

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 781 Unsolicited Proposals for Public-private Partnerships

SPONSOR(S): Constitutional Rights, Rule of Law & Government Operations Subcommittee, Clemons and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 870

FINAL HOUSE FLOOR ACTION: 114 Y's

0 N's

GOVERNOR'S ACTION: Approved

SUMMARY ANALYSIS

CS/HB 781 passed the House on March 4, 2024, and subsequently passed the Senate on March 4, 2024.

Public-private partnerships (P3s) are contractual arrangements between public entities and private sector entities that facilitate increased private sector involvement in the funding and execution of public building and infrastructure projects. Current law authorizes a local government, which is referred to as a responsible public entity (RPE), to receive unsolicited proposals or to solicit proposals for a qualifying P3 project and thereafter enter into a comprehensive agreement for the building, upgrading, operating, ownership, or financing of facilities.

If the RPE intends to execute a comprehensive agreement for a project arising from an unsolicited proposal, the RPE must publish certain notices stating that the RPE has received an unsolicited proposal and will accept other proposals for the same project. After the public notification period has expired, the RPE ranks the proposals received in order of preference and begins negotiations. However, before approving a comprehensive agreement, the RPE must determine that the proposed project is in the public's best interest, is for a facility that is owned by the RPE or one for which ownership will be conveyed to the RPE, and the facility will be owned by the RPE upon completion, expiration, or termination of the comprehensive agreement and upon payment of the financed amounts.

The bill authorizes an RPE to proceed with an unsolicited proposal for a qualifying project without engaging in a public bidding process. To do so, an RPE must hold an initial duly noticed public meeting at which the proposal is presented and affected public entities and members of the public are able to provide comment. The RPE then must hold a second duly noticed public meeting at which the RPE determines that the proposal is in the public's interest based on specified factors.

The bill provides that an RPE is authorized, but no longer required, to publish notice in the Florida Administrative Register (FAR) and a newspaper of general circulation and mail a copy to each affected local government in the affected area if the RPE intends to execute a comprehensive agreement for a project arising from an unsolicited proposal. If the RPE decides to proceed with an unsolicited proposal without engaging in the public bidding process, the RPE must publish a report that provides the public interest determination, and specifically detailed information, in the FAR for at least seven days.

The bill no longer requires the RPE to determine that an unsolicited proposed project will be owned by the RPE. The RPE will only be required to determine the proposed project is in the public's best interest or will be conveyed to the RPE upon completion and payment if the proposal was solicited.

The bill may have an indeterminate fiscal impact on local governments.

The bill was approved by the Governor on April 15, 2024, ch. 2024-96, L.O.F., and will become effective on July 1, 2024.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Present Situation

Public-private Partnerships

Public-private partnerships (P3s) are contractual arrangements between public entities and private sector entities¹ that facilitate increased private sector involvement in the funding and execution of public building and infrastructure projects. These agreements enable the collaboration of skills and assets from both sectors to provide services or facilities for the benefit of the general public. In addition to resource sharing, both parties assume shared risks and potential rewards throughout the delivery of the service or facility.² Several statutes promote and offer direction for P3 projects, including those for services and facilities related to transportation,³ housing,⁴ and education.⁵

Current law allows responsible public entities (RPEs)⁶ to engage in P3 projects aimed at developing an extensive array of public-use facilities or projects that fulfill a public purpose. Examples of qualifying projects include those for mass transit, vehicle parking, airports or seaports, educational facilities, and public sector buildings or complexes such as courthouses or city halls.⁷ Current law outlines specific requirements to which RPEs must adhere, including protocols for reviewing and approving proposals.⁸

Procurement Procedures

Current law allows an RPE to receive unsolicited proposals or may solicit proposals for a qualifying P3 project and thereafter enter into a comprehensive agreement for the building, upgrading, operating, ownership, or financing of facilities. To cover the costs associated with evaluating unsolicited proposals, a reasonable application fee may be established. If the RPE opts not to assess the unsolicited proposal, it must refund the application fee.⁹

An unsolicited proposal from a private entity for approval of a qualifying project must be accompanied by the following materials and information, unless waived by the RPE:

- A comprehensive description of the qualifying project.
- A detailed account of the method proposed by the private entity to secure the necessary property interests required for the qualifying project.
- A description of the private entity's general plans for financing the qualifying project.

¹ "Private entity" means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity, or other private business entity. S. 255.065(1)(g), F.S.

² See Florida Department of Transportation, *Public-Private Partnerships*, <https://www.fdot.gov/comptroller/pfo/p3.shtm> (last visited January 7, 2024).

³ See s. 334.30, F.S., relating to public-private transportation facilities.

⁴ See s. 420.0003(2)(b), F.S., relating to state housing strategy.

⁵ See s. 1013.35, F.S., relating to school district educational facilities plans.

⁶ "Responsible public entity" means a county, municipality, school district, special district, 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. S. 255.065(1)(j), F.S. "Develop" means to plan, design, finance, lease, acquire, install, construct, or expand. S. 255.065(1)(b), F.S. "Operate" means to finance, maintain, improve, equip, modify, or repair. S. 255.065(1)(f), F.S.

⁷ "Qualifying project" means a facility or project that serves a public purpose, including, but not limited to, any ferry or mass transit facility, vehicle parking facility, airport or seaport facility, rail facility or project, fuel supply facility, oil or gas pipeline, medical or nursing care facility, recreational facility, sporting or cultural facility, or educational facility or other building or facility that is used or will be used by a public educational institution, or any other public facility or infrastructure that is used or will be used by the public at large or in support of an accepted public purpose or activity; an improvement, including equipment, of a building that will be principally used by a public entity or the public at large or that supports a service delivery system in the public sector; a water, wastewater, or surface water management facility or other related infrastructure; or notwithstanding any provision of this section, for projects that involve a facility owned or operated by the governing board of a county, district, or municipal hospital or health care system, or projects that involve a facility owned or operated by a municipal electric utility, only those projects that the governing board designates as qualifying projects pursuant to this section. S. 255.065(1)(i), F.S.

⁸ "Proposal" means a plan for a qualifying project with detail beyond a conceptual level for which terms such as fixing costs, payment schedules, financing, deliverables, and project schedule are defined. S. 255.065(1)(h), F.S.

⁹ S. 255.065(3)(a), F.S.

- The name and address of a designated contact person who can provide additional information about the proposal.
- The proposed user fees,¹⁰ lease payments,¹¹ or other service payments throughout the term of the comprehensive agreement, along with the methodology for and circumstances allowing adjustments to these payments over time.
- Any additional material or information reasonably requested by the RPE.¹²

If the RPE intends to execute a comprehensive agreement for a project arising from an unsolicited proposal, the RPE must publish notice in the Florida Administrative Register (FAR) and a newspaper of general circulation and mail a copy of the notice to each local government in the affected area.¹³ The notice must be published at least once a week for two weeks stating the RPE has received a proposal and will accept other proposals for the same project. The duration for accepting additional proposals must range from a minimum of 21 days to a maximum of 120 days, unless an alternative timeframe that more adequately suits the needs of the qualifying project is approved by a majority vote of the RPE's governing body.¹⁴

Project Qualification and Approval

After the public notification period has expired for an unsolicited proposal, the RPE ranks the proposals received in order of preference. The RPE may then begin negotiations for a comprehensive agreement with the highest-ranked firm. If the negotiation outcome is unsatisfactory, the RPE may terminate negotiations and engage with each subsequent-ranked firm in order of preference. The RPE may reject all proposals at any point in the process until an agreement is reached.¹⁵

Before approving a comprehensive agreement, the RPE must determine that the proposed project:

- Is in the public's best interest.
- Is for a facility owned by the RPE or for which ownership will be conveyed to the RPE.
- Has adequate safeguards to prevent additional costs or service disruptions for the public in case of material default¹⁶ or cancellation of the comprehensive agreement by the RPE.
- Includes measures to allow the RPE or the private entity to add capacity to the proposed project or other facilities serving similar predominantly public purposes.
- Will be owned by the RPE upon completion, expiration, or termination of the comprehensive agreement and upon payment of the financed amounts.¹⁷

Comprehensive Agreement

The RPE and the private entity must enter into a comprehensive agreement before developing or operating a qualifying project. The comprehensive agreement must provide for:

- Delivery of performance and payment bonds, letters of credit, or other security related to the qualifying project's development or operation.
- Review of the qualifying project design by the RPE. This does not require the private entity to complete the project's design before executing the comprehensive agreement.
- Inspection of the qualifying project by the RPE.
- Maintenance of a public liability insurance policy, a copy of which together with proofs of coverage are filed with the RPE, or satisfactory proof of self-insurance.

¹⁰ "Fees" means charges imposed by the private entity of a qualifying project for use of all or a portion of such qualifying project pursuant to a comprehensive agreement. S. 255.065(1)(c), F.S.

¹¹ "Lease payment" means any form of payment, including a land lease, by a public entity to the private entity of a qualifying project for the use of the project. S. 255.065(1)(d), F.S.

¹² S. 255.065(4), F.S. Any pricing or financial terms included in an unsolicited proposal must be specific as to when the pricing or terms expire.

¹³ "Affected local jurisdiction" means a county, municipality, or special district in which all or a portion of a qualifying project is located. S. 255.065(1)(a), F.S.

¹⁴ S. 255.065(3)(b), F.S.

¹⁵ S. 255.065(5)(c), F.S.

¹⁶ "Material default" means a nonperformance of its duties by the private entity of a qualifying project which jeopardizes adequate service to the public from the project. S. 255.065(1)(e), F.S.

¹⁷ S. 255.065(3)(d), F.S.

- Monitoring the maintenance practices of the private entity by the RPE to ensure proper upkeep of the qualifying project.
- Periodic filing of financial statements pertaining to the qualified project by the private entity.
- Procedures governing the rights and responsibilities of both parties in the event of a termination of the comprehensive agreement or a material default by the private entity.
- User fees, lease payments, or service payments that do not discourage use of the project, as may be established in the agreement.
- Duties of the private entity, including the terms and conditions that the RPE determines serve the public purpose of the qualifying project.¹⁸

Effect of the Bill

The bill authorizes an RPE to proceed with an unsolicited proposal for a qualifying project without engaging in a public bidding process. Accordingly, the RPE will no longer be required to provide notice of accepting additional bids or to rank received proposals in order of preference. However, an RPE may only abstain from the public bidding process if the RPE holds a duly noticed public meeting at which the proposal is presented, affected public entities and members of the public are able to provide comment. The RPE then must conduct a second duly noticed public hearing at which the RPE determines that the proposal is in the public's interest. In making the public interest determination, the bill requires the RPE to consider all of the following factors:

- The benefits to the public.
- The financial structure of and the economic efficiencies achieved by the proposal.
- The qualifications and experience of the private entity that submitted the proposal and such entity's ability to perform the project.
- The project's compatibility with regional infrastructure plans.
- Public comments submitted at the meeting. The RPE must provide a statement that explains why the proposal should proceed and addresses such comments.

The bill authorizes, but no longer requires, an RPE to publish notice of receiving an unsolicited proposal in the FAR and a newspaper of general circulation, and mail a copy of the notice to each local government in the affected area, if the RPE intends to execute a comprehensive agreement for a project arising from an unsolicited proposal. If the RPE decides to proceed with an unsolicited proposal without engaging in a public bidding process, the RPE must publish in the FAR for at least seven days a report that provides the public interest determination, includes the factors considered in making such public interest determination, and the RPE's findings based on each considered factor.

The bill amends the comprehensive agreement approval process. Such process no longer requires an RPE to determine that an unsolicited proposed project will be owned by the RPE upon completion, expiration, or termination of the comprehensive agreement and upon payment of the amounts financed. However, if ownership will not be conveyed to the RPE within 10 years after the initial public operation begins, the public benefits apart from ownership must be identified and stated by the RPE in the public interest determination.

The bill only requires an RPE to determine a proposed project is in the public's best interest, or will be conveyed to the RPE upon completion and payment of amounts financed, if the proposal was solicited.

¹⁸ S. 255.065(7)(a), F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill authorizes RPEs to proceed with an unsolicited proposal for a qualifying project without engaging in a public bidding process if certain conditions are met. Accordingly, private entities may experience less competition when contracting with RPEs through such means resulting in contracts more economically attractive for the private entities but possibly less advantageous to the taxpayers. Such costs may be offset, at least in part, by reducing the workload expenditures associated with the public bidding process. The fiscal impact to local governments is indeterminate at this time.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill authorizes RPEs to proceed with an unsolicited proposal for a qualifying project without engaging in a public bidding process if certain conditions are met. Accordingly, private entities may experience less competition when contracting with RPEs through such means resulting in more economically attractive contracts for the private entities. The financial impact to the private sector is indeterminate at this time.

D. FISCAL COMMENTS:

None.