

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: SB 870

INTRODUCER: Senator Boyd

SUBJECT: Unsolicited Proposals for Public-private Partnerships

DATE: January 19, 2024

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harmsen	McVaney	GO	Pre-meeting
2.			CA	
3.			RC	

I. Summary:

SB 870 amends s. 255.065, F.S., to provide an alternative process by which local governments and other political subdivisions of the state may enter into a public-private partnership for a project offered by a private entity's unsolicited proposal. The bill allows the governmental entity to hold a public meeting at which the unsolicited proposal is presented for public comment. At the meeting, the governmental entity must also present its determination whether the unsolicited proposal is in the public's interest, based on the:

- Benefits to the public.
- Financial structure of and any economic efficiencies that are achieved by the proposal.
- Submitting private entity's qualifications and experience, and ability to perform the project.
- Project's compatibility with regional infrastructure plans.
- Public comments submitted at the meeting.

The determination must also explain why the proposal should proceed and address any public comments.

The government's determination of public interest must be published in the Florida Administrative Register for at least 7 days.

The bill continues to allow a governmental entity to proceed with competitive procurement in response to its receipt of an unsolicited proposal as currently provided in s. 255.065, F.S., should it choose that process instead of the public meeting process provided in the bill.

This bill will have an indeterminate fiscal impact on local governments and other political subdivisions of the state that use a public meeting to negotiate a contract pursuant to its receipt of an unsolicited proposal.

The bill takes effect July 1, 2024.

II. Present Situation:

Procurement of Personal Property and Services

Chapter 287, F.S., regulates state agency¹ procurement of personal property and services. The Department of Management Services (department) is responsible for overseeing state purchasing activity including professional and contractual services as well as commodities needed to support agency activities.² The Division of State Purchasing in the department establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.³

Current law requires contracts for commodities or contractual services in excess of \$35,000 to be procured utilizing a competitive solicitation process.^{4,5} These competitive procurement provisions apply to an agency, defined as "any of the various state officers, departments, board commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive boards of state government."⁶ This definition does not include municipalities and local governments; and university and college boards of trustees, and the state universities and colleges are specifically excluded from this definition.⁷

State agencies may use a variety of procurement methods, depending on the cost and characteristics of the needed good or service, the complexity of the procurement, and the number of available vendors. These methods include the following:

- Single source contracts,⁸ used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;
- Invitations to bid,⁹ used when an agency determines that standard services or goods will meet needs, wide competition is available and the vendor's experience will not greatly influence the agency's results;
- Requests for proposals,¹⁰ used when the procurement requirements allow for consideration of various solutions and the agency believes more than two or three vendors exist who can provide the required goods or services; and

¹ As defined in s. 287.012(1), F.S., "agency" means any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. "Agency" does not include the university and college boards of trustees or the state universities and colleges.

² See ss. 287.032 and 287.042, F.S.

³ Chapter 287, F.S., provides requirements for the procurement of personal property and services. Part I of that chapter pertains to commodities, insurance, and contractual services, and part II pertains to means of transport.

⁴ Section 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold provided in s. 287.017, F.S., to be competitively bid.

⁵ As defined in s. 287.012(6), F.S., "competitive solicitation" means the process of requesting and receiving two or more sealed bids, proposals, or replies submitted by responsive vendors in accordance with the terms of a competitive process, regardless of the method of procurement.

⁶ Section 287.012(1), F.S.

⁷ *Id.*

⁸ Section 287.057(3)(c), F.S.

⁹ Section 287.057(1)(a), F.S.

¹⁰ Section 287.057(1)(b), F.S.

- Invitations to negotiate,¹¹ used when negotiations are determined to be necessary to obtain the best value and involve a request for highly complex, customized, mission-critical services, by an agency dealing with a limited number of vendors.

The Consultants' Competitive Negotiation Act

In 1973, the Florida Legislature enacted the Consultant's Competitive Negotiation Act (CCNA),¹² s. 287.055, F.S., which requires state and local government agencies to procure the professional services of an architect, engineer, landscape architect, or registered surveyor and mapper using a qualifications-based selection process. The qualifications-based selection requires the selection of providers on the basis of their competency, qualifications, and experience, rather than lowest-price.¹³

The CCNA requires that state agencies publicly announce, in a consistent and uniform manner, each occasion when professional services must be purchased for one of the following:

- A project, when the basic construction cost is estimated to exceed \$4 million.
- A planning or study activity, when the fee for professional services exceeds \$500,000.

The CCNA provides a two-phase selection process.¹⁴ In the first phase, the "competitive selection," the agency evaluates the qualifications and past performance of no fewer than three bidders. The agency selects the three bidders, ranked in order of preference, that it considers most highly qualified to perform the required services. The CCNA requires consideration of several factors in determining the three most highly qualified bidders including: willingness to meet time and budget requirements; past performance; location; recent, current, and projected firm workloads; volume of work previously awarded to the firm; and whether the firm is certified as a minority business.¹⁵

During the second phase, competitive negotiation, the agency negotiates compensation to be paid under the contract with the highest qualified of at least three selected firms.¹⁶ Should the agency be unable to negotiate a satisfactory contract with the top firm at a price the agency determines to be fair, competitive, and reasonable, the agency may progress to negotiations with the second most qualified firm, and if this fails,¹⁷ with the third.¹⁸ If the agency cannot negotiate a satisfactory contract with any of the ranked firms, it must begin the qualifications-based selection process again and continue negotiations until an agreement is reached.¹⁹

¹¹ Section 287.057(1)(c), F.S.

¹² Ch. 73-19, Laws of Fla., codified as s. 287.055, F.S.

¹³ Section 287.055(3)-(5), F.S.

¹⁴ Section 287.055(4) and (5), F.S.

¹⁵ See s. 287.055(4)(b), F.S.

¹⁶ Section 287.055(5)(a), F.S.

¹⁷ Section 287.055(5)(b), F.S.

¹⁸ *Id.*

¹⁹ Section 287.055(5)(c), F.S.

Procurement of Construction Services

Chapter 255, F.S., regulates construction services²⁰ for public property and publically owned buildings. The Department of Management Services is responsible for establishing, through administrative rules, the following:

- Procedures for determining the qualifications and responsibility of potential bidders prior to advertisement for and receipt of bids for building construction contracts;
- Procedures for awarding each state agency construction project to the lowest qualified bidder;
- Procedures to govern negotiations for construction contracts and modifications thereto when such negotiations are determined by the secretary of the department to be in the best interest of the state; and
- Procedures for entering into performance-based contracts for the development of public facilities when the department determines the use of such contracts to be in the best interest of the state.²¹

State contracts for construction projects that are projected to cost in excess of \$200,000 must be competitively bid.²² In addition, such projects must be advertised in the Florida Administrative Register at least 21 days prior to the bid opening.^{23,24} Counties, municipalities, special districts,²⁵ or other political subdivisions seeking to construct or improve a public building must competitively bid the project if the projected cost is in excess of \$300,000.²⁶

Public-private Partnerships – Section 255.065, F.S.

Public-private partnerships (P3s) are contractual agreements formed between public entities and private sector entities that allow for greater private sector participation in the delivery and financing of public building and infrastructure projects. Numerous Florida Statutes encourage and provide guidance for P3 projects including those for services and facilities specific to transportation,²⁷ housing,²⁸ and education²⁹.

²⁰ As defined in s. 255.072(2), F.S., “construction services” means all labor, services, and materials provided in connection with the construction, alteration, repair, demolition, reconstruction, or any other improvements to real property. The term “construction services” does not include contracts or work performed for the Department of Transportation.

²¹ Section 255.29, F.S.

²² See 60D-5.0073, Fla Admin. Code; *see also* s. 255.0525, F.S.

²³ Section 255.0525(1), F.S.

²⁴ State construction projects that are projected to exceed \$500,000 are required to be published 30 days prior to bid opening in the Florida Administrative Register, and at least once in a newspaper of general circulation in the county where the project is located. *See* s. 255.0525(1), F.S.

²⁵ As defined in s. 189.012(6), F.S., “special district” means a local unit of special purpose, as opposed to general-purpose, government within a limited boundary, created by general law, special act, local ordinance, or by rule of the Governor and Cabinet. The term does not include a school district, a community college district, a special improvement district created pursuant to s. 285.17, F.S., a municipal service taxing or benefit unit as specified in s. 125.01, F.S., or a board which provides electrical service and which is a political subdivision of a municipality or is part of a municipality.

²⁶ *See* s. 255.20(1), F.S.

²⁷ *See* s. 334.30, F.S., on public-private transportation facilities.

²⁸ *See* s. 420.0003(2)(b), F.S., on the state housing strategy.

²⁹ *See* s. 1013.35(2)(a)6., F.S., on school district educational facilities plans.

Chapter 2013-223, L.O.F., created the Partnership for Public Facilities and Infrastructure Act Guidelines Task Force to study the P3 process and make recommendations for the Legislature's consideration for purposes of creating a uniform process for establishing public-private partnerships.³⁰ Chapters 2016-153 and 2016-154, L.O.F., utilized the task force analysis to create the current provisions of s. 255.065, F.S.

Section 255.065, F.S., grants responsible public entities (RPEs) (e.g., counties, municipalities, school districts and special districts)³¹ the authority to engage in P3 projects for the development of a wide range of public-use facilities or projects that serve a public purpose. Examples of qualifying projects include those for mass transit, vehicle parking, airports or seaports, educational facilities and courthouse or city hall public sector buildings or complexes.³² The P3 law establishes requirements to which RPEs must adhere, including procedures for reviewing and approving proposals.

The selection process permitted by s. 255.065, F.S., contemplates the following four-step process with the goal of the timely development or operation of a qualifying project:

- Submission of an unsolicited proposal and general screening;
- Procurement of additional proposals;
- Determination of qualifications; and
- Approval and negotiation of a comprehensive agreement between the parties.

Submission of an Unsolicited Proposal

A RPE can receive unsolicited proposals for a qualifying P3. Unless waived by the RPE, the unsolicited proposal must include the following:³³

- A description of the qualifying project, including a conceptual facilities design or conceptual services plan;
- The project's schedule, including the proposed start and completion dates;
- A description of how the private entity will secure the required property interests;
- Project financing details, including the sources of the proposing private entity's funds' and the identity of any dedicated revenue source or proposed debt or equity investment on the private entity's behalf;
- Contact information for the individual who can be contacted for additional information regarding the proposal;
- What user fees, lease payments, or other service payments are expected over the term of any resulting contract, and terms that would allow for amendment of these fees; and
- Additional material or information reasonable requested by the RPE.

³⁰ The task force held 10 meetings to study the law, understand how governmental entities around the world have implemented public-private partnerships, and to hear from interested parties and stakeholders. The Task Force's Final Recommendations can be found here: Partnership for Public Facilities and Infrastructure Act Guidelines Task Force, *Final Report and Recommendations* (Jul. 1, 2014), https://dms-media.ccplatform.net/content/download/104626/592850/Final_Report_and_Recommendations_Partnership_for_Public_Facilities_and_Infrastructure_Act_Guidelines_Task_Force.pdf (last visited Jan. 19, 2024).

³¹ Section 255.065(1)(j), F.S., defines "responsible public entity" to mean a county, municipality, school district, special district, or any other political subdivision of the state; a public body corporate and politic; or a regional entity that serves a public purpose and is authorized to develop or operate a qualifying project.

³² See s. 255.065(1)(i)1.-4., F.S.

³³ Section 255.065(4), F.S.

Additionally, the private entity must meet the minimum standards otherwise required by the RPE's guidelines for qualifying professional services and contracts for their traditionally procured projects.³⁴

Procurement of Additional Proposals³⁵

The RPE is not required to entertain the unsolicited proposal, but if it chooses to do so, then it must solicit other proposals by publication of a notice in the Florida Administrative Register (FAR) and a newspaper of general circulation at least once a week for two weeks stating that the RPE has received a proposal and will accept other proposals for the same project. The RPE must also mail a copy of the notice to each local government in the area affected by the proposal.³⁶

The RPE sets a timeframe within which it will accept additional proposals on a project-by-project basis, based upon the complexity of the project and the public benefit to be gained by allowing a longer or shorter period of time for receipt of alternative proposals. However, the RPE must allow at least 21 days, but no more than 120 days, after the initial notice publication in the FAR.³⁷

After the public notification period that was triggered by an unsolicited proposal ends, the RPE ranks the proposals it received in order of preference. The RPE may then begin negotiations for a comprehensive agreement with the highest-ranked firm. If the RPE did not receive additional proposals, it may negotiate based on the single unsolicited proposal in good faith, and may ultimately terminate such negotiations if it is not satisfied with the results.³⁸

Project Qualification

The RPE's evaluation of a solicited or unsolicited project, pursuant to s. 255.065, F.S., must determine that the proposed project:³⁹

- Is responsive to a public need, or otherwise provides a public benefit;
- Is a reasonable cost in relation to similar facilities; and
- Will be completed in a timely manner.

The RPE must also ensure that a professional review and evaluation of the design and construction proposals (both unsolicited and solicited) meet material quality standards, interior space utilization, budget estimates, design and construction schedules, and sustainable design and construction standards that are consistent with public projects.⁴⁰

³⁴ Section 255.065(5)(a), F.S.

³⁵ See s. 255.065(3), F.S.

³⁶ Section 255.065(3)(b), F.S.

³⁷ *Id.*

³⁸ Section 225.065(5)(c), F.S., includes provisions for the RPE to consider subsequent-ranked firms or reject all proposers if negotiations results are unsatisfactory.

³⁹ Section 255.065(5)(e)1.-3., F.S.

⁴⁰ Section 255.065(3)(a)5., F.S.

The RPE must also consider the project's cost, finance plan, revenues and sources thereof, whether governmental funds are required, a total cash-flow analysis of the project, and other related inquiries.⁴¹

The RPE may establish a reasonable application fee to cover these evaluation costs.⁴² If the RPE does not evaluate the unsolicited proposal, the RPE must return the application fee.

Comprehensive Agreement

The comprehensive agreement is the contract for services between the RPE and private entity. Before the RPE can approve the comprehensive agreement to engage on the proposal, the RPE must determine that the proposed project:⁴³

- Is in the public's best interest.
- Is for a facility that the RPE owns, or is for a facility for which ownership will be conveyed to the RPE.
- Has safeguards to ensure that additional costs or service disruptions are not imposed on the public in the event of material default or the RPE's cancellation of the comprehensive agreement.
- Has adequate safeguards in place to ensure that the RPE or private entity may add capacity to the proposed project or other facilities that serve similar predominantly public purposes.
- Will be owned by the RPE upon completion, expiration, or termination of the comprehensive agreement and upon payment of the amounts financed.

The comprehensive agreement must include terms that provide for:⁴⁴

- Delivery of performance or payment bonds, letters of credit, or other acceptable security in an amount determined by the RPE;
- Review, by the RPE, of the project's design to ensure its conformity to acceptable standards;
- Inspection of the project by the RPE;
- Maintenance of a public liability insurance policy or self-insurance, in an amount determined by the RPE to ensure coverage of tort liability to the public and employees;
- Monitoring by the RPE to ensure that proper maintenance of the project by the private entity;
- Filing of financial statements that pertain to the project by the private entity;
- Procedures that govern the parties' rights and responsibilities in the event of termination of the agreement;
- Fees, lease payments, or service payments that may be collected by the private entity for use of the facility; and
- Duties of the private entity.

⁴¹ Section 265.055(3)(e), F.S.

⁴² Section 255.065(3)(a)3., F.S., allows an RPE to request additional review funds if the initial application fee does not cover the costs to evaluate an unsolicited proposal. Section 255.065(5)(f), F.S., also allows an RPE to charge a reasonable fee to cover the costs of processing, reviewing, and evaluating the request, including attorney fees and fees for other advisors or consultants.

⁴³ Section 255.065(3)(d)1.-5., F.S.

⁴⁴ Section 255.065(7)(a)1.-9., F.S.

III. Effect of Proposed Changes:

The bill amends s. 255.065, F.S., to allow an RPE that intends to pursue a public-private partnership for a qualifying project with a private entity that has submitted an unsolicited proposal to either (1) engage in a public bidding process by publishing a request for additional proposals in the FAR; or (2) hold a public meeting at which the unsolicited proposal is presented for public comment.

Section 1 amends s. 255.065(3), F.S., to provide an alternative to the requirement that a responsible public entity's (RPE) seek, via competitive procurement, additional proposals after its receipt of an unsolicited proposal that it intends to entertain for contract. The RPE may instead hold a duly noticed public meeting at which it presents the unsolicited proposal and entertains comment from affected public entities and members of the public. The RPE must make a determination whether the unsolicited proposal is in the public's interest, based on the:

- Benefits to the public.
- Financial structure of and any economic efficiencies that are achieved by the proposal.
- Submitting private entity's qualifications and experience, and ability to perform the project.
- Project's compatibility with regional infrastructure plans.
- Public comments submitted at the meeting.

The determination must also explain why the proposal should proceed and address any public comments.

The RPE must then publish this determination of public interest in the FAR for at least 7 days and include the factors it considered in making its determination.

The bill also allows requires the RPE to specifically determine the public benefits, apart from ownership of the project, if ownership of the project will not be conveyed to the RPE within 10 years of commencement of the project's public operation. It is unclear whether this statement must be included in the determination of public interest that is published in the FAR. This requirement does not apply to projects that are procured pursuant to competitive procurement.

The bill amends s. 255.065(5), F.S., to make conforming changes, clarifying that the RPE's duty to rank and competitively negotiate applies only where an unsolicited proposal is submitted and noticed for public bidding.

Section 2 provides that the bill takes effect July 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties and municipalities to spend funds, reduce the counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

A private entity that submits an unsolicited proposal for a public-private partnership project may endure a shortened approval process if the RPE opts to use the public meeting approval procedure, rather than the competitive negotiation procedure to approve a qualifying project. This may result in less cost to the private entity.

Conversely, a private entity that seeks to compete at a lower cost for the project proposed by an unsolicited proposal will not have the same opportunity to engage for its services, should the RPE choose to use the public meeting process for approval. Depending on the project, it is unlikely that a competing private entity will be able to complete a bid proposal within the timeframe provided by the public meeting process. This may result in lost revenues for entities that may have otherwise been awarded the project.

C. Government Sector Impact:

The cost to state and local governments is indeterminate. However, it is likely that the governmental entities will see a reduced timeframe to approve unsolicited projects submitted for review pursuant to s. 255.065, F.S. This will likely lead to reduced administrative review costs associated with competitive procurement of such projects.

There may be less pricing competition for projects that are awarded via the public meeting process. This may result in higher project costs to the governmental entities that approve public-private partnerships in this manner.

VI. Technical Deficiencies:

The bill requires the presentation of the RPE's determination that an unsolicited proposal is in the public's interest at the public meeting. However, the RPE's determination of whether the project is in the public interest must consider, as directed by line 79 of the bill, public comments submitted at the meeting. This does not appear to provide sufficient time for the RPE to consider public comments before it must submit its determination. The sponsor may wish to require the RPE's initial public interest determination at the public meeting and its final public interest determination in the report that is published in the FAR.

The report published in the FAR (see proposed section 255.065(3)(d), F.S.) is only required to include the RPE's determination of public interest, and the factors it considered. It is unclear whether the RPE is only required to cite the naked factor it considered (e.g., "The RPE considered cost."), or whether it must present its reasoning (e.g., "The RPE considered that the additional cost for construction will result in a more historically accurate building in a section of the town that is characterized by its historical preservation.")

It is not clear where the RPE must state the "public benefits apart from ownership" in the case where ownership of the P3 project will not be conveyed to the public entity within 10 years of commencement of the project's operation. As this detail may not be resolved until negotiation of the comprehensive agreement, it may require a separate notice in the FAR.

VII. Related Issues:

It is unclear why the RPE must issue its determination of public interest in the FAR. There is no opportunity to rebut the findings or otherwise change the determination. It may be more appropriate to allow the RPE to make its determination at a subsequent duly-noticed public meeting.

VIII. Statutes Affected:

This bill substantially amends section 255.065 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.