

Meeting Notice

Partnership for Public Facilities and Infrastructure Act Guidelines Task Force Meeting

June 12, 2014

9:00 a.m. – 12:00 noon

Betty Easley Conference Center
4075 Esplanade Way, Room 148
Tallahassee, FL 32399

Meeting Agenda

- I. Introductions and Adoption of Minutes
- II. Discussion of draft final report
- III. Other Business and Public Testimony
- IV. Adjourn

For information regarding this meeting, please contact Marlene Williams with the Department of Management Services at (850) 488-6285.

Partnership for Public Facilities and Infrastructure Act Guidelines Task Force Meeting

Meeting Date: May 23, 2014

DMS Offices

4050 Esplanade Way, Room 280K

Tallahassee, FL 32399

Meeting Agenda

- I. Introductions and Adoption of Minutes
- II. Discussion and vote on final concepts for inclusion in the final report
- III. Other Business and Public Testimony
- IV. Adjourn

Meeting Packet

The meeting packet with all meeting materials can be accessed [here](#). The Task Force webpage with all meeting materials and meeting video footage can be accessed [here](#).

Call to Order

Meeting called to order and welcome at 3:01 p.m.

Roll call conducted at 3:02 p.m.

Members present (via teleconference):

Craig Nichols, Chair

Sonya Little

Michael Olenick

John (Jay) Smith

Andy Tuck

Members absent:

Frank Attkisson, Vice Chair

George Burgess

Business

I. Introduction and Adoption of Minutes

Motion for Approval of Meeting Minutes from 01-31-14 task force meeting at 3:02 p.m.

Vote: All in favor; 0 opposed; 0 abstained

Resolved: Motion carried

II. Discussion and vote on final concepts for inclusion in the final report

Discussion of proposed determinations made on the remaining discussion points and floor opened for any additional refinements or comments at 2:06 p.m.

G. Discussion, modification and concurrence at 2:08 p.m.

M. Concurrence at 2:11 p.m.

N. Discussion at 2:13 p.m., continued discussion and concurrence at 2:21 p.m.

- O. Concurrence at 2:19 p.m.
- P. Concurrence at 2:25 p.m.
- Q. Concurrence at 2:26 p.m.
- R. Concurrence (not to pursue recommendation) at 2:27 p.m.
- S. Concurrence at 2:30 p.m.
- V. Concurrence (Proposed Determination B) at 2:32 p.m.
- Y. Concurrence at 2:35 p.m.

Motion to establish item for discussion at next meeting at 2:37 p.m.

Motion by Michael Olenick; Second by Jay Smith

Vote: All in favor

Resolved: Motion Carried

- Z. Concurrence at 2:39 p.m.
- AA. Concurrence at 2:40 p.m.
- BB. Concurrence at 2:42 p.m.
- CC. Concurrence (Proposed Determination A) at 2:44 p.m.
- DD. Concurrence at 2:48 p.m.

Recognition of Randy Clement at 2:51 p.m. for his assistance and guidance

Discussion of recognition to those who have assisted the Task Force at 2:51 p.m.

Motion to adopt all proposed determinations at 2:52 p.m.

Motion by Michael Olenick; Second by Jay Smith

Vote: All in favor

Resolved: Motion Carried

III. Other Business and Public Testimony

Public Comment at 2:54 p.m.

IV. Adjourn

Adjournment at 2:4 p.m.

Partnership for Public Facilities and Infrastructure Act Guidelines Task Force – Tracking Document

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	Discussion Point	Corresponding Item Number	Discussion/Determination
EE	Clarify Definition of Responsible Public Entity	Clean Up	<p>Paragraph 287.05712(1)(j), F.S., defines “Responsible public entity” as “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.”</p> <p>This definition could be interpreted to not include special districts.</p> <p>Section 1.01, F.S., which is the Definitions section of the Florida Statutes and applies broadly to statute, provides the following definition:</p> <p>(8) The words “public body,” “body politic,” or “political subdivision” include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state.</p> <p>Proposed Determination:</p> <p>To avoid ambiguity in the interpretation of responsible public entity, amend paragraph 287.05712(1)(j), F.S., to explicitly include special districts in the definition of responsible public entity.</p>

Partnership for Public Facilities and Infrastructure Act Guidelines Task Force

Recommendations

July 1, 2014

TASK FORCE MEMBERSHIP

(Pictures to be included)

Chair: Craig J. Nichols, Secretary, Department of Management Services

Vice Chair: Frank Attkisson, Chair, Osceola County Board of County Commissioners

George Burgess, Chief Operating Officer, Becker & Poliakoff, P.A.

Sonya C. Little, Chief Financial Officer, City of Tampa

Michael H. Olenick, Vice President of Corporate Affairs and Chief Compliance Officer, Morganti Group

John B. "Jay" Smith II, Vice President and Owner, Ajax Building Corporation

Andy Tuck, Chair, Highlands County School Board

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LETTER FROM SECRETARY NICHOLS (with P3 letterhead)

The Honorable Rick Scott, Governor
State of Florida
PL-05 The Capitol
Tallahassee, Florida 32399-0001

The Honorable Don Gaetz
President, The Florida Senate
409 The Capitol
Tallahassee, Florida 32399-1100

The Honorable Will Weatherford
Speaker, Florida House of Representatives
420 The Capitol
Tallahassee, Florida 32399-1300

Dear Governor Scott, President Gaetz, and Speaker Weatherford:

In 2013, the Legislature passed and Governor Scott signed into law House Bill 85 to authorize the use of public-private partnerships by local governments, citing the public need for the construction or upgrade of facilities that are used predominantly for public purposes and stating that it is in the public's interest to provide for the construction or upgrade of such facilities and to encourage investment in the state by private entities.

The law established the Partnership for Public Facilities and Infrastructure Act Guidelines Task Force (Task Force) to study the public-private partnership process outlined in law and make recommendations for the Legislature's consideration for purposes of creating a uniform process for establishing public-private partnerships. Governor Scott appointed six members to the Task Force chaired by the Secretary of the Department of Management Services in accordance with the law. Task Force membership, per the law, includes one county government official, one municipal government official, one district school board member, and three representatives of the business community. I would like to thank the Governor for his thoughtful appointment of six highly-qualified individuals.

Working together to ensure the greatest possible flexibility to public and private entities contracting for the provision of public services, the Task Force held ten meetings to study the law, understand how governmental entities around the world have implemented public-private partnerships, and to hear from interested parties and stakeholders.

In accordance with section 287.05712, Florida Statutes, the Partnership for Public Facilities and Infrastructure Act Guidelines Task Force submits the following recommendations for your consideration.

Please do not hesitate to contact myself or Marlene Williams for additional information at (850) 487-7001 or Marlene.Williams@dms.myflorida.com.

Sincerely,

Craig J. Nichols,
Chair, Partnership for Public Facilities and Infrastructure Act Guidelines Task Force
Agency Secretary, Department of Management Services

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INTRODUCTION

In the 2013 Regular Legislative Session, the Florida Legislature enacted HB 85, which was signed into law as Chapter 2013-223, Laws of Florida, and incorporated into law as section 287.05712, Florida Statutes (F.S.). The law authorizes public-private partnerships with “responsible public entities” for certain purposes and establishes requirements for such partnerships. Public-private partnership (P3) projects are contractual agreements formed between public entities and private sector entities that allow for greater private sector participation in the delivery and financing of public building and infrastructure projects.

The law grants responsible public entities the authority to engage in public-private partnership projects for the development of a wide range of public use facilities or projects that serve a public purpose. The law defines “responsible public entity” as “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.”

In order for a project to use the public-private partnerships delivery method, it must meet the definition of “qualifying project.” Under the law, “qualifying project” is broadly defined as:

1. 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;
2. 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;
3. A water, wastewater, or surface water management facility or other related infrastructure; or
4. 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.

General Procurement Provisions for Public-Private Partnership Projects

The public-private partnerships law establishes requirements by which responsible public entities must adhere, including reviewing and approving proposals received pursuant to this

section of law. For reference, the following provides a high-level overview of the public-private partnerships procurement process.

Proposal Receipt and Notice

A proposal may be either requested by a public entity or submitted by a private entity on an unsolicited basis.

Proposals received by the responsible public entity in response to a public solicitation are received, reviewed and either accepted or rejected on a proposal-by-proposal basis.

The process for unsolicited proposals is slightly different. The responsible public entity may establish a reasonable application fee for the submission of an unsolicited proposal under this section. The fee must be sufficient to pay the costs of evaluating the proposal and the responsible public entity may engage the services of a private consultant to assist in the evaluation.

Once a responsible public entity receives an unsolicited proposal for a P3 project and the public entity intends to enter into a comprehensive agreement for the project, the public entity must publish notice in the Florida Administrative Register and a newspaper of general circulation at least once a week for 2 weeks stating that the public entity has received a proposal and will accept other proposals for the same project.

The timeframe within which the public entity may accept proposals shall be determined by the public entity on a project-by-project basis based upon the complexity of the project and the public benefit to be gained by allowing a longer or shorter period of time within which other proposals may be received; however, the timeframe for allowing other proposals must be at least 21 days, but no more than 120 days, after the initial date of publication.

After the public notification period has expired in the case of an unsolicited proposal, the responsible public entity shall rank the proposals received in order of preference and sequentially negotiate a comprehensive agreement, beginning with the highest-ranked firm.

For both solicited and unsolicited proposals, the responsible public entity must perform an independent analysis of the proposed public-private partnership which demonstrates the cost-effectiveness and overall public benefit before the procurement process is initiated or before the contract is awarded.

Project Approval

The responsible public entity may approve the development or operation of an educational facility, a transportation facility, a water or wastewater management facility or related infrastructure, a technology infrastructure or other public infrastructure, or a government facility needed by the responsible public entity as a qualifying project, or the design or equipping of a qualifying project that is developed or operated, if:

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

Additionally, for both solicited and unsolicited proposals, before approving a proposed project, the responsible public entity must determine that the proposed project:

- is in the public's best interest;
- is for a facility that is owned by the responsible public entity or for a facility for which ownership will be conveyed to the responsible public entity;
- 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 responsible public entity;
- has adequate safeguards in place to ensure that the responsible public entity or private entity has the opportunity to add capacity to the proposed project or other facilities serving similar predominantly public purposes; and
- will be owned by the responsible public entity upon completion or termination of the agreement and upon payment of the amounts financed.

Interim or Comprehensive Agreement

Before developing or operating the qualifying project, the selected private entity must enter into a comprehensive agreement with the responsible public entity. Before entering into or in connection with a comprehensive agreement, the public entity may enter into an interim agreement with the private entity authorizing the private entity to begin project activities such as project planning. Any interim or comprehensive agreement must define the rights and obligations of the responsible public entity and the private entity.

RECOMMENDATIONS

Items Specified for Consideration

HB 85 included the following eight items required for Task Force consideration:

1. Opportunities for competition through public notice and the availability of representatives of the responsible public entity to meet with private entities considering a proposal.
2. Reasonable criteria for choosing among competing proposals.
3. Suggested timelines for selecting proposals and negotiating an interim or comprehensive agreement.
4. If an accelerated selection and review and documentation timelines should be considered for proposals involving a qualifying project that the responsible public entity deems a priority.
5. Procedures for financial review and analysis which, at a minimum, include a cost-benefit analysis, an assessment of opportunity cost, and consideration of the results of all studies and analyses related to the proposed qualifying project.
6. The adequacy of the information released when seeking competing proposals and providing for the enhancement of that information, if deemed necessary, to encourage competition.
7. Current exemptions from public records and public meetings requirements, if any changes to those exemptions are necessary, or if any new exemptions should be created in order to maintain the confidentiality of financial and proprietary information received as part of an unsolicited proposal.
8. Recommendations regarding the authority of the responsible public entity to engage the services of qualified professionals, which may include a Florida-registered professional or a certified public accountant, not otherwise employed by the responsible public entity, to provide an independent analysis regarding the specifics, advantages, disadvantages, and long-term and short-term costs of a request by a private entity for approval of a qualifying project, unless the governing body of the public entity determines that such analysis should be performed by employees of the public entity.

The Task Force reviewed each item in detail, designating a Task Force member to each item specifically accountable to research, gather input, and develop recommendations on that individual subject. The Task Force offers the following recommendations for Legislative consideration.

Does the public-private partnership process, in particular when unsolicited proposals are involved, provide for an adequate level of competition?

Item 1, Item 3

The public-private partnerships law (section 287.05712, F.S.) provides for notice process and timelines for public and potential competing proposers. The best prospect for success in generating competing proposals is the amount of time and the extent that it is publicly

advertised. Because this law is intended to encourage innovative partnerships between responsible public entities and private entities, public entities should be encouraged to maintain an open dialogue with private entities regarding the need for infrastructure improvements.

Discussion on this item included ensuring opportunity for competition through public notice and the availability of representatives of the responsible public entity to meet with private entities considering a proposal.

Recommendation:

The Task Force reviewed this item and determined that current law is sufficient to provide an adequate level of competition regarding public notice as noticing requirements in place ensure public advertisement. Current laws in place governing open meetings and procurements are sufficient to cover public-private partnerships.

Criteria for choosing among competing proposals

Item 2

Section 287.05712, F.S., provides that in reviewing and evaluating proposals, the responsible public entity may consider factors that include, but are not limited to professional qualifications, general business terms, innovative design techniques or cost-reduction terms, and finance plans. Additionally, before approving a project, the responsible public entity must determine that the proposed project is in the public's best interest.

Discussion on this item focused on ensuring responsible public entities utilize public resources effectively while ensuring local governments have the flexibility to rank and select proposals as determined at the local level, including application of a local preference or other adopted preference.

Recommendation:

The Task Force reviewed this item and determined that current law in place governing the selection of proposals for public-private partnerships is adequate. Local governments should retain the flexibility to rank and select proposals as determined at the local level, including consideration of qualifications and experience, project characteristics, project benefit, and other factors.

Acceptance of Unsolicited Proposals Timeframe

Item 3

Paragraph 287.05712(4)(b), F.S., specifies that a responsible public entity must notice and accept other proposals for the same project following the receipt of an unsolicited proposal it intends to pursue. Such notice shall be published in the Florida Administrative register and a newspaper of general circulation at least once a week for 2 weeks. The law states the responsible public entity may determine the timeframe within which the public entity may accept other proposals on a project-by-project basis, based upon the complexity of the project and the public benefit to be gained by allowing a longer or shorter period of time; however,

such timeframe must be at least 21 days but no more than 120 days after the initial date of publication. Discussion focused on ensuring that the timeline for competing proposals solicited in response to an unsolicited proposal was sufficient to ensure competing proposers have time to develop a quality competing proposal, particularly in the case of a complex proposal.

Recommendation:

The Task Force reviewed this item and determined that, given the intent to allow the responsible public entity flexibility to determine the timeframe within which to accept other proposals, the Task Force recommends the Legislature consider allowing the responsible public entity the flexibility to extend the timeframe beyond 120 days after the initial date of publication should a project have the complexity to warrant such an extension. This extension must be granted by the elected body or other authorized representative of the responsible public entity.

Should there be a time limit on how long a responsible public entity (RPE) can review a proposal?

Item 3

Responsible public entity representatives should have the flexibility to perform adequate review of submitted proposals to ensure the best allocation of public resources. From a private entity perspective, it was noted that the review period should have a time limit for any pricing included in the proposal.

Recommendation:

The Task Force reviewed this item and determined current law allows for flexibility in the timing of responsible public entity (RPE) review. This flexibility in current statute allows an RPE to fully review and vet both simple and complex proposals in the time needed for deliberate decision making. The Task Force recommends any pricing submitted in a proposal should include the timeframe for which such pricing is valid.

Accelerated selection and review and documentation timelines for proposals involving a qualifying project prioritized by the RPE.

Item 4

Discussion regarding this item focused on whether a responsible public entity (RPE) should have the option to accelerate proposals they deem a priority, if specified accelerated timelines should be developed, and the scenarios that would prompt expedited process. How will the RPE ensure public access to project information? How can the RPE ensure expediting timelines does not deter competition?

Recommendation:

The Task Force reviewed this item and determined that accelerated selection and review and documentation timelines are appropriate and should be considered for proposals involving a qualifying project that the responsible public entity deems a priority. Following noticing requirements established in the law, responsible public

entities should be given the flexibility to determine such accelerated timelines and the process by which projects are selected for accelerated review.

Information released when seeking competing proposals and requests for additional or enhanced information

Item 6

If unsolicited proposals were exempt from public record, the RPE would be required to develop its own solicitation documents to solicit competing proposals. Discussion regarding this item considered what project information should be released when soliciting competing proposals. The quality of information released in soliciting competing proposals is key to ensuring competition.

Recommendation:

The Task Force reviewed this item and determined that responsible public entities (RPEs) should be given the flexibility to develop their own documentation to solicit competing proposals. An RPE should consider using the same project information for soliciting public-private partnerships as it does for standard construction projects. Alternatively, the RPE may request the private entity provide a redacted copy of the proposal without confidential information that may be released should the project be accepted and the RPE need to solicit competing proposals. The private entity shall not deem its entire proposal proprietary and confidential or trade secret.

Exemption from public records requirements for unsolicited proposals

Item 7

An unsolicited proposal may identify proprietary business information and is not currently exempt from public records requirements. Because unsolicited proposals may contain proprietary information and trade secrets, such as patent-pending designs and financing terms, if such information is made publicly available before the responsible public entity (RPE) makes a decision, competitors could determine the creative financing used to fund these projects. The harm that may result from the release of such information may outweigh any public benefit that may be derived from the disclosure of the information.

Recommendation:

The Task Force recommends the Legislature consider establishing an exemption from public records requirements for proprietary and confidential and trade secret information provided in proposals for public-private partnerships. The Task Force voted to support legislation (HB 1051 and SB 1318) filed in the 2014 Regular Legislative Session that would accomplish such an exemption and encourages such an exemption be reviewed by the First Amendment Foundation. The private entity shall not deem its entire proposal proprietary and confidential or trade secret.

Financial Review and Analysis, including use of qualified professionals to conduct an independent analysis of a proposal

Item 5, Item 8

In accordance with the law, a responsible public entity is required perform an independent analysis of the proposed public-private partnership that demonstrates the cost-effectiveness and overall public benefit before the procurement process is initiated or before the contract is awarded.

Additionally, before signing a comprehensive agreement, the responsible public entity must consider: a reasonable finance plan; the project cost; revenues by source; available financing; major assumptions; 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. If considering an unsolicited proposal, the responsible public entity may engage a private consultant for this review and require from the private entity a technical study prepared by a nationally-recognized expert with experience in preparing analysis for bond rating agencies.

Recommendation:

The Task Force reviewed this item and determined that requirements in current law governing the financial review of proposals for public-private partnerships are adequate. Responsible public entities are encouraged to engage professional consultants as needed for advice to support internal personnel and staff.

Guidance regarding application fee for the submission of an unsolicited proposal

Item 5, Item 8

The public-private partnerships law allows an RPE to establish a reasonable application fee for the submission of an unsolicited proposal. The law states the fee must be sufficient to pay the costs of evaluating the proposal. The RPE may engage the services of private consultants to assist in the evaluation.

Discussion regarding this item focused on ensuring that such fees be related to actual, reasonable costs of reviewing the proposal. It is fundamental that such fee is for cost recovery, but not revenue generation.

The Task Force reviewed the fee acceptance process of the Florida Department of Transportation, particularly since their process had been successfully implemented since 1997. Chapter 14-107.0011, Florida Administrative Code, provides the following:

(1) An initial fee of \$50,000 payable to the responsible public entity (RPE) shall accompany any unsolicited public-private facility proposal. Unsolicited proposals received without the initial fee shall not be accepted.

(2) Payment shall be made by cash, cashier's check, or any other non-cancelable instrument. Personal checks will not be accepted.

(3) If the initial fee is not sufficient to pay the RPE's costs of evaluating the unsolicited proposal, the RPE shall request in writing additional amounts required. The public-private partnership or private entity submitting the unsolicited proposal shall pay the requested additional fee within 30 days. Failure to pay the additional fee shall result in the proposal being rejected.

Recommendation:

The Task Force recommends the Legislature consider a flat submission fee of \$50,000 payable to the responsible public entity (RPE) for each unsolicited proposal. This fee shall be used to evaluate the unsolicited proposal. If the initial fee is not sufficient to pay the RPE's costs to evaluate the proposal, the RPE must request in writing additional amounts required. The private entity shall pay such fee or result in the proposal being rejected. This recommendation follows the Florida Department of Transportation's practice and promulgated administrative code for FDOT public-private partnerships.

Best Practices

In its research of the implementation of public-private partnerships by other governmental entities, the Task Force identified specific efficiencies, best practices, and guidance that could maximize the value of private sector engagement and impact of public-private partnership projects. The Task Force offers the following recommendations for Legislative consideration.

Support entity for Responsible Public Entities and to encourage the use of public-private partnerships at the local level

Public Private Partnerships are complex arrangements that seek to balance responsibilities, risks and rewards. Successful partnerships require careful analysis and design, in addition to successful execution. Those public and private-sector entities engaged in public-private partnerships are increasingly using experienced advisors for project support and to ensure project outcomes. Because the public-private partnership delivery method is relatively new for Florida responsible public entities and because such projects utilize considerable public resources, the Task Force finds there is a need to provide support to responsible public entities in their use of public-private partnership projects. Such an entity could provide service as simple as general resource support, such as acting as a depository for best practices, previous contracts, and other resources. Alternatively, the entity could also be given more specific authority to provide professional project support to responsible public entities relating to public-private partnership transactions, including but not limited to tax planning, valuation, risk analysis, construction practices, accounting treatment, change management, and project management. This support would encourage responsible public entities to engage in public-private partnership projects while also attracting private sector involvement. The support entity could attract investors in Florida's public-private partnerships market by acting as a state-wide point of contact for public-private partnership projects and, for example, widely advertising RPE projects. As a best practice, other states and countries utilizing public-private partnerships are establishing such advisory entities.

Recommendation:

The Task Force recommends the Legislature consider authorizing a state agency or other established state entity the additional responsibility to assist local governments in

developing and engaging in public-private partnerships. This entity could engage, identify, or contract with professional vendors to assist in the financial analysis and other services needed to develop solicited proposals and to assess and review solicited and unsolicited proposals to ensure state and local funds are expended in the best interest of taxpayers.

Model Guidelines

As a best practice, other states that have authorized the use of public-private partnerships have determined that model guidelines must be updated periodically to ensure their relevance.

Recommendation:

The Task Force recommends the Legislature consider requiring a support entity develop model guidelines for responsible public entity (RPE) use that should be updated or reviewed at least bi-annually.

Develop best practices guidance for use by RPE comprised of commentary and explanations

The model guidelines of other states specifically include best practice guidance for responsible public entity use. This guidance can also include a checklist and other resources to assist responsible public entities in the delivery of public-private partnership projects. Learning from other public entities that have implemented public-private partnerships, such resources are invaluable for smaller responsible public entities that may not have the same staff resources as larger responsible public entities.

Recommendation:

The Task Force recommends best practices guidance be included in the model guidelines that are developed by a support entity for responsible public entity (RPE) use. General guidance may include checklists or other resources to provide further assistance to RPEs.

Notice to Affected Local Jurisdictions

In several instances during the public-private partnerships procurement process, a responsible public entity is required to provide notice regarding a project to “affected local jurisdictions.” Affected local jurisdictions are defined as a county, municipality, or special district in which all or a portion of a qualifying project is located.

A responsible public entity must provide notice in the following instances:

1. When soliciting competing proposals for an unsolicited proposal it intends to pursue, the RPE must provide a copy of the published notice to affected jurisdictions (paragraph 287.05712(4)(b), F.S.).
2. The responsible public entity must notify each affected local jurisdiction by furnishing a copy of the proposal to each affected local jurisdiction when considering a proposal for a qualifying project. The affected local jurisdiction then has 60 days after receiving the notice to submit in writing any comments to the responsible public entity and to indicate whether the facility is incompatible with the local comprehensive plan, the local

infrastructure development plan, the capital improvements budget, any development of regional impact processes or timelines, or other governmental spending plan. The responsible public entity must consider the comments of the affected local jurisdiction before entering into a comprehensive agreement with a private entity (subsection 287.05712(7), F.S.).

Though this type of notice would be beneficial for transportation projects, the benefit of such notice for facility projects is unclear. For expedited projects a responsible public entity deems a priority, the timeline for receiving feedback from other affected jurisdictions could delay project timelines. Further, such notice is often completed through the standard permitting process.

Recommendation:

The Task Force recommends the Legislature consider removing the requirements for a responsible public entity to provide additional notice to affected local jurisdictions when engaging in a public-private partnership project as authorized in Section 287.01512, F.S.

Judicial Validation

It is not uncommon for a dissenting citizen to file a legal challenge with respect to the undertaking of major public projects by units of local government. Any legal uncertainty or challenge to any aspect of the authorization and implementation of a public-private partnership structure seriously undermines the ability to attract private sector participation and impairs the timely implementation of public projects. With respect to bond financed projects, Chapter 75, F.S., provides an optional process for expedited judicial review and resolution of all legal issues, with a direct appeal to the Florida Supreme Court. Such an optional procedure for expedited judicial review and resolution of legal issues with respect to P3 projects would be very beneficial to the ability of local governmental units to timely implement P3 projects and attract potential private sector participants.

Recommendation:

The Task Force recommends the Legislature consider amending section 287.05712, F.S., to include an optional validation process for public-private partnership project financing similar to the process provided by Chapter 75, Florida Statutes with respect to bond financings.

Ground Lease Allowance

Subparagraph 287.05712(4)(d)5., F.S., requires a responsible public entity determine, prior to project approval, that the project “Will be owned by the responsible public entity upon completion or termination of the agreement and upon payment of the amounts financed.”

Ownership may not be in the best interest of the responsible public entity. One common structure is for the governmental unit to ground lease property to a private entity on which a facility will be constructed and leased, in whole or in part, back to the governmental unit. The

provision should be clarified to clearly permit a ground lease for a period of time longer than the lease-back period.

Recommendation:

The Task Force recommends the Legislature consider amending subparagraph 287.05712(4)(d)5., F.S., to state:

“5. Will be owned by the responsible public entity either upon completion or upon expiration or termination of the agreement (including the expiration or termination of any ground lease from the responsible public entity to the private entity with respect to the qualifying project) and upon payment of the amounts financed.”

Requirement for “most efficient pricing”

Subparagraph 287.05712(6)(b)2., F.S., requires a responsible public entity, during the project qualification and acceptance process to “Ensure the most efficient pricing of the security package that provides for the performance and payment of subcontractors.” It is unclear how the RPE ensures the most efficient pricing to meet this requirement.

Recommendation:

The Task Force recommends the Legislature consider revising the requirement in subparagraph 287.05712(6)(b)2., F.S., to state that the responsible public entity must “Ensure the ~~most~~ efficient pricing of the security package that provides for the performance and payment of subcontractors.”

Transfer of Obligations

Subparagraph 287.05712(6)(b)3., F.S., requires that provision is made for the transfer of the private entity’s obligations if the comprehensive agreement is terminated or a material default occurs. A transfer of obligations is not universally appropriate in the event of a termination or default. In many instances, the appropriate remedy is termination of the agreement and the rights and obligations of the private entity.

Recommendation:

The Task Force recommends the Legislature consider revising the requirement in subparagraph 287.05712(6)(b)3., F.S., to state that the responsible public entity must “3. Ensure that the comprehensive agreement addresses termination or material default.”

Revision of Priority Basis Appropriation Language

Paragraph 287.05712(11)(d), F.S., which relates to Financing, provides that “A responsible public entity shall appropriate on a priority basis as required by the comprehensive agreement a contractual payment obligation, annual or otherwise, from the enterprise or other government fund from which the qualifying projects will be funded. This required payment obligation must be appropriated before other non-contractual obligations payable from the same enterprise or other government fund.”

It is common for lease agreements by which Florida local governmental entities lease property as lessee to provide that the lease obligation is “subject to annual appropriation.” Under Florida law, such a provision provides the local governmental unit the discretion, on an annual basis, whether or not to continue the lease and causes the obligation to be one year obligation. As an obligation of 12 months or less, an annual appropriation obligation is not subject to referendum approval under Article VII, Section 12 of the Florida Constitution. The first sentence of subsection 11(d), by mandating appropriation, draws into question the ability of a responsible public entity to retain discretion whether or not to appropriate under an annual appropriation obligation. Arguably the phrase “as required by the comprehensive agreement” would permit the parties to agree that the responsible public entity may retain discretion whether or not to appropriate on an annual basis, although it is not free from doubt.

Another common financing structure used by Florida local governments is to secure financing obligations with a covenant to budget and appropriate funds sufficient to pay the obligation from legally available non-ad valorem revenues after satisfying funding obligations for essential governmental services of the local government unit. The qualification that the appropriation obligation is from revenues available after satisfying funding obligations for essential governmental services is viewed as necessary to comply with Florida case law precedent in order not to have an indirect pledge of ad valorem taxing powers and to avoid the potential that a court exercising its equitable powers would not require a governmental unit to appropriate funds for the payment of debt leaving it with insufficient funds to provide essential governmental services of the governmental unit. The second sentence would prevent a local governmental unit from using this common financing technique as it would obligate an appropriation prior to appropriations for “non-contractual obligations” which would encompass many funding obligations for essential governmental services. Subsection 11(d) at best calls into question the ability of local governmental units to use two very common financing techniques and is not necessary to provide a binding payment obligation on behalf of responsible public entities.

Recommendation:

The Task Force recommends the Legislature consider revising paragraph 287.05712(11)(d), F.S., to read as follows:

“(d) A responsible public entity shall comply with its financial and payment obligations in accordance with the terms of the comprehensive agreement and shall appropriate sufficient funds to satisfy such obligations from the sources and in the manner provided in the comprehensive agreement, subject to the express terms and conditions of the comprehensive agreement, including, without limitation, any prioritization of security or payment, conditional or discretionary appropriation undertakings and existing and reserved contractual obligations and rights ~~appropriate on a priority basis as required by the comprehensive agreement a contractual payment obligation, annual or otherwise, from the enterprise or other government fund from which the qualifying projects will be funded. This required payment obligation must be appropriated before other non-contractual obligations payable from the same enterprise or other government fund.~~”

Authorization of State University System Use of Public-Private Partnerships

Authorization of the State University System to engage in public-private partnerships was not included in Chapter 2013-223, Laws of Florida, now incorporated into law as Section 287.05712, F.S. The Task Force finds these public entities could benefit from the construction or upgrade of facilities that are used predominantly for public purposes and it is in the public's interest to provide for the construction or upgrade of such facilities.

Recommendation:

The Task Force recommends the Legislature consider specifically authorizing the State University System to utilize public-private partnerships as a project delivery method.

Clarifications

In its review of Section 287.05712, Florida Statutes, the Task Force was made aware of several provisions in need of further clarification. The Task Force provides the following recommendations for Legislative consideration.

Revenue Return Requirement

Subsection 287.05712(10), F.S., provides that a public-private partnership agreement entered into pursuant to this section may authorize the private entity to impose fees to members of the public for the use of the facility. The law provides several provisions that apply to the agreement, including paragraph (e), which states: "A negotiated portion of revenues from fee-generating uses must be returned to the public entity over the life of the agreement."

The requirement that the responsible public entity receive a portion of revenues over the life of the contract may not be universally appropriate or desirable. In many instances, fees are sufficient to pay only a portion of the costs of operation and maintenance, financing costs and return on investment to the private entity.

Recommendation:

The Task Force recommends the Legislature consider amending paragraph 287.05712(10)(e), F.S., to state:

"A negotiated portion of revenues from fee-generating uses may ~~must~~ be returned to the public entity over the life of the agreement."

Clarify applicability of mandatory procurement requirements relating to public-private partnerships

Paragraph 287.05712(15)(c), F.S., provides that the public-private partnership statute does not waive the requirements of section 287.055, F.S., relating to the Consultant's Competitive Negotiation Act (CCNA), which applies to the acquisition of professional architectural, engineering, landscape architectural, or surveying and mapping services.

Private entities interested in bidding or submitting a proposal for a public-private partnership frequently pair or team with other companies to share strengths and resources. The Task Force has discussed the importance of a strong and cohesive private and public team as a key factor in project success. Under the current law, if the team requires a professional service covered by the CCNA, this team member must be selected in accordance with CCNA selection law.

Recommendation:

The Task Force recommends the Legislature consider removing paragraph 287.05712(15)(c), F.S., to clarify that the requirements of section 287.055, F.S., do not apply to projects delivered using the procurement methods in Section 287.05712, F.S.

Clarify the intent of s. 287.05712(4)(c), F.S., relating to an RPE that is a school board

Paragraph 287.05712(4)(c), F.S., states: “A responsible public entity that is a school board may enter into a comprehensive agreement only with the approval of the local governing body.” Since school boards are not subject to governance by a local governing body, should the Task Force recommend this language be removed from statute?

Recommendation:

Since school boards are not subject to governance by a local governing body, the Task Force recommends the Legislature consider striking paragraph 287.05712(4)(c), F.S., from law.

Clarify Definition of Responsible Public Entity

Paragraph 287.05712(1)(j), F.S., defines “Responsible public entity” as “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.”

This definition is not consistent with Florida local law. Under Florida law, “school districts” are the local government units that provide public primary education. The governing bodies of school districts are referred to as “school boards.”

Recommendation:

The Task Force recommends the Legislature consider amending the definition of “responsible public entity” in paragraph 287.05712(1)(j), F.S., to reference school district, rather than school board.

Consistent Use of Responsible Public Entity

Paragraph 287.05712(1)(l), F.S., which provides the definition of “Service contract” uses the term “public entity” which is not a defined term.

Recommendation:

The Task Force recommends the Legislature consider amending the definition of “service contract” in paragraph 287.05712(1)(l), F.S., to use the defined term “responsible public entity.”

Construction Section Clarification

Section 287.05712(15), F.S., provides:

“(15) CONSTRUCTION. – This section shall be liberally construed to effectuate the purposes of this section. This section shall be construed as cumulative and supplemental to any other authority or power vested in or exercised by the governing board of a county, district, or municipal hospital or health care system including those contained in acts of the Legislature establishing such public hospital boards or s. 155.40. This section does not affect any agreement or existing relationship with a supporting organization involving such governing board or system in effect as of January 1, 2013.

(a) This section does not limit a political subdivision of the state in the acquisition, design, or construction of a public project pursuant to other statutory authority.

(b) Except as otherwise provided in this section, this section does not amend existing laws by granting additional powers to, or further restricting, a local governmental entity from regulating and entering into cooperative arrangements with the private sector for the planning, construction, or operation of a facility.”

Because of the diverse nature, needs, and circumstances of local governmental units in Florida and the wide variety of projects and structures that could be deemed qualifying projects eligible as public-private partnership projects, local governments need flexibility to address their particular needs and circumstances and to structure projects and agreements. Florida municipalities and counties have home rule powers that would enable them to implement public-private partnership projects and structures. Many special districts also have broad powers to serve their statutory purposes to serve their statutory purposes and functions. To provide needed flexibility to address diverse and dynamic needs and circumstances and myriad of projects and structures that may be proposed or considered, this statute should be clearly stated as supplemental to existing authority and an alternative authorization, not in derogation of existing authorization similar to that provided in Section 159.43, F.S., with respect to industrial development revenue bond financing.

Recommendation:

The Task Force recommends the Legislature consider amending section 287.05712(15), F.S., including paragraphs (a) and (b) to read as follows:

(15) CONSTRUCTION. –

(a) This section shall be liberally construed to effectuate the purposes of this section.

(b) This section shall be, and be deemed, authority in addition to, and shall provide alternative methods for, any other authority provided by law for the same or similar purposes; and is supplemental to and not in derogation of any powers of any responsible public entity otherwise conferred. The criteria and requirements of this section are applicable only to qualifying projects financed under the authority of this section.

Financing and Facility Liens

Paragraph 287.05712(11) (c), F.S., which relates to Financing, provides:

“(c) The responsible public entity may use innovative finance techniques associated with a public-private partnership under this section, 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 responsible public entity may provide its own capital or operating budget to support a qualifying project. The budget may be from any legally permissible funding sources of the responsible public entity, including the proceeds of debt issuances. A responsible public entity may use the model financing agreement provided in s. 489.145(6) for its financing of a facility owned by a responsible public entity. A financing agreement may not require the responsible public entity to indemnify the financing source, subject the responsible public entity’s facility to liens in violation of s. 11.066(5), or secure financing by the responsible public entity with a pledge of security interest, and any such provision is void.”

The intended application of this provision is unclear; however, it seems to be intended to prohibit a responsible public entity from granting a mortgage or security interest on the project and tangible personal property.

Recommendation:

The Task Force recommends the Legislature consider revising the final sentence of paragraph (c) of subsection 287.05712(11), F.S., to clarify the intent to prohibit a responsible public entity from granting a mortgage or security interest in its real or tangible personal property as follows:

“A financing agreement may not require the responsible public entity to indemnify the financing source, subject the responsible public entity’s facility to liens in violation of s. 11.066(5), or secure financing of by the responsible public entity by a mortgage on or security interest in the real or tangible personal property of the responsible public entity in a manner that could result in the loss of the fee ownership of the property by the responsible governmental unit, with a pledge of security interest, and any such provision is void.”

Revenue Regulation

Subsection 287.05712(10), F.S., provides that a public-private partnership agreement entered into pursuant to this section may authorize the private entity to impose fees to members of the public for the use of the facility. The law provides several provisions that apply to the agreement, including paragraph (d), which states: “Any revenues must be regulated by the responsible public entity pursuant to the comprehensive agreement.”

It is unclear how responsible public entities should interpret their responsibility to regulate such fees. Additionally, fees may already be subject to regulation by other governmental entities (such as the Public Service Commission).

If the intent is to require revenues generated by the facility be applied in the manner provided in or permitted by the agreement, this section should be revised.

Recommendation:

The Task Force recommends the Legislature consider clarifying the intent of this section to assist responsible public entities in implementing this section. Amend paragraph 287.05712(10)(d), F.S., to state:

“(d) Any revenues shall be applied in the manner required or permitted by the comprehensive agreement.”

Teaming to meet minimum standards for qualifying professional services and contracts

Paragraph 287.05712(6)(a), F.S., mandates that the private entity must meet the minimum standards contained in the responsible public entity’s guidelines for qualifying professional services and contracts for traditional procurement projects. In many instances, the private entity will be a special purpose entity. It is doubtful that the private entity would meet the public entity’s guidelines, but rather that a member of the private entity’s team, as reflected in its proposal, would meet the criteria.

Recommendation:

The Task Force recommends the Legislature consider revising paragraph 287.05712(6)(a), F.S., to clarify that the private entity or the applicable party or parties of the private entity’s team proposed to provide the particular professional services must meet the minimum standards contained in the responsible public entity’s guidelines.

RECOGNITION

In developing its recommendations, the Task Force heard from experts in the field of public-private partnerships, governmental contracting, construction and finance. The guidance, advice, and shared knowledge the following partners provided to the Task Force was invaluable in the development of Task Force recommendations. The Task Force would like to extend our gratitude and sincere thanks to the following people for their tremendous assistance in gathering the information necessary to support this initiative:

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