

# Florida Adopts Legislation on Public Private Partnerships Expanding Opportunities for Infrastructure Projects

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The fiscal challenges faced by Florida in recent years have made the political climate more favorable for the use of Public-Private Partnerships (P3s). Recognizing the successful use by the Florida Department of Transportation of its authority under Section 334.30 to help finance, build and operate numerous roads, bridges and highways throughout the state, the Legislature has, this session, passed Bill CS/CS/HB 85 expanding the Florida P3 statute to allow the finance/build/operate model to be used in a broad range of projects outside of transportation. This action is anticipated to open opportunities for the use of the P3 model in a wide range of applications to help address Florida's many varied and infrastructure needs.<sup>1</sup>

A P3 is a contractual arrangement 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. Through these arrangements, the skills and assets of each sector, public and private, are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards in the delivery of the service or facility.

The Bill acknowledges the need for providing, renovating and upgrading public infrastructure projects on a timely and cost effective basis. The Bill notes the lack of adequate resources to develop such projects and declares that it is the intent of the Legislature to encourage investment by private entities through the facilitation of various bond financing mechanisms, private capital and other sources. The Bill specifically identifies the demonstrated capacity of P3s to improve delivery schedules, lower costs and provide other benefits to the public. Procurements will qualify if they facilitate timely development or operation of a "qualifying project."

"Qualifying projects" are broadly defined as those serving a public purpose including mass transit, parking, airports, seaports, rail facilities, medical or nursing care facilities, sporting, public education, cultural and recreational facilities, wastewater, surface water management and water management facilities.

## Task Force

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The Bill also creates the Partnership for Public Facilities and Infrastructure Act Guidelines Task Force to recommend guidelines to the Legislature for establishing uniform processes for P3s, including factors public entities should review and consider when processing requests for P3 projects. Task Force members are to include:

- The Secretary of Management Services or designee (who will serve as chair); and
- Six members appointed by the Governor, including:
  - One county government official,
  - One municipal government official,
  - One district school board member, and
  - Three representatives of the business community.

By July 1, 2014, the Task Force is to provide recommended guidelines relating to:

- Opportunities for competition through public notice and the availability of representatives of the responsible public entity to meet with private entities considering a proposal.
- Reasonable criteria for choosing among competing proposals.
- Suggested timelines for selecting proposals and negotiating an interim or comprehensive agreement.
- Authorization for accelerated selection and review, and documentation timelines for proposals involving a qualifying project that the responsible public entity deems a priority.
- Procedures for financial review and analysis.
- Consideration of the nonfinancial benefits of a proposed qualifying project.
- A mechanism for the appropriating body to review a proposed comprehensive agreement before execution.
- Analysis of the adequacy of the information released when seeking competing proposals, and providing for the enhancement of that information, if deemed necessary, to encourage competition, as well as establishing standards to maintain the confidentiality of financial and proprietary terms of an unsolicited proposal, an area of particular concern to many potential bidders.
- Authority for the responsible public entity to engage the services of qualified professionals.

Public entities are not required to adopt the proposed guidelines and are permitted to adopt other guidelines, so long as they are not inconsistent with the statute.

## **Unsolicited Proposals**

In addition to soliciting proposals, under the Bill, a public entity is authorized to act on unsolicited bids. Beyond mandating newspaper publication of receipt of an unsolicited bid (once a week for two weeks), the agency is given freedom to set a timeframe for receipt of other bids on an individual project basis taking into consideration the benefits of a longer or shorter period within a minimum 21 and a maximum 120 days prior after the first publication. The agency is permitted to require a technical study prepared by a nationally recognized expert with experience in preparing analyses for bond rating agencies. A detailed list of factors to be submitted with respect to an unsolicited proposal is set out in the Bill, including conceptual design, start and completion dates, financing (including sources of funds) and the proposed user fees. Unsolicited bids are to be ranked by a number of factors including innovative design techniques and finance plans. Negotiations commence in order of ranking and the agency is free to terminate all discussions prior to reaching a definitive agreement. It is significant to note again that one of the assignments of the Task Force is to evaluate exemptions

from public records and meeting requirements as they relate to the confidentiality of financial and proprietary information in unsolicited bids.

## Financing

Specific provisions on financing are set out in the Bill, including the ability of the public authority to lend funds to the private enterprise. “Innovative Financing Techniques” are authorized including federal loans, bank loans, and inflation hedges. The public authority is also authorized to provide its “own capital or operation budget to support the project” including debt issuance, but prohibits the public authority from indemnifying the financing source. The public authority is to appropriate “on a priority basis” the contractual payment obligation from the fund from which the project is to be funded. Although the full faith and credit of the agency may not be pledged to support the financing, in the event of a default by the private entity, the user fees may be used to service the financial obligations to investors and lenders.

## Other Provisions of the Bill Include:

- Notice to affected local jurisdictions as well as for comprehensive agreements between a public and a private entity.
- The applicability of sovereign immunity for public entities with respect to qualified projects.
- Authority for P3s to contract with nonprofit organizations for public service works.
- Authority for P3s to construct county roads.

The Bill also amends chapter 336, F.S., to authorize procedures for the creation and operation of public-private partnerships for transportation facilities within a county.

## Conclusion

In conclusion, Florida has recognized the need of the state to upgrade its infrastructure and has made significant strides in adopting legislation to make participating in such projects more attractive to the private sector.

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<sup>1</sup> Unless vetoed (considered very unlikely), the Bill will become law on the earlier of signature by Governor Scott or 15 days after it is sent to him and become effective on July 1, 2013.