

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 337 Public-Private Partnerships

SPONSOR(S): Government Operations Appropriations Subcommittee, 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	12 Y, 3 N, As CS	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 does not appear to have a fiscal impact on state government. However, the bill has an indeterminate fiscal impact on local governments.

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

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 entity 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:

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

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.

- “Responsible public entity” means the county, municipality, or any subdivision of the state; any body politic and corporate; or any regional entity that serve a public purpose and 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.

For the 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.

The guidelines must 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.

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

Project Approval Process

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.

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. It does not provide for a process by which vendors may protest the solicitation.

The public entity shall establish a fee for submission of unsolicited proposals that is sufficient to pay the costs of evaluating the proposal. The responsible public entity may request proposals. The public entity shall publish a notice in Florida Administrative Weekly and a newspaper of general circulation for 2 weeks and accept proposals for 60 days after initial publication date.

The public entity shall rank the proposals in order of preference and may consider factors that include, but may not need be limited to, professional qualifications, general business terms, innovative engineering or cost reductions terms, and finance plans. The public entity may negotiate with each vendor by order of rank until each such negotiation is terminated. The public entity may reject all proposals.

A responsible public entity may enter an interim or comprehensive agreement with the approval of the local governing body. The public entity must determine that the project is 1) in the public's best interest, 2) is for a facility which is or will be owned by the public entity, 3) has adequate safeguards in place to ensure that addition costs or service disruptions will not be imposed on residents in the event of a default.

Technical studies and independent analysis must be performed in conjunction with an interim or comprehensive agreement.

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 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.

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.

Project Qualifications

The public-private partnerships shall ensure that the private entity meets at least minimum standards for using qualified professionals. The procurement documents will include provisions for the private entity's performance and payment of sub-contractors including but not limited to surety bonds, letters of credit and lender and equity partner guarantees.

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.

Fees

Agreements entered into may authorize the private entity to impose fees for the use of a facility. The agreement must ensure that the facility is properly operated, maintained and renewed in accordance with the public entity's standards. All revenues must be regulated by the responsible public entity. The agreement shall ensure that a negotiated portion of the revenues from fee-generating projects are returned to the public entity over the life of the agreement.

Financing

Private entities may enter into private-source financing agreements. All financing agreements and liens must be paid in full prior to transfer of ownership of the facility to the public entity. The public entity may loan funds for the project. In order to use these funds, the private entity will have to provide bonded ratings from nationally recognized rating agency that the senior bonds for the project are investment grade, or supply a letter of credit that is acceptable to the public entity to ensure full repayment of the loan. A responsible public entity may use innovative financing techniques for these projects. A financing agreement may not require the responsible public entity to indemnify the financing source.

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.

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.

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:

None

2. Expenditures:

This bill does not appear to have a fiscal impact on state government.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

The fiscal impact on local governments is indeterminate. 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 does not appear to have a fiscal impact on state government. However, the bill has an indeterminate fiscal impact on local governments. Local government expenditures would be based on currently unidentified agreements with public-private projects. Local governments may need to establish new administrative units to implement the proposed process.

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:

Eminent Domain

Eminent domain may be described as the fundamental power of the sovereign to take private property for public use without the owner's consent. The power of eminent domain is absolute, except as limited by the Federal and State Constitutions.

Article X, s. 6 of the Florida Constitution prohibits takings of private property unless the taking is for a "public purpose" and the property owner is paid "full compensation." In 2006, 69 percent of Florida voters approved an amendment to the Florida Constitution to prohibit the conveyance of private property, taken by eminent domain, to a private entity or person except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature.

Generally, the Legislature retains the power of eminent domain unless it enacts a law delegating the power to another governmental entity. As such, the Legislature has authorized certain local

government entities to take private property by eminent domain subject to statutory and constitutional requirements. Those entities include counties, municipalities, district school boards, community development districts, community redevelopment agencies, special fire control districts, and other types of local special districts established by special act of the Legislature.

It is unclear whether the eminent domain provision in the bill (see lines 546-547) expands existing eminent domain authority held by these local government entities. In addition, the effect of the eminent domain provision is unclear with respect to the constitutional prohibition on conveying property, taken by eminent domain, to a private entity or person.

B. RULE-MAKING AUTHORITY:

The bill requires agencies to adopt guidelines to provide a process to guide the selection of proposals from private entities.

DRAFTING ISSUES OR OTHER COMMENTS:

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.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 21, 2012, the Government Operations Appropriations Subcommittee adopted a strike-all amendment and two amendments to the strike all and reported the bill favorably as a committee substitute.

The strike-all amendment as amended provided definitions and sets guidelines and procedures for public entities to procure, contract for and operate facilities using a Public-Private Partnership agreement. The amendment clarifies that the bill provides a new procurement method that may be used by public entities and clearly excludes state agencies from the definition of public entities eligible for this procurement method.

This analysis is written to the committee substitute as adopted by the Government Operations Appropriations Subcommittee.