

HOUSE BILL 1132

By Brooks H

AN ACT to amend Tennessee Code Annotated, Title 5;
Title 6; Title 7; Title 9 and Title 49, Chapter 2,
relative to new school construction.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 49, Chapter 2, is amended by adding Sections 2 through 4 as a new, appropriately designated part:

SECTION 2. As used in this part, unless the context otherwise requires:

- (1) "Board of education" or "local education agency" means the entity responsible for the local administration of a city or county school system;
- (2) "Build-to-suit capital lease" means a capital lease that provides for the construction of new facilities or the renovation of existing facilities by a private developer, the cost of which is estimated to be greater than three hundred thousand dollars (\$300,000);
- (3) "Capital lease" means a lease that, in accordance with generally accepted accounting principles, and regardless of how the parties describe the agreement, transfers substantially all the benefits and risks of ownership to the lessee;
- (4) "Deficiency judgment" means a judgment or decree for any deficiency due on a secured indebtedness;
- (5) "Prime contractor" means a contractor who contracts directly with the private developer or the private developer's construction manager-at-risk, if any, for construction, repair, or renovation work under this part and shall include minority contractors as defined and, at least to the extent included, within the local board of education's minority participation goal;

(6) "Private developer" means the entity with which the local board of education enters into a capital lease or build-to-suit capital lease for the construction, repair, or renovation of property under this part.

SECTION 3.

(a) Local boards of education may enter into capital leases of real or personal property for use as or in school buildings or school facilities. The capital lease may relate to an existing building or a new school building to be constructed. The term of any capital lease, including any renewal periods, shall not exceed forty (40) years from the expected date that the local board of education shall take occupancy if that action is to occur pursuant to the lease of the property that is the subject of a capital lease.

(b) A capital lease entered into under this part may provide that the private developer is responsible for providing, or contracting for, construction, repair, or renovation work. Construction, repair, or renovation work undertaken or contracted by a private developer is not subject to the requirements of § 49-2-203(a)(3) regarding construction of school buildings and purchase of supplies, furniture, fixtures and materials; except, that if the work undertaken or contracted for involves the estimated expenditure of three hundred thousand dollars (\$300,000) or more, the work shall be subject to § 49-2-203(a)(3).

(c) A capital lease shall not contain a nonsubstitution clause that restricts the right of a local board of education to continue to provide a service or activity or to replace or provide a substitute for any property financed or purchased pursuant to the capital lease.

(d) No deficiency judgment may be rendered against any local board of education or local legislative body in any action for breach of a contractual obligation

authorized by this part, and the taxing power of a local government shall not and may not be pledged directly or indirectly to secure any monies due under a contract authorized by this part. A capital lease shall state that it does not constitute a pledge of the taxing power or full faith and credit of a local government.

(e) A capital lease entered into under this part shall be considered a continuing contract for capital outlay, and may be entered into for a period of years; provided, that, the local legislative body has appropriated funds to the LEA sufficient to service the first year of debt and the local legislative body has by binding resolution agreed to appropriate sufficient funds in ensuing fiscal years to meet the amounts to be paid under the contract in those years.

(f) Capital leases entered into under this part are subject to approval by the local legislative body, if they are for five (5) or more years, including extension or renewal periods, obligate the local legislative body to pay sums of money to another, without regard to whether the payee is a party to the contract, and obligate the local legislative body over the full term of the contract including extension or renewal periods, to payment of five hundred thousand dollars (\$500,000) or more.

(g) A capital lease shall not contain any provision with respect to the assignment of specific students or students from a specific area to any specific school.

(h) The provisions of title 66, chapter 11 shall apply to any real property, improvement to the real property, and rights that flow with the real property that is subject to a capital lease under this part. Real property that is subject to a capital lease under this part shall be subject to liens and foreclosure actions in the same manner and to the same extent as if the property were owned in fee simple by a private entity.

SECTION 4.

(a) Local boards of education may enter into build-to-suit capital leases for property, products, services, and guaranties related to property for use as and in school buildings or school facilities.

(b) A build-to-suit capital lease may include contractual provisions by the private developer regarding the provision of products, services, and guaranties related to a facility that is the subject of a capital lease. A local board of education may also enter into a separate agreement or series of related agreements regarding the provision of products, services, and guaranties related to a facility that is the subject of a build-to-suit capital lease; provided, that all agreements are approved by the local legislative body in connection with the approval of the build-to-suit capital lease.

(c) Before entering into a build-to-suit capital lease pursuant to this section, the local board of education shall adopt a resolution in accordance with this subsection. Before adopting the resolution, the local board of education shall publish a notice of its intent to enter into a build-to-suit capital lease at least ten (10) days in advance of the date of the meeting at which the action is contemplated and in a newspaper having general circulation within the geographic area served by the local board of education. The notice shall include, at a minimum, the date, time, and place of the meeting, a description in brief and general terms of the subject of the build-to-suit capital lease, the name of the other party to the build-to-suit capital lease, and an indication of the board's intent to take action to authorize the build-to-suit capital lease at the indicated meeting. The resolution shall provide:

(1) That entering into the build-to-suit capital lease for one (1) or more specified buildings or facilities is in the board's best interests under all the circumstances. In making this evaluation, the local board of education may consider the time, cost, and quality of design, engineering, and construction,

including the time required to begin and the time required to complete a particular activity; occupancy costs, including build-to-suit capital lease payments, life-cycle maintenance, repair, and energy costs; and any other factors the board deems relevant; and

(2) That the private developer is qualified to provide, either alone or in conjunction with other identified and associated persons, the products and services called for under the proposed build-to-suit capital lease and any related agreements. The local board of education shall make this determination taking into account any factors the local board of education deems relevant, including the knowledge, skill, and reputation of the private developer and its associated persons, the goals and plans of the private developer for utilization of minority business enterprises as defined and included within the local board of education's minority participation goal, and the costs to be incurred by the local board of education.

(d) Required design and engineering services shall be performed by an engineer or a licensed architect, pursuant to title 62, chapter 2. Specifications for any new school building shall be consistent with any requirements of law regarding public building contracts. All applicable requirements for the review or approval of design and specifications for school buildings by the department of education, state fire marshal, state building commission, or procurement commission shall apply to school buildings constructed, repaired, or renovated under a build-to-suit capital lease authorized under this section.

(e) A private developer shall seek competition and minority business participation which comply with the local board of education's minority participation goal in connection with all construction work under this part, as follows:

(1) A private developer shall:

(A) Solicit bids from prime contractors for all construction work under this part; or

(B) Select a construction manager-at-risk through a qualification based process, in which case, notwithstanding any other provision of law to the contrary, the selected construction manager-at-risk shall solicit bids from all of its prime contractors for all construction work under this part.

(2) The private developer or its construction manager-at-risk shall prequalify contractors. The prequalification criteria shall be determined by the local board of education and the private developer to address quality, performance, the time specified in the bids for performance of the contract, the cost of construction oversight, time for completion, capacity to perform, and other factors deemed appropriate by the private developer and the local board of education.

(3) A private developer or its construction manager-at-risk shall comply with any requirements of law applicable to a public entity regarding bid documents, and the award of contracts to construct, alter, or repair buildings. Prime contractors shall comply with any similar requirements of law applicable to contractors, except the private developer and its construction manager-at-risk shall comply with the local board of education's minority participation goal. The local board of education shall require the private developer to submit its plan of compliance with any applicable requirements of law for approval by the local board of education prior to the private developer soliciting bids under this subsection (e).

(4) A private developer or its construction manager-at-risk shall:

(A) Publicly advertise at least thirty (30) days in advance of the bid date in a newspaper having general circulation within the geographic areas served by the local board of education;

(B) Open bids publicly; and

(C) Award each contract to the lowest responsible, responsive, and prequalified bidder, taking into consideration quality, performance, the time specified in the bids for performance of the contract, the cost of construction oversight, time for completion, compliance with laws regarding the award of contracts to construct, alter, or repair buildings, and any other factors deemed appropriate by the private developer and the local board of education and included in the bid solicitation. A private developer or its construction manager-at-risk shall enter into the construction contracts directly with the successful bidder. After the award of a contract or contracts, the private developer or its construction manager-at-risk and any contractor may negotiate and reach agreement with the successful bidder on modifications to all aspects of the contract, including the time for performance, the scope of the work, and the price to be paid.

(5) The local board of education, in its discretion, may require the private developer to provide a performance bond and payment bond for construction work, as follows. If required:

(A) The performance bond shall be in the amount of one hundred percent (100%) of the construction contract amount, conditioned upon the faithful performance of the contract in accordance with the plans,

specifications, and conditions of the contract. The bond shall be solely for the protection of the contracting body that is constructing the project;

(B) The payment bond shall be in the amount of one hundred percent (100%) of the construction contract amount, conditioned upon the prompt payment for all labor or materials for which a contractor or subcontractor is liable. The payment bond shall be solely for the protection of the persons furnishing materials or performing labor for which a contractor, subcontractor, or construction manager-at-risk is liable; and

(C) The payment bond and performance bond shall be executed by one (1) or more surety companies legally authorized to do business in this state and shall become effective upon the awarding of the construction contract.

(6) The private developer shall be subject to any other provisions of law requiring the developer to provide a bond, if required pursuant to subdivision (5), or other appropriate guarantee to cover any other guaranties, products, or services to be provided by the private developer.

(f) Local boards of education may enter into predevelopment agreements with a private developer in advance of entering into a build-to-suit capital lease.

Predevelopment agreements, if entered into, shall be approved by the local legislative body. Predevelopment agreements may include provisions for each of the following:

(1) Site selection, land acquisition, and site preparation, including services such as wetlands delineation, archaeological review, and state and local government land-use permitting; and

(2) Building programming and design, including both architectural and engineering services pursuant to subsection (d).

(g) Notwithstanding provisions of § 49-6-2006, title 29, chapter 17, part 1 or other laws pertaining to the sale or transfer of public property to the contrary, a local board of education may, subject to the approval by the local legislative body, sell, lease, or otherwise transfer real or personal property to any private developer for construction, repair, or renovation of a school facility under a build-to-suit capital lease entered into pursuant to this section. The conveying governing body may subject the property to any covenants, conditions, or restrictions as the body deems to be necessary to carry out the purposes of this part. The disposition of property pursuant to this subsection (g) is not subject to any requirements of law, regarding the disposition of any real or personal property that is unnecessary or unsuitable for public school purposes.

(h) In addition to other requirements imposed on a private developer pursuant to this section, in recognition of the potential economic and technical utility of build-to-suit capital leases, which include in their scope combinations of design, construction, operation, management, and maintenance responsibilities over prolonged periods of time, and the potential desirability of a single point of responsibility for these matters in connection with build-to-suit capital leases, any build-to-suit capital lease may include provisions imposing responsibility on the private developer or any identified affiliated entity for any of the following:

(1) Site selection, land acquisition, and site preparation, including services such as wetlands delineation, archaeological review, and state and local government land-use permitting;

(2) Building programming and design, including both architectural and engineering services pursuant to subsection (d).

(3) Construction and construction management;

(4) Financing;

(5) Facility maintenance and repairs;

(6) Energy usage guarantees;

(7) Transfer of ownership of the leased property which is the subject of the build-to-suit lease to the local board of education or local government at the end of term of such lease if provided within the terms of the build-to-suit capital lease; and

(8) Any other guaranties, products, and services as the local board of education may determine to be appropriate.

(i) A private developer shall provide an irrevocable letter of credit for the benefit of laborers and materialmen in an amount not less than five percent (5%) of the total cost of the improvements which are the subject of the build-to-suit capital lease and shall maintain the letter of credit throughout the construction of the project and for the succeeding six-month period.

SECTION 5. This act shall take effect July 1, 2011, the public welfare requiring it.