



Government Operations Appropriations Subcommittee

**Tuesday, February 21, 2012
8:30 AM - 10:00 AM
404 HOB**

Meeting Packet

**Dean Cannon
Speaker**

**Ed Hooper
Chair**

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Government Operations Appropriations Subcommittee

Start Date and Time: Tuesday, February 21, 2012 08:30 am
End Date and Time: Tuesday, February 21, 2012 10:00 am
Location: 404 HOB
Duration: 1.50 hrs

Consideration of the following bill(s):

HB 337 Public-Private Partnerships by Williams, T.

Pursuant to rule 7.12, the deadline for amendments to bills on the agenda by non-appointed members shall be 6:00 p.m., Monday, February 20, 2012.



By request of the chair, all committee members are asked to have amendments to bills on the agenda submitted to staff by 6:00 p.m., Monday, February 20, 2012.

Appearance forms can be found on myfloridahouse.gov. Please print and bring 2 copies of the form to the meeting and give them to the administrative assistant.

NOTICE FINALIZED on 02/17/2012 16:18 by MRI

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 337 Public-Private Partnerships
SPONSOR(S): Williams and others
TIED BILLS: IDEN./SIM. **BILLS:** SB 576

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	12 Y, 0 N	Meadows	Williamson
2) Government Operations Appropriations Subcommittee		Lloyd 	Topp 
3) State Affairs Committee			

SUMMARY ANALYSIS

Public-private partnerships are contractual agreements formed between a public agency and a private sector entity 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 the Florida Public-Private Partnership Act to facilitate public-private partnerships to construct public-purpose projects as an alternative to the Consultants' Competitive Negotiation Act. The bill specifies the requirements for such partnership, and creates a Public-Private Partnership Advisory Commission.

The bill has an unknown potentially negative fiscal impact on state and local governments.

The bill provides an effective date of July 1, 2012.

The bill appears to raise constitutional concerns. See Section III.A.2. of the analysis.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Public-Private Partnership

Overview

Public-private partnerships (PPP) are contractual agreements formed between a public agency and a private sector entity 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 with varying levels of private sector involvement. The most common is called a Design-Build-Finance-Operate (DBFO) transaction, where the government grants a private sector partner the right to develop a new piece of public infrastructure.⁴ The private entity takes on full responsibility and risk for delivery and operation of the public project against pre-determined standards of performance established by government. 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 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 for the technical and legal review.⁷

Florida Department of Transportation Public-Private Partnership

The Florida Department of Transportation (FDOT) currently has a public-private partnership program in place.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

¹ See the Federal Highway Administration, United States Department of Transportation, Innovative Program Delivery webpage, available at: <http://www.fhwa.dot.gov/ipd/p3/defined/index.htm> (last visited on January 25, 2012).

² See generally The National Council for Public-Private Partnerships webpage, *How PPPs Work*, available at: <http://ncppp.org/howpart/index.shtml#define> (last visited on January 25, 2012).

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 January 25, 2012).

⁵ *Id.*

⁶ See *Innovative Models for the Design, Build, Operation and Financing of Public Infrastructure*, John J. Fumero, at 3 (on file with the Government Operations Subcommittee).

⁷ *Id.*

⁸ See s. 334.30, F.S.

⁹ Section 334.30, F.S.

¹⁰ 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 as programmed in the adopted work program.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 solicitation or proposal, it is required to publish a notice in the Florida Administrative Weekly and a news paper of general circulation stating that FDOT has received the proposal and it will accept other proposals for the same project.¹⁴ In addition, FDOT requires an initial payment of \$50,000 accompany any unsolicited proposal to cover the costs of evaluating the proposal.¹⁵

Current law governing FDOT's PPP provides for a solicitation process that is similar to the Consultants' Competitive Negotiation Act¹⁶. FDOT may request proposals from private entities for public-private transportation projects.¹⁷ The partnerships must be qualified by FDOT as part of the procurement process outlined in the procurement documents.¹⁸ 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.¹⁹ FDOT must rank the proposals in the order of preference.²⁰ 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, and if unsuccessful again, move to the third-ranked firm.²¹ 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.²²

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.²³ PPP agreements under s. 334.30, F.S., must be limited to a term not to exceed 50 years. In addition, FDOT may not utilize more than 15 percent of total federal and state funding in any given year to fund PPP projects.²⁴

Procurement of Personal Property and Services

Chapter 287, F.S., regulates state agency²⁵ 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

¹¹ Section 334.30(1), F.S.

¹² *Id.*

¹³ *Id.*

¹⁴ Section 334.30(6)(a), F.S.

¹⁵ See Fla. Admin. Code R. 14-107.0011

¹⁶ See s. 287.055, F.S.

¹⁷ Section 334.30(6)(a), F.S.

¹⁸ Section 334.30(6)(b), F.S.

¹⁹ Section 334.30(6)(c)

²⁰ 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.

²¹ Section 334.30(6)(d), F.S.

²² Section 334.30(6)(e), F.S.

²³ Section 334.30(8), F.S.

²⁴ Section 334.30(13), F.S.

²⁵ As defined in s. 287.012(1), F.S., "agency" means 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.

agency activities, such as office supplies, vehicles, and information technology.²⁶ The Division of State Purchasing in the department establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.²⁷

Current law requires contracts for commodities or contractual services in excess of \$35,000 to be procured utilizing a competitive solicitation process.^{28,29}

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 1973,³⁰ 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.³¹

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.³² 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.³³ 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.³⁴

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.³⁵

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

²⁶ See ss. 287.032 and 287.042, F.S.

²⁷ Chapter 287, F.S., provides requirements for the procurement of personal property and services. Part I of that chapter pertains to commodities, insurance, and contractual services, and part II pertains to motor vehicles.

²⁸ 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.

²⁹ As defined in s. 287.012(6), F.S., "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.

³⁰ Chapter 73-19, L.O.F.

³¹ Chapter 88-108, L.O.F.

³² Section 287.055, F.S.

³³ Section 287.055(4) and (5), F.S.

³⁴ See s. 287.055(4)(b), F.S.

³⁵ Section 287.055(2)(d), F.S.

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 services³⁶ 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.³⁷

State contracts for construction projects that are projected to cost in excess of \$200,000 must be competitively bid.³⁸ In addition, such projects must be advertised in the Florida Administrative Weekly at least 21 days prior to the bid opening.^{39,40} Counties, municipalities, special districts⁴¹, 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 \$300,000.⁴²

Effect of Proposed Changes

The bill creates the Florida Public-Private Partnership Act in chapter 287, F.S. (act) and provides legislative findings to support the need for public-private partnerships (PPP) in Florida.

Definitions

The bill provides for definitions to be used in the act. Included in the definitions are the terms:

- "Public entity" means the state and any agency or authority thereof; any county, city, or town and any other political subdivision of the state; any public body politic and corporate; or any regional entity that serves a public purpose.
- "Qualifying project" means any public-purpose facility or project, including a public school building and any functionally related and subordinate facility, including any stadium or other facility primarily used for school events; a building or facility that meets a public purpose and is developed or operated by or for any public entity; improvements, including equipment, of

³⁶ As defined in s. 255.072(2), F.S., "construction services" means all labor, services, and materials provided in connection with the construction, alteration, repair, demolition, reconstruction, or any other improvements to real property. The term "construction services" does not include contracts or work performed for the Department of Transportation.

³⁷ Section 255.29, F.S.

³⁸ See 60D-5.0073, F.A.C.; see also s. 255.0525, F.S.

³⁹ Section 255.0525(1), F.S.

⁴⁰ State construction projects that are projected to exceed \$500,000 are required to be published 30 days prior to 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. See s. 255.0525(1), F.S.

⁴¹ As defined in s. 189.403(1), F.S., "special district" means 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. The special purpose or purposes of special districts are implemented by specialized functions and related prescribed powers. For the purpose of s. 196.199(1), F.S., special districts must be treated as municipalities. The term does not include a school district, a community college district, a special improvement district created pursuant to s. 285.17, F.S., a municipal service taxing or benefit unit as specified in s. 125.01, F.S., or a board which provides electrical service and which is a political subdivision of a municipality or is part of a municipality.

⁴² See s. 255.20(1), F.S.

buildings to be principally used by a public entity; and water or wastewater management facility and other related infrastructure.

- “Responsible public entity” means an agency or institution of the state that has the authority to develop or operate a qualifying project.

Guidelines

Before requesting or considering a proposal for a qualifying project, the bill requires a responsible public entity to adopt and make publicly available guidelines that are reasonable, encourage competition, and guide the selection of projects under the purview of the responsible public entity. However, the responsible public entity does not have to follow the guidelines if the guidelines are not advantageous to such public entity.

Responsible Public Entities of the State

For a state agency that is a responsible public entity, the guidelines must include, but are not limited to:

- Opportunities for competition through public notice.
- Reasonable criteria for choosing among competing proposals.
- Suggested timelines for selecting proposals and negotiating an interim⁴³ or comprehensive agreement.⁴⁴
- Authorization for accelerated selection and review and documentation timelines for proposals involving a qualifying project that the responsible public entity deems a priority.
- Financial review and analysis procedures.
- Consideration of the nonfinancial benefits of a proposed qualifying project.
- A mechanism for the appropriating body⁴⁵ to review a proposed interim or comprehensive agreement prior to execution.
- Establishment of criteria for the creation of and the responsibilities of a public-private partnership oversight committee with members representing the responsible public entity and the appropriating body. If formed, the oversight committee must be an advisory committee to review the terms of any proposed interim or comprehensive agreement.
- Analysis of the adequacy of the information released when seeking competing proposals; and
- Establishment of criteria, key decision points, and approvals required to ensure that the responsible public entity considers the extent of competition before selecting proposals and negotiating an interim or comprehensive agreement.
- The posting and publishing of public notice of a private entity’s request for approval of a qualifying project.

The bill specifies that the notice must be published on the Internet, but it does not provide guidance as to the location on the Internet for publication.

Responsible Public Entities that are not the State

The bill also provides guidelines for a responsible public entity *that is not an agency or institution of the state*; however, this is in contradiction to the definition of “responsible public entity.” The guidelines may include the provisions previously discussed and must include a requirement that the responsible public entity engage the services of qualified professionals not otherwise employed by such responsible entity. The qualified professional must provide an independent analysis regarding the specifics, advantages, disadvantages, and the long and short-term costs of any request by a private entity for approval of a qualifying project. However, the governing body of the responsible public entity may determine that such analysis must be performed by employees of such responsible public entity. Qualified professionals may include an architect, professional engineer, or certified public accountant.

⁴³ The bill defines “interim agreement” to mean an agreement between a private entity and a responsible public entity that provides for phasing of the development or operation of a qualifying project. Such phases may include, but are not limited to, design, planning, engineering, environmental analysis and mitigation, financial and revenue analysis, or any other phase of the project that constitutes activity on any part of the qualifying project.

⁴⁴ The bill defines “comprehensive agreement” to mean the comprehensive agreement between the private entity and the responsible public entity.

⁴⁵ The bill defines “appropriating body” to mean the body responsible for appropriating or authorizing funding to pay for a qualifying project.

In addition, the guidelines must include a mechanism for the appropriating body to review a proposed interim or comprehensive agreement prior to execution.

Procurement Process

The bill provides that the Consultants' Competitive Negotiation Act, and any interpretations, regulations, or guidelines of the Department of Management Services, do not apply to the act. The bill provides an optional procurement process that the public entity may follow. It also provides that a public entity is not required to select the proposal with the lowest bid offer, but may use price as one consideration. Additionally, the bill encourages the public entity to consider private entities that will utilize local contractors and residents for the qualifying project. It does not provide for a process by which vendors may protest the solicitation.

Qualifying Projects

A responsible public entity may request proposals or invite bids from private entities for the development or operation of qualifying projects. A private entity may request the approval of a responsible public entity for a qualifying project. The private entity must accompany the request with the following information, unless waived by the responsible public entity:

- A topographical map.
- A description of the qualifying project.
- A statement providing the method the private entity will utilize to secure necessary property interests.
- Information relating to the current plans for the development of facilities or technology infrastructure to be used by a public entity that is similar to the qualifying project being proposed by the private entity, if any, of each affected local jurisdiction.
- A list of permits and approvals required.
- A list of public water or wastewater management facilities that will be crossed by the project.
- A statement setting forth the private entity's general plans for financing the project.
- The names and addresses of the persons who may be contacted for further information.
- User fees, lease payments, and other service payment over the term of the agreement.
- Any additional material and information that the responsible public entity may request.

Upon receipt of a proposal, the responsible public entity must determine whether to accept the proposal for consideration. The responsible public entity may charge a reasonable fee to cover the costs of processing, reviewing, and evaluating the request, including reasonable attorney fees and fees for financial, technical, and other necessary advisors or consultants.

The responsible public entity may reject any proposal initiated by a private entity at any time. If the responsible public entity does not accept the proposal, then the responsible public entity must return the proposal, including fees and documentation, to that private entity. This provision appears to conflict with the Public Records Act⁴⁶ and the Administrative Procedure Act (APA).⁴⁷ Once a proposal is submitted to a public entity it becomes a public record. In addition, it may be needed if the solicitation is challenged by a vendor under the APA.

The responsible public entity may approve the development or operation of an education facility, water or wastewater management facility and related infrastructure, technology infrastructure or other public infrastructure, or a government facility needed by a public entity as a qualifying project, or the design or equipping of a qualifying project so developed or operated, if certain conditions are met. Upon approval of a qualifying project, the responsible public entity must establish a date for the commencement of activities related to the qualifying project. Such approval is subject to entering into a comprehensive agreement with the private entity.

⁴⁶ See chapter 119, F.S.

⁴⁷ See chapter 120, F.S.

Agreements

Interim Agreement

The bill provides that before or in connection with the negotiation of a comprehensive agreement, the responsible public entity may enter into an interim agreement. The interim agreement may:

- Permit 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 provisions related to any aspect of the development or operation of a qualifying project.

Comprehensive Agreement

The bill provides that the private entity must enter into a comprehensive agreement with the responsible public entity before developing or operating the qualifying project. The comprehensive agreement must provide for:

- Delivery of maintenance, performance, and payment bonds and letters of credit 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 practices of the private entity to ensure the project is properly maintained.
- Reimbursement to be paid to the responsible public entity for services provided by that entity.
- Filing of financial statements on a periodic basis.
- Policies and 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.
- User 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 comprehensive agreement may include:

- 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.
- Provisions under which the responsible public entity agrees to provide notice of default and cure rights for the benefit of the private entity and the person specified therein as providing financing for the qualifying project. The provisions may include terms and conditions to which the private entity and the responsible public entity mutually agree, including provisions regarding unavoidable delays or a loan of public funds to the private entity to develop or operate one or more qualifying projects.
- Provisions where the authority and duties of the private entity must cease, and the qualifying project is dedicated to the responsible public entity or, if the qualifying project was initially dedicated by an affected local jurisdiction, to such local jurisdiction.

Notification of Local Jurisdictions

The bill requires any private entity requesting approval from, or submitting a proposal to, a responsible public entity to notify each affected local jurisdiction. The private entity must provide a copy of its request or proposal to that local jurisdiction. Each affected local jurisdiction that is not a responsible public entity for the respective qualifying project must, within 60 days after receiving such notice, submit in writing any comments it may have on the proposed qualifying project to the responsible public entity and indicate whether the facility is compatible with the local comprehensive plan, local infrastructure development plans, the capital improvements budget, or other government spending plan. The comments must be given consideration by the responsible public entity before entering a comprehensive agreement with a private entity.

Powers of the Private Entity

The bill provides that the private entity has the power to develop or operate the qualifying project and collect lease payments, impose user fees, or enter into service contracts in connection with the use of the qualifying project. In addition, the private entity has the ability to own, lease, or acquire any other right to use or operate the qualifying project. The private entity may determine the amounts and terms and conditions of the financing of the qualifying project. The bill also authorizes the private entity to make and enforce rules to the same extent as the public entity in regards to operating the qualifying project. It is unclear what is meant by “making” and “enforcing” rules.

Material Default

The bill provides for processes in the event there is a material default⁴⁸ by the private entity. If the private entity materially defaults, the responsible public entity may elect to assume the duties and responsibilities of the private entity of the qualifying project. In such case, it must succeed to all of the right, title, and interest in such qualifying project, subject to any liens on revenues previously granted by the private entity to any person providing financing.

A responsible public entity having the power of condemnation under state law may exercise the power of condemnation to acquire the qualifying project in the event of a material default by the private entity. Any person who has provided financing for the qualifying project, and the private entity, may participate in the condemnation proceedings with the standing of a property owner.

If a responsible public entity elects to take over a qualifying project, the responsible public entity may develop or operate the qualifying project, impose user fees, impose and collect lease payments, and comply with any service contracts as if it were the private entity. If the responsible public entity collects monies or fees from third parties, the fees would be considered just compensation for the qualifying project.

Federal, State, and Local Financing

The bill provides that the financing of the qualified project may be in such amounts or on such terms and conditions as agreed upon by the responsible public entity and the private entity. The private entity and the responsible public entity may propose to use any and all funding resources that may be available and may issue debt, equity, or other securities or obligations; enter into leases; access any designed trust funds; borrow or accept grants from any state infrastructure bank; and secure any financing with a pledge of, security interest in, or lien on, any or all of its property, including all of its property interests in the qualifying facility. The responsible public entity may take any action to obtain federal, state, or local assistance for a qualifying project that serves the public purpose of the act and may enter into any contracts required to receive such assistance.

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.

Public-Private Partnership Advisory Commission

The bill creates the Public-Private Partnership Advisory Commission (commission). The commission is established to review and report the “implementation” of the Public-Private Partnership Act, and provide recommendations and revisions to further the PPP opportunities in the state. The membership consists of two members of the Florida House of Representatives, appointed by the Speaker of the House of Representatives; two members of the Florida Senate, appointed by the President of the Senate; and eight members appointed by the Governor. Members’ terms are for four years, except members of the House of Representatives and the Senate, who serve until the expiration of their terms in office or their successors qualify. The members of the commission must elect a chairperson and vice-chairperson.

⁴⁸ The bill defines “material default” to mean any default by the private entity in the performance of its duties that jeopardizes adequate service to the public from a qualifying project.

Members must hold public meetings at least quarterly or at the call of the chairperson. Members of the commission are entitled to per diem and travel expenses,⁴⁹ and the Executive Office of the Governor must provide the administrative support for the commission.

The commission is required to submit a report providing comments on the implementation of the act and recommendations for future revisions, beginning December 13, 2013, and each year thereafter.

B. SECTION DIRECTORY:

Section 1 creates s. 287.05712, F.S., to establish the Florida Public-Private Partnership Act.

Section 2 provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The fiscal impact on state government is unknown. See Fiscal Comments.

2. Expenditures:

The fiscal impact on state government is unknown. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The fiscal impact on local governments is unknown. See Fiscal Comments.

2. Expenditures:

The fiscal impact on local governments is unknown. 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 the state and local governments.

D. FISCAL COMMENTS:

The bill has an unknown potentially negative fiscal impact on state and local governments.

The Department of Management Services also provided the following fiscal comments:

- The annual fiscal impact of this proposal is unknown due to the newness of the proposed process and the current trends and conditions of the national and state economies. The proposed language may be problematic in implementation and result in legal complications in future years. Other issues may result in complications related to delivery of project not within current statute and administrative guidelines. The process may result in unforeseen funding, delivery and utilization complexities as a result of agreements that are not currently in existence or vary from public entity to public entity.⁵⁰
- The expenditures for both the state and local government would be unknown. The expenditures would be based on currently unidentified agreements with public-private projects. State and

⁴⁹ See 112.061, F.S.

⁵⁰ *Id.* at 4.

local governments may need to establish new administrative units to implement the proposed process.⁵¹

There is likely an insignificant fiscal impact to the state associated with the creation of the Public-Private Partnership Advisory Commission. Members appointed to the commission are entitled to per diem and travel expenses, as provided in s. 112.061, F.S.

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 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:

Pledging Credit

The bill may implicate Article VII, s. 10 of the Florida Constitution. Article VII, s. 10 of the Florida Constitution places limits on the pledging of credit. The purpose of Article VII, s. 10 of the Florida Constitution is to prohibit state and local governments from becoming stockholders in or loaning their credit to aid any corporation, association, institution, or individual.⁵²

The bill permits private entities to issue debt, equity, or other securities and obligations or to secure financing with a pledge of security interest. It also permits the interests to be turned over to the state agency or local government, either voluntarily or by default. This ability of the private entity to issue debt, equity, or other securities and obligations and to secure financing, with a pledge of security interest, could implicate the constitutional prohibition on pledging credit if state and local governments are later subject to those terms and conditions.

Sovereign Immunity

Article X, s. 13 of the Florida Constitution provides that provisions may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating. Sovereign immunity is a doctrine that precludes the bringing of a suit against the government without its consent.⁵³ Sovereign immunity extends to all subdivisions of the state, including counties and school boards. Any waiver of sovereign immunity by a state or local government must be clear and unequivocal, it may not be inferred.⁵⁴ Express waiver of sovereign immunity by the state requires either a statutory or constitutional provision.⁵⁵

Although not specifically provided in statute, the state is vulnerable to suit over contractual disputes. The Florida Supreme Court has held, "statutes authorizing government agencies to enter into contracts constitute a waiver of sovereign immunity for actions arising under those contracts."⁵⁶

⁵¹ *Id.*

⁵² See State v. Housing Finance Authority of Polk County, 376 So.2d 1158, 1160 (Fla. 1979). See also 1997 Fla. Op. Atty. Gen. 34, available online at: <http://myfloridalegal.com/ago.nsf/Opinions/23922B3CC09BB5D9852564B80057BF82> (last visited February 1, 2012).

⁵³ Black's Law Dictionary, 1396 (6th ed. 1990).

⁵⁴ See City of Key West v. Florida Keys Community College, 2012 WL 126858 (Fla. 3d DCA 2012).

⁵⁵ See Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4 (Fla. 1984).

⁵⁶ See Florida Department of Environmental Protection v. ContractPoint Florida Parks, LLC, 986 So.2d 1260, 1268 (Fla. 2008); See also Substantive Analysis of HB 337, Department of Financial Services, January 26, 2012, at 2 (on file with the Government Operations Subcommittee).

The bill specifically provides that the act does not waive the sovereign immunity of the state, any responsible public entity, any affected local jurisdiction, or any officer or employee thereof. However, the bill allows a responsible public entity to assume the duties and responsibilities of the private entity and, as such, the responsible public entity would gain all of the right, title, and interest in the project and would be subject to any liens that may have been placed on the project. This would appear to impose liability on the state on any outstanding financial interests on the property that the private entity previously secured.

Holding Dual Office Roles

The bill could implicate Article II, s. 5 of the Florida Constitution. Article II, s. 5 of the Florida Constitution provides:

No person holding any office of emolument under any foreign government, or civil office of emolument under the United States or any other state, shall hold any office of honor or of emolument under the government of this state. No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers.

The bill creates the Public-Private Partnership Advisory Commission (commission). It provides that membership of the commission must consist of two members of the House of Representatives and two members of the Senate. The commission is established to review and report on the "implementation" of the Public-Private Partnership Act, and to provide recommendations and revisions to further the PPP opportunities in the state. It is unclear whether the commission is supposed to monitor or oversee the implementation of the act. If the commission is supposed to oversee the implementation of the act then one could argue that the commission's role is more than advisory in nature. If the commission's role is more than advisory, the members of the House of Representatives and the Senate could be deemed to be elected officials holding dual office roles.

B. RULE-MAKING AUTHORITY:

The bill requires agencies to adopt guidelines to provide a process to guide the selection of proposals from private entities; however, agencies do not have to follow those guidelines.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues: Responsible Public Entity

The bill defines "responsible public entity" to mean "an agency or institution of the state that has the authority to develop or operate a qualifying project. Throughout the act, the bill refers to a "responsible public entity," a "responsible public entity that is an agency or institution of the state," and a "responsible public entity that is not an agency or institution of the state." As such, the sponsor may want to consider an amendment to address the inconsistencies regarding the use of the term "responsible public entity."

Drafting Issue: Comprehensive Agreement

Lines 447-455 of the bill provide a provision that may be included in a comprehensive agreement. However, it provides that the provision is "including but limited to". It appears the word "not" was omitted from the phrase. As such, the sponsor may want to consider an amendment to clarify the phrase.

Other Comments: Qualifying Project

The bill defines "qualifying project" to include equipment. According to the Department of Financial Services, including "equipment" in the description of "qualifying project" appears to conflict with s. 287.063, F.S., relating to commodity contracts requiring deferred-payment and preaudit reviews. The Chief Financial Officer (CFO) of Florida is responsible for pre-audit of all commodity contracts, including

the leasing and purchasing of equipment, that require deferred payments and the payment of interest.⁵⁷ The bill does not provide a process for the CFO to perform this pre-audit.⁵⁸

Other Comments: User Fees

The bill does not appear to provide sufficient guidance as to how to structure the user fees that may be collected by the private entity for use of the facility. The user fees may be agreed to in the comprehensive agreement, but it does not provide guidelines for setting those fees. Parameters may need to be established to help guide the responsible public entity and the private entity when establishing appropriate user fees.

Other Comments: Public-Private Partnership Advisory Commission

The bill creates a Public-Private Partnership Advisory Commission (commission). Current law defines a "commission" to mean:

[U]nless otherwise required by the State Constitution, means a body created by specific statutory enactment within a department, the office of the Governor, or the Executive Office of the Governor and exercising limited quasi-legislative or quasi-judicial powers, or both, independently of the head of the department or the Governor.⁵⁹

Current law provides that a council or advisory council is defined as an advisory body created by specific statutory enactment and appointed to function on a continuing basis for the study of the problems arising in a specified functional program or area of state government and to provide recommendations and policy alternatives.⁶⁰ It appears that designating the commission as a council would be more appropriate if the commission is truly an advisory body.

Other Comments: Department of Financial Services

The Department of Financial Services provided the following comments:

- HB 337 new s. 287.05712(6)-(7), F.S., allow a handoff of duties from the private entity to the public agency (line 457). These impose on the agency contractual liabilities and provisions that do not meet the agency's statutory accountability and liability limitation requirements. The interim contract (line 365-75) appears to be without competition, and is not sufficiently limited in scope (as in 489.145, F.S., technical feasibility study) to prevent subsequent obligations on the agency, e.g., to terms not negotiated by the agency (line 495).⁶¹
- HB 337 new s. 287.05712(10)(e), F.S., allows agencies to collect money from third parties that the private entity was given power to impose . . . if the agency takes over, which fees are "considered just compensation for the qualifying project." This means there is no financial disincentive for non-performance.⁶²
- HB 337 new s. 287.05712(10), F.S., allows the facility owner-agency, if with condemnation powers, to condemn land for the private entity's project if the private entity defaults (line 537) but private entity acts as landowner . . . landowner gets paid for taking by agency if private entity defaults . . .⁶³
- HB 337 new s. 287.05712(14): The Chief Financial Officer should be on the commission. The CFO responsible for pre-audit of deferred payment contracts per s. 287.063, F.S.⁶⁴

⁵⁷ See s. 287.063(2)(a), F.S.

⁵⁸ See Substantive Analysis of HB 337, Department of Financial Services, January 25, 2012, at 1 (on file with the Government Operations Subcommittee).

⁵⁹ Section 20.03(10), F.S.

⁶⁰ See s. 20.03(8), F.S.

⁶¹ Substantive Analysis of HB 337, Department of Financial Services, January 26, 2012, at 1 (on file with the Government Operations Subcommittee).

⁶² *Id.* at 2.

⁶³ *Id.* at 3.

⁶⁴ *Id.*

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

1 A bill to be entitled
 2 An act relating to public-private partnerships;
 3 creating s. 287.05712, F.S.; establishing the Florida
 4 Public-Private Partnership Act; providing definitions;
 5 providing legislative findings and intent; providing
 6 for private entities to develop and operate public-
 7 purpose projects; requiring public entities to adopt
 8 and make publicly available specified guidelines for
 9 public-private agreements; providing requirements and
 10 procedures for procurement, consideration, and
 11 approval of projects; providing an exemption from the
 12 Consultant's Competitive Negotiation Act and any
 13 interpretations, regulations, or guidelines of the
 14 Department of Management Services; providing
 15 requirements and procedures for interim and
 16 comprehensive agreements between private and public
 17 entities; providing for affected local governments to
 18 comment on proposed projects; providing powers and
 19 duties for private entities; providing for material
 20 default and remedies with respect to projects and
 21 agreements; providing for federal, state, and local
 22 financing; providing sovereign immunity for public
 23 entities with respect to specified project activities;
 24 providing for construction and effect of the act;
 25 establishing the Public-Private Partnership Advisory
 26 Commission; providing commission duties; providing for
 27 appointment and reimbursement of commission members;
 28 requiring the commission to submit annual reports to

29 the Governor and the Legislature; providing an
 30 effective date.

31
 32 Be It Enacted by the Legislature of the State of Florida:

33
 34 Section 1. Section 287.05712, Florida Statutes, is created
 35 to read:

36 287.05712 Florida Public-Private Partnership Act.-

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

38 (a) "Affected local jurisdiction" means any county, city,
 39 or town in which all or a portion of a qualifying project is
 40 located.

41 (b) "Appropriating body" means the body responsible for
 42 appropriating or authorizing funding to pay for a qualifying
 43 project.

44 (c) "Comprehensive agreement" means the comprehensive
 45 agreement between the private entity and the responsible public
 46 entity.

47 (d) "Develop" or "development" means to plan, design,
 48 develop, finance, lease, acquire, install, construct, or expand.

49 (e) "Interim agreement" means an agreement between a
 50 private entity and a responsible public entity that provides for
 51 phasing of the development or operation of a qualifying project.
 52 Such phases may include, but are not limited to, design,
 53 planning, engineering, environmental analysis and mitigation,
 54 financial and revenue analysis, or any other phase of the
 55 project that constitutes activity on any part of the qualifying
 56 project.

57 (f) "Lease payment" means any form of payment, including a
 58 land lease, by a public entity to the private entity for the use
 59 of a qualifying project.

60 (g) "Material default" means any default by the private
 61 entity in the performance of its duties that jeopardizes
 62 adequate service to the public from a qualifying project.

63 (h) "Operate" means to finance, maintain, improve, equip,
 64 modify, repair, or operate.

65 (i) "Private entity" means any natural person,
 66 corporation, general partnership, limited liability company,
 67 limited partnership, joint venture, business trust, public
 68 benefit corporation, nonprofit entity, or other private business
 69 entity.

70 (j) "Proposal" means a detailed proposal accepted by a
 71 responsible public entity beyond a conceptual level of review
 72 and at which time issues such as fixing costs, payment
 73 schedules, financing, deliverables, and project schedule are
 74 defined.

75 (k) "Public entity" means the state and any agency or
 76 authority thereof; any county, city, or town and any other
 77 political subdivision of the state; any public body politic and
 78 corporate; or any regional entity that serves a public purpose.

79 (l) "Qualifying project" means any:
 80 1. Public-purpose facility or project, including, but not
 81 limited to, a public school building and any functionally
 82 related and subordinate facility, including any stadium or other
 83 facility primarily used for school events.

84 2. Building or facility that meets a public purpose and is
 85 developed or operated by or for any public entity.

86 3. Improvements, including equipment, of buildings to be
 87 principally used by a public entity.

88 4. Water or wastewater management facility and other
 89 related infrastructure.

90 (m) "Responsible public entity" means an agency or
 91 institution of the state that has the authority to develop or
 92 operate a qualifying project.

93 (n) "Revenues" means all revenues, income, earnings, user
 94 fees, lease payments, or other service payments relating to the
 95 development or operation of a qualifying project, including, but
 96 not limited to, money received as grants or otherwise from the
 97 Federal Government, from any public entity, or from any agency
 98 or instrumentality of the foregoing in aid of a qualifying
 99 project.

100 (o) "Service contract" means a contract entered into
 101 between a public entity and the private entity.

102 (p) "Service payments" means payments to the private
 103 entity of a qualifying project pursuant to a service contract.

104 (q) "User fees" means the rates, tolls, fees, or other
 105 charges imposed by the private entity of a qualifying project
 106 for use of all or a portion of such qualifying project pursuant
 107 to a comprehensive agreement.

108 (r) "Water or wastewater management facility" means a
 109 project for treatment, storage, disposal, or distribution of
 110 water or wastewater.

111 (2) LEGISLATIVE FINDINGS AND INTENT.-

112 (a) The Legislature finds that:

113 1. There is a public need for timely and cost-effective
 114 acquisition, design, construction, improvement, renovation,
 115 expansion, equipping, maintenance, operation, implementation, or
 116 installation of public projects, including educational
 117 facilities, water or wastewater management facilities and
 118 infrastructure, technology infrastructure, and any other public
 119 infrastructure and government facilities within the state that
 120 serve a public need and purpose, and that such public need may
 121 not be wholly satisfied by existing methods of procurement.

122 2. There are inadequate resources to develop new
 123 educational facilities, water or wastewater management
 124 facilities and infrastructure, technology infrastructure and
 125 other public infrastructure and government facilities for the
 126 benefit of citizens of the state, and it has been demonstrated
 127 that public-private partnerships can meet these needs by
 128 improving the schedule for delivery, lowering the cost, and
 129 providing other benefits to the public.

130 3. There are state and federal tax incentives that promote
 131 partnerships between public and private entities to operate and
 132 develop qualifying projects.

133 4. An action under subsection (4) serves the public
 134 purpose of this section if such action facilitates the timely
 135 development or operation of qualifying projects.

136 (b) The Legislature declares it is the intent of this
 137 section to encourage investment in the state by private
 138 entities, to facilitate various bond financing mechanisms,
 139 private capital, and other funding sources for the development

140 and operation of qualifying projects, including expansion and
 141 acceleration of such financing to meet the public need, and to
 142 provide the greatest possible flexibility to public and private
 143 entities to contract for the provision of public services.

144 (3) ADOPTION OF GUIDELINES BY RESPONSIBLE PUBLIC
 145 ENTITIES.—

146 (a) A responsible public entity shall, before requesting
 147 or considering a proposal for a qualifying project, adopt and
 148 make publicly available guidelines that are sufficient to enable
 149 the responsible public entity to comply with this section. Such
 150 guidelines shall be reasonable, encourage competition, and guide
 151 the selection of projects under the purview of the responsible
 152 public entity.

153 (b) For a responsible public entity that is an agency or
 154 institution of the state, the guidelines shall include, but are
 155 not limited to:

156 1. Opportunities for competition through public notice and
 157 availability of representatives of the responsible public entity
 158 to meet with private entities considering a proposal.

159 2. Reasonable criteria for choosing among competing
 160 proposals.

161 3. Suggested timelines for selecting proposals and
 162 negotiating an interim or comprehensive agreement.

163 4. Authorization for accelerated selection and review and
 164 documentation timelines for proposals involving a qualifying
 165 project that the responsible public entity deems a priority.

166 5. Financial review and analysis procedures that shall
 167 include, at a minimum, a cost-benefit analysis, an assessment of

168 opportunity cost, and consideration of the results of all
 169 studies and analyses related to the proposed qualifying project.
 170 These procedures shall also include requirements for the
 171 disclosure of such analysis to the appropriating body for review
 172 prior to execution of an interim or comprehensive agreement.

173 6. Consideration of the nonfinancial benefits of a
 174 proposed qualifying project.

175 7. A mechanism for the appropriating body to review a
 176 proposed interim or comprehensive agreement prior to execution.

177 8. Establishment of criteria for the creation of and the
 178 responsibilities of a public-private partnership oversight
 179 committee with members representing the responsible public
 180 entity and the appropriating body. Such criteria shall include
 181 the scope, costs, and duration of the qualifying project, as
 182 well as whether the project involves or impacts multiple public
 183 entities. The oversight committee, if formed, shall be an
 184 advisory committee to review the terms of any proposed interim
 185 or comprehensive agreement.

186 9. Analysis of the adequacy of the information released
 187 when seeking competing proposals and providing for the
 188 enhancement of that information, if deemed necessary, to
 189 encourage competition.

190 10. Establishment of criteria, key decision points, and
 191 approvals required to ensure that the responsible public entity
 192 considers the extent of competition before selecting proposals
 193 and negotiating an interim or comprehensive agreement.

194 11. The posting and publishing of public notice of a
 195 private entity's request for approval of a qualifying project,
 196 including:

197 a. Specific information and documentation to be released
 198 regarding the nature, timing, and scope of the qualifying
 199 project.

200 b. A reasonable time period as determined by the
 201 responsible public entity to encourage competition and public-
 202 private partnerships in accordance with the goals of this
 203 section, such reasonable period to be at least 45 days, during
 204 which time the responsible public entity shall receive competing
 205 proposals.

206 c. A requirement for advertising the public notice and
 207 posting a notice on the Internet.

208 (c) For a responsible public entity that is not an agency
 209 or institution of the state, the guidelines may include the
 210 provisions set forth in this subsection at the discretion of the
 211 public entity. However, the guidelines shall include:

212 1. A requirement that the responsible public entity engage
 213 the services of qualified professionals, which may include an
 214 architect, professional engineer, or certified public
 215 accountant, not otherwise employed by the responsible public
 216 entity, to provide an independent analysis regarding the
 217 specifics, advantages, disadvantages, and the long and short-
 218 term costs of any request by a private entity for approval of a
 219 qualifying project unless the governing body of the responsible
 220 public entity determines that such analysis shall be performed
 221 by employees of the responsible public entity.

222 2. A mechanism for the appropriating body to review a
 223 proposed interim or comprehensive agreement prior to execution.

224 (4) PROCUREMENT PROCEDURES FOR RESPONSIBLE PUBLIC
 225 ENTITIES.—The Consultant's Competitive Negotiation Act under s.
 226 287.055 and any interpretations, regulations, or guidelines of
 227 the Department of Management Services do not apply to this
 228 section. However, a responsible public entity may enter into an
 229 interim or comprehensive agreement as follows:

230 (a) A responsible public entity shall not be required to
 231 select the proposal with the lowest bid offer, but may consider
 232 price as one factor in evaluating the proposals received. Other
 233 factors that may be considered include:

- 234 1. The proposed costs of the qualifying facility.
- 235 2. The general reputation, industry experience, and
 236 financial capacity of the private entity.
- 237 3. The proposed design of the qualifying project.
- 238 4. The eligibility of the facility for accelerated
 239 selection, review, and documentation timelines under the
 240 responsible public entity's compliance with a minority business
 241 enterprise participation plan or good faith effort to comply
 242 with the goals of such plan.
- 243 5. The private entity's plans to employ local contractors
 244 and residents.
- 245 6. Other criteria that the responsible public entity deems
 246 appropriate.

247 (b) A responsible public entity shall proceed in
 248 accordance with the guidelines adopted under subsection (3)
 249 unless it determines that proceeding in accordance with the

250 guidelines is likely to be advantageous to the responsible
 251 public entity and the public, based on:

252 1. The probable scope, complexity, or priority of the
 253 project.

254 2. Risk sharing, including guaranteed cost or completion
 255 guarantees, added value or debt, or equity investments proposed
 256 by the private entity.

257 3. An increase in funding, dedicated revenue source, or
 258 other economic benefit that would not otherwise be available.

259
 260 When the responsible public entity determines to proceed
 261 according to the guidelines adopted by it pursuant to subsection
 262 (3), it shall state the reasons for its determination in
 263 writing.

264 (c) A responsible public entity shall not proceed to
 265 consider any request by a private entity for approval of a
 266 qualifying project until the responsible public entity has
 267 adopted and made publicly available guidelines that are
 268 sufficient to enable the responsible public entity to comply
 269 with this section.

270 (d) A responsible public entity that is a school board or
 271 a county, city, or town may enter into an interim or
 272 comprehensive agreement under this section only with the
 273 approval of the local governing body.

274 (5) CONSIDERATION AND APPROVAL OF QUALIFYING PROJECTS.—

275 (a) A responsible public entity may request proposals or
 276 invite bids from private entities for the development or
 277 operation of qualifying projects pursuant to the public notice

278 and procurement provisions of this section. A private entity may
 279 request the approval of the responsible public entity for a
 280 qualifying project.

281 (b) A request by a private entity for approval of a
 282 qualifying project shall be accompanied by the following
 283 material and information unless waived by the responsible public
 284 entity:

285 1. A topographic map with a scale of 1:2,000 or other
 286 appropriate scale indicating the location of the qualifying
 287 project.

288 2. A description of the qualifying project, including the
 289 conceptual design of such facility or facilities or a conceptual
 290 plan for the provision of services, and a schedule for the
 291 initiation of and completion of the qualifying project to
 292 include the proposed major responsibilities and timeline for
 293 activities to be performed by both the public and private
 294 entity.

295 3. A statement setting forth the method by which the
 296 private entity proposes to secure any necessary property
 297 interests required for the qualifying project.

298 4. Information relating to the current plans for
 299 development of facilities or technology infrastructure to be
 300 used by a public entity that is similar to the qualifying
 301 project being proposed by the private entity, if any, of each
 302 affected local jurisdiction.

303 5. A list of all permits and approvals required for the
 304 qualifying project from local, state, or federal agencies and a
 305 projected schedule for obtaining such permits and approvals.

306 6. A list of public water or wastewater management
 307 facilities, if any, that will be crossed by the qualifying
 308 project and a statement of the plans of the private entity to
 309 accommodate such crossings.

310 7. A statement setting forth the private entity's general
 311 plans for financing the qualifying project, including the
 312 sources of the private entity's funds and identification of any
 313 dedicated revenue source or proposed debt or equity investment
 314 on the behalf of the private entity.

315 8. The names and addresses of the persons who may be
 316 contacted for further information concerning the request.

317 9. User fees, lease payments, and other service payment
 318 over the term of an interim or comprehensive agreement and the
 319 methodology and circumstances for changes to such user fees,
 320 lease payments, and other service payments over time.

321 10. Additional material and information as the responsible
 322 public entity may reasonably request.

323 (c) Upon receipt of a proposal to develop or operate a
 324 qualifying project, the responsible public entity shall
 325 determine whether to accept the proposal for consideration. The
 326 responsible public entity may reject any proposal initiated by a
 327 private entity at any time. If the responsible public entity
 328 determines not to accept the proposal for consideration, the
 329 responsible public entity shall return the proposal to the
 330 private entity, including all fees and accompanying
 331 documentation.

332 (d) The responsible public entity may approve the
 333 development or operation of an education facility, a water or

334 wastewater management facility and related infrastructure,
 335 technology infrastructure or other public infrastructure, or a
 336 government facility needed by a public entity as a qualifying
 337 project, or the design or equipping of a qualifying project so
 338 developed or operated, if:

339 1. There is a public need for or benefit derived from a
 340 project of the type the private entity proposes as a qualifying
 341 project.

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

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

348 (e) In evaluating any request, the responsible public
 349 entity may rely upon internal staff reports prepared by
 350 personnel familiar with the operation of similar facilities or
 351 the advice of external advisors or consultants having relevant
 352 experience.

353 (f) The responsible public entity may charge a reasonable
 354 fee to cover the costs of processing, reviewing, and evaluating
 355 the request, including, but not limited to, reasonable attorney
 356 fees and fees for financial, technical, and other necessary
 357 advisors or consultants.

358 (g) Upon approval of a qualifying project, the responsible
 359 public entity shall establish a date for the commencement of
 360 activities related to the qualifying project. The responsible
 361 public entity may extend such date.

362 (h) Approval of a qualifying project by the responsible
 363 public entity is subject to entering into a comprehensive
 364 agreement with the private entity.

365 (6) INTERIM AGREEMENT.—Before or in connection with the
 366 negotiation of a comprehensive agreement, the responsible public
 367 entity may enter into an interim agreement with the private
 368 entity proposing the development or operation of the qualifying
 369 project. The interim agreement may:

370 (a) Permit the private entity to commence activities for
 371 which it may be compensated related to the proposed qualifying
 372 project, including, but not limited to, project planning and
 373 development, design and engineering, environmental analysis and
 374 mitigation, survey, and ascertaining the availability of
 375 financing for the proposed facility or facilities.

376 (b) Establish the process and timing of the negotiation of
 377 the comprehensive agreement.

378 (c) Contain any other provisions related to any aspect of
 379 the development or operation of a qualifying project that the
 380 responsible public entity and the private entity deem
 381 appropriate.

382 (7) COMPREHENSIVE AGREEMENT.—

383 (a) Before developing or operating the qualifying project,
 384 the private entity shall enter into a comprehensive agreement
 385 with the responsible public entity. The comprehensive agreement
 386 shall provide for:

387 1. Delivery of maintenance, performance, and payment bonds
 388 and letters of credit in connection with the development or
 389 operation of the qualifying project, in the forms and amounts

390 satisfactory to the responsible public entity for those
 391 components of the qualifying project that involve construction.

392 2. Review of plans and specifications for the qualifying
 393 project by the responsible public entity and approval by the
 394 responsible public entity if the plans and specifications
 395 conform to standards acceptable to the responsible public
 396 entity. This subparagraph does not require the private entity to
 397 complete the design of a qualifying project prior to the
 398 execution of a comprehensive agreement.

399 3. Inspection of the qualifying project by the responsible
 400 public entity to ensure that the operator's activities are
 401 acceptable to the responsible public entity in accordance with
 402 the provisions of the comprehensive agreement.

403 4. Maintenance of a policy or policies of public liability
 404 insurance, copies of which shall be filed with the responsible
 405 public entity accompanied by proofs of coverage, and self-
 406 insurance, each in the form and amount satisfactory to the
 407 responsible public entity and reasonably sufficient to insure
 408 coverage of tort liability to the public and employees and to
 409 enable the continued operation of the qualifying project.

410 5. Monitoring the practices of the private entity by the
 411 responsible public entity to ensure that the qualifying project
 412 is properly maintained.

413 6. Reimbursement to be paid to the responsible public
 414 entity for services provided by the responsible public entity.

415 7. Filing of appropriate financial statements on a
 416 periodic basis.

417 8. Policies and procedures governing the rights and
 418 responsibilities of the responsible public entity and the
 419 private entity in the event the comprehensive agreement is
 420 terminated or there is a material default by the private entity.
 421 Such policies and guidelines shall include conditions governing
 422 assumption of the duties and responsibilities of the private
 423 entity by the responsible public entity and the transfer or
 424 purchase of property or other interests of the private entity by
 425 the responsible public entity.

426 9. User fees, lease payments, or service payments as may
 427 be established by agreement of the parties. A copy of any
 428 service contract shall be filed with the responsible public
 429 entity. In negotiating user fees under this subsection, the
 430 parties shall establish payments or fees that are the same for
 431 persons using the facility under like conditions and that will
 432 not materially discourage use of the qualifying project. The
 433 execution of the comprehensive agreement or any amendment
 434 thereto shall constitute conclusive evidence that the user fees,
 435 lease payments, or service payments provided for comply with
 436 this section. User fees or lease payments established in the
 437 comprehensive agreement as a source of revenues may be in
 438 addition to, or in lieu of, service payments.

439 10. Duties of the private entity, including terms and
 440 conditions that the responsible public entity determines serve
 441 the public purpose of this section.

442 (b) The comprehensive agreement may include:

443 1. An agreement by the responsible public entity to make
 444 grants or loans to the private entity from amounts received from

445 the federal, state, or local government or any agency or
 446 instrumentality thereof.

447 2. Provisions under which the responsible public entity
 448 agrees to provide notice of default and cure rights for the
 449 benefit of the private entity and the persons specified therein
 450 as providing financing for the qualifying project, including
 451 terms and conditions to which the private entity and the
 452 responsible public entity mutually agree, including but limited
 453 to, provisions regarding unavoidable delays or a loan of public
 454 funds to the private entity to develop or operate one or more
 455 qualifying projects.

456 3. Provisions where the authority and duties of the
 457 private entity under this section shall cease, and the
 458 qualifying project is dedicated to the responsible public entity
 459 or, if the qualifying project was initially dedicated by an
 460 affected local jurisdiction, to such affected local jurisdiction
 461 for public use.

462 (c) Any changes in the terms of the comprehensive
 463 agreement, as agreed upon by the responsible public entity and
 464 the private entity, shall be added to the comprehensive
 465 agreement by written amendment.

466 (d) The comprehensive agreement may provide for the
 467 development or operation of phases or segments of the qualifying
 468 project.

469 (8) AFFECTED LOCAL JURISDICTIONS.—

470 (a) Any private entity requesting approval from, or
 471 submitting a proposal to, a responsible public entity shall
 472 notify each affected local jurisdiction by furnishing a copy of

473 its request or proposal to each affected local jurisdiction.

474 (b) Each affected local jurisdiction that is not a
 475 responsible public entity for the respective qualifying project
 476 shall, within 60 days after receiving such notice, submit any
 477 comments it may have in writing on the proposed qualifying
 478 project to the responsible public entity and indicate whether
 479 the facility is compatible with the local comprehensive plan,
 480 local infrastructure development plans, the capital improvements
 481 budget, or other government spending plan. Such comments shall
 482 be given consideration by the responsible public entity before
 483 entering a comprehensive agreement with a private entity.

484 (9) POWERS AND DUTIES OF THE PRIVATE ENTITY.-

485 (a) The private entity has all power allowed by law
 486 generally to a private entity having the same form of
 487 organization as the private entity and shall have the power to
 488 develop or operate the qualifying project and collect lease
 489 payments, impose user fees, or enter into service contracts in
 490 connection with use thereof.

491 (b) The private entity may own, lease, or acquire any
 492 other right to use or operate the qualifying project.

493 (c) Any financing of the qualifying project may be in such
 494 amounts and upon such terms and conditions as may be determined
 495 by the private entity. Without limiting the generality of the
 496 foregoing, the private entity may issue debt, equity, or other
 497 securities or obligations; enter into sale and leaseback
 498 transactions; and secure any financing with a pledge of,
 499 security interest in, or lien on any or all of its property,

500 including all of its property interests in the qualifying
 501 project.

502 (d) In operating the qualifying project, the private
 503 entity may make classifications according to reasonable
 504 categories for assessment of user fees and, with the consent of
 505 the responsible public entity, make and enforce reasonable rules
 506 to the same extent that the responsible public entity may make
 507 and enforce rules with respect to similar facilities.

508 (e) The private entity shall:

509 1. Develop or operate the qualifying project in a manner
 510 that is acceptable to the responsible public entity, all in
 511 accordance with the provisions of an interim or comprehensive
 512 agreement.

513 2. Maintain, or provide by contract for the maintenance or
 514 upgrade of the qualifying project, if required by an interim or
 515 comprehensive agreement.

516 3. Cooperate with the responsible public entity in making
 517 best efforts to establish any interconnection with the
 518 qualifying project requested by the responsible public entity.

519 4. Comply with the provisions of an interim or
 520 comprehensive agreement and any lease or service contract.

521 (f) A private entity of a qualifying project is not
 522 prohibited from providing additional services for the qualifying
 523 project to public or private entities other than the responsible
 524 public entity so long as the provision of additional service
 525 does not impair the private entity's ability to meet its
 526 commitments to the responsible public entity pursuant to an
 527 interim or comprehensive agreement.

528 | (10) MATERIAL DEFAULT; REMEDIES.-

529 | (a) In the event of a material default by the private
 530 | entity, the responsible public entity may elect to assume the
 531 | responsibilities and duties of the private entity of the
 532 | qualifying project, and in such case, it shall succeed to all of
 533 | the right, title, and interest in such qualifying project,
 534 | subject to any liens on revenues previously granted by the
 535 | private entity to any person providing financing thereof.

536 | (b) Any responsible public entity having the power of
 537 | condemnation under state law may exercise such power of
 538 | condemnation to acquire the qualifying project in the event of a
 539 | material default by the private entity. Any person who has
 540 | provided financing for the qualifying project, and the private
 541 | entity, to the extent of its capital investment, may participate
 542 | in the condemnation proceedings with the standing of a property
 543 | owner.

544 | (c) The responsible public entity may terminate, with
 545 | cause, an interim or comprehensive agreement and exercise any
 546 | other rights and remedies that may be available to it at law or
 547 | in equity.

548 | (d) The responsible public entity may make or cause to be
 549 | made any appropriate claims under the maintenance, performance,
 550 | or payment bonds, or lines of credit.

551 | (e) In the event the responsible public entity elects to
 552 | take over a qualifying project, the responsible public entity
 553 | may develop or operate the qualifying project, impose user fees,
 554 | impose and collect lease payments for the use thereof and comply
 555 | with any service contracts as if it were the private entity. Any

556 revenues that are subject to a lien shall be collected for the
 557 benefit of and paid to secured parties, as their interests may
 558 appear, to the extent necessary to satisfy the private entity's
 559 obligations to secured parties, including the maintenance of
 560 reserves. Such liens shall be correspondingly reduced and, when
 561 paid off, released. Before any payments to, or for the benefit
 562 of, secured parties, the responsible public entity may use
 563 revenues to pay current operation and maintenance costs of the
 564 qualifying project, including compensation to the responsible
 565 public entity for its services in developing and operating the
 566 qualifying project. The right to receive such payment, if any,
 567 shall be considered just compensation for the qualifying
 568 project. The full faith and credit of the responsible public
 569 entity shall not be pledged to secure any financing of the
 570 private entity by the election to take over the qualifying
 571 project. Assumption of the development or operation of the
 572 qualifying project shall not obligate the responsible public
 573 entity to pay any obligation of the private entity from sources
 574 other than revenues.

575 (11) FEDERAL, STATE, AND LOCAL FINANCING.-

576 (a) Any financing of a qualifying project may be in such
 577 amounts and upon such terms and conditions as determined by an
 578 interim or comprehensive agreement between the responsible
 579 public entity and the private entity. Without limiting the
 580 generality of the terms and conditions of the financing, the
 581 private entity and the responsible public entity may propose to
 582 use any and all funding resources that may be available and may,
 583 to the fullest extent permitted by applicable law, issue debt,

584 equity, or other securities or obligations; enter into leases;
 585 access any designed trust funds; borrow or accept grants from
 586 any state infrastructure bank; and secure any financing with a
 587 pledge of, security interest in, or lien on, any or all of its
 588 property, including all of its property interests in the
 589 qualifying facility.

590 (b) The responsible public entity may take any action to
 591 obtain federal, state, or local assistance for a qualifying
 592 project that serves the public purpose of this section and may
 593 enter into any contracts required to receive such assistance. If
 594 the responsible public entity is a state agency, any funds
 595 received from the state or federal government or any agency or
 596 instrumentality thereof shall be subject to appropriation by the
 597 Legislature. The responsible public entity may determine that it
 598 serves the public purpose of this section for all or any portion
 599 of the costs of a qualifying project to be paid, directly or
 600 indirectly, from the proceeds of a grant or loan made by the
 601 local, state, or federal government or any agency or
 602 instrumentality thereof.

603 (12) SOVEREIGN IMMUNITY.—This section does not waive the
 604 sovereign immunity of the state, any responsible public entity,
 605 any affected local jurisdiction, or any officer or employee
 606 thereof with respect to the participation in, or approval of all
 607 or any part of the qualifying project or its operation,
 608 including, but not limited to, interconnection of the qualifying
 609 project with any other infrastructure or project. Counties,
 610 cities, and towns in which a qualifying project is located

611 possess sovereign immunity with respect to the project's design,
 612 construction, and operation.

613 (13) CONSTRUCTION AND EFFECT.-This section shall be
 614 liberally construed to effectuate the purposes thereof. This
 615 section does not affect the authority of the responsible public
 616 entity to take action that would impact the debt capacity of the
 617 state.

618 (14) PUBLIC-PRIVATE PARTNERSHIP ADVISORY COMMISSION.-

619 (a) The Public-Private Partnership Advisory Commission is
 620 established to review the implementation of this section and to
 621 provide recommendations for any revisions necessary to further
 622 support public-private partnership opportunities in the state.

623 (b) The commission shall consist of 12 members, as
 624 follows:

625 1. Two members of the House of Representatives, appointed
 626 by the Speaker of the House of Representatives.

627 2. Two members of the Senate, appointed by the President
 628 of the Senate.

629 3. Eight members appointed by the Governor, as follows:

630 a. Four local government officials.

631 b. Two state agency representatives.

632 c. Two representatives of the private sector.

633
 634 All terms are for 4 years, except those members of the House of
 635 Representatives and Senate, who shall serve on the commission
 636 until the expiration of their terms of office or until their
 637 successors qualify.

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638 (c) The members of the commission shall elect a
 639 chairperson and a vice-chairperson. The commission shall hold
 640 public meetings at least quarterly or upon the call of the
 641 chairperson. A majority of the commission constitutes a quorum.

642 (d) Members of the commission are entitled to receive per
 643 diem and travel expenses as provided in s. 112.061.

644 (e) Administrative staff support shall be provided by the
 645 Executive Office of the Governor, as appropriate.

646 (f) A copy of the minutes from each commission meeting
 647 shall be provided to and maintained by the Governor, the
 648 President of Senate, and the Speaker of the House of
 649 Representatives.

650 (g) Beginning on December 13, 2013, and each year
 651 thereafter, the commission shall submit a report providing
 652 comments on the implementation of this section and
 653 recommendations for future revisions to the Governor, the
 654 President of the Senate, and the Speaker of the House of
 655 Representatives.

656 Section 2. This act shall take effect July 1, 2012.

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COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Government Operations
 2 Appropriations Subcommittee
 3 Representative Williams, T. offered the following:

Amendment (with title amendment)

6 Remove everything after the enacting clause and insert:

7 Section 1. Section 287.05712, Florida Statutes, is created
 8 to read:

9 287.05712 Public-private partnerships.-

10 (1) DEFINITIONS.—As used in this section, the term:

11 (a) "Affected local jurisdiction" means any county or
 12 municipality in which all or a portion of a qualifying project
 13 is located.

14 (b) "Appropriating body" means the body responsible for
 15 appropriating or authorizing funding to pay for a qualifying
 16 project.

17 (c) "Develop" or "development" means to plan, design,
 18 develop, finance, lease, acquire, install, construct, or expand.

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19 (d) "Fees" means fees or other charges imposed by the
20 private entity of a qualifying project for use of all or a
21 portion of such qualifying project pursuant to a comprehensive
22 agreement.

23 (e) "Lease payment" means any form of payment, including a
24 land lease, by a public entity to the private entity for the use
25 of a qualifying project.

26 (f) "Material default" means any default by the private
27 entity in the performance of its duties which jeopardizes
28 adequate service to the public from a qualifying project.

29 (g) "Operate" means to finance, maintain, improve, equip,
30 modify, repair, or operate.

31 (h) "Private entity" means any natural person,
32 corporation, general partnership, limited liability company,
33 limited partnership, joint venture, business trust, public
34 benefit corporation, nonprofit entity, or other private business
35 entity.

36 (i) "Proposal" means a detailed proposal accepted by a
37 responsible public entity beyond a conceptual level of review at
38 which issues such as fixing costs, payment schedules, financing,
39 deliverables, and project schedule are defined.

40 (j) "Qualifying project" means any:

41 1. Public-purpose facility or project, including, but not
42 limited to, a public school building and any functionally
43 related and subordinate facility, including any stadium or other
44 facility primarily used for school events.

45 2. Building or facility that meets a public purpose and is
46 developed or operated by or for any public entity.

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47 3. Improvements, including equipment, of buildings to be
48 principally used by a public entity.

49 4. Water, wastewater, or surface water management facility
50 and other related infrastructure.

51 (k) "Responsible public entity" means any county,
52 municipality, or other political subdivision of the state; any
53 public body politic and corporate; or any regional entity that
54 serves a public purpose and has authority to develop or operate
55 a qualifying project.

56 (l) "Revenues" means all revenues, income, earnings, user
57 fees, lease payments, or other service payments relating to the
58 development or operation of a qualifying project, including, but
59 not limited to, money received as grants or otherwise from the
60 Federal Government, from any public entity, or from any agency
61 or instrumentality of the foregoing in aid of a qualifying
62 project.

63 (m) "Service contract" means a contract entered into
64 between a public entity and the private entity.

65 (n) "Service payments" means payments to the private
66 entity of a qualifying project pursuant to a service contract.

67 (o) "Water or wastewater management facility" means a
68 project for the treatment, storage, disposal, or distribution of
69 water or wastewater.

70 (2) LEGISLATIVE FINDINGS AND INTENT.—The Legislature finds
71 that there is a public need for the construction or upgrade of
72 facilities that are used predominantly for public purposes and
73 that it is in the public's interest to provide for the
74 construction or upgrade of such facilities.

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75 (a) The Legislature also finds that:

76 1. There is a public need for timely and cost-effective
77 acquisition, design, construction, improvement, renovation,
78 expansion, equipping, maintenance, operation, implementation, or
79 installation of public projects, including educational
80 facilities, water or wastewater management facilities and
81 infrastructure, technology infrastructure, and any other public
82 infrastructure and government facilities within the state which
83 serve a public need and purpose, and that such public need may
84 not be wholly satisfied by existing procurement methods.

85 2. There are inadequate resources to develop new
86 educational facilities, water or wastewater management
87 facilities and infrastructure, technology infrastructure, and
88 other public infrastructure and government facilities for the
89 benefit of residents of this state, and that it has been
90 demonstrated that public-private partnerships can meet these
91 needs by improving the schedule for delivery, lowering the cost,
92 and providing other benefits to the public.

93 3. There are state and federal tax incentives that promote
94 partnerships between public and private entities to develop and
95 operate qualifying projects.

96 4. A procurement under this section serves the public
97 purpose of this section if such action facilitates the timely
98 development or operation of qualifying projects.

99 (b) The Legislature declares that it is the intent of this
100 section to encourage investment in the state by private
101 entities, to facilitate various bond financing mechanisms,
102 private capital, and other funding sources for the development

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103 and operation of qualifying projects, including expansion and
104 acceleration of such financing to meet the public need, and to
105 provide the greatest possible flexibility to public and private
106 entities contracting for the provision of public services.

107 (3) ADOPTION OF GUIDELINES.-

108 (a) Before requesting or considering a proposal for a
109 qualifying project, a responsible public entity shall adopt and
110 make publicly available guidelines that enable the public entity
111 to comply with this section. Such guidelines must be reasonable,
112 encourage competition, and guide the selection of projects under
113 the purview of the public entity.

114 (b) The guidelines must include:

115 1. Opportunities for competition through public notice and
116 the availability of representatives of the responsible public
117 entity to meet with private entities considering a proposal.

118 2. Reasonable criteria for choosing among competing
119 proposals.

120 3. Suggested timelines for selecting proposals and
121 negotiating an interim or comprehensive agreement.

122 4. Authorization for accelerated selection and review and
123 documentation timelines for proposals involving a qualifying
124 project that the responsible public entity deems a priority.

125 5. Procedures for financial review and analysis which, at
126 a minimum, include a cost-benefit analysis, an assessment of
127 opportunity cost, and consideration of the results of all
128 studies and analyses related to the proposed qualifying project.
129 The procedures must also include requirements for disclosing

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130 such analysis to the appropriating body for review before the
131 execution of an interim or comprehensive agreement.

132 6. Consideration of the nonfinancial benefits of a
133 proposed qualifying project.

134 7. A mechanism for the appropriating body to review a
135 proposed interim or comprehensive agreement before execution.

136 8. Establishment of criteria for the creation and
137 responsibilities of a public-private partnership oversight
138 committee that includes members representing the responsible
139 public entity and the appropriating body. Such criteria must
140 include the scope, costs, and duration of the qualifying
141 project, as well as whether the project involves or affects
142 multiple public entities. If formed, the oversight committee
143 shall be an advisory committee that reviews the terms of a
144 proposed interim or comprehensive agreement.

145 9. Analysis of the adequacy of the information released
146 when seeking competing proposals and providing for the
147 enhancement of that information, if deemed necessary, to
148 encourage competition.

149 10. Establishment of criteria, key decision points, and
150 approvals required to ensure that the responsible public entity
151 considers the extent of competition before selecting proposals
152 and negotiating an interim or comprehensive agreement.

153 11. The publishing and posting of public notice of a
154 private entity's request for approval of a qualifying project,
155 including:

156 a. Specific information and documentation to be released
157 regarding the nature, timing, and scope of the project.

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158 b. A reasonable time period, as determined by the
159 responsible public entity, of at least 45 days, which encourages
160 competition and public-private partnerships in accordance with
161 the goals of this section, during which time the responsible
162 public entity is to receive competing proposals.

163 c. A requirement for advertising the public notice and
164 posting the notice on the Internet.

165 12. A requirement that the responsible public entity
166 engage the services of qualified professionals, which may
167 include an architect, professional engineer, or certified public
168 accountant, not otherwise employed by the responsible public
169 entity, to provide an independent analysis regarding the
170 specifics, advantages, disadvantages, and long-term and short-
171 term costs of a request by a private entity for approval of a
172 qualifying project, unless the governing body of the public
173 entity determines that such analysis should be performed by
174 employees of the public entity.

175 (4) PROCUREMENT PROCEDURES.—The responsible public entity
176 may receive or solicit proposals with the approval of the
177 appropriating body as evidenced by approval of the project in
178 the public entity's work program, enter into agreements with
179 private entities, or consortia thereof, for the building,
180 upgrade, operation, ownership, or financing of facilities.

181 (a) A responsible public entity may not consider any
182 request by a private entity for approval of a qualifying project
183 until the responsible public entity has adopted, or incorporated
184 and made publicly available, in accordance with subsection (3),

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185 guidelines that enable the responsible public entity to comply
186 with this section.

187 (b) By rule, ordinance, or guideline as applicable, the
188 responsible public entity shall establish an application fee for
189 the submission of unsolicited proposals under this section. The
190 fee must be sufficient to pay the costs of evaluating the
191 proposal. The responsible public entity may engage the services
192 of private consultants to assist in the evaluation.

193 (c) The responsible public entity may request proposals
194 from private entities for public-private projects or, if the
195 public entity receives an unsolicited proposal, the public
196 entity shall publish a notice in the Florida Administrative
197 Weekly and a newspaper of general circulation at least once a
198 week for 2 weeks stating that the public entity has received the
199 proposal and will accept other proposals for the same project
200 for 60 days after the initial date of publication. A copy of the
201 notice must be mailed to each local government in the affected
202 area.

203 (d) A responsible public entity that is a school board or
204 a county or municipality may enter into an interim or
205 comprehensive agreement only with the approval of the local
206 governing body.

207 (e) Before approval, the responsible public entity must
208 determine that the proposed project:

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

210 2. Is for a facility that is owned by the responsible
211 public entity or for a facility for which ownership will be
212 conveyed to the responsible public entity;

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213 3. Has adequate safeguards in place to ensure that
214 additional costs or service disruptions would not be imposed on
215 the public and residents of the state in the event of default or
216 cancellation of the agreement by the public entity;

217 4. Has adequate safeguards in place to ensure that the
218 responsible public entity or the private entity has the
219 opportunity to add capacity to the proposed project and other
220 facilities serving similar predominantly public purposes; and

221 5. Would be owned by the responsible public entity upon
222 completion or termination of the agreement and upon payment of
223 all amounts financed.

224 (f) Technical studies and independent analyses must comply
225 with the following:

226 1. Any interim or comprehensive agreement must include a
227 reasonable finance plan, consistent with subsection (11), which
228 identifies the project cost, revenues by source, financing,
229 major assumptions, internal rate of return on private
230 investments, and whether any government funds are assumed to
231 deliver a cost-feasible project, and a total cash flow analysis
232 beginning with implementation of the project and extending for
233 the term of the agreement.

234 2. Any comprehensive agreement must be consistent with an
235 investment-grade technical study prepared by a nationally
236 recognized expert who is accepted by the national bond rating
237 agencies. In evaluating the technical study, the responsible
238 public entity may rely upon internal staff reports prepared by
239 personnel familiar with the operation of similar facilities or

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240 the advice of external advisors or consultants having relevant
241 experience.

242 (5) PROJECT APPROVAL REQUIREMENTS.—A request by a private
243 entity for approval of a qualifying project must be accompanied
244 by the following material and information, unless waived by the
245 responsible public entity:

246 (a) A topographic map with a scale of 1:2,000 or other
247 appropriate scale indicating the location of the qualifying
248 project.

249 (b) A description of the qualifying project, including the
250 conceptual design of such facilities or a conceptual plan for
251 the provision of services, and a schedule for the initiation of
252 and completion of the qualifying project which includes the
253 proposed major responsibilities and a timeline for activities to
254 be performed by both the public and private entity.

255 (c) A statement setting forth the method by which the
256 private entity proposes to secure any necessary property
257 interests required for the qualifying project.

258 (d) Information relating to current plans for the
259 development of facilities or technology infrastructure to be
260 used by a public entity which is similar to the qualifying
261 project being proposed by the private entity, if any, of each
262 affected local jurisdiction.

263 (e) A list of all permits and approvals required for the
264 qualifying project from local, state, or federal agencies and a
265 projected schedule for obtaining such permits and approvals.

266 (f) A list of public water or wastewater management
267 facilities, if any, which will be crossed by the qualifying

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268 project and a statement of the plans of the private entity to
269 accommodate such crossings.

270 (g) A statement setting forth the private entity's general
271 plans for financing the qualifying project, including the
272 sources of the private entity's funds and identification of any
273 dedicated revenue source or proposed debt or equity investment
274 on the behalf of the private entity.

275 (h) The names and addresses of persons who may be
276 contacted for further information concerning the request.

277 (i) User fees, lease payments, and other service payments
278 over the term of an interim or comprehensive agreement, and the
279 methodology and circumstances for changes to such user fees,
280 lease payments, and other service payments over time.

281 (j) Any additional material and information that the
282 responsible public entity may reasonably request.

283 (6) PROJECT QUALIFICATION AND PROCESS.-

284 (a) Public-private partnerships shall be qualified by the
285 responsible public entity as part of the procurement process
286 outlined in the procurement documents if such process ensures
287 that the private entity meets at least the minimum standards
288 contained in the responsible public entity's guidelines for
289 qualifying professional architectural, engineering, and
290 contracting services before submitting a proposal under the
291 procurement.

292 (b) The responsible public entity must ensure that
293 procurement documents include provisions for the private
294 entity's performance and payment of subcontractors, including,
295 but not limited to, surety bonds, letters of credit, parent

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296 company guarantees, and lender and equity partner guarantees.
297 For those components of the qualifying project which involve
298 construction, performance and payment bonds are required and are
299 subject to the recordation, notice, suit limitation, and other
300 requirements of s. 255.05. The responsible public entity shall
301 balance the structure of the security package for the public-
302 private partnership which ensures performance and payment of
303 subcontractors with the cost of the security to ensure the most
304 efficient pricing. The procurement documents must contain
305 contract provisions addressing termination, default, and exit
306 transition obligations of the private entity.

307 (c) After the public notification period has expired, the
308 responsible public entity shall rank the proposals in order of
309 preference. In ranking the proposals, the responsible public
310 entity may consider factors that include, but need not be
311 limited to, professional qualifications, general business terms,
312 innovative engineering or cost-reduction terms, and finance
313 plans. If the public entity is not satisfied with the results of
314 the negotiations, the public entity may terminate negotiations
315 with the proposer. If these negotiations are unsuccessful, the
316 responsible public entity may go to the second-ranked and lower-
317 ranked firms, in order, using this same procedure. If only one
318 proposal is received, the responsible public entity may
319 negotiate in good faith and, if the public entity is not
320 satisfied with the results of the negotiations, the public
321 entity may terminate negotiations with the proposer.
322 Notwithstanding this subsection, the responsible public entity

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323 may reject all proposals at any point in the process up to
324 execution of a contract with the proposer.

325 (d) The responsible public entity shall perform an
326 independent analysis, or other analysis in accordance with
327 paragraph (4)(f), of the proposed public-private partnership
328 which demonstrates the cost-effectiveness and overall public
329 benefit at the following times:

330 1. Before the procurement process; and

331 2. Before awarding the contract.

332 (e) The responsible public entity may approve the
333 development or operation of an educational facility, a water or
334 wastewater management facility and related infrastructure,
335 technology infrastructure or other public infrastructure, or a
336 governmental facility needed by the public entity as a
337 qualifying project, or the design or equipping of a qualifying
338 project so developed or operated, if:

339 1. There is a public need for or benefit derived from a
340 project of the type the private entity proposes as a qualifying
341 project.

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

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

348 (f) The responsible public entity may charge a reasonable
349 fee to cover the costs of processing, reviewing, and evaluating
350 the request, including, but not limited to, reasonable attorney

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351 fees and fees for financial, technical, and other necessary
352 advisors or consultants.

353 (g) Upon approval of a qualifying project, the responsible
354 public entity shall establish a date for the commencement of
355 activities related to the qualifying project. The responsible
356 public entity may extend such date.

357 (h) Approval of a qualifying project by the responsible
358 public entity is subject to entering into a comprehensive
359 agreement with the private entity.

360 (7) NOTICE TO AFFECTED LOCAL JURISDICTIONS.-

361 (a) Any private entity requesting approval from, or
362 submitting a proposal to, a responsible public entity must
363 notify each affected local jurisdiction by furnishing a copy of
364 its request or proposal to each affected local jurisdiction.

365 (b) Each affected local jurisdiction that is not a
366 responsible public entity for the respective qualifying project
367 shall, within 60 days after receiving such notice, submit any
368 comments it may have in writing to the responsible public entity
369 and indicate whether the facility is compatible with the local
370 comprehensive plan, the local infrastructure development plans,
371 the capital improvements budget, or other governmental spending
372 plan. Such comments shall be given consideration by the
373 responsible public entity before entering a comprehensive
374 agreement with a private entity.

375 (8) INTERIM AGREEMENT.-Before, or in connection with, the
376 negotiation of a comprehensive agreement, the responsible public
377 entity may enter into an interim agreement with the private
378 entity proposing the development or operation of the qualifying

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379 project. An interim agreement does not obligate the responsible
380 public entity to enter into a comprehensive agreement. An
381 interim agreement must be limited to provisions that:

382 (a) Authorize the private entity to commence activities
383 for which it may be compensated related to the proposed
384 qualifying project, including, but not limited to, project
385 planning and development, design and engineering, environmental
386 analysis and mitigation, surveys, or other activities concerning
387 any part of the proposed qualifying project, and ascertaining
388 the availability of financing for the proposed facility or
389 facilities.

390 (b) Establish the process and timing of the negotiation of
391 the comprehensive agreement.

392 (c) Contain any other provisions related to any aspect of
393 the development or operation of a qualifying project which the
394 responsible public entity and the private entity deem
395 appropriate.

396 (9) COMPREHENSIVE AGREEMENT.-

397 (a) Before developing or operating the qualifying project,
398 the private entity shall enter into a comprehensive agreement
399 with the responsible public entity. The comprehensive agreement
400 shall provide for:

401 1. Delivery of maintenance, performance, and payment bonds
402 and letters of credit in connection with the development or
403 operation of the qualifying project in the forms and amounts
404 satisfactory to the responsible public entity. For those
405 components of the qualifying project which involve construction,
406 the form and amount of the bonds must comply with s. 255.05.

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COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 337 (2012)

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407 2. Review of plans and specifications for the qualifying
408 project by the responsible public entity and approval by the
409 responsible public entity if the plans and specifications
410 conform to standards acceptable to the responsible public
411 entity. This subparagraph does not require the private entity to
412 complete the design of a qualifying project before the execution
413 of a comprehensive agreement.

414 3. Inspection of the qualifying project by the responsible
415 public entity to ensure that the operator's activities are
416 acceptable to the public entity in accordance with the
417 comprehensive agreement.

418 4. Maintenance of a policy or policies of public liability
419 insurance, copies of which shall be filed with the responsible
420 public entity accompanied by proofs of coverage, or self-
421 insurance, each in the form and amount satisfactory to the
422 responsible public entity and reasonably sufficient to ensure
423 coverage of tort liability to the public and employees and to
424 enable the continued operation of the qualifying project.

425 5. Monitoring the practices of the private entity by the
426 responsible public entity to ensure that the qualifying project
427 is properly maintained.

428 6. Reimbursement to be paid to the responsible public
429 entity for services provided by the responsible public entity.

430 7. Filing of appropriate financial statements on a
431 periodic basis.

432 8. Procedures governing the rights and responsibilities of
433 the responsible public entity and the private entity in the
434 event the comprehensive agreement is terminated or there is a

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435 material default by the private entity. Such procedures must
436 include conditions governing assumption of the duties and
437 responsibilities of the private entity by the responsible public
438 entity and the transfer or purchase of property or other
439 interests of the private entity by the responsible public
440 entity.

441 9. Fees, lease payments, or service payments as may be
442 established by agreement of the parties. A copy of any service
443 contract shall be filed with the responsible public entity. In
444 negotiating user fees, the parties shall establish fees that are
445 the same for persons using the facility under like conditions
446 and that will not materially discourage use of the qualifying
447 project. The execution of the comprehensive agreement or any
448 amendment thereto constitutes conclusive evidence that the fees,
449 lease payments, or service payments provided for comply with
450 this section. Fees or lease payments established in the
451 comprehensive agreement as a source of revenues may be in
452 addition to, or in lieu of, service payments.

453 10. Duties of the private entity, including terms and
454 conditions that the responsible public entity determine serve
455 the public purpose of this section.

456 (b) The comprehensive agreement may include:

457 1. An agreement by the responsible public entity to make
458 grants or loans to the private entity from amounts received from
459 the federal, state, or local government or any agency or
460 instrumentality thereof.

461 2. Provisions under which each entity agrees to provide
462 notice of default and cure rights for the benefit of the other

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463 entity, including, but not limited to, provisions regarding
464 unavoidable delays.

465 3. Provisions whereby the authority and duties of the
466 private entity under this section will cease and the qualifying
467 project be dedicated to the responsible public entity or, if the
468 qualifying project was initially dedicated by an affected local
469 jurisdiction, to such affected local jurisdiction for public
470 use.

471 (10) FEES.-

472 (a) Agreements entered into pursuant to this section may
473 authorize the private entity to impose fees for the use of the
474 facility. The following provisions apply to such agreements:

475 1. The public-private partnership agreement must ensure
476 that the facility is properly operated, maintained, and renewed
477 in accordance with the responsible public entity's standards.

478 2. The responsible public entity may develop new
479 facilities or increase capacity in existing facilities through
480 public-private partnerships.

481 3. The responsible public entity may lease existing fee-
482 for-use facilities through public-private partnerships.

483 4. Any revenues must be regulated by the responsible
484 public entity pursuant to guidelines or rules established
485 pursuant to subsection (3). The regulations governing the future
486 increase of fees must be included in the public-private
487 partnership agreement.

488 (b) The responsible public entity shall include provisions
489 in the public-private partnership agreement which ensure that a
490 negotiated portion of revenues from fee-generating projects are

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491 returned to the public entity over the life of the agreement. In
492 the case of a lease of an existing facility, the responsible
493 public entity shall receive a portion of funds upon closing on
494 the agreements and also a portion of excess revenues over the
495 life of the public-private partnership.

496 (11) FINANCING.—

497 (a) A private entity may enter into private-source
498 financing agreements between financing sources and the private
499 entity. All financing agreements and any liens on the property
500 or facility must be paid in full at the applicable closing that
501 transfers ownership of a facility to a responsible public
502 entity.

503 (b) The responsible public entity may lend funds from its
504 trust fund to private entities that construct projects
505 containing facilities that are approved under this section. To
506 be eligible, a private entity must comply with s. 215.97 and
507 must provide an indication from a nationally recognized rating
508 agency that the senior bonds for the project will be investment
509 grade, or must provide credit support, such as a letter of
510 credit or other means acceptable to the responsible public
511 entity, to ensure that the loans will be fully repaid.

512 (c) The responsible public entity may use innovative
513 finance techniques associated with a public-private partnership
514 under this section, including, but not limited to, federal loans
515 as provided in Titles 23 and 49 C.F.R., commercial bank loans,
516 and hedges against inflation from commercial banks or other
517 private sources. A responsible public entity may use the model
518 financing agreement as provided in s. 489.145(6)

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519 for its financing of a facility owned by a responsible public
520 entity. A financing agreement may not require the responsible
521 public entity to indemnify the financing source, subject the
522 responsible public entity's facility to liens in violation of s.
523 11.066(5), or secure financing by a responsible public entity
524 with a pledge of security interest, and any such provisions are
525 void.

526 (12) POWERS AND DUTIES OF THE PRIVATE ENTITY.—

527 (a) The private entity shall:

528 1. Develop or operate the qualifying project in a manner
529 that is acceptable to the responsible public entity in
530 accordance with the provisions of an interim or comprehensive
531 agreement.

532 2. Maintain, or provide by contract for the maintenance or
533 upgrade of, the qualifying project if required by an interim or
534 comprehensive agreement.

535 3. Cooperate with the responsible public entity in making
536 best efforts to establish any interconnection with the
537 qualifying project requested by the responsible public entity.

538 4. Comply with an interim or comprehensive agreement and
539 any lease or service contract.

540 (b) Each private facility constructed pursuant to this
541 section must comply with all requirements of federal, state, and
542 local laws; state, regional, and local comprehensive plans;
543 responsible public entity rules, procedures, and standards for
544 facilities; and any other conditions that the responsible public
545 entity determine to be in the public's best interest.

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546 (c) The responsible public entity may exercise any power
547 possessed by it, including eminent domain, to facilitate the
548 development and construction of projects pursuant to this
549 section. The responsible public entity may provide services to
550 the private entity. Agreements for maintenance and other
551 services entered into pursuant to this section must provide for
552 full reimbursement for services rendered for projects.

553 (d) A private entity of a qualifying project may provide
554 additional services for the qualifying project to public or
555 private entities other than the responsible public entity if the
556 provision of additional service does not impair the private
557 entity's ability to meet its commitments to the public entity
558 pursuant to an interim or comprehensive agreement.

559 (13) EXPIRATION OR TERMINATION OF AGREEMENTS.—Upon
560 expiration or termination of an interim or comprehensive
561 agreement, the responsible public entity may use revenues to pay
562 current operation and maintenance costs of the qualifying
563 project, as well as compensation to the responsible public
564 entity for its services in developing and operating the
565 qualifying project. Except as provided otherwise in the interim
566 or comprehensive agreement, the right to receive such payment,
567 if any, is considered just compensation for the qualifying
568 project in the event termination is due to the default of the
569 private entity; however, this right does not affect the right of
570 the responsible public entity to terminate, with cause, an
571 interim or comprehensive agreement and to exercise any other
572 rights and remedies that may be available to it at law or in
573 equity. The full faith and credit of the responsible public

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574 | entity may not be pledged to secure any financing of the private
575 | entity by the election to take over the qualifying project.
576 | Assumption of the development or operation of the qualifying
577 | project does not obligate the responsible public entity to pay
578 | any obligation of the private entity from sources other than
579 | revenues.

580 | (14) SOVEREIGN IMMUNITY.—This section does not waive the
581 | sovereign immunity of the state, any responsible public entity,
582 | any affected local jurisdiction, or any officer or employee
583 | thereof with respect to participation in, or approval of, all or
584 | any part of the qualifying project or its operation, including,
585 | but not limited to, interconnection of the qualifying project
586 | with any other infrastructure or project. Counties and
587 | municipalities in which a qualifying project is located possess
588 | sovereign immunity with respect to the project's design,
589 | construction, and operation.

590 | (15) CONSTRUCTION.—This section shall be liberally
591 | construed to effectuate the purposes thereof.

592 | (a) This section does not affect the authority of the
593 | responsible public entity to take action that would impact the
594 | debt capacity of the state.

595 | (b) This section does not limit the state or its agencies
596 | in the acquisition, design, or construction of public projects
597 | pursuant to other statutory authority.

598 | (c) Except as otherwise provided in this section, this
599 | section does not amend existing laws by granting additional
600 | powers to, or further restricting, local governmental entities
601 | from regulating and entering into cooperative arrangements with

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602 the private sector for the planning, construction, and operation
603 of facilities.

604 Section 2. This act shall take effect July 1, 2012.

605

606

607 -----

608 **T I T L E A M E N D M E N T**

609 Remove the entire title and insert:

610 A bill to be entitled

611 An act relating to public-private partnerships;
612 creating s. 287.05712, F.S.; providing definitions;
613 providing legislative findings and intent relating to
614 the construction or upgrade of facilities by private
615 entities which are used predominately for a public
616 purpose; requiring public entities to develop and
617 adopt guidelines governing procedures and criteria for
618 the selection of projects and public-private
619 agreements; providing procurement procedures;
620 providing project-approval requirements; providing
621 project qualifications and process; providing for
622 notice to affected local jurisdictions; providing for
623 interim and comprehensive agreements between the
624 public and private entities; providing for use fees;
625 providing for private financing requirements;
626 providing powers and duties for private entities;
627 providing for expiration or termination of agreements;
628 providing for the applicability of sovereign immunity
629 for public entities with respect to qualified

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 337 (2012)

Amendment No. 1

630 projects; providing for construction of the act;
631 providing an effective date.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 337 (2012)

Amendment No. 1a

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Government Operations
2 Appropriations Subcommittee
3 Representative Williams, T. offered the following:

4

5 **Amendment to Amendment (798823) by Representative Williams,**
6 **T.**

7 Remove lines 592-594 of the amendment

8

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 337 (2012)

Amendment No. 1b

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Government Operations
2 Appropriations Subcommittee
3 Representative Patronis offered the following:

4

5 **Amendment to Amendment (798823) by Representative Williams,**

6 **T.**

7 Remove line 167 of the amendment and insert:

8 include a Florida registered professional or certified public

9