

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1291

Public-Private Partnership Infrastructure Projects

**SPONSOR(S):** Van Zant and others

**TIED BILLS:**

**IDEN./SIM. BILLS:** SB 2060

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Government Accountability Act Council	17 Y, 4 N, As CS	Mitchell	Hansen
2)	Governmental Affairs Policy Committee			
3)	Economic Development & Community Affairs Policy Council			
4)	Government Operations Appropriations Committee			
5)				

### SUMMARY ANALYSIS

HB 1291 would authorize the Department of Management Services (DMS), other state agencies and local governments to receive or solicit proposals to enter into public works infrastructure projects with a private entity or a consortium of private entities. The purpose would be to build, operate, or finance public works infrastructure projects. It would establish the criteria for the selection of projects and for public-private partnership agreements to build or operate projects. DMS would be required to compile a summary of new projects each year.

The bill would require all reasonable state costs which are not part of the governmental unit's work plan, to be borne by the private entity. Private entities would be authorized to assess public user fees for the use of the infrastructure project through financing and revenue criteria established in the infrastructure project agreement. DMS and participating governmental units would be authorized to use innovative financing techniques for infrastructure projects.

Each infrastructure facility would require compliance with all applicable federal, state, and local laws, construction standards, and performance standards. The bill would authorize participating governmental units to exercise any lawful powers to aid in development and construction. Specific procedures for requesting and considering proposals are provided. There would be a specified term limitation requirement for infrastructure project agreements. However, the head of a participating governmental unit would be able to authorize an increase in the term of a project by 25 years.

Finally, the bill will prohibit private entities participating in public-private partnerships from engaging in or benefiting from, activities with terrorist states, as designated by the U.S. Department of State.

The annual fiscal impact of this proposal is unknown due to the newness with the proposed process and the current trends and conditions of the national and state economies.

The bill's effective date is July 1, 2009.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Current Situation

##### **Department of Management Services**

DMS provides project management services under the authority of s. 255.31, F.S. This authority includes the oversight of fixed capital outlay (FCO) funds, contracts administration and construction project management oversight. Construction project management oversight involves managing the delivery process as the public representative, through private engineers, architects and contractors. It ensures that the public's interest over the expenditure of appropriated funds and construction standards are executed as designed.

DMS performs these activities through a data system known as the Facilities Accountability and Communication Tool (FACT). This system was specifically designed to comply with Florida's laws when delivering public construction projects, including the tracking of project funds.

DMS specializes in vertical construction and, in the past, has managed various types of vertical construction projects from K-12 schools to complex rocket launching facilities for local governments. However, in 2001, HB 1711<sup>1</sup> repealed in s. 255.31, F.S., the authority for DMS to provide local government entities with the option of contracting with the state's project-related services.

##### Effect of Proposed Changes

HB 1291 intends to address a public need for improving the economy, environment and social infrastructure of the state through construction or expansion of public works projects. It would specifically involve DMS and include the state political subdivisions as well as private entities. Intended projects will include telecommunications, cable television, electricity, transportation of gas, oil or crude oil products, solid waste, wastewater and specific storm water projects. Implementation of the bill would encourage public-private partnerships in addressing infrastructure projects through up to 50-year limited agreements with the potential for longer time periods. This includes the establishment of "user fees" paid by the public to a private entity for use of the resulting project.

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<sup>1</sup> Chapter 2001-283, Laws of Fla.

DMS would play a significant role in the implementation of this proposed legislation that would require the agency to:

- Establish a cost recovery application fee for the submission of unsolicited proposals, which could come from governmental or private entities.
- Utilize private consultants to assist in evaluating proposals.
- Follow specific guidelines before approval of a proposed infrastructure project
- Ensure reasonable costs to the state and that all non-governmental costs are borne by the private entity.
- Implement projects under current laws and department rules, policies, procedures and standards.
- Include in agreements full reimbursement for services from private entities.
- Operate using generally accepted business practices during the procurement process.
- Request proposals from private entities for infrastructure projects.
- Publish unsolicited proposals in the Florida Administrative Weekly and newspapers.
- Except other proposals for the same project within a standard time frame.
- Qualify private entities through specific documents they provide.
- Ensure that the bonding security of projects is in order.
- Rank proposals in order of preference based on specific elements.
- Terminate negotiations when not satisfied with results and negotiate with consecutive ranked proposals.
- Provide an independent analysis of the proposals before contracting.
- Use innovative finance techniques including federal or commercial bank loans.
- Utilize an option of extended term agreements of annual payments based on specific conditions and subject to annual appropriations by the Legislature.
- Compile an annual summary of new projects with specific requirements included.

## **Proposed Process**

Governmental units in the state would be allowed to develop new infrastructure projects or increase capacity of existing projects through public-private partnerships. User fee revenue from these projects would be regulated by the participating government unit including any future increases. All agreements would require provisions for a portion of the generated revenue to go directly to the participating government. Private entities would be required to provide DMS with a financial plan and an investment grade usage/revenue study prepared under specific guidelines. All projects would require compliance with existing laws, comprehensive plans, DMS rules, policies and procedures, as well as any other government condition determined to be in the public interest. Government entities would be allowed to exercise existing powers for development of infrastructure projects including eminent domain.

## **Implementation by DMS**

DMS has the knowledge, skills and experience to implement infrastructure projects and ensure that public funds are spent as intended within a contract. This includes professionally licensed engineers, architects and contractors for technical reviews of proposed projects. Any increase in the workload will require an equivalent increase in staff to perform the duties. DMS administration and projects management oversight activities have experienced downsizing over the years including professional staff reductions from 58 positions to 11 positions. The Architects Incidental Trust Fund is used to fund construction-related activities. The authorized positions performing these activities are supported through a fee charged for the services performed. The current technology platform utilized for project management oversight and tracking would require rework or funding in order to support this additional workload. The technology upgrade would allow for scalability, transparency, and speed in processing, reporting and tracking functions. The estimated need for this technology enhancement is a one-time cost of \$79,320.

## Miscellaneous

The bill will prohibit private entities participating in public-private partnerships from engaging in or benefiting from, activities with terrorist states, as designated by the U.S. Department of State.

### B. SECTION DIRECTORY:

**Section 1.** Creates s. 287.09475, F.S.

**Section 2.** Provides an effective date of July 1, 2009.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

DMS would be required to establish an application fee for the submission of unsolicited proposals. The fee would be limited to the cost of evaluating a proposal.

DMS and a participating governmental unit are to ensure that all reasonable state costs related to infrastructure projects, which are not part of a participating governmental unit's work plan, are borne by the private entity.

DMS and a participating governmental unit would also be required to ensure that all reasonable costs to the state and substantially affected local governments and utilities related to the infrastructure project are borne by the private entity for infrastructure projects that are owned by private entities. A public-private partnership infrastructure project agreement would be required to include provisions that ensure a portion of revenue from projects that generate revenue is returned to the participating governmental unit over the term of the agreement.

If an infrastructure project agreement includes the lease of an existing public works facility, the participating governmental unit must receive a portion of the funds upon closing the agreement, with the remainder paid from excess revenue that accrues during the term of the agreement.

#### 2. Expenditures:

The annual fiscal impact of this proposal is unknown due to the newness with the proposed process and the current trends and conditions of the national and state economies. At a minimum, DMS has identified technology enhancements, mentioned above, in the amount of \$79,320.

Private entities are to provide financing plans that identify if any government funds are necessary in order to deliver a costs-feasible project. DMS will experience an additional workload in two areas that will require funds to implement. This includes the activities and tasks associated with DMS requirements that are identified in "Effect of Proposed Changes" of this analysis. The bill does not provide any rulemaking authority for DMS to manage the process or for determining expenditures it will incur within its oversight activities and tasks.

This includes a process for all reasonable state costs not part of a work plan to be borne by the private entity. Any project management activities would be subject to normal operational expenditures and recovered through standard fees for the services under client agency agreements.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

2. Expenditures:

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

D. FISCAL COMMENTS:

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

2. Other:

B. RULE-MAKING AUTHORITY:

C. DRAFTING ISSUES OR OTHER COMMENTS:

According to DMS analysis, the implementation of a new initiative in public-private partnerships (PPP), procured through the "Invitation to Negotiate" or "Request for Proposal" public procurement process and memorialized in complex multi-party agreements may raise the prospects of litigation in the form of:

- (1) administrative bid protests by unsuccessful respondents to high value procurements, and
- (2) contract disputes between the parties to the PPP agreements.

For item (1), the legislation should clearly and precisely lay out the governing procurement process to ensure that it works best in the PPP infrastructure setting.

For item (2), the primary legal issue is determining who will bear the risk if a project falls apart (i.e., termination, non appropriation, deficiency of user-fee revenues, etc.). Assignment of risk is key. Those details should be carefully crafted into each PPP agreement so that the state's interests are fully protected; so that the private entity's share of the risk matches (or exceeds) its share of the financial responsibility and benefit; and so that the PPP agreement is clear and provides certainty among the parties in order to minimize the chance of disputes and litigation.

#### **IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

The Council Substitute differs from the bill, as originally filed. At its March 26, 2009, meeting, the Government Accountability Act Council adopted two amendments to HB 1291, which do the following:

- require public private partnership procurement documents to include the surety bond provisions of s. 255.05, F.S.; and
- prohibit private entities participating in public-private partnerships from engaging in or benefiting from, activities with terrorist states, as designated by the U.S. Department of State.

The Council Substitute and the analysis above take these changes into account.