Meeting Notice

Partnership for Public Facilities and Infrastructure Act Guidelines Task Force Meeting
Feb. 28, 2014
9:00 a.m. – 12:00 noon

Building 4050, Room 101
4050 Esplanade Way
Tallahassee, FL 32399

Meeting Agenda

I. Introductions and Adoption of Minutes
II. Discussion of preliminary concepts for task force recommendations relating to the eight items required for task force consideration and vote on final preliminary concepts
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: Jan. 31, 2014
Betty Easley Conference Center
4075 Esplanade Way, Room 148
Tallahassee, FL 32399-0950

Agenda

- **I.** Introductions and Adoption of Minutes
- **II.** Presentation and discussion of preliminary concepts for task force recommendations relating to the eight items required for task force consideration
- **III.** Discussion and Vote on Proposed Public Records Exemption for Unsolicited Proposals
- **IV.** Other Business and Public Testimony
- **V.** Adjourn

Call to Order
Meeting called to order and welcome at 9:07 a.m.

Members present:
Craig Nichols, Chair
Frank Attkisson, Vice Chair
George Burgess
Sonya Little (attending telephonically)
Michael Oelnick
John (Jay) Smith
Andy Tuck (attending telephonically)

Members absent:
None

Business

I. Introductions and Adoption of Minutes

Motion for Approval of Meeting Minutes from 1-9-14 task force meeting at 9:09 a.m.
Vote: All in favor, 0 opposed, 0 abstained
Resolved: Motion carried

II. Presentation and discussion of preliminary concepts for task force recommendations relating to the eight items required for task force consideration

Introduction of Meredith Stanfield, professional staff to the task force, for facilitation of discussion at 9:11 a.m.

*Note: The tracking document (item 4 of the meeting packet) was used to facilitate task force discussion during this portion of the meeting. This document can be accessed here.

Discussion of development of model guidelines for use by responsible public entities (RPE) at 9:12 a.m.

Discussion of development of a support entity to provide guidance to RPE and encourage the use of public-private partnerships at the local level at 9:17 a.m.

Discussion of development of best practices guidance for use by RPE at 9:30 a.m.

Discussion of development of model comprehensive agreements and interim agreements at 9:35 a.m.

Discussion of ensuring adequate level of competition in public-private partnership process, in particular when unsolicited proposals are involved at 9:45 a.m.

Discussion of information released when seeking competing proposals and requests for additional or enhanced information at 9:55 a.m.

Discussion of exemption from public records requirements for unsolicited proposals at 10:00 a.m.
- The discussion included comments on HB 541 and HB 543 from Vikki Shirley, General Counsel for the State University System of Florida Board of Governors and the Chancellor
- See item III. Discussion and Vote on Proposed Public Records Exemption for Unsolicited Proposals below for full discussion and vote on proposed public records exemption for unsolicited proposals

Meeting Break at 10:20 a.m.

Discussion of availability of representatives of the RPE to meet with private entities considering a proposal at 10:35 a.m.

Discussion of criteria for choosing among competing proposals at 10:39 a.m.

Discussion of time limits on RPE review of submitted proposals at 10:41 a.m.

Discussion of accelerated selection and review and documentation timelines for proposals involving a qualifying project prioritized by the RPE at 10:52 a.m.

Expanded discussion of time limits on RPE review of submitted proposals at 10:55 a.m.

Discussion of applicability of mandatory procurement requirements relating to public-private partnerships at 10:57 a.m.
- Discussion tabled until next meeting

Discussion to clarify the intent of ss. 287.05712(4) and (6), F.S., relating to project procurement and qualification and process at 11:07 a.m.
- Discussion tabled until next meeting

Discussion of guidance regarding application fee for the submission of an unsolicited proposal and RPE use of qualified professionals to conduct an independent analysis of a proposal at 11:15 a.m.

Discussion to clarify the intent of s. 287.05712(4)(c), F.S. relating to an RPE that is a school board at 11:25 a.m.

III. Discussion and Vote on Proposed Public Records Exemption for Unsolicited Proposals

Comments on HB 541 and HB 543 from Vikki Shirley, General Counsel for the State University System of Florida Board of Governors and the Chancellor at 10:00 a.m.

- Ms. Shirley provided an update on potential amendments to HB 543 to satisfy recommendations from the First Amendment Foundation. HB 543 would be amended as such: reduce the time information provided in a proposal is shaded from public record from one year to 90 days. All confidential and proprietary information would be permanently exempt from public record.

Motion by Mike Olenick for the task force to vote to formally support HB 541 at 10:10 a.m.

- Second by Jay Smith
- House Bill 541 would authorize the State University System to engage in public-private partnerships
- Vote: All in favor, 0 opposed, 0 abstained
- Resolved: Motion carried

Motion by Mike Olenick for the task force to vote to formally support HB 541 at 10:13 a.m.

- Second by Frank Attkisson
- House Bill 543 would provide an exemption from public records requirements for unsolicited proposals received by the State University System
- Vote: All in favor, 0 opposed, 0 abstained
- Resolved: Motion carried

IV. Other Business and Public Testimony

Discussion of next meeting and member availability at 11:27 a.m.

Public Comment at 11:32 a.m.

- No public comment was provided.

V. Adjourn

Adjournment at 11:34 a.m.

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Bonding P3 Projects

Government entities in the United States have understood the importance of surety bonds and have required bonds for over a century to provide performance and payment assurance for the nation's infrastructure projects. Although procurement methods have evolved—including the increased use of public-private partnerships (P3s) in the U.S.—construction risks remain the same, making surety bonds just as relevant and important today. Bonding is a tool that protects taxpayer and investor dollars and supports economic empowerment, sustainability, job creation and legacy wealth for contractors and subcontractors, and the surety industry remains ready to provide bonding for all types of construction delivery mechanisms, including P3 projects.

Frequently Asked Questions about P3s

What is a public-private partnership (P3)?
A P3 is a long-term contractual agreement between a public entity and a private partner in which the private partner, in exchange for compensation, invests its own assets and delivers a public service or facility. In such agreements, the public entity grants the exclusive rights ("concession") to the private partner ("concessionaire") to engage in an activity that would otherwise be a public responsibility and compensates the private partner. The P3 agreements currently in place or under consideration have lifetimes of 30 to 99 years.

How are P3s used?
P3s have been used to a much greater extent in other countries to design, finance, construct, operate and/or maintain many types of public services and infrastructure: transportation, water infrastructure, waste water facilities, court houses, prisons, hospitals and schools. In the United States, the P3 is more of a case of first impression. The experience with P3s is limited, however, the current level of interest in P3s is high at both the state and federal levels.

How do P3s work?
Every P3 is unique in that it is the result of negotiations between the public and private partners and P3 agreements can take many forms. The following are the most common P3 structures:

1) *Design-Finance-Build-Operate-Maintain*; The private partner can be involved in some or all of these functions. In this structure, the private partner finances a public service or facility and is compensated, usually over the term of the P3 agreement. The compensation can be the right to collect revenues associated with the project (e.g., private partner constructs road and collects the tolls for 30 years) or periodic payments from the public entity based on performance. (E.g., payment is triggered at milestones in the P3 agreement if the infrastructure is operating as required). In some P3s, the public entity pays the private partner pre-established "availability payments," which are rent-like

payments based on certain periods of time. The payments are made if the contractually obligated construction or performance specifications are met. When the public entity makes periodic or availability payments, the funds come from public funds.

2) *Sale/Long Term Lease;* The public entity "sells" an existing public asset (e.g., a government building/ parking lot) to the private partner through a long term lease, under which the private partner gives the public entity a cash payment upfront. The private partner gets the long term revenues either from lease payments (public building) or the revenue stream from users (parking lot). This often is called the "monetization of a public asset." The public entity usually retains ownership and the public asset is returned to it upon expiration of the P3 agreement.

3) *Build/Leaseback;* The private partner invests the costs to construct a public building and the public owner agrees to a long-term rental after construction.

Who are the private partners?
The entities involved as private partners generally are infrastructure equity investors and lenders, developers and construction/engineering firms.

How are P3s different from other public works projects?
Under traditional methods of construction of public works projects, the public entity lets a contract to a private construction company, based on a public design and with public financing, to pay the contractor. Contracts are let through a competitive bidding process and awarded to the lowest responsible bidder, who completes the project and turns it over to the public entity. The public entity must obtain funding, hire a designer, solicit bids, oversee the construction project, and ensure the operation and maintenance of the facility over its lifetime.

Under a P3, the private partner may participate in the design, finance, construction, operation and/or maintenance. The public entity usually starts with a Request for Qualifications to identify and retain a qualified private partner/concessionaire. The prospective private partners submit proposals. After review, the public entity invites those that it believes are qualified to bid in a final round in which bidders submit detailed plans. The selection criteria may vary with the type of project, and the winning proposal may not be the least costly. The public entity and the private partner negotiate a P3 agreement.

Do all P3s involve public construction?
The answer is yes when a P3 involves design, build, finance, operate and/or maintain, because these arrangements generally involve public infrastructure construction, either transportation or more recently, social infrastructure. There are other P3 relationships where public construction may not be involved in the P3 arrangement. For example, in Sandy Spring, Georgia, almost all municipal services have been outsourced to CH2M Hill, including police department, fire department and trash clean up services. At the federal level, the Federal Emergency Management Agency (FEMA) is known to have many P3 relationships for disaster or emergency management.

Why are P3s such a big issue in the United States now?
Currently, the need for infrastructure improvement in the U.S. far exceeds the available funds at the state and federal level. In its 2013 Report on American Infrastructure, the American Society

of Civil Engineers (ASCE), the overall grade point average of the current system is a D+. The estimated investment needed by 2020 to restore it is $3.6 trillion. The Federal Highway Trust Fund, which funds the federal government's surface transportation programs with revenues from the federal fuel tax, has not had enough money to fund its current obligations since 2008. It has received around $50 billion from the general revenues to address shortfalls and it is predicted to run out of money in 2015. Most state and local government budgets have been cut and they lack even the funding levels that they had prior to the Great Recession to complete all the needed infrastructure projects so that the financing available through a P3 is attractive to public entities.

Why is legislative authorization needed for P3s?
State law varies, but state and local governments may well not have the authority to encumber government property with a lease or otherwise with a private partner.

Additionally, existing procurement codes typically address public works projects that involve contracts directly between the public entity and the contractor that performs the work. P3s involve contracts between the public entity and the private partner/concessionaire, who in turns contracts with the team that performs the construction under the P3 agreement. The private partner, not the public entity, hires and supervises the contractor in a P3. Existing public procurement laws address construction projects, but P3s also can contain elements other than construction. The private partner may design, construct, finance, operate and/or maintain a public infrastructure project. Over the last decade, states have needed to amend their procurement codes in a similar manner to authorize other new methods of delivery, such as design-build and construction manager at risk, for the same reasons.

In addition, under P3 agreement, public entities commit public funds to repay the private partner over a long period of time. Legislators want to provide a statutory framework for P3s as the impact of these projects will be felt for generations. P3 legislation typically contains detailed requirements for the procurement process for a P3 and the terms and conditions that must be included in the P3 (concession) agreement.

Will there be pushback to including bond requirements in P3 legislation?
Any opposition to bonding the construction portions of a P3 would be for the same reason as in any other public works project delivered by any other method, although the arguments may be asserted differently. The value of bonds on a public works project is the basic issue.

One of the primary benefits of bonding is the surety's prequalification of contractors. The surety's underwriting of a bond is crucial to the success of public works projects. The surety provides a bond only to contractors that, in the surety's estimation, are capable of performing the work. The surety examines the contractor's expertise in the work, character, ability to work in the region where the project is located, current work in progress, and overall management as well as its capital and record of paying its obligations. By issuing a bond, the surety provides the public entity and the taxpayers and subcontractors with assurance from an independent third party, backed by the surety's own funds, that the contractor is capable of performing the construction contract.

The other primary benefit of the bond is that the surety responds if the contractor defaults. The payment bond guarantees that covered subcontractors, suppliers, and laborers on the job will get paid. Generally, mechanics liens cannot be asserted against public property. Subcontractors,

suppliers, and laborers on public works projects must rely on the general contractor's payment bond for protection. If no payment bond is required, these parties are left with no means to collect for their services and supplies if the contractor is unable or unwilling to pay them. Many subcontractors and suppliers on public works projects are small contractors that have fewer resources to absorb an event of non-payment.

The performance bond guarantees that funds will be available to complete the public works project according to the construction contract. For a traditional public works project, if a performance bond is not provided, the federal, state, or local budget and taxpayers take on the risk should the contractor default, and thus bear the burden of re-letting work and paying any excess completion costs. When a performance bond is in place, the full amount of the bond is available to complete the project in the event of the contractor's default. Governmental entities do not have adequate resources to perform all of the tasks that the surety does either in prequalification of contractors or in the servicing of claims brought on by contractor default.

P3s may add some new twists and challenges to the basic issue regarding the value of bonding on public works projects as discussed below.

If the private partner funds the project, how can it still be considered a public works project?
The private party finances the project, not funds it. The private party always is repaid with public funds in any P3. For example, the private partner that pays the upfront costs to rebuild a public road typically gets repaid through a license to collect the tolls for the next 30 years. A P3 is a new source of financing for the public entity, not a new revenue source. Private money has long been used in public works projects. One of the traditional ways state and local governments fund public works projects is through issuance of municipal or other revenue bonds, which private investors purchase. For over 75 years, the federal government has granted tax exemptions on interest paid on bonds issued by state and local governments to finance public works projects in order to encourage such private investment. A P3 is a new way for public entities to access the capital market.

If the private partner has the risk of construction in a P3, why should bonding be required?
The private partner may design, construct, build, finance, operate and/or maintain a public works project under a P3, and will assume the risk involved in the construction portion of the P3 in terms of schedule and costs, including any cost overruns, contractor defaults and re-letting of construction contracts. If the public entity no longer chooses and manages the construction contractor, are bonds still needed to protect the public entity and taxpayer in the event of the contractor's default and payment of subcontractors, suppliers and workers as the risk has shifted to the private partner?

The first P in any P3 is Public. The end result of a P3 is a project that provides a public service or facility. A P3 is just another method to deliver a public works project, just like design-bid-build by a general contractor, design-build and the construction manager methods. Construction of public works should be bonded.

Public money pays for the P3 project in the long run and such public funds are at risk in a P3 the same as in any other method of delivery. Arguably, the risk to the public entity is increased in a P3 since the public entity is responsible to the taxpayers to deliver a public service or facility, but

the public entity does not choose or control the construction contractor and could suffer financial loss if the private partner defaulted.

The private partner also can and has failed for reasons unrelated to the construction portion of the P3. If the private partner's financing fails and causes a default when the construction portion of the P3 is not yet complete, the public entity may have to take control of the project. Without a surety bond that includes the public entity as an obligee, the public entity would have to fund, manage and possibly relet the construction part of the project. Requiring performance bonds on the construction portion of a P3 will protect the public entity and its taxpayers in the event that the private partner defaults and the public entity takes control of the P3 just as they do in any other public works project.

With respect to the payment of subcontractors and suppliers, when subcontractors perform, they need to be paid promptly for the work. The public interest demands that payment bonds be in place on P3s to ensure that subcontractors and suppliers get paid promptly for work performed if the construction contractor defaults on the project. Payment to these entities cannot spread over the long life of a P3 contract.

Politically, the risk to the public entity also remains the same. Taxpayers have a direct interest in seeing those roads completed on time and maintained. They also want school projects delivered for the start of the school year. If there are problems or a contractor defaults in the construction portion of a P3, the public entity will get the same pushback that it gets when something goes wrong in any other type of public works project. The bottom line is that the public entity remains responsible for delivering a completed public works project to the taxpayers. That risk politically cannot be shifted to the private partner.

If the public entities pre-qualify the private partners that can bid for a P3, why do contractors that perform the construction in the P3 need to be bonded?

The public entity prequalifies the private partners that can bid and be selected in a P3. In most cases, the contractor performing the construction portion of the P3 is the private partner or is affiliated with the private partner. If the public entity has determined that the private partner is qualified to perform under the P3 agreement, why should the public entity further require bonds?

The public entity is prequalifying the private partner for many things, and construction is simply one part of those contractual responsibilities. The construction, however, is the piece that most impacts the taxpayers and subcontractors and suppliers on the project. Construction is extremely risky, and contractors perform more than one project at a time. It is not uncommon that the loss that causes the collapse of a company is not the job the contractor is performing for a particular public entity, but one of its other projects.

One of the key benefits of having a surety is that the surety has a broader view. Sureties look at the 3Cs--capital, capacity, and character. Sureties provide a robust review of all the activity in which a contractor is engaged. Once a contractor gets in trouble on one job, its effects are felt on all the jobs. When a surety determines that there is a problem with the account, it manages the entire situation not just one job or the bonded jobs. A DOT or governmental entity does not have the access to information about all the projects in which the contractor is engaged nor does it have the resources to provide the degree of scrutiny and management that a surety does. In a P3, to the extent the public entity scrutinizes the ability of the contractor to perform the construction,

it will be reviewing only its ability to perform the work under the P3 agreement, rather than using the broader lens of the surety.

If a bonded contractor defaults, its surety supports the contractor with the strength of its balance sheet. Also, the surety industry can avail itself of risk mitigation strategies that spread the risk of loss including co-surety for mega projects or reinsurance. If a large contractor defaults and the projects are not bonded, each owner or obligee has to negotiate its own resolution and manage the completion of the project and payment of subcontractors and suppliers. Surety companies are equipped to manage these types of defaults and have claim departments that do just that.

Just looking at the recent failure rate in the construction industry shows that construction is a risky business. The contractors, subcontractors and suppliers that the private partner/concessionaire hires for the construction element of the P3 can default on their performance. The value of the surety bond is the prequalification of the contractors that are able to do the job in the first place to prevent construction losses. In the event of a default the surety steps in and pays to complete the contract up to the value of the bond.

Surety in the 2000s

Building, heavy/highway, and specialty trade contractors		
In Business	**Survivors**	**Failure Rate**
853,372 **(2002)**	610,357 **(2004)**	28.5%
850,029 **(2004)**	649,602 **(2006)**	23.6%
1,155,245 **(2006)**	919,848 **(2008)**	20.4%
897,602 **(2009)**	702,618 **(2011)**	21.7%
918,483 **(2010)**	696,441 **(2012)**	24.2%

Source: BizMiner

SIO

Since large sophisticated contractors participate in P3s, should they be required to be bonded?
Big is big; big does not necessarily mean strong. One only need look back less than twenty years to see a list of well established and well respected large heavy construction companies who have filed for bankruptcy; names like Morrison Knudsen (1905-1995), Guy F. Atkinson (1926-1997), and J.A. Jones (1890s-2003). A more recent name is Modern Continental (1967-2008), the largest contractor on The Big Dig. In 2000, Modern Continental was a $1.3 billion company with over 4000 employees. While Modern Continental's problems started with a default on a wastewater treatment plant project, the issues it encountered on the Big Dig (including a guilty plea to 39 federal charges) led it to file for bankruptcy in 2008. The successful completion of the

Big Dig should be credited to the surety claim department which managed the claims and financed Modern Continental to completion of its projects and ultimately filed a proof of claim in the bankruptcy for hundreds of millions of dollars.

Even more recently, Ballenger Construction Company (1937-2012), a large Texas road contractor, filed for bankruptcy in December 2012 leaving millions of dollars in bills to subcontractors, suppliers and others on 20 bonded transportation projects with a total value of $356 million. About $112 million of work remained on the Ballenger contracts when the company went out of business. Ballenger was founded in 1937 and had 550 employees, all of whom were laid off. Ballenger's sureties again are managing the claims and making sure the projects get completed and the subcontractors and suppliers who timely file proper claims are being paid.

Large contractors need the surety's prequalification in a P3 just as in any other public works project. The surety does not look just at the contractor's qualification to complete the public works project upon which the contractor submits a bid. Rather, the surety reviews all the contractor's works in progress to make a determination that the financing, equipment, workers and other resources will be available and on location when the new project starts.

To the extent that a P3 has construction elements, the construction risk is the same under a P3 as any other delivery method, and construction is a risky business.

If P3s have worked well in other countries without bonding, why can't that work in the U.S.?
P3s have been used in countries with vastly different procurement systems than the U.S. Other countries have different approaches to public funds and many do not include protection for subcontractors and laborers on any public project. They also do not look for the security posted on a public construction project to address completion of the project or to pay workers, but rather require only a small demand guarantee. In essence, the public entities in many other countries require a small amount of money to be available upon demand if the contractor defaults so that they can re-let the contract. These countries often do not limit the guaranty that must be provided to a surety bond, but rather permit letters of credit (LOCs), and sometimes even parental guarantees and other forms of security. Some countries require 30% to 50% bonds. Most other countries require only a 5% - 10% LOC as the security on any public construction project in some other countries, and their P3 projects follow that approach. In the countries that do require a higher percentage conditional guaranty, that same percentage normally is required for P3 projects as well.

The U.S. is the only country that requires 100% bonding of virtually all public works projects. The U.S. adopted a policy over 100 years ago that the key to protection on public construction projects is completion of the contract and payment to the subcontractors and workers on the job. That policy is contained in the federal Miller Act and the state Little Miller Acts, which require bonding on public works projects to guarantee payment for completion of the contract and payment of subcontractors and suppliers. Those public policies hold true regardless of who is providing the revenue stream for these projects.

Many of the private partners in P3s are foreign companies that are familiar with the public procurement system in their own country and have not been required in the past to comply with the requirements in the U.S. of large penalty bonding on public works projects (i.e. bonding

100% of the contract price). Here in the US, we have a procurement system that guarantees that significant funds will be available to pay for completion of the work and payment of workers in the event a contractor defaults on a public works project. Other countries treat P3s like any other public construction project and P3s in the U.S. likewise should be treated as any other public construction project and require bonding. There is no reason to adopt a foreign approach to P3 projects here at home.

Don't surety bonds need to be changed to meet the expectations of foreign private partners and encourage investment in P3s in the U.S.?

The surety industry is highly competitive and every surety wants to write more bonds. The companies continually look for better ways to market their product, improve their customer service and become more effective at underwriting and to use these factors to compete for the contractors' business. It is not surprising that some sureties now may be considering adding a "demand payment" feature to their traditional payment and performance bonds, or a separate demand instrument in addition to the traditional performance and payment bonds, so that the private partner/concessionaire receives a previously agreed payment if the construction contractor defaults. It must be understood that bonds are universally required on public construction projects in the U.S. to protect public budgets, taxpayers and subcontractors, suppliers and workers on the job—not private partners and their investors. The latter are sophisticated parties that have the expertise and resources to negotiate financing arrangements and P3 agreements on terms that are acceptable to them. Providing a quick payment to the private partner neither increases the likelihood that the construction contract will be completed nor that subcontractors, suppliers and workers will be paid promptly. If there is a contractor default, the surety is going to bear the expense of adjusting the claims and managing the process. The payment protection available for subcontractors, suppliers and workers and the contract completion protection for public entities should not be compromised and reduced because some financiers and concessionaires are comfortable with less security. Changing the fundamental U.S. protections solely to accommodate the financial interests of equity investors or financiers is misplaced. Bonding 100% of the construction portion of P3 projects still remains the best option in the U.S. for payment and performance security.

What states are the most active in P3s?

Over 30 states have enacted legislation authorizing P3s. California, Indiana, Florida, Texas and Virginia have led the way in P3s. Chicago is the most active city.

What do public owners see as the benefits of P3s?

Factors that public owners commonly cite as the benefits of a P3 include:

1) The private partner invests in and otherwise obtains financing (loans/incurs the debt) to deliver the new or renovated infrastructure so that the public entity obtains a capital asset on its balance sheet without increasing its debt level. The P3 financing is off the balance sheet for the public partner.

2) Reconstruction of a major highway in a state may take a long time as there are competing interests for limited funds in each annual budget cycle. There is not much private investor interest now in municipal and other revenues bond in the current market. A P3 agreement allows the private partner to obtain the capital upfront and proceed to complete the project in a shorter time frame.

3) Use of the private sector expertise in delivering a public service or facility.

What are the major concerns about P3s?

The most frequent concerns expressed about P3s include:

1) The ultimate cost to the taxpayer is greater because the private partner and its investors make a higher rate of return than it would have received from buying revenue bonds from the public entity.

2) The private partners are highly sophisticated and have resources to access any expertise needed, and state and federal contracting entities do not have the capacity to negotiate a P3 agreement that adequately protects the public interests and taxpayers.

3) It is uncertain what will happen to the public entity's bond rating when it commits revenue streams to a private partner for decades.

4) The private partner has a profit motive when it provides a public service or facility.

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

DRAFT

	Discussion Point	Corresponding Item Number	Discussion/Determination
A	**Develop model guidelines for use by Responsible Public Entities (RPE)**	N/A	Should model guidelines be developed for responsible public entity (RPE) use? Who should develop these guidelines? Models can quickly become outdated – how often should the models be updated? **Determination: Model guidelines should be developed for responsible public entity (RPE) use and should be updated or reviewed at least bi-annually.**
B	**Develop best practices guidance for use by RPE comprised of commentary and explanations**	N/A	Should best practices guidance be developed for RPE use? Should such guidance be included in the model guidelines? Should such guidance include a checklist or other resources? **Determination: Best practices guidance should be included in the model guidelines developed for responsible public entity (RPE) use. General guidance may include checklists or other resources to provide further assistance to RPEs.**
C	**Develop model comprehensive agreements and interim agreements**	N/A	Should model agreements be developed for RPE use? Would these agreements be used as a template to start from rather than a model document? Should multiple templates be considered to cover different types of projects? Who should develop? Models can quickly become outdated – how often should templates be updated? **Determination: No. Should a public-private partnerships support entity be developed to provide guidance to local governments, they should act as a repository of previously used agreements but not a creator of model agreements. No further action is required.**
D	**Support entity to provide guidance to RPE and to encourage the use of public-private partnerships at the local level**	N/A	Should an entity be created to provide guidance to RPE? Will this entity be responsible for supporting RPE analysis/review or will the entity be responsible for providing information to the RPE? Should this entity be tasked with encouraging private companies to engage in public-private partnerships with Florida RPE? If so, what is the appropriate entity for such a functional role? Should an established program be developed within a state agency or the legislature? How will staffing for this entity be

	Discussion Point	Corresponding Item Number	Discussion/Determination
			provided? **Determination: A state agency or other established entity should be given the additional responsibility to assist local governments in developing and engaging in public-private partnerships. This entity can engage, identify, or contract with professional vendors to assist in the financial analysis and other services needed to a) develop solicited proposals and b) assess and review solicited and unsolicited proposals to ensure state and local funds are expended in the best interest of taxpayers.**
E	**Does the public-private partnership process, in particular when unsolicited proposals are involved, provide for an adequate level of competition?**	Item 1	The public-private partnerships law (s. 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. What information should be provided during the solicitation of competing proposers? Should more flexibility be included in the timeline to ensure competing proposers have time to develop a quality competing proposal? **Determination: Current statute and processes are sufficient to ensure adequate competition. No further action is required.**
F	**Information released when seeking competing proposals and requests for additional or enhanced information**	Item 6	If an unsolicited proposal **IS** exempted from public record (see below), the RPE will be required to develop its own solicitation documents to solicit competing proposals. What project information should be released when soliciting competing proposals? **Determination: 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 procured under Chapter 255, F.S. No further action is required.**
G	**Exemption from public records requirements for unsolicited proposals**	Item 7	Language has been filed for universities relating to exempting unsolicited proposals from public records. The proposal provides the following:

	Discussion Point	Corresponding Item Number	Discussion/Determination
			• If a board receives an unsolicited proposal for public-private partnerships, the proposal would be exempt from public records until such time that the board receives and ranks the proposals as described in subsection (5) [Project Approval Requirements]. o Note: The ranking of proposals takes place <u>after</u> soliciting competing proposals. Under this proposal, responsible public entities (RPE) would not be allowed to release an unsolicited proposal to solicit competing proposals. • An unsolicited proposal would not be exempt for more than 12 months after the RPE rejects all proposals received for the project in the unsolicited proposal or, if the RPE does not intend to enter into an agreement for the project, 12 months after the date that the unsolicited proposal was received. • This exemption is subject to the Open Government Sunset Review Act and will be repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the legislature. • Public Necessity Statement: The legislature would find that it is a public necessity that an unsolicited proposal, which may identify proprietary business information, be exempt from public records requirements. Because unsolicited proposals may contain proprietary information and trade secrets, such as patent-pending designs and financing terms, should such information be made publicly available before the RPE makes a decision, competitors could determine the creative financing used to fund these projects. Therefore, the Legislature would find that the harm that may result from the release of such information outweighs any public benefit that may be derived from the disclosure of the information. Does the task force support such exemption for unsolicited proposals? Alternatively, should the exemption be only for information deemed proprietary and confidential or trade secret? Can a private entity deem its entire proposal proprietary and confidential or trade secret?

	Discussion Point	Corresponding Item Number	Discussion/Determination
			Determination: The task force recommends such exemptions be considered by the Legislature. On 1-31-14, the task force voted to support HB 543 by Representative Steube, a measure that would provide an exemption from public records requirements for unsolicited proposals held by state university board of trustees for specified period.
H	**Availability of representatives of the responsible public entity to meet with private entities considering a proposal**	Item 1	Current laws in place governing open meetings and procurements are sufficient to cover public-private partnerships. **Determination: Current laws in place governing open meetings and procurements are sufficient to cover public-private partnerships. No further action is required.**
I	**Criteria for choosing among competing proposals**	Item 2	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 • Finance plans. Local governments should have the flexibility to rank and select proposals as determined at the local level, including application of a local preference or other adopted preference. Is current statute adequate for this item? **Determination: 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. No further action is required.**
J	**Should there be a time limit on how long an RPE can review a proposal?**	Item 3	Public entity representatives should have the flexibility to perform adequate review. If a time limit is set, would it result in the rejection of most proposals? From a private entity perspective, it was noted that the review period should have a time limit for any pricing included in the proposal. Is current statute adequate for this item? **Determination: 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**

	Discussion Point	Corresponding Item Number	Discussion/Determination
			and vet both simple and complex proposals in the time needed for deliberate decision making. Any pricing submitted in a proposal should include the timeframe for which such pricing is valid.
K	**Accelerated selection and review and documentation timelines for proposals involving a qualifying project prioritized by the RPE.**	Item 4	Should an RPE have the option to accelerate proposals they deem a priority? How expedited should timelines be? What scenarios would prompt expedited process and should this be determined by the RPE? How will the RPE ensure public access to project information? How can the RPE ensure expediting timelines does not deter competition? **Determination: Accelerated selection and review and documentation timelines should be considered for proposals involving a qualifying project that the responsible public entity deems a priority. Responsible public entities should be given the flexibility to determine such accelerated timelines and the process by which projects are selected for accelerated review.**
L	**Clarify applicability of mandatory procurement requirements relating to public-private partnerships**	N/A	The public-private partnerships law (s. 287.05712, F.S.) provides that public-private partnership statute does not waive the requirements of s. 287.055, F.S., relating to the Consultant's Competitive Negotiation Act, which applies to the acquisition of professional architectural, engineering, landscape architectural, or surveying and mapping services. Should this nuance be resolved through legislative action? **Determination: Tabled for further discussion**
M	**Clarify the intent of s. 287.05712(4), F.S., relating to procurement procedures and s. 287.05712(6), F.S., relating to project qualification and process**	N/A	Subsections (4) and (6) of s. 287.05712, F.S., include provisions that are mandatory for a RPE. Such provisions include language such as must or shall, which create a requirement in law. Should these provisions be reviewed to make procedures more permissive (using language such as may) to allow the statute to serve as guidance rather than mandate? **Determination: Tabled for further discussion**
N	**Guidance regarding application fee for the submission of an unsolicited**	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 fee must be sufficient to pay the

	Discussion Point	Corresponding Item Number	Discussion/Determination
	proposal and RPE use of qualified professionals to conduct an independent analysis of a proposal		costs of evaluating the proposal. The RPE may engage the services of a private consultant to assist in the evaluation. Should there be guidance for the RPE regarding the financial analysis? Are the requirements in statute adequate for the RPE? Should there be guidance for the RPE in selecting a qualified professional? Should the RPE be required to utilize a Florida-registered professional or CPA? Such fees vary and should be related to actual, reasonable costs of reviewing the proposal. It is fundamental that such fee is for cost recovery, but not revenue generation. Should guidance regarding what is reasonable be a recommendation of the task force or should such guidance be included generally in a best practices document? **Determination:** **(1) An initial fee of $50,000 payable to the responsible public entity (RPE) shall accompany any unsolicited public-private transportation 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.**
O	**Clarify the intent of s. 287.05712(4)(c), F.S., relating to an RPE that is a school board**	N/A	S. 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? **Determination: Since school boards are not subject to governance by a local governing body, subsection 287.05712(4)(c), F.S., should be stricken from law.**

287.05712 Public-private Partnerships. —

(4) PROCUREMENT PROCEDURES.—A responsible public entity **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, for the building, upgrading, operating, ownership, or financing of facilities.

(a) 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. The responsible public entity **MAY** engage the services of a private consultant to assist in the evaluation.

(b) The responsible public entity **MAY** request a proposal from private entities for a public-private project or, if the public entity receives an unsolicited proposal for a public-private project and the public entity intends to enter into a comprehensive agreement for the project described in such unsolicited proposal, the public entity **SHALL** 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 other 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. A copy of the notice **MUST** be mailed to each local government in the affected area.

(c) A responsible public entity that is a school board **MAY** enter into a comprehensive agreement only with the approval of the local governing body.

(d) Before approval, the responsible public entity **MUST** determine that the proposed project:

1. Is in the public's best interest.
2. 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.
3. 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.
4. 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.
5. Will be owned by the responsible public entity upon completion or termination of the agreement and upon payment of the amounts financed.

(e) Before signing a comprehensive agreement, the responsible public entity **MUST** consider a reasonable finance plan that is consistent with subsection (11); 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.

(f) In considering an unsolicited proposal, the responsible public entity **MAY** require from the private entity a technical study prepared by a nationally recognized expert with experience in preparing analysis for bond rating agencies. In evaluating the technical study, the responsible public entity **MAY** rely upon internal staff reports prepared by personnel familiar with the operation of similar facilities or the advice of external advisors or consultants who have relevant experience.

(6) PROJECT QUALIFICATION AND PROCESS.—

(a) 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.

(b) The responsible public entity **MUST**:

1. Ensure that provision is 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. For the components of the qualifying project which involve construction performance and payment, bonds are required and are subject to the recordation, notice, suit limitation, and other requirements of s. 255.05.

2. Ensure the most efficient pricing of the security package that provides for the performance and payment of subcontractors.

3. Ensure that provision is made for the transfer of the private entity's obligations if the comprehensive agreement is terminated or a material default occurs.

(c) 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. In ranking the 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. The responsible public entity **MAY** then begin negotiations for a comprehensive agreement with the highest-ranked firm. If the responsible public entity is not satisfied with the results of the negotiations, the responsible public entity **MAY** terminate negotiations with the proposer and negotiate with the second-ranked or subsequent-ranked firms, in the order consistent with this procedure. If only one proposal is received, the responsible public entity **MAY** negotiate in good faith, and if the public entity is not satisfied with the results of the negotiations, the public entity **MAY** terminate negotiations with the proposer. Notwithstanding this paragraph, the responsible public entity **MAY** reject all proposals at any point in the process until a contract with the proposer is executed.

(d) The responsible public entity **SHALL** 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.

(e) 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.

(f) The responsible public entity **MAY** charge a reasonable fee to cover the costs of processing, reviewing, and evaluating the request, including, but not limited to, reasonable attorney fees and fees for financial and technical advisors or consultants and for other necessary advisors or consultants.

(g) Upon approval of a qualifying project, the responsible public entity **SHALL** establish a date for the commencement of activities related to the qualifying project. The responsible public entity **MAY** extend the commencement date.

(h) Approval of a qualifying project by the responsible public entity is subject to entering into a comprehensive agreement with the private entity.

A bill to be entitled

An act relating to public records; amending s. 287.05712, F.S., relating to public-private projects for the upgrade of public facilities and infrastructure; providing an exemption from public records requirements for unsolicited proposals held by a responsible public entity for a specified period; providing for future legislative review and repeal of the exemption; providing a statement of public necessity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (16) is added to section 287.05712, Florida Statutes, to read:

287.05712 Public-private partnerships.—

(16) PUBLIC RECORDS EXEMPTION.—

(a) An unsolicited proposal held by a responsible public entity under this section is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until such time that the responsible public entity receives, opens, and ranks the proposals as set forth in paragraph (6)(c).

(b) If a responsible public entity rejects all proposals submitted for a qualifying project as provided in paragraph (6)(c) and the entity concurrently provides notice of its intent to seek additional proposals for the qualifying project, the

rejected unsolicited proposal remains exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until such time that the responsible public entity solicits bids and provides notice of a decision or intended decision. An unsolicited proposal is not exempt for more than 12 months after the responsible public entity rejects all proposals submitted as provided in paragraph (6)(c).

(c) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that an unsolicited proposal held by a responsible public entity pursuant to s. 287.05712, Florida Statutes, be made exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution until such time that the responsible public entity receives, opens, and ranks the proposals as set forth in s. 287.05712(6)(c), Florida Statutes, or, if the responsible public entity rejects all proposals, until the responsible public entity solicits bids for the qualifying project and notices its decision or intended decision. An unsolicited proposal is not exempt for more than 12 months after all proposals are rejected. The disclosure of information in an unsolicited proposal, such as financing mechanisms and terms, formulas, and designs, could give competitors a business advantage by knowing the proposal's

financial strategy and innovative plans, thereby injuring the entity that submitted the unsolicited proposal and placing the entity at a competitive disadvantage in the marketplace. Without the exemption, entities might not submit unsolicited proposals that could provide timely and cost-effective solutions for qualifying projects that serve a public need. Therefore, the Legislature finds that the harm that may result from the release of such information outweighs any public benefit that may be derived from disclosure of the information.

Section 3. This act shall take effect July 1, 2014.