

**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 Committee on Community Affairs

---

BILL: CS/SB 900

INTRODUCER: Education Committee and Senator Latvala

SUBJECT: Public-private Partnerships

DATE: March 14, 2014

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

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

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

COMMITTEE SUBSTITUTE - Substantial Changes

---

**I. Summary:**

CS/SB 900 authorizes state universities to utilize public-private partnerships as an alternative procurement process to develop, operate, or maintain qualifying projects that the state university will subsequently own at the end of the associated comprehensive agreement.

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 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 to provide the greatest possible flexibility to public and private entities contracting for the provision of services.

**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, 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 direct-support organization 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 direct-support organization, 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 agreements, whether erected on land under the jurisdiction of the university or not, shall conform to the construction standards and codes applicable to university

---

<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.

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>

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

State university boards 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:

---

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

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

<sup>6</sup> Section 1013.19, 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.

- 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>

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

---

<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.

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

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>

### ***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>

<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](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.

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

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

- 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 rewards potential 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>
- 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

---

<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.*

<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.*

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>

### ***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>

<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 Section 287.05712(1)(i), F.S.

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

<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*

- The University of West Florida created Business Enterprises, Inc. as a direct support organization 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>

### III. Effect of Proposed Changes:

**Section 1** provides definitions, legislative findings and intent, procurement procedures, qualification requirements and approval process, agreement provisions, fee structures, financing arrangements, powers and duties of state university boards and private entities, and provisions that affirm the applicability of sovereign immunity.

#### 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>56</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 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 develop, improve, operate, own, or finance facilities.

The board may establish a reasonable application fee for the submission of an unsolicited proposal. A board may engage the services of a private consultant to assist in the evaluation.

If an unsolicited proposal is received and the board intends to enter into a comprehensive agreement for the project described in such unsolicited proposal, the board 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.

---

*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> Universities might be implicitly 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.

### ***Board Approval and Duties***

The board must determine that the proposed project:

- Is in the public's best interest;
- Is for a facility that is owned by the board or for a facility for which ownership will be conveyed to the board;
- Has adequate safeguards in place to ensure that additional costs or service disruptions are not imposed on the public in the event of material default or cancellation of the agreement by the board;
- Has adequate safeguards in place to ensure that the board or private entity has the opportunity to add capacity to the proposed project or other facilities serving similar predominantly public purposes;
- Will be owned by the board upon completion or termination of the agreement and upon payment of the amount financed; and
- is supported by a reasonable finance plan that is consistent with:
  - The bill's financing requirements;
  - The project cost;
  - Revenues by source;
  - Available financing;
  - Major assumptions;
  - The internal rate of return on private investments, if governmental funds are assumed in order to deliver a cost-feasible project; and
  - A total cash-flow analysis beginning with the implementation of the project and extending for the term of the agreement.

The board must ensure that:

- Provisions are made for the private entity's performance and payment of subcontractors, including but not limited to, surety bonds, letters of credit, parent company guarantees, and lender and equity partner guarantees.<sup>57</sup>
- The most efficient pricing of the security package provides for the performance and payment of subcontractors.
- Provisions are made for the transfer of the private entity's obligations if the comprehensive agreement is terminated or a material default occurs.
- Before the procurement process is initiated or before the contract is awarded, the board performs an independent analysis of the proposed P3 that demonstrates the cost-effectiveness and overall public benefit.

---

<sup>57</sup> Construction bonds are subject to s. 255.05, F.S.

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

Unless waived by the board, an unsolicited proposal from a private entity for approval of a qualifying project must be accompanied by:<sup>58</sup>

- A description of the qualifying project, including the conceptual design of the facilities or a conceptual plan for the provision of services, and a schedule for the initiation and completion of the qualifying project.
- A description of the method by which the private entity proposes to secure the necessary property interests that are required for the qualifying project.
- A description of the private entity's general plans for financing the qualifying project, including the sources of the private entity's funds and the identity of a dedicated revenue source or proposed debt or equity investment on behalf of the private entity.
- The proposed user fees, lease payments, or other service payments over the term of a comprehensive agreement, and the methodology for and circumstances that would allow changes to the user fees, lease payments, or other service payments over time.
- The name and address of a person who may be contacted for additional information concerning the proposal.

The board may reasonably request any additional material or information, including a technical study prepared by a nationally recognized expert with experience in preparing analyses for bond rating agencies.

### ***Review Negotiation of Proposals***

The board must review and rank the proposals received in order of preference. For purposes of ranking, the board may consider, but is not limited to:

- Professional qualifications;
- General business terms;
- Innovative design techniques or cost-reduction terms; and
- Finance plans.

As with an unsolicited proposal, the board may charge a reasonable fee to cover the cost of processing, reviewing and evaluating solicited proposals, including but not limited to, reasonable attorney fees and fees for financial and technical advisors or consultants and for other necessary advisors or consultants.

The board may negotiate for a comprehensive agreement with the highest-ranked entity. If the board is not satisfied with the results of the negotiations, the board may terminate negotiations with the highest ranked and negotiate with the second-ranked or subsequent-ranked entities. The board may reject all proposals at any point in time.

### ***Board Approval***

The board may approve the development or operation of a qualifying project, or the design or equipping of a qualifying project that is developed or operated, if:

---

<sup>58</sup> The private entity must also meet the minimum standards contained in the board's regulation or guidelines for qualifying professional services and contracts for traditional procurement projects.

- There is a public need for or benefit derived from the project that the private entity proposes as the qualifying project and the project is included in the university's master plan.
- The estimated cost of the qualifying project is reasonable in relation to similar facilities.
- The private entity's plan will result in the timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project.

### **Agreements**

The bill envisions the possibility of the board and the private entity entering into multiple agreements, including interim agreements, comprehensive agreements, maintenance agreements, service agreements, and fee agreements, when implementing the P3.

#### ***Interim Agreement***

Before the negotiation of a comprehensive agreement, the board may enter into an interim agreement with the private entity. The interim agreement does not obligate the board to enter into a comprehensive agreement. The interim agreement must be limited to provisions that:

- Authorize 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, environmental analysis and mitigation, survey, other activities concerning any part of the proposed qualifying project, 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 other provisions related to an aspect of the development or operation of a qualifying project that the board and the private entity deem appropriate.

#### ***Comprehensive Agreement***

The board may enter into a comprehensive agreement subject to approval by the BOG and pursuant to guidelines adopted by the BOG for P3 transactions. Before developing or operating the qualifying project, the private entity must enter into a comprehensive agreement with the board.

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 s. 255.05, F.S.;
- Board 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 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 to ensure the project is properly maintained;
- Filing of financial statements on a periodic basis by the private entity;

- Procedures governing the rights and responsibility of the board and private entity in the course of the development, 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; and,
  - Transfer or purchase of property or other interests of the private entity by the board.
- Agreement on negotiated fees (i.e., user fees, lease payments, service payments); and
- Duties of the private entity, including terms and conditions that the board determines serve the public purpose.

The comprehensive agreement may include:

- An agreement by the board to make grants or loans to the private entity from amounts received from federal, state, or local government or an agency or instrumentality thereof, or private donors.
- A provision under which each entity agrees to provide notice of default and cure rights for the benefit of the other entity, including, but not limited to, a provision regarding unavoidable delays.
- A provision that terminates the authority and duties of the private entity and dedicates the qualifying project to the board.

Each private facility that is constructed pursuant to the comprehensive agreement must comply with the requirements of federal, state and local laws; state, regional, and local comprehensive plans; board rules, regulations, procedures, and facility standards; and such other conditions that the board determines to be in the public's best interest and that are included in the comprehensive agreement.

The private entity must develop, operate, or maintain the qualifying project in accordance with the comprehensive agreement. The private entity must also:

- Cooperate with the board in making best efforts to establish interconnection between the qualifying project and other facilities and infrastructure; and,
- Comply with the comprehensive agreement and lease or service contract.

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

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

If the private entity materially defaults under the comprehensive agreement, the compensation that is otherwise due to the private entity is payable to satisfy all financial obligations to investors and lenders on the qualifying project in the same way that is provided in the comprehensive agreement or any other agreement involving the qualifying project, if the cost of operating and maintaining the project are paid in the normal course.

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.

A board 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 full faith and credit of the board may not be pledged to secure the financing of the private entity. The assumption of the development or operation of the qualifying project does not obligate the board to pay an obligation of the private entity from sources other than revenues from the qualifying project unless stated otherwise in the comprehensive agreement.

### ***Additional Services and Agreements***

The board 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 pursuant to the comprehensive agreement.

The board and private entity may enter into an agreement to impose fees to members of the public for the use of the facility.<sup>59</sup> The agreement must contain the following provisions:

- The board may develop new facilities or increase capacity in existing facilities through agreements with P3s.
- The P3 agreement must ensure that the facility is properly operated, maintained, or improved in accordance with standards set forth in the comprehensive agreement.
- The board may lease new facilities or existing fee-for-use facilities through a P3 agreement.
- All revenues must be regulated by the board pursuant to the comprehensive agreement.
- A negotiated portion of revenues from fee-generating uses must be returned to the board over the life of the agreement.

### **Financing Arrangements**

The private entity may enter into a private-source financing agreement between financing sources and the private entity. A financing agreement and any liens on the property or facility must be paid in full at the applicable closing that transfers ownership or operation of the facility to the board at the conclusion of the term of the comprehensive agreement.

The board 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 may

---

<sup>59</sup> Florida courts have held that the Legislature, when delegating authority to executive agencies or other entities, must establish minimal standards and guidelines ascertainable by reference to the legislation. *See Askew v. Cross Key Waterways*, 372 So.2d 913, 924 (Fla. 1978); *Avatar Development Corp. v. State*, 723 So.2d 199 (Fla. 1998). The bill identifies the standards and guidelines for the fees as follows: (1) Lines 112 – 116, where the board is authorized to establish a reasonable application fee for unsolicited proposals; (2) Lines 249 – 253, where the board is authorized to charge a reasonable fee to cover the cost of processing, reviewing, and evaluating solicited proposals; and (3) Lines 323-325, and 347 – 349, where the private entity may impose fees to members of the public for the use of the facility, the fees must be the same for persons using the facility under like conditions, and must not materially discourage use of the qualifying project.

provide its own capital or operating budget to support a qualifying project. The budget may be from any legally permissible funding sources of the board, including the proceeds of debt issuances.<sup>60</sup> A financing agreement may not subject the boards' facility to liens in violation of s. 11.066(5), F.S.

### **Sovereign Immunity**

The bill does not waive the sovereign immunity of a board, or an officer or employee of the board, with respect to participation in, or approval of, any part of a qualifying project or its operation.

### **Applicable Laws**

The bill provides that it does not waive any requirement in ss. 255.103,<sup>61</sup> 287.055,<sup>62</sup> or 1013.45,<sup>63</sup> F.S., if applicable.

**Section 2** of the bill provides an effective date of July 1, 2014.

## **IV. Constitutional Issues:**

### A. Municipality/County Mandates Restrictions:

None.

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

None.

### C. Trust Funds Restrictions:

None.

## **V. Fiscal Impact Statement:**

### A. Tax/Fee Issues:

Indeterminate.

### B. Private Sector Impact:

Indeterminate.

---

<sup>60</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).

<sup>61</sup> Pertaining to construction management or program management entities.

<sup>62</sup> Pertaining to the acquisition of professional architectural, engineering, landscape architectural, or surveying and mapping services; definitions; procedures; contingent fees prohibited; penalties.

<sup>63</sup> Pertaining to education facilities contracting and construction techniques.

**C. Government Sector Impact:**

According to the BOG:<sup>64</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.

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.

**IX. Additional Information:**

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

**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.

---

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

---

<sup>64</sup> Staff of the Board of Governors, *Legislative Bill Analysis for SB 900*, at 2-3 (February 21, 2014).