup> See *Innovative Models for Design, Build, Operations and Financing of Public Infrastructure*, John J. Fumero, at 2.

<sup>6</sup> *Id.*

<sup>7</sup> See s. 334.30, F.S.

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

<sup>9</sup> Section 334.30(3), F.S.

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 the project.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> If FDOT receives an unsolicited proposal, it is required to publish a notice in the Florida Administrative Weekly<sup>13</sup> and a newspaper of general circulation stating FDOT has received the proposal and it will accept other proposals for the same project.<sup>14</sup> In addition, FDOT requires that an initial payment of \$50,000 accompany any unsolicited proposal to cover the costs of evaluating the proposal.<sup>15</sup>

Current law governing FDOT's PPP provides for a solicitation process that is similar to the Consultants' Competitive Negotiation Act.<sup>16</sup> FDOT may request proposals from private entities for public-private transportation projects.<sup>17</sup> The partnerships must be qualified by FDOT as part of the procurement process outlined in the procurement documents.<sup>18</sup> 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.<sup>19</sup> FDOT must rank the proposals in the order of preference.<sup>20</sup> 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 negotiations with the second ranked firm are unsuccessful, FDOT must move to the third-ranked firm.<sup>21</sup> 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.<sup>22</sup>

Current law authorizes FDOT to use innovative finance techniques associated with a PPP, including federal loans, commercial bank loans, and hedges against inflation from commercial banks or other private sources.<sup>23</sup> PPP agreements under s. 334.30, F.S., must be limited to a term not to exceed 50 years.<sup>24</sup> In addition, FDOT may not utilize more than 15 percent of total federal and state funding in any given year to fund PPP projects.<sup>25</sup>

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<sup>10</sup> Section 334.30(1), F.S.

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

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

<sup>13</sup> The Florida Administrative Weekly was renamed the Florida Administrative Register during the 2012 Session. Chapter 2012-63, L.O.F.

<sup>14</sup> Section 334.30(6)(a), F.S.

<sup>15</sup> See chapter 14-107.0011, F.A.C.

<sup>16</sup> See s. 287.055, F.S.

<sup>17</sup> Section 334.30(6)(a), F.S.

<sup>18</sup> Section 334.30(6)(b), F.S.

<sup>19</sup> Section 334.30(6)(c), F.S.

<sup>20</sup> See s. 334.30(6)(d), F.S. In ranking the proposals, 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.

<sup>21</sup> Section 334.30(6)(d), F.S.

<sup>22</sup> Section 334.30(6)(e), F.S.

<sup>23</sup> Section 334.30(7), F.S.

<sup>24</sup> Section 334.30(11), F.S.

<sup>25</sup> Section 334.30(12), F.S.

### Expressway Authority

Current law authorizes an authority created and established pursuant to the Florida Expressway Authority Act<sup>26</sup> to acquire, hold, construct, improve, maintain, operate, and own an expressway system.<sup>27</sup> For purposes of such authority, the Legislature declared “that there is a public need for the rapid construction of safe and efficient transportation facilities for traveling within the state and that it is in the public’s interest to provide for public-private partnership agreements to effectuate the construction of additional safe, convenient, and economical transportation facilities.”<sup>28</sup>

An expressway authority may receive or solicit proposals and enter into agreements with private entities for the building, operation, ownership, or financing of authority transportation facilities.<sup>29</sup> Current law provides a process that must be followed if an expressway authority chooses to pursue a public-private partnership.<sup>30</sup>

### *The Orlando-Orange County Expressway Authority*

The Orlando-Orange County Expressway Authority currently serves Orange County and is authorized to construct, operate, and maintain roads, bridges, avenues of access, thoroughfares, and boulevards in the county, as well as outside the jurisdictional boundaries of Orange County with the consent of the county within whose jurisdiction the activities occur.<sup>31</sup> Section 348.754(2)(d), F.S., authorizes the Orlando-Orange County Expressway Authority to enter into and make leases for terms not exceeding 40 years.

## **Procurement by Governmental Entities**

### Procurement of Personal Property and Services

Chapter 287, F.S., regulates state agency<sup>32</sup> 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.<sup>33</sup> The department establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state’s buying power.<sup>34</sup>

Current law requires contracts for commodities or contractual services in excess of \$35,000 to be procured utilizing a competitive solicitation process.<sup>35</sup> 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

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<sup>26</sup> See part I of chapter 348, F.S., which is comprised of the Florida Expressway Authority Act and related provisions. In addition, s. 348.0001, F.S., provides that sections 20-31 of chapter 90-136, L.O.F., may be cited as the Florida Expressway Authority Act.

<sup>27</sup> Section 348.0004(1)(a), F.S.

<sup>28</sup> Section 348.0004(9), F.S.

<sup>29</sup> Section 348.0004(9)(a), F.S.

<sup>30</sup> See s. 348.0004(9), F.S.

<sup>31</sup> Section 348.754(2)(n), F.S.

<sup>32</sup> 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.”

<sup>33</sup> See ss. 287.032 and 287.042, F.S.

<sup>34</sup> *Id.*

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

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<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup> The CCNA requires that 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; or
- A planning or study activity, when the fee for professional services exceeds \$35,000.

The CCNA provides a two-phase selection process.<sup>39</sup> 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.<sup>40</sup>

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 mean "the amount paid by the agency for professional services," regardless of whether stated as compensation or as other types of rates.<sup>41</sup>

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 services<sup>42</sup> 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.

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<sup>36</sup> Chapter 73-19, L.O.F.

<sup>37</sup> Chapter 88-108, L.O.F.

<sup>38</sup> Section 287.055, F.S.

<sup>39</sup> Section 287.055(4) and (5), F.S.

<sup>40</sup> See s. 287.055(4)(b), F.S.

<sup>41</sup> Section 287.055(2)(d), F.S.

<sup>42</sup> 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.

- Procedures to govern negotiations for construction contracts and modifications to contract documents when such negotiations are determined by the secretary of the department to be in the best interest of the state.
- Procedures for entering into performance-based contracts for the development of public facilities when the department determines the use of such contracts to be in the best interest of the state.<sup>43</sup>

State contracts for construction projects that are projected to cost in excess of \$200,000 must be competitively bid.<sup>44</sup> In addition, such projects must be advertised in the Florida Administrative Weekly at least 21 days prior to the bid opening.<sup>45</sup> 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.<sup>46</sup> Counties, municipalities, special districts,<sup>47</sup> 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.<sup>48</sup>

#### Special Contracts with Charitable Youth Organizations

Notwithstanding the competitive sealed bid procedures required in chapters 255 and 287, F.S., the state or the governing body of any political subdivision of the state may contract for public service work, such as highway and park maintenance, if the state or governing body complies with s. 255.60, F.S. Section 255.60, F.S., governs special contracts with charitable youth organizations. It requires the contractor or supplier to be a not-for-profit organization; the contractor or supplier must hold exempt status under s. 501(a) of the Internal Revenue Code, as an organization described in s. 501(c)(3) of the Internal Revenue Code; the corporate charter of the contractor or supplier must state that the corporation is organized as a charitable youth organization exclusively for at-risk youths enrolled in a work-study program; and administrative salaries and benefits for any such corporation must not exceed 15 percent of gross revenues.<sup>49</sup>

Any contract entered into under the section must provide at a minimum that labor must be performed exclusively by at-risk youth and their direct supervisors, and must not be subject to subcontracting; payment must be production-based; the contract will terminate should the supplier or contractor no longer meet certain qualifications under this section; the supplier or contractor has instituted a drug-free workplace program; and the contractor or supplier agrees to be subject to review and audit at the discretion of the Auditor General in order to ensure compliance.<sup>50</sup>

Contracts entered into under this section may not exceed \$250,000 annually.<sup>51</sup>

#### EFFECT OF THE BILL

##### **Special Contracts with Charitable Youth or Not-for-Profit Organizations**

The bill amends s. 255.60, F.S., to authorize public-private partnerships to contract for public service work with not-for-profit organizations or charitable youth organizations. The bill specifies that for the preservation, maintenance, and improvement of park land, the property must be at least 20 acres with contiguous public facilities that are capable of seating at least 5,000 people in a permanent structure. A contract for public education buildings must provide that the building be at least 90,000 square feet.

<sup>43</sup> Section 255.29, F.S.

<sup>44</sup> See chapters 60D-5.002 and 60D-5.0073, F.A.C.; see also s. 255.0525, F.S.

<sup>45</sup> Section 255.0525(1), F.S.

<sup>46</sup> *Id.*

<sup>47</sup> 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.”

<sup>48</sup> See s. 255.20(1), F.S.

<sup>49</sup> Section 255.60(1), F.S.

<sup>50</sup> Section 255.60(2), F.S.

<sup>51</sup> Section 255.60(3), F.S.

## **Public-Private Partnerships for Public-Purpose Facilities**

The bill creates s. 287.05712, F.S., to govern the procurement process for public-private partnerships for public purpose projects.

### Definitions

The bill provides for definitions to be used in this 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:
  - 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
  - Notwithstanding any provision of this section, 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.
- “Responsible public entity” means 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.

### 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 projects that serve a public purpose, 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.

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

The bill creates the Partnership for Public Facilities and Infrastructure Act Guidelines Task Force (task force) to recommend guidelines for the Legislature to consider for purposes of creating a uniform process for establishing PPPs. The seven-member task force is comprised of the Secretary of the Department of Management Services and six members appointed by the Governor who represent the county government, municipal government, district school board, and business community. The department must provide administrative and technical support to the task force.

The task force members must be appointed by July 31, 2013, and must meet to establish procedures for the conduct of its business by August 31, 2013. All meetings must be held in Tallahassee, except that no more than two meetings may be held in other locations for the purpose of taking public testimony. Task force members are not compensated and are not entitled to reimbursement for per diem and travel expenses.

The bill provides that the task force must submit a final report of its recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives by July 1, 2014, and it is terminated December 31, 2014.

Public entities may participate in public-private partnerships prior to the adoption of any guidelines by the state. The bill provides that a responsible public entity may adopt guidelines so long as such guidelines are not inconsistent with s. 287.05712, F.S.

#### 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, upgrading, 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 and the public entity intends to enter into a comprehensive agreement for the project described in such unsolicited proposal, 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 the entity has received a proposal and will accept other proposals. Public entities must determine the timeframe in which to accept other proposals based upon the complexity of the project and the benefit gained by allowing longer or shorter periods of time; however, the timeframe for accepting other proposals must be at least 21 days, but no more than 120 days, after the initial date of publication.

#### 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.
- 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.
- 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. 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 the development or operation of an educational facility, a water or wastewater management facility, a technology or other government infrastructure, or a government facility needed by the responsible public entity as 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.

Approval of a qualifying project by the responsible public entity is subject to entering into a comprehensive agreement with the private entity.

#### 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 each affected local jurisdiction 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.

#### Interim Agreement

The bill provides that before entering a comprehensive agreement, the public entity may enter into an interim agreement with the public entity, which does not obligate the public entity to enter into a comprehensive agreement. 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 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 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 of public liability insurance.
- Monitoring of the practices of the private entity by the responsible public entity to ensure the project is properly maintained.
- Filing of financial statements on a periodic basis by the private entity.
- Procedures governing the rights and responsibilities of the responsible public entity and private entity in the event of a termination of the agreement or a material default.
- Fees, lease payments, or service payments as may be established by agreement of the parties.
- Duties of the private entity, including terms and conditions that the responsible 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 to members of the public for the use of the facility. Any revenues must be regulated by the responsible public entity pursuant to the agreement, and a negotiated portion of the revenues must be returned to the responsible public entity over the life of the agreement.

### 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. A responsible public entity must appropriate on a priority basis a contractual payment obligation, annual or otherwise, from the enterprise or other government fund from which the qualifying projects will be funded.

### 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 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.

#### **Public-Private Partnerships for County Road Projects**

The bill creates s. 336.71, F.S., which authorizes counties to utilize public-private partnerships for purposes of county road construction. Specifically, the bill authorizes a county to receive or solicit proposals and enter into agreements with private entities to construct, extend, or improve a county road or portion thereof within a county.

Before the county can approve such a partnership, the county must conduct a noticed public hearing and determine that the partnership is in the best interest of the public, would only use county funds for portions of the project that will be part of the county road system, would have adequate safeguards to ensure that additional costs or unreasonable service disruptions are not realized by the traveling public and citizens of the state, would be owned by the county upon completion of the agreement, and would result in a financial benefit to the public by completing the project at a cost to the public significantly lower than if the project was constructed by the county using the normal procurement process.

The bill requires the county to publish notice for the public hearing at least 14 days before the governing board takes final action. The notice must identify the project, the estimated cost of the project, and specify that the purpose for the public meeting is to consider whether it is in the public's best interest to accept the proposal and enter into an agreement. The determination of cost savings must be supported by a professional engineer's cost estimate made available to the public at least 14 days before the public meeting and placed in the record for that meeting.

#### **Orlando-Orange County Expressway Authority Lease**

The bill amends s. 348.754(2)(d), F.S., extending the limit for leases that the Orlando-Orange County Expressway Authority may enter into from 40 years to 99 years. The 99 year maximum lease term is consistent with FDOT's current authority to make leases.<sup>52</sup>

#### **Effective Date**

The bill 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 government revenues.

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<sup>52</sup> Section 337.251(1), F.S., authorizes FDOT to enter certain leases for terms not exceeding 99 years.

2. Expenditures:

The bill will have an insignificant negative fiscal impact on the Department of Management Services related to administrative support costs associated with the Partnership for Public Facilities and Infrastructure Act Guidelines Task Force.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill has an indeterminate fiscal impact on local governments that enter into public-private partnerships.

2. Expenditures:

The bill has 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.

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:

None.