

**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.)

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Prepared By: The Professional Staff of the Appropriations Subcommittee on Education

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BILL: CS/CS/SB 900

INTRODUCER: Education Committee and Senator Latvala

SUBJECT: Public-private Partnerships

DATE: April 8, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hand</u>	<u>Klebacha</u>	<u>ED</u>	<u>Fav/CS</u>
2.	<u>Stearns</u>	<u>Yeatman</u>	<u>CA</u>	<u>Fav/CS</u>
3.	<u>Bryant</u>	<u>Elwell</u>	<u>AED</u>	<u>Pre-meeting</u>
4.	_____	_____	<u>AP</u>	_____

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/SB 900 authorizes state universities or certain direct-support organizations (DSOs) to utilize public-private partnerships (P3s) as an alternative procurement process to build, upgrade, operate, own, or finance qualifying projects.

The bill provides definitions, legislative findings and intent, procurement procedures, qualification and approval processes for qualifying projects, agreement provisions, fee structures, financing arrangements, powers and duties of state university boards, direct-support organizations, and private entities, and provisions that affirm the applicability of sovereign immunity.

The bill's stated intent is to: encourage investment in the state by private entities; facilitate various bond financing mechanisms, private capital, and other funding sources; and provide the greatest possible flexibility to public and private entities contracting for the provision of services.

Because it is not possible to determine the number and size of future projects which CS/CS/SB 900 will impact, the fiscal impact is indeterminate.

The bill takes effect July 1, 2014.

## II. Present Situation:

State universities have specific statutory mechanisms to procure and finance capital projects. Both procurement and finance mechanisms are subject to the regulatory oversight of the Board of Governors (BOG). State universities must navigate different procedural requirements under each of the currently available mechanisms. Even with the various existing mechanisms at their disposal, state universities face a “crisis” in infrastructure and facilities funding.<sup>1</sup>

### Development Options for State University Capital Projects

State universities have a few options available for pursuing the development of capital projects, including university lease agreements, joint occupancy structures, use of innovative contracting techniques, and the issuance of revenue bonds.<sup>2</sup>

#### *University Lease Agreements*

Pursuant to s. 1013.171, F.S., each university is authorized to:

- Negotiate and enter into agreements to lease land under its jurisdiction to for-profit and non-profit corporations, for the purpose of erecting thereon facilities and accommodations necessary and desirable to serve the needs and purposes of the university, as determined by the system-wide strategic plan adopted by the BOG.
- Enter into agreements with for-profit and nonprofit corporations, whereby income-producing buildings, improvements, and facilities necessary and desirable to serve the needs and purposes of the university, as determined by the system-wide strategic plan adopted by the BOG, are acquired by purchase or lease-purchase by the university. When such agreements provide for lease-purchase of facilities erected on land that is not under the jurisdiction of the university, the agreement shall include as part of the consideration provisions for the eventual ownership of the land and facility by the state. Each university is authorized to use any auxiliary trust funds, available and not otherwise obligated, to pay rent to the owner should income from the facilities not be sufficient in any debt payment period.
- Construct educational facilities on land that is owned by a direct-support organization (DSO), or a governmental agency at the federal, state, county, or municipal level, if the university has acquired a long-term lease for use of the land. If a DSO does not have sufficient land available, the university may acquire a short-term lease from a private landowner or developer.
- Enter into a short-term lease for the use of land and buildings upon which capital improvements may be made.

These agreements must be entered into with an entity resulting from publicly announced competitive bids or proposals, except that, the university may enter into an agreement with a DSO, or a governmental agency at the federal, state, county, or municipal level, which shall enter into subsequent agreements for financing and constructing the project after receiving competitive bids or proposals.<sup>3</sup> Any facility constructed, lease-purchased, or purchased under such

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<sup>1</sup> Florida Board of Governors, Task Force on Facilities Funding – 2012, at 1, *available at* <http://www.flbog.edu/about/taskforce/facilities.php> (last visited March 18, 2014).

<sup>2</sup> The state university matching grant program has been suspended since 2011. Section 1013.79(12), F.S.

<sup>3</sup> Section 1013.171, F.S.

agreements, whether erected on land under the jurisdiction of the university or not, shall conform to the construction standards and codes applicable to university facilities.<sup>4</sup> These agreements are also subject to s. 1010.62, F.S., pertaining to revenue bonds and debt.<sup>5</sup>

### ***Joint Occupancy Structures***

For the purpose of implementing jointly financed construction project agreements, or for the construction of combined occupancy structures, any board may purchase, own, convey, sell, lease or encumber airspace or any other interests in property above airspace of the land, provided the lease of airspace for nonpublic use is for such reasonable rent, length of term, and conditions as the board in its discretion may describe.<sup>6</sup>

All proceeds from the sale or lease shall be used by the board or boards receiving the proceeds solely for fixed capital outlay purposes.<sup>7</sup> These purposes may include the renovation or remodeling of existing facilities owned by the board, or the construction of new facilities.<sup>8</sup> However, construction of new facilities must be authorized by the Legislature.<sup>9</sup>

Buildings commonly used for both nonpublic and educational uses, that are sold or leased for nonpublic use are subject to applicable regulations pertaining to land use, zoning, construction, fire protection, health, and safety to the same extent such regulations would be applicable to the construction of a building for nonpublic use on the appurtenant land beneath the subject airspace.<sup>10</sup>

Any educational facility constructed or leased as part of a joint-occupancy facility is subject to all rules and requirements of the respective boards or departments having jurisdiction over educational facilities.<sup>11</sup> Any contract executed by a state university pursuant to this section is subject to s. 1010.62, F.S., pertaining to revenue bonds and debt.<sup>12</sup>

### ***Coordination of Planning with Local Governing Bodies***

State policy requires the coordination of planning between boards and local governing boards to ensure that plans for the construction and opening of public educational facilities are facilitated and coordinated in time and place with plans for residential development, concurrently with other necessary services.<sup>13</sup>

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

<sup>5</sup> *Id.*

<sup>6</sup> Section 1013.19, F.S. As used in ch. 1013, F.S., “board” means a district school board, a Florida College System institution board of trustees, a university board of trustees, and The Board of Trustees of the Florida School for the Deaf and Blind, but does not include the State Board of Education or the BOG. *See* s. 1013.01(3), F.S.

<sup>7</sup> *Id.*

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

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

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

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

<sup>13</sup> Section 1013.33, F.S.

### ***Contracting and Construction Techniques for Educational Facilities***

State university boards of trustees may contract for the construction of new facilities, or for additions, remodeling, renovation, maintenance, or repairs to existing facilities. The procedures the boards may use for doing so include but are not limited to:

- Solicitation of competitive bids;
- Issuance of a design-build contract pursuant to s. 287.055, F.S.;
- Selection of a construction management entity that would be responsible for all scheduling and coordination in both design and construction phases and is generally responsible for the successful, timely, and economical completion of the construction project;
- Selection of a program management entity that would be responsible for schedule control, cost control, and coordination in providing or procuring planning, design and construction services; or
- Execution of day labor contracts not exceeding \$280,000 for the construction, renovation, remodeling, or maintenance of existing facilities.<sup>14</sup>

### ***Joint Use of Facilities by Multiple State Universities***

State law has authorized and created a process by which two or more boards may cooperatively establish a common educational facility to accommodate students.<sup>15</sup>

### ***Debt and Financing for State University Capital Projects***

Debt to finance state university capital projects may be incurred at different levels and through different structures.<sup>16</sup> Debt may be state-issued debt, university system-issued debt, and university-issued debt.<sup>17</sup> State-issued debt is primarily in the form of Public Education Capital Outlay (PECO) bonds. System-issued debt is limited to Capital Improvement Trust Fund Fee (CITF) bonds.<sup>18</sup>

### ***State-Issued Debt (Public Education Capital Outlay)***

State-issued debt is backed by various revenue sources including state taxes, general revenue, dedicated revenue sources, and lottery profits.<sup>19</sup> The Legislature must approve state-funded university capital projects.<sup>20</sup> Florida has historically provided state funding for university projects with a dedicated revenue source.<sup>21</sup>

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<sup>14</sup> Section 1013.45, F.S.

<sup>15</sup> Section 1013.52, F.S.

<sup>16</sup> Office of Program Policy Analysis and Government Accountability, *Other States Use a Variety of Revenues and Financing Methods to Fund Public University Capital Outlay Projects*, Research Memorandum, at 5 (October 12, 2012) (on file with the Senate Committee on Community Affairs).

<sup>17</sup> *Id.*

<sup>18</sup> Email, Staff of the Board of Governors, (March 10, 2014) (on file with the Senate Committee on Education).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1.

<sup>21</sup> *Id.* at 2.

According to the staff of the BOG, “[s]tate-issued debt is typically undertaken on behalf of the university system or individual institutions and takes advantage of the full faith and credit of the state as the guarantee for bond payments.”<sup>22</sup>

The BOG currently relies on state PECO bonds as the primary source of funding for university construction (i.e., new teaching and research facilities) and building maintenance (i.e., to keep existing buildings functional and to retrofit old buildings for new uses).<sup>23</sup> However, PECO funds cannot be used to construct student life facilities, such as student unions, cafeterias, recreational fields, and fitness centers.<sup>24</sup>

### ***University System Issued Debt***

The BOG can only issue system debt based on revenues from student capital improvement fees, formally known as the Capital Improvement Trust Fund Fee.<sup>25</sup> Such debt is subject to specific legislative authorization in the general appropriations act, and requires approval of the State Board of Administration.<sup>26</sup> No new debt has been authorized under the CITF program since 2008.<sup>27</sup>

The BOG may “issue revenue bonds that are secured by a pledge of revenues from institution enterprises such as dormitories, parking garages, food service, and athletic programs. These bonds are typically used to finance student support facilities, such as student unions, recreation facilities, housing, health and parking facilities.”<sup>28</sup>

### ***Individual Institution Issued Debt***

“Institution debt is typically a revenue bond authorized to fund student support facilities such as student unions, dormitories, or parking garages.”<sup>29</sup> Institutional debt is typically backed by student fees and revenues from auxiliary enterprises (such as housing and parking).<sup>30</sup> “[A]ny proposal for issuance of institution revenue bonds is reviewed by the State Board of Administration’s Division of Bond Finance and approved by the BOG.”<sup>31</sup>

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<sup>22</sup> *Id.* at 6.

<sup>23</sup> Florida Board of Governors, Task Force on Facilities Funding – 2012, available at <http://www.flbog.edu/about/taskforce/facilities.php>, State University System, Board of Governors, *FACT SHEET: Public Education Capital Outlay (PECO) (July 17, 2012)* available at <http://flbog.edu/pressroom/doc/7.2012-PECO-Fact-Sheet-Press-Room.pdf> (last visited March 18, 2014).

<sup>24</sup> *Id.*

<sup>25</sup> Office of Program Policy Analysis and Government Accountability, *Other States Use a Variety of Revenues and Financing Methods to Fund Public University Capital Outlay Projects*, Research Memorandum, at 6 (October 12, 2012) (on file with the Senate Committee on Community Affairs), Email, Staff of the Board of Governors, (March 10, 2014) (on file with the Senate Committee on Education).

<sup>26</sup> Email, Staff of the Board of Governors, (March 10, 2014) (on file with the Senate Committee on Education), Office of Program Policy Analysis and Government Accountability, *Other States Use a Variety of Revenues and Financing Methods to Fund Public University Capital Outlay Projects*, Research Memorandum, at 6 (October 12, 2012) (on file with the Senate Committee on Community Affairs).

<sup>27</sup> Email, Staff of the Board of Governors, (March 10, 2014) (on file with the Senate Committee on Education).

<sup>28</sup> *Id.* at 7.

<sup>29</sup> *Id.* at 9.

<sup>30</sup> *Id.* at 5.

<sup>31</sup> *Id.* at 9.

### ***Debt Structures***

“The primary debt structures used to finance projects are general obligation bonds, revenue bonds, and lease/purchase contracts....”<sup>32</sup> For example:

- General obligation bonds take advantage of the full faith and credit and the taxing authority of the state to guarantee payment.<sup>33</sup>
- Revenue bonds depend on a dedicated revenue source as guarantee for payment.<sup>34</sup>
- Lease/purchase contracts are similar to bonds, but the investor purchases a share of the lease revenues of a program rather than the bond being secured by those revenues.<sup>35</sup>

### **Public-Private Partnerships**

Public-private partnerships (P3) are in use nationally, even for state universities. While generally authorized and in use in Florida, P3s are not specifically authorized in law for use by state universities.

### ***P3s Nationally***

A P3 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.<sup>36</sup> Through these agreements, the skills and assets of each sector, public and private, are shared in delivering a service or facility for the use of the general public.<sup>37</sup> In addition to the sharing of resources, each party shares in the risks and potential rewards in the delivery of the service or facility.<sup>38</sup>

There are different types of P3s with varying levels of private sector involvement. For example:

- A Design-Build-Finance-Operate transaction involves a grant made by the government to a private sector partner of the right to develop a new piece of public infrastructure.<sup>39</sup> 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 the government.<sup>40</sup> 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”).<sup>41</sup> Any increases in the user charge or payment for performance typically are set out in advance and regulated by a binding contract.<sup>42</sup>

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<sup>32</sup> *Id.* at 5,

<sup>33</sup> *Id.* at 5.

<sup>34</sup> *Id.* at 5.

<sup>35</sup> *Id.* at 5.

<sup>36</sup> 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 March 18, 2014).

<sup>37</sup> See generally The National Council for Public-Private Partnerships webpage, *How PPPs Work*, available at: <http://www.ncppp.org/ppp-basics/7-keys/> (last visited on March 18, 2014).

<sup>38</sup> *Id.*

<sup>39</sup> See The Oregon Department of Transportation, *The Power of Public-Private Partnerships*, available at: <http://www.oregon.gov/ODOT/HWY/OIPP/docs/PowerofPublicPrivate050806.pdf> (last visited March 18, 2014).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

- An Unsolicited Proposal Procurement Model allows for the receipt of unsolicited bids from private entities to contract for the design, construction, operation, and financing of public infrastructure.<sup>43</sup> Generally, the public entity requires a processing or review fee to cover costs for the technical and legal review.<sup>44</sup> A local government’s “acceptance” of a proposal results in the publishing of a notice to other prospective proposers for the project.<sup>45</sup> These other proposers have a certain amount of time in which to submit a competing proposal, after which the local government considers and ranks all of the proposals, including the initial proposal that began the process.<sup>46</sup>

### ***State University Use of P3s Nationally***

According to the Office of Program Policy Analysis and Government Accountability, a P3 “can provide universities access to additional capital resources, spread risk, and offer expertise in specialized areas of construction, such as medical centers or housing; however, the contracts covering these arrangements are often complex and private partners may not live up to their obligations.”<sup>47</sup>

Universities in other states typically form P3s to construct dining, housing, parking, dormitories or other support facilities. Some universities in other states have begun to use them to construct research laboratories and classrooms.<sup>48</sup>

### ***P3s in Florida***

In 2013, the Legislature created s. 287.0512, F.S., which, in part, created an alternative procurement process as well as requirements that must be met by responsible public entities<sup>49</sup> seeking to enter into P3s to facilitate construction of public-purpose projects.<sup>50</sup> However, this law is not applicable to state universities.<sup>51</sup>

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<sup>43</sup> See *Innovative Models for the Design, Build, Operation and Financing of Public Infrastructure*, John J. Fumero, 2, available at <http://documents.jdsupra.com/3c55cef3-3a4f-45d7-b199-b658fa2f1443.pdf> (last visited March 18, 2014).

<sup>44</sup> *Id.*

<sup>45</sup> Section 287.05712(4)(b), F.S.

<sup>46</sup> Section 287.05712(4)(b) and (6)(c), F.S.

<sup>47</sup> Office of Program Policy Analysis and Government Accountability, *Other States Use a Variety of Revenues and Financing Methods to Fund Public University Capital Outlay Projects*, Research Memorandum, at 10 (October 12, 2012) (on file with the Senate Committee on Community Affairs).

<sup>48</sup> *Id.*

<sup>49</sup> Section 287.05712(1)(j), F.S. “Responsible public entity” means “a county, municipality, school board, or any other political subdivision of the state; a public body corporate and politic; or a regional entity that serves a public purpose and is authorized to develop or operate a qualifying project.” *Id.*

<sup>50</sup> See Staff of the Florida House of Representatives, *Legislative Bill Analysis for CS/CS/HB 85* (2013). Under this law, P3s may be used for facilities or projects that serve a public purpose, including but not limited to, any ferry or mass transit facility, vehicle parking facility, airport or seaport facility, recreational facility, an improvement of a building (including equipment) that will principally be used by the public-at-large or that supports a service delivery system in the public sector, or a water, wastewater, or surface water management facility or other related infrastructure. See also, s. 287.05712(1)(i), F.S., for the definition of a “qualifying project.”

<sup>51</sup> Staff of the Board of Governors, *Legislative Bill Analysis for SB 900*, at 3 (February 21, 2014).

### *State University Use of P3s in Florida*

Despite the lack of specific statutory authority directly authorizing or regulating P3s for state universities, some state universities in Florida are nevertheless utilizing P3s. For example:

- Florida Atlantic University used a P3 to build a dormitory.<sup>52</sup>
- Florida State University is using, and has attempted, P3s for various fields.<sup>53</sup>
- The University of West Florida created Business Enterprises, Inc. as a DSO to build and manage P3s to help the university accomplish its goals.<sup>54</sup>
- Florida Polytechnic University entered into a P3 for the construction of student housing.<sup>55</sup>

### **University Direct-Support Organizations**

A university direct-support organization (DSO) is a Florida not-for-profit corporation which is organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of a state university.<sup>56</sup> A DSO may also be operated for the benefit of a research and development park or research and development authority affiliated with a state university. A DSO must be certified by a state university board of trustees to operate in a manner consistent with the goals of the university and in the best interest of the state.<sup>57</sup> DSOs serve a role in raising private support for university academic, research, and athletic activities.<sup>58</sup>

State universities are considered agencies of the state. As a result, state universities are subject to public records and public meetings laws.<sup>59</sup> DSO boards are also subject to public records and public meetings laws.<sup>60</sup>

A DSO must provide for an annual financial audit of the organization's accounts and records which must be conducted by an independent certified public accountant pursuant to rules

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<sup>52</sup> Office of Program Policy Analysis and Government Accountability, *Other States Use a Variety of Revenues and Financing Methods to Fund Public University Capital Outlay Projects*, Research Memorandum, at 12 (October 12, 2012) (on file with the Senate Committee on Community Affairs).

<sup>53</sup> "Florida State University participated in a [P3] with the company Digital Domain. The company provided the facilities for students in West Palm Beach to train in digital animation. *Id.* at 13, footnote 21, The Gradebook, *FSU's announcement is the latest in trend of public-private partnerships at universities*, <http://www.tampabay.com/blogs/gradebook/content/fsus-announcement-latest-trend-public-private-partnerships-universities> (last viewed March 8, 2014).

<sup>54</sup> UWF Business Enterprises, Inc., *Direct Support for the University*, <http://uwf.edu/bei/about.html> (last viewed March 18, 2014).

<sup>55</sup> Florida Polytechnic University, *Florida Polytechnic University Awards Contract For Student Housing*, <https://floridapolytechnic.org/news-item/florida-polytechnic-university-awards-contract-for-student-housing/> (last viewed March 18, 2014).

<sup>56</sup> Section 1004.28(1)(a)1.-2., F.S.

<sup>57</sup> Section 1004.28(1)(a)2.-3., F.S.

<sup>58</sup> Florida Board of Governors, *2013 Agency Bill Analysis for HB 359* (Feb. 14, 2013), at 1. HB 359

<sup>59</sup> Chapters 119 and 286, Florida Statutes. *See Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983) (holding that a University of Florida screening committee was subject to Florida's Sunshine Law).

<sup>60</sup> Section 1004.28, F.S.; *see also Palm Beach Community College Foundation, INC., v. WFTV, INC.*, 611 So.2nd 588 (4th DCA 1993); Op. Att'y Gen. Fla. 05-27 (2005); Op. Att'y Gen. Fla. 92-53 (1992) (providing that John and Mable Ringling Museum of Art Foundation, Inc., established pursuant to statute as a not-for-profit corporation to assist the museum in carrying out its functions by raising funds for the museum, is subject to Sunshine Law by virtue of its substantial ties with the museum).



adopted by the Auditor General in accordance with current law<sup>61</sup> and by the university board of trustees.<sup>62</sup>

### III. Effect of Proposed Changes:

**Section 1** provides definitions, legislative findings and intent, procurement procedures, project feasibility criteria, procedures for approval of agreements, required agreement provisions, financing arrangements, responsibilities of the private entity, provisions governing the expiration or termination of agreements, a statement of authority, a statement affirming the applicability of sovereign immunity, a requirement of an annual report, and rulemaking authority.

#### **Legislative Findings and Intent**

The bill declares that there is a public need for construction or improvement of facilities that are used predominantly for a public purpose and that it is in the public's interest to provide for the construction or improvement of such facilities.<sup>63</sup> The bill states that the need for timely and cost-effective acquisition and operation of such facilities cannot be met by existing procurement methods.

The bill declares it is the Legislature's intent to encourage investments in the state by private entities, to facilitate various bond financing mechanisms, and to provide the greatest possible flexibility to public and private entities contracting for the provision of public services.

#### **Procurement Procedures**

A state university board of trustees (board) or a university direct-support organization (DSO) may receive unsolicited proposals or may solicit proposals for qualifying projects and may thereafter enter into an agreement with a private entity, or a consortium of private entities to build, upgrade, operate, own, or finance facilities.

The BOG may establish a reasonable application fee for the submission of an unsolicited proposal. A board or DSO may engage the services of a private consultant to assist in the evaluation. The BOG may also establish a reasonable fee to cover the costs of evaluating all other proposals received by a board or DSO as part of a competitive procurement process.

If an unsolicited proposal is received and the board or DSO intends to enter into a comprehensive agreement for the project described in such unsolicited proposal, the board or DSO must publish a notice in a newspaper of general circulation at least once a week for two weeks stating that the board has received a proposal and will accept other proposals for the same project.

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<sup>61</sup> Section 11.45(8), F.S.

<sup>62</sup> Section 1004.28(5), F.S.

<sup>63</sup> Universities implicitly might be allowed to expand their focus from what is necessary and desirable to serve the needs and purposes of the university (or its students), to what serves a public need or benefit derived from the type of qualifying project that the private entity proposes.

## **Proposal Requirement and Approval Process**

The board must consider various factors before approving the proposed project and in reviewing and ranking proposals, and the private entity's unsolicited proposal must provide certain information and meet specified requirements.

### ***Unsolicited Proposal Requirements***

Unless waived by the board or DSO, an unsolicited proposal must be accompanied by:

- A description of the qualifying project;
- A description of the method by which the private entity proposes to secure the necessary property interests that are required to complete the project (if applicable);
- A description of the private entity's general plans for financing the project;
- The name and address of a person who may be contacted for additional information;
- The proposed user fees, lease payments, or other service payments over the term of a comprehensive agreement; and
- Additional material that the board or DSO reasonably requests.

In considering an unsolicited proposal, the board or DSO may require the private entity to provide a technical study prepared by a nationally recognized expert with experience in preparing analyses for bond rating agencies. In evaluating the technical study, the board or DSO may rely upon internal staff reports prepared by personnel familiar with the operation of similar facilities or the advice of external advisors or consultants who have relevant experience.

After the public notification period has expired in the case of an unsolicited proposal, or upon receipt of all proposals if using the traditional process for competitive procurement, the board or DSO must rank the proposals received in order of preference. The board or DSO may then begin negotiations for a comprehensive agreement with the highest-ranked firm, followed by negotiations with successively ranked firms (if necessary) until arriving at a satisfactory agreement. The board or DSO may reject all proposals at any point in the process.

### ***Project Feasibility***

Prior to entering into a comprehensive agreement, a board or DSO must conduct an analysis of the feasibility and desirability of the project and shall develop sufficient information to determine:

- The agreement is in the best interest of the public, state, or university;
- The conformity of the project with the master plan of the university and a determination that the project is essential to the university's core mission;
- The need for the project based on quantitative metrics;
- The amount and source of funds to be used to fully fund the capital, operation, maintenance, or other expenses under the agreement;
- The cost of any investment to be made under the agreement by the board or DSO;
- The economic and financial feasibility of the project;
- That the projected demand for use of the project is adequate in relation to the project's cost;
- The expected return on investment or other appropriate quantitative measure for a non-revenue-generating project;

- That the cost of the project is reasonable in relation to similar facilities;
- The financial, operational, or technological risk associated with the project;
- That any increase in the cost of financing the project over the cost of financing the project under s. 1010.62, F.S., will be offset by quantifiable savings in operational costs of other activities and specifies the amount of such savings;
- Any impact to the state's finances of undertaking the project;
- The impact of the agreement on similar activities of the state university or DSO;
- The anticipated use of money to be received by the state university or DSO;
- The relationship between the source of any funds committed by the board or DSO and the project or activities proposed to be funded under the agreement;
- The private entity has the available sources of funding or other financial resources necessary to carry out the agreement;
- That the staff of the private entity have sufficient experience and qualifications to perform the project;
- That no director, officer, partner, owner, or other individual with direct and significant control over the policy of the private entity has been convicted of corruption or fraud; and
- Any other factors determined to be appropriate by the board, DSO, or the BOG.

#### ***Approval of Comprehensive Agreements***

All comprehensive agreements are contingent upon approval by the BOG. A comprehensive agreement between a DSO and a private entity must be approved by the university board prior to submission to the BOG.

In addition to approval of the BOG, the approval of the Governor and Cabinet, in their role as the governing board of the Division of Bond Finance, is required for any comprehensive agreement that:

- Has a term of over ten years, including any renewals or extensions;
- Provides for an up-front payment from the private entity to the board or DSO which constitutes more than 10 percent of the total compensation anticipated to be paid by the private entity to the board or DSO over the life of the agreement;
- Provides for the creation of debt of the board or DSO as permitted under s. 1010.62, F.S.;<sup>64</sup>
- Pledges or uses revenues permitted under s. 1010.62, F.S.,<sup>65</sup> to secure or pay amounts due under the agreement; or
- Is expected to yield more than \$10 million to the board or DSO.

For agreements under which the board or DSO is expected to receive more than \$10 million, the state university must provide a summary of the proposal, including a description of the anticipated use of the money to be received by the board of DSO, to the BOG, the Governor, the members of the Cabinet, the President of the Senate, and the Speaker of the House of Representatives. If the President or Speaker objects to the proposed agreement in writing within 14 days after receipt of the summary, the board or DSO may not proceed with the agreement unless all objections are resolved.

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<sup>64</sup> Section 1010.62, F.S.

<sup>65</sup> *Id.*

The BOG must establish a process and informational requirements for the evaluation and approval of comprehensive agreements.

## **Agreements**

### ***Comprehensive Agreement***

Before developing or operating the qualifying project, the private entity must enter into a comprehensive agreement with the board or DSO.

The comprehensive agreement must provide for:

- Delivery of performance and payment bonds, letters of credit, or other security in connection with the development or operation of the qualifying project. Construction bonds must comply with ss. 255.05 and 1013.47, F.S.;
- Board or DSO review and approval of the design of the qualifying project. This does not require the private entity to complete the design of the project before the execution of the comprehensive agreement;
- Inspection of the qualifying project by the board or DSO to ensure the private entity's activities are acceptable to the board;
- Maintenance of a policy of public liability insurance or self-insurance;
- Monitoring of the maintenance practices of the private entity by the board or DSO to ensure the project is properly maintained;
- Periodic filing of financial statements by the private entity;
- Procedures governing the rights and responsibilities of the board or DSO and the private entity in the course of the construction, and operation of the qualifying project and in the event of a termination of the agreement or a material default. The procedures must include:
  - Conditions that govern the assumption of the duties and responsibilities of the private entity by an entity that funded, in whole or part, the qualifying project or by the board or DSO; and,
  - Transfer or purchase of property or other interests of the private entity by the board or DSO.
- Fees, lease payments, or service payments. In negotiating user fees, the fees must be the same for persons using the facility under like conditions;
- Duties of the private entity, including terms and conditions that the board or DSO determines serve the public purpose of this section;
- A limit on the term of the comprehensive agreement to 30 years, including all renewal terms;
- A provision under which each entity agrees to provide notice of default and cure rights for the benefit of the other entity;
- A provision that terminates the authority and duties of the private entity under this section and dedicates the qualifying project to the board or DSO.

A comprehensive agreement may not obligate the full faith and credit of the state, a state university or the BOG, but shall only be secured by the revenues of the board or DSO pledged for such a purpose. Revenues<sup>66</sup> of a board or DSO may not be pledged to secure or be used to

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<sup>66</sup> Section 1013.505(1)(m), F.S., created in the bill defines "revenues" as "those revenues authorized under s. 1010.62, except that money received as grants or otherwise from the Federal Government, a public entity, or an agency or instrumentality in

make payments on or in relation to, a comprehensive agreement. No debt of a board or DSO may be created except as provided in s. 1010.62, F.S., and only the revenues authorized to be used pursuant to s. 1010.62, F.S., may be used to secure or pay obligations related to such an agreement.<sup>67</sup>

### ***Financing Arrangements***

The private entity may enter into a private-source financing agreement between financing sources and the private entity. A financing agreement must be paid in full at the applicable closing that transfers ownership or operation of the facility to the board or DSO at the conclusion of the term of the comprehensive agreement. In the event of a material default by the private entity, the board or DSO will assume ownership or operation of the qualifying project pursuant to the terms of the comprehensive agreement.

The board or DSO may use innovative finance techniques associated with a P3 including, but not limited to, federal loans as provided in Titles 23 and 49 C.F.R., commercial bank loans, and hedges against inflation from commercial banks or other private sources. In addition, the board or DSO may provide its own capital or operating budget to support a qualifying project<sup>68</sup>. The budget apparently may be from any legally permissible funding sources of the board or DSO, including the proceeds of debt issuances.<sup>69</sup> A financing agreement may not subject the board's or DSO's facility to liens in violation of s. 11.066(5), F.S.

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aid of a qualifying project or gifts from private donors that are donated for the purpose of constructing or equipping a facility may be used without limitation, unless a gift is used to secure debt, in which event the maturity of the debt shall not exceed 5 years.”

<sup>67</sup> Section 1010.62(2)(a), F.S., limits the revenues that may be used to pay or secure revenue bonds and specifies certain revenues that may not be used for that purpose: “Revenues from the activity and service fee and the athletic fee may be used to pay and secure revenue bonds except that the annual debt service shall not exceed an amount equal to 5 percent of the fees collected during the most recent 12 consecutive months for which collection information is available prior to the sale of the bonds. The assets of a university foundation and the earnings thereon may also be used to pay and secure revenue bonds of the university or its direct-support organizations. Revenues from royalties and licensing fees may also be used to pay and secure revenue bonds so long as the facilities being financed are functionally related to the university operation or direct-support organization reporting such royalties and licensing fees.” Revenue bonds may not be secured by or be payable from, directly or indirectly, tuition, the financial aid fee, sales and services of educational departments, revenues from grants and contracts, except for money received for overhead and indirect costs and other moneys not required for the payment of direct costs, or any other operating revenues of a state university. Revenues from one auxiliary enterprise may not be used to secure revenue bonds of another unless the Board of Governors, after review and analysis, determines that the facilities being financed are functionally related to the auxiliary enterprise revenues being used to secure such revenue bonds.”

<sup>68</sup> The bill does not define the terms “own capital or operating budget.”

<sup>69</sup> The bill does not allow bonding of tuition. Email, Staff of the Board of Governors (March 9, 2014) (on file with the Senate Committee on Education). Additionally, while not specified, the provisions of s. 1013.78, F.S., which require prior approval of projects by the Legislature if the state will be asked for operating funds for the project, still appear to apply. Staff of the Board of Governors, *Legislative Bill Analysis for SB 900*, at 3 (February 21, 2014).

***Responsibilities of the Private Entity under an Agreement***

The private entity shall, in accordance with the comprehensive agreement:

- Develop or operate the project in a manner that is acceptable to the board or DSO;
- Maintain or provide by contract for the maintenance or improvement of, the qualifying project if required by the comprehensive agreement;
- Cooperate with the board or DSO in making best efforts to establish interconnection between the qualifying project and any other facility or infrastructure as requested by the board or DSO;
- Comply with the comprehensive agreement and a lease or service contract.

Each private facility must comply with the requirements of federal, state, and local laws and plans as well as the conditions and standards of the board of DSO, as applicable.

***Additional Services and Agreements***

The board or DSO may provide services to the private entity. An agreement for maintenance and other services must provide for full reimbursement for services rendered for qualifying projects.

A private entity may provide additional services for the qualifying project to the public or to other private entities if the provision of additional services does not impair the private entity's ability to meet its commitments to the board or DSO pursuant to the comprehensive agreement and the services do not differ in kind from those provided under the agreement.

***Expiration or Termination of the Comprehensive Agreement***

Upon the expiration or termination of a comprehensive agreement, the board or DSO may use revenues from the qualifying project to pay current operation and maintenance costs of the qualifying project.

Revenues in excess of the costs for operation and maintenance costs may be paid to investors and lenders to satisfy payment obligations under their respective agreements if allowed under the provisions of the comprehensive agreement.

A board or DSO may terminate with cause and without prejudice a comprehensive agreement and may exercise other rights or remedies that may be available to it in accordance with the provisions of the comprehensive agreement.

The assumption of the development or operation of the qualifying project does not obligate the board or DSO to pay an obligation of the private entity from sources other than revenues from the qualifying project.

***Sole Authority***

This section provides the sole authority for a state university or DSO to enter into a comprehensive agreement.

### **Sovereign Immunity**

A comprehensive agreement may not be construed as waiving the sovereign immunity of the state or as a grant of sovereign immunity to a private entity.

### **Annual Report**

For any comprehensive agreement executed by a board or DSO after this bill becomes law, the university must prepare an annual report to the BOG which updates information provided for the initial approval of the P3 and provides any other information required by the BOG. The format and specific timeframe for the report shall be provided by the BOG. However, the initial annual report shall be filed no later than November 30 after the P3 has been in effect for one full fiscal year.

### **Rules**

The BOG may adopt such rules as may be necessary for carrying out all of the requirements of this section and may do all things necessary to carry out the powers granted under this section. The BOG may establish additional restrictions relating to P3s but may not take any action which would reduce the requirements of this section.

### **Applicable Laws**

The bill provides that it does not waive any requirement in ss. 255.103,<sup>70</sup> 287.055,<sup>71</sup> or 1013.45,<sup>72</sup> F.S., if applicable.

The bill takes effect July 1, 2014.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

### **B. Public Records/Open Meetings Issues:**

None.

### **C. Trust Funds Restrictions:**

None.

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<sup>70</sup> Pertaining to construction management or program management entities.

<sup>71</sup> Pertaining to the acquisition of professional architectural, engineering, landscape architectural, or surveying and mapping services; definitions; procedures; contingent fees prohibited; penalties.

<sup>72</sup> Pertaining to education facilities contracting and construction techniques.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

Indeterminate.

**B. Private Sector Impact:**

Indeterminate.

**C. Government Sector Impact:**

According to the BOG:<sup>73</sup>

The potential cost savings are indeterminable at this time. However, in general, potential cost savings are most likely to be realized on a life-cycle cost basis, rather than up front. It is not expected that P3s will result in lower interest rates. Rather, potential savings may be realized in that partnership agreements legally commit both parties to the long-term maintenance of the subject facilities. Making repairs on a scheduled basis can result in long-term cost savings. The ability to defer critical maintenance items due to short-term budget obligations will be significantly reduced if public partnership agreements are properly structured and adequately enforced.

Because it is not possible to determine the number and size of future projects which CS/CS/SB 900 will impact, the fiscal impact is indeterminate.

In reviewing unsolicited proposals, boards may be required to utilize time and resources reviewing projects that are not identified as priorities, which may take time and resources away from projects that are identified priorities.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 1013.505 of the Florida Statutes.

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<sup>73</sup> Staff of the Board of Governors, *Legislative Bill Analysis for SB 900*, at 2-3 (February 21, 2014).



**IX. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS/CS by Community Affairs on March 25, 2014:**

- Updates the “Definitions” section of the bill;
- Authorizes university DSOs to engage in P3s;
- Removes the provisions related to Interim Agreements;
- Requires the approval of the Governor and Cabinet sitting as the governing board of the Division of Bond Finance for certain projects;
- Requires the university to present to the Cabinet and Legislature prior to engaging in agreements that yield more than \$10 million to the university. Provides that an agreement that is objected to by one of the above parties may not be finalized;
- Requires the BOG to set up a new process for evaluating potential P3 agreements;
- Limits the term of P3s to 30 years;
- Prohibits the obligation of the full faith and credit of the state as part of a P3 agreement;
- Removes the authority for a private entity engaged in a P3 with a university to levy fees on the public for use of a facility that is the product of the P3;
- Removes the requirement that any liens on the property be paid off at the time that ownership of the property is transferred from the P3 to the university;
- States that the section created by this bill provides the sole authority for a university board to enter into a P3;
- Requires a university board engaged in a P3 to submit an annual report to the BOG; and
- Authorizes the BOG to adopt rules related to P3s.

**CS by Education on March 11, 2014:**

Provides that the new law, s. 1013.505, F.S., does not waive any requirement in ss. 255.103, 287.055, or 1013.45, F.S., if those laws are applicable.

- B. **Amendments:**

None.