

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: SB 576

INTRODUCER: Senator Bennett

SUBJECT: Public-Private Partnerships

DATE: January 28, 2012

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Roberts	GO	Favorable
2.	_____	_____	CA	_____
3.	_____	_____	BC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill creates the Florida Public-Private Partnership Act to facilitate public-private partnerships, when cost-effective, 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 creates section 287.05712 of the Florida Statutes.

II. Present Situation:

Public-Private Partnerships

Overview

A public-private partnership (PPP) is a contractual agreement formed between a public agency and a private sector entity that allows 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

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>.

³ *Id.*

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

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.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

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>.

⁵ *Id.*

⁶ See *Innovative Models for the Design, Build, Operation and Financing of Public Infrastructure*, John J. Fumero, at 3.

⁷ *Id.*

⁸ See s. 334.30, F.S.

⁹ Section 334.30, F.S.

¹⁰ Section 334.30(3), F.S.

¹¹ Section 334.30(1), F.S.

¹² *Id.*

facilities.¹³ If FDOT receives an unsolicited solicitation or proposal, it is required to publish a notice in the Florida Administrative Weekly and a newspaper 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 PPPs, 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 agency activities, such as office supplies, vehicles, and information technology.²⁶ The Division

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., [i]n ranking the proposals, the department 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.

²⁶ See ss. 287.032 and 287.042, F.S.

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

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.

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 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,

³⁵ Section 287.055(2)(d), F.S.

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.

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

III. Effect of Proposed Changes:

Florida Public-Private Partnership Act and Definitions

The bill creates the Florida Public-Private Partnership Act (Act) in s. 287.05712, F.S., and specifies relevant definitions. “Public entity” means the state and any agency or related authority; 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 buildings to be principally used by a public entity; and water or wastewater management facility and other related infrastructure.

Legislative Findings and Intent

In subsection (2), the bill specifies that the Legislature finds that there is a public need for timely and cost-effective acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, operation, implementation, or installation of public projects, that such public need may not be wholly satisfied by existing methods of procurement, and that it has been demonstrated that public-private partnerships can meet these needs by improving the schedule for delivery, lowering the cost, and providing other benefits to the public. The Legislature declares it is the intent of this section to encourage investment in the state by private entities, to facilitate various bond financing mechanisms, private capital, and other funding sources for the development and operation of qualifying projects, including expansion and acceleration of such financing to meet the public need, and to provide the greatest possible flexibility to public and private entities to contract for the provision of public services.

Adoption of Guidelines

Subsection (3) requires a responsible public entity to adopt and make publicly available guidelines that are sufficient to enable the responsible public entity to comply, before requesting or considering a proposal for a qualifying project. The guidelines must be reasonable, encourage competition, and guide the selection of projects under the purview of the responsible public entity. State entity guidelines must include opportunities for competition through public notice, reasonable criteria for choosing among competing proposals, and suggested timelines for selecting proposals and negotiating an interim or comprehensive agreement.

For a public entity that is not an agency or institution of the state, the guidelines may include the provisions set forth in this subsection at the discretion of the public entity. However, the guidelines must include a requirement that the responsible public entity engage the services of qualified professionals, which may include an architect, professional engineer, or certified public

⁴² See s. 255.20(1), F.S.

accountant, not otherwise employed by the responsible public entity, to 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 unless the governing body of the responsible public entity determines that such analysis shall be performed by employees of the responsible public entity. The guidelines must also include a mechanism for the appropriating body to review a proposed interim or comprehensive agreement prior to execution.

Procurement Procedures

Subsection (4) provides that the Consultant's Competitive Negotiation Act and related DMS interpretations, regulations, or guidelines do not apply to the Florida Public-Private Partnership Act. A public entity is not required to select the proposal with the lowest bid offer, but may consider price as one factor in evaluating the proposals received. Other factors that may be considered include:

- The proposed costs of the qualifying facility.
- The general reputation, industry experience, and financial capacity of the private entity.
- The proposed design of the qualifying project.
- The eligibility of the facility for accelerated selection, review, and documentation timelines under the public entity's compliance with a minority business enterprise participation plan or good faith effort to comply with the goals of such plan.
- The private entity's plans to employ local contractors and residents.
- Other criteria that the responsible public entity deems appropriate.

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

Consideration and Approval of Qualifying Projects

A public entity may request proposals or invite bids from private entities for the development or operation of qualifying projects pursuant to the public notice and procurement provisions of the Act. A private entity may request the approval of the responsible public entity for a qualifying project; the request must include specified information, unless waived by the public entity. Upon receipt of a proposal, the public entity must determine whether to accept the proposal for consideration. The public entity may reject any proposal initiated by a private entity at any time.

The responsible public entity may approve the development or operation of an education facility, a 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.

Agreements

Before, or in connection with the negotiation of a comprehensive agreement, the public entity may enter into an interim agreement with the private entity. The interim agreement may:

- Permit the private entity to commence activities for which it may be compensated related to the proposed qualifying project, including, but not limited to, project planning and

development, design and engineering, environmental analysis and mitigation, survey, and ascertaining the availability of financing for the proposed facility or facilities.

- 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 that the responsible public entity and the private entity deem appropriate.

Before developing or operating the qualifying project, the private entity must enter into a comprehensive agreement with the public entity. Subsection (7) specifies that the comprehensive agreement must provide for:

- Delivery of maintenance, performance, and payment bonds and letters of credit.
- Review of plans and specifications.
- Inspection of the qualifying project.
- Maintenance of a policy or policies of public liability insurance.
- Monitoring the practices of the private entity by the public entity.
- Reimbursement to be paid to the public entity for services provided by the public entity.
- Filing of appropriate financial statements on a periodic basis.
- Policies and procedures governing the rights and responsibilities of the public entity and the private entity in the event the comprehensive agreement is terminated or there is a material default by the private entity.
- 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 this section.

The comprehensive agreement may include other specified provisions.

Affected Jurisdictions

Any private entity requesting approval from, or submitting a proposal to, a public entity must notify each affected local jurisdiction by furnishing a copy of its request or proposal to each affected 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 any comments it may have in writing 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 and Duties of the Private Entity

Subsection (9) specifies that the private entity can collect lease payments, impose user fees, or enter into service contracts in connection with use thereof, determine financing for the project, and other specified duties.

Defaults and remedies

In the event of a material default by the private entity, the public entity may elect to assume the responsibilities and duties of the private entity of the qualifying project. If so, it will succeed to all of the right, title, and interest in the project, subject to any liens on revenues previously granted by the private entity to any person providing financing. A 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.

Financing

Any financing of a qualifying project may be made pursuant to an interim or comprehensive agreement between the public entity and the private entity. The private entity and the 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 public entity may take any action to obtain federal, state, or local assistance for a qualifying project that serves the public purpose of this section and may enter into any contracts required to receive such assistance.

Sovereign Immunity

The sovereign immunity of the state, any responsible public entity, any affected local jurisdiction, or any officer or employee thereof with respect to a project is not waived by the Act. Counties, cities, and towns in which a qualifying project is located possess sovereign immunity with respect to the project's design, construction, and operation.

Construction

Subsection (13) provides that the Act is to be liberally construed to effectuate its purposes.

Advisory Commission

Subsection (14) establishes a Public-Private Partnership Advisory Commission to review the implementation of the Act, and to provide recommendations for any revisions necessary to further support public-private partnership opportunities in the state. The commission consists of 12 members, as follows:

- Two members of the House of Representatives, appointed by the Speaker of the House of Representatives.
- Two members of the Senate, appointed by the President of the Senate.
- Eight members appointed by the Governor, as follows:
 - Four local government officials.
 - Two state agency representatives.
 - Two representatives of the private sector.

All terms are for 4 years, except those members of the House of Representatives and Senate, who will serve on the commission until the expiration of their terms of office or until their successors qualify. The members of the commission will elect a chairperson and a vice chairperson. The commission shall hold public meetings at least quarterly or upon the call of the chairperson. Members of the commission are entitled to receive per diem and travel expenses as provided in s. 112.061, F.S. Administrative staff support will be provided by the Executive Office of the Governor. Beginning on December 13, 2013, and each year subsequently, the commission must submit a report providing comments on the implementation of the Act and recommendations for future revisions to the Governor, the President of the Senate, and the Speaker of the House of Representatives.

IV. **Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Pledging Credit

Article VII, s. 10 of the Florida Constitution states:

Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person; but this shall not prohibit laws authorizing:

- (a) the investment of public trust funds;
- (b) the investment of other public funds in obligations of, or insured by, the United States or any of its instrumentalities;
- (c) the issuance and sale by any county, municipality, special district or other local governmental body of (1) revenue bonds to finance or refinance the cost of capital projects for airports or port facilities, or (2) revenue bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants to the extent that the interest thereon is exempt from income taxes under the then existing laws of the United States, when, in either case, the revenue bonds are payable solely from revenue derived from the sale, operation or leasing of the projects. If any project so financed, or any part thereof, is occupied or operated by any private corporation, association, partnership or person pursuant to contract

or lease with the issuing body, the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately owned property.

(d) a municipality, county, special district, or agency of any of them, being a joint owner of, giving, or lending or using its taxing power or credit for the joint ownership, construction and operation of electrical energy generating or transmission facilities with any corporation, association, partnership or person.

The bill permits private entities to issue debt, equity, or other securities and obligations, and to secure financing, with a pledge of security interest. These activities, if turned over to the state agency, either voluntarily or by default, could implicate constitutional prohibitions on pledging credit if security interests are granted, as authorized in the bill.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.