

Select Year: 2013

The 2013 Florida Statutes

[Title XIX](#)[Chapter 287](#)[View Entire Chapter](#)

PUBLIC BUSINESS PROCUREMENT OF PERSONAL PROPERTY AND SERVICES

287.05712 Public-private partnerships.—

(1) DEFINITIONS.—As used in this section, the term:

(a) “Affected local jurisdiction” means a county, municipality, or special district in which all or a portion of a qualifying project is located.

(b) “Develop” means to plan, design, finance, lease, acquire, install, construct, or expand.

(c) “Fees” means charges imposed by the private entity of a qualifying project for use of all or a portion of such qualifying project pursuant to a comprehensive agreement.

(d) “Lease payment” means any form of payment, including a land lease, by a public entity to the private entity of a qualifying project for the use of the project.

(e) “Material default” means a nonperformance of its duties by the private entity of a qualifying project which jeopardizes adequate service to the public from the project.

(f) “Operate” means to finance, maintain, improve, equip, modify, or repair.

(g) “Private entity” means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity, or other private business entity.

(h) “Proposal” means a plan for a qualifying project with detail beyond a conceptual level for which terms such as fixing costs, payment schedules, financing, deliverables, and project schedule are defined.

(i) “Qualifying project” means:

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.

(j) “Responsible public entity” means a county, municipality, school board, or any other political subdivision of the state; a public body corporate and politic; or a regional entity that serves a public purpose and is authorized to develop or operate a qualifying project.

(k) “Revenues” means the income, earnings, user fees, lease payments, or other service payments relating to the development or operation of a qualifying project, including, but not limited to, money received as grants

or otherwise from the Federal Government, a public entity, or an agency or instrumentality thereof in aid of the qualifying project.

(l) "Service contract" means a contract between a public entity and the private entity which defines the terms of the services to be provided with respect to a qualifying project.

(2) LEGISLATIVE FINDINGS AND INTENT.—The Legislature finds that there is a public need for the construction or upgrade of facilities that are used predominantly for public purposes and that it is in the public's interest to provide for the construction or upgrade of such facilities.

(a) The Legislature also finds that:

1. There is a public need for timely and cost-effective acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, operation, implementation, or installation of projects serving a public purpose, including educational facilities, transportation facilities, water or wastewater management facilities and infrastructure, technology infrastructure, roads, highways, bridges, and other public infrastructure and government facilities within the state which serve a public need and purpose, and that such public need may not be wholly satisfied by existing procurement methods.

2. There are inadequate resources to develop new educational facilities, transportation facilities, water or wastewater management facilities and infrastructure, technology infrastructure, roads, highways, bridges, and other public infrastructure and government facilities for the benefit of residents of this state, and that a public-private partnership has demonstrated that it can meet the needs by improving the schedule for delivery, lowering the cost, and providing other benefits to the public.

3. There may be state and federal tax incentives that promote partnerships between public and private entities to develop and operate qualifying projects.

4. A procurement under this section serves the public purpose of this section if such procurement facilitates the timely development or operation of a qualifying project.

(b) It is the intent of the Legislature to encourage investment in the state by private entities; to facilitate various bond financing mechanisms, private capital, and other funding sources for the development and operation of qualifying projects, including expansion and acceleration of such financing to meet the public need; and to provide the greatest possible flexibility to public and private entities contracting for the provision of public services.

(3) PUBLIC-PRIVATE PARTNERSHIP GUIDELINES TASK FORCE.—

(a) There is created the Partnership for Public Facilities and Infrastructure Act Guidelines Task Force for the purpose of recommending guidelines for the Legislature to consider for purposes of creating a uniform process for establishing public-private partnerships, including the types of factors responsible public entities should review and consider when processing requests for public-private partnership projects pursuant to this section.

(b) The task force shall be composed of seven members, as follows:

1. The Secretary of Management Services or his or her designee, who shall serve as chair of the task force.

2. Six members appointed by the Governor, as follows:

a. One county government official.

b. One municipal government official.

c. One district school board member.

d. Three representatives of the business community.

(c) Task force members must be appointed by July 31, 2013. By August 31, 2013, the task force shall meet to establish procedures for the conduct of its business and to elect a vice chair. The task force shall meet at the call of the chair. A majority of the members of the task force constitutes a quorum, and a quorum is necessary for the purpose of voting on any action or recommendation of the task force. All meetings shall be held in Tallahassee, unless otherwise decided by the task force, and then no more than two such meetings may be held in other locations for the purpose of taking public testimony. Administrative and technical support shall be

provided by the department. Task force members shall serve without compensation and are not entitled to reimbursement for per diem or travel expenses.

(d) In reviewing public-private partnerships and developing recommendations, the task force must consider:

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.

(e) The task force must submit a final report of its recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives by July 1, 2014.

(f) The task force is terminated December 31, 2014. The establishment of guidelines pursuant to this section or the adoption of such guidelines by a responsible public entity is not required for such entity to request or receive proposals for a qualifying project or to enter into a comprehensive agreement for a qualifying project. A responsible public entity may adopt guidelines so long as such guidelines are not inconsistent with this section.

(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.

(5) PROJECT APPROVAL REQUIREMENTS.—An unsolicited proposal from a private entity for approval of a qualifying project must be accompanied by the following material and information, unless waived by the responsible public entity:

(a) A description of the qualifying project, including the conceptual design of the facilities or a conceptual plan for the provision of services, and a schedule for the initiation and completion of the qualifying project.

(b) A description of the method by which the private entity proposes to secure the necessary property interests that are required for the qualifying project.

(c) A description of the private entity's general plans for financing the qualifying project, including the sources of the private entity's funds and the identity of any dedicated revenue source or proposed debt or equity investment on behalf of the private entity.

(d) The name and address of a person who may be contacted for additional information concerning the proposal.

(e) The proposed user fees, lease payments, or other service payments over the term of a comprehensive agreement, and the methodology for and circumstances that would allow changes to the user fees, lease payments, and other service payments over time.

(f) Additional material or information that the responsible public entity reasonably requests.

(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.

(7) NOTICE TO AFFECTED LOCAL JURISDICTIONS.—

(a) 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.

(b) Each affected local jurisdiction that is not a responsible public entity for the respective qualifying project may, within 60 days after receiving the notice, submit in writing any comments to the responsible public entity and 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 shall consider the

comments of the affected local jurisdiction before entering into a comprehensive agreement with a private entity. If an affected local jurisdiction fails to respond to the responsible public entity within the time provided in this paragraph, the nonresponse is deemed an acknowledgment by the affected local jurisdiction that the qualifying project is compatible with the local comprehensive plan, the local infrastructure development plan, the capital improvements budget, or other governmental spending plan.

(8) INTERIM AGREEMENT.—Before or in connection with the negotiation of a comprehensive agreement, the public entity may enter into an interim agreement with the private entity proposing the development or operation of the qualifying project. An interim agreement does not obligate the responsible public entity to enter into a comprehensive agreement. The interim agreement is discretionary with the parties and is not required on a qualifying project for which the parties may proceed directly to a comprehensive agreement without the need for an interim agreement. An interim agreement must be limited to provisions that:

(a) Authorize the private entity to commence activities for which it may be compensated related to the proposed qualifying project, including, but not limited to, project planning and development, design, environmental analysis and mitigation, survey, other activities concerning any part of the proposed qualifying project, and ascertaining the availability of financing for the proposed facility or facilities.

(b) Establish the process and timing of the negotiation of the comprehensive agreement.

(c) Contain such other provisions related to an aspect of the development or operation of a qualifying project that the responsible public entity and the private entity deem appropriate.

(9) COMPREHENSIVE AGREEMENT.—

(a) Before developing or operating the qualifying project, the private entity must enter into a comprehensive agreement with the responsible public entity. The comprehensive agreement must provide for:

1. Delivery of performance and payment bonds, letters of credit, or other security acceptable to the responsible public entity in connection with the development or operation of the qualifying project in the form and amount satisfactory to the responsible public entity. For the components of the qualifying project which involve construction, the form and amount of the bonds must comply with s. [255.05](#).

2. Review of the design for the qualifying project by the responsible public entity and, if the design conforms to standards acceptable to the responsible public entity, the approval of the responsible public entity. This subparagraph does not require the private entity to complete the design of the qualifying project before the execution of the comprehensive agreement.

3. Inspection of the qualifying project by the responsible public entity to ensure that the private entity's activities are acceptable to the public entity in accordance with the comprehensive agreement.

4. Maintenance of a policy of public liability insurance, a copy of which must be filed with the responsible public entity and accompanied by proofs of coverage, or self-insurance, each in the form and amount satisfactory to the responsible public entity and reasonably sufficient to ensure coverage of tort liability to the public and employees and to enable the continued operation of the qualifying project.

5. Monitoring by the responsible public entity of the maintenance practices to be performed by the private entity to ensure that the qualifying project is properly maintained.

6. Periodic filing by the private entity of the appropriate financial statements that pertain to the qualifying project.

7. Procedures that govern the rights and responsibilities of the responsible public entity and the private entity in the course of the construction and operation of the qualifying project and in the event of the termination of the comprehensive agreement or a material default by the private entity. The procedures must include conditions that govern the assumption of the duties and responsibilities of the private entity by an entity that funded, in whole or part, the qualifying project or by the responsible public entity, and must provide for the transfer or purchase of property or other interests of the private entity by the responsible public entity.

8. Fees, lease payments, or service payments. In negotiating user fees, the fees must be the same for persons using the facility under like conditions and must not materially discourage use of the qualifying project. The execution of the comprehensive agreement or a subsequent amendment is conclusive evidence that the fees, lease payments, or service payments provided for in the comprehensive agreement comply with this section. Fees or lease payments established in the comprehensive agreement as a source of revenue may be in addition to, or in lieu of, service payments.

9. Duties of the private entity, including the terms and conditions that the responsible public entity determines serve the public purpose of this section.

(b) The comprehensive agreement may include:

1. An agreement by the responsible public entity to make grants or loans to the private entity from amounts received from the federal, state, or local government or an agency or instrumentality thereof.

2. A provision under which each entity agrees to provide notice of default and cure rights for the benefit of the other entity, including, but not limited to, a provision regarding unavoidable delays.

3. A provision that terminates the authority and duties of the private entity under this section and dedicates the qualifying project to the responsible public entity or, if the qualifying project was initially dedicated by an affected local jurisdiction, to the affected local jurisdiction for public use.

(10) FEES.—An 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 following provisions apply to the agreement:

(a) The responsible public entity may develop new facilities or increase capacity in existing facilities through agreements with public-private partnerships.

(b) The public-private partnership agreement must ensure that the facility is properly operated, maintained, or improved in accordance with standards set forth in the comprehensive agreement.

(c) The responsible public entity may lease existing fee-for-use facilities through a public-private partnership agreement.

(d) Any revenues must be regulated by the responsible public entity pursuant to the comprehensive agreement.

(e) A negotiated portion of revenues from fee-generating uses must be returned to the public entity over the life of the agreement.

(11) FINANCING.—

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

(b) The responsible public entity may lend funds to private entities that construct projects containing facilities that are approved under this section.

(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.

(d) 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 noncontractual obligations payable from the same enterprise or other government fund.

(12) POWERS AND DUTIES OF THE PRIVATE ENTITY.—

(a) The private entity shall:

1. Develop or operate the qualifying project in a manner that is acceptable to the responsible public entity in accordance with the provisions of the comprehensive agreement.
2. Maintain, or provide by contract for the maintenance or improvement of, the qualifying project if required by the comprehensive agreement.
3. Cooperate with the responsible public entity in making best efforts to establish interconnection between the qualifying project and any other facility or infrastructure as requested by the responsible public entity in accordance with the provisions of the comprehensive agreement.
4. Comply with the comprehensive agreement and any lease or service contract.

(b) Each private facility that is constructed pursuant to this section must comply with the requirements of federal, state, and local laws; state, regional, and local comprehensive plans; the responsible public entity's rules, procedures, and standards for facilities; and such other conditions that the responsible public entity determines to be in the public's best interest and that are included in the comprehensive agreement.

(c) The responsible public entity may provide services to the private entity. An agreement for maintenance and other services entered into pursuant to this section must provide for full reimbursement for services rendered for qualifying projects.

(d) A private entity of a qualifying project may provide additional services for the qualifying project to the public or to other private entities if the provision of additional services does not impair the private entity's ability to meet its commitments to the responsible public entity pursuant to the comprehensive agreement.

(13) EXPIRATION OR TERMINATION OF AGREEMENTS.—Upon the expiration or termination of a comprehensive agreement, the responsible public entity may use revenues from the qualifying project to pay current operation and maintenance costs of the qualifying project. If the private entity materially defaults under the comprehensive agreement, the compensation that is otherwise due to the private entity is payable to satisfy all financial obligations to investors and lenders on the qualifying project in the same way that is provided in the comprehensive agreement or any other agreement involving the qualifying project, if the costs of operating and maintaining the qualifying project are paid in the normal course. Revenues in excess of the costs for operation and maintenance costs may be paid to the investors and lenders to satisfy payment obligations under their respective agreements. A responsible public entity may terminate with cause and without prejudice a comprehensive agreement and may exercise any other rights or remedies that may be available to it in accordance with the provisions of the comprehensive agreement. The full faith and credit of the responsible public entity may not be pledged to secure the financing of the private entity. The assumption of the development or operation of the qualifying project does not obligate the responsible public entity to pay any obligation of the private entity from sources other than revenues from the qualifying project unless stated otherwise in the comprehensive agreement.

(14) SOVEREIGN IMMUNITY.—This section does not waive the sovereign immunity of a responsible public entity, an affected local jurisdiction, or an officer or employee thereof with respect to participation in, or approval of, any part of a qualifying project or its operation, including, but not limited to, interconnection of the qualifying project with any other infrastructure or project. A county or municipality in which a qualifying project is located possesses sovereign immunity with respect to the project, including, but not limited to, its design, construction, and operation.

(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.

(c) This section does not waive any requirement of s. [287.055](#).

History.—s. 2, ch. 2013-223.