

# Florida P3s

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A public-private partnership, known as a PPP or P3, is a contractual agreement between a public agency (federal, state or local) and one or more private sector entities. Through this agreement, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service and/or facility. Generally, project risks are allocated to the party that is the best equipped to manage them. PPP contracts often include incentives that reward private partners for mitigating risk factors. PPPs have been used often in several sectors including transportation, water and wastewater, education, health care, corrections, housing, power, parks and recreation, and technology. The American Society of Civil Engineers grades the status of U.S. infrastructure in various categories. Its overall grade for the U.S. in 2012 was a D+. Estimates for infrastructure costs in surface transportation indicate that almost \$2 trillion will be needed in the next five years to properly upgrade that type of infrastructure alone. Obviously state and municipal budgets will not come close to being able to fund this infrastructure gap fully.

## **Florida P3**

Florida has been one of the most innovative states in the use of P3s. Florida projects have been almost exclusively in the transportation sector. The Florida Department of Transportation has profited from one of the earliest and most inclusive laws in the U.S. Section 334.30 of the Florida Statutes has allowed P3 projects such as the Port of Miami Tunnel and managed lanes on Interstate 595 to move forward. The Florida Legislature, recognizing that public private partnerships are a desirable part of government's arsenal in solving its infrastructure, now has gone the next step. Effective as of July 1, 2013, HB 85 (now Fla Stat. Section 287.05712) expands P3 projects to so-called 'social infrastructure' projects. These projects include education facilities, water and wastewater facilities, healthcare facilities, sporting and cultural facilities, as well as local roads and bridges. HB 85, in addition to expanding the range of projects eligible for P3 treatment, created a year-long P3 Task Force. Its job is essentially to make recommendations by July 1, 2014, to the governor, the president of the Senate and the speaker of the House of Representatives of Florida to create guidelines that localities can consider and adopt, if they wish, for their P3 agreements and projects. **The New Social Infrastructure Law-Benefits**

So what is important that you should know about this new law? First, it legitimizes (read: gives political cover) to local governmental entities who have wanted to use the P3 model for locally

needed projects, but have felt vulnerable to charges that they are providing benefits to private companies that should be the province of government. These public entities have had the ability to do this even without the new law. Now, however, allowing local entities to use P3s is recognized by the Florida Legislature and so, is given the imprimatur of the state of Florida. Second, HB 85 expands the P3 reach beyond roads and now includes schools, jails, water and sewer facilities, and many other needed structures and facilities. Social infrastructure has been a huge project sector in the UK and Canada, both of which have been leaders in public-private partnerships (or as they call it in the UK, Private Finance Initiatives, 'PFI'). This gives the public sector eye-opening opportunities to include private finance and accelerate the construction of needed projects. Third, it authorizes and provides guidelines for unsolicited proposals. In fact, as with P3s, local and state government entities have always had the ability to entertain unsolicited proposals, but under HB 85, they have the Legislature's blessing and a road map to follow if they receive an unsolicited proposal. For instance, if previously an entity received an unsolicited proposal, it was up to the entity to adopt a procedure that made the procurement process transparent, including but not limited to advertising the proposal and providing a reasonable period of time for competing proposals to be submitted. Now under HB 85, publication of the fact of an unsolicited proposal must be published in the Florida Administrative Register once a week for two weeks, and then the entity must provide a time period of at least 21 days from the initial publication and no longer than 120 days from the initial publication within which others may submit proposals. HB 85 also makes the entity's life much easier by mandating what must be included with the unsolicited proposal. Finally, the new law provides for some flexibility in payment and performance security requirements. Security may be in the form of payment and performance bonds, letters of credit or other security acceptable to the public entity. Construction must comply with the bonding requirements of Section 255.05 of the Florida Statutes. Payment and performance security is always an issue in public contracting, so this is both a positive aspect of HB 85 as well as a negative one as described below in this article. **The New Social**

### **Infrastructure Law-Questions**

So, what's problematic in the new law? The first is that although there is flexibility in connection with the type of security to be posted for these P3 projects, under Section 255.05, Florida Statutes, the amount of the security to be posted for the construction of the project must equal the cost of construction except if the project cost exceeds \$250 million. So the local entity has no discretion to reduce the amount of security required unless the project cost is in excess of \$250 million. Second and last, it appears that under Section (11) (d) of the HB, now Florida Statute Section 287.05712 (11) (d), there may still be appropriation risk. The new law indicates that the public entity must appropriate the contractual payment obligation, whether annual or otherwise, on a priority basis and before other non-contractual obligations payable from the same entity. Since Florida constitutional law prohibits appropriating funds in excess of those used in the current year, P3 concessionaires are still exposed to the possibility that the public entity will not have funds to appropriate later in the project. Taken literally, the statutory language would seem to require, for example, the appropriation of funds for the project before appropriating funds for police, fire and other public purposes. In the P3 law relating to transportation projects, Section 334.30 of the Florida Statutes, while the law

recognizes that the appropriations for P3 projects can only be annual, the funds must be included in the 5-year work program of FDOT and must be appropriated in subsequent years before new capacity program funds. There is no such requirement in HB 85 and it therefore leads one to wonder if the lack of clarity in appropriation risk may scare off some potential sponsors. **Conclusion** Even with its attendant uncertainties, the passage of HB 85 represents a big step forward in the encouragement of P3 projects. It represents a maturity of the recognition of P3s in Florida. As a leader in P3s nationally, Florida is once again on the leading edge in inclusion of the private sector in public sector development. Once the recommendations of the P3 Task Force are submitted and become publicly known, the development of social infrastructure P3 financing and operation will be solidly established in Florida. This initiative will certainly benefit the professionals who conceive of, manage, finance, engineer and construct such projects, as well as the public who benefits from the results obtained. *Reprinted with permission by the Florida Engineering Society Journal, February 2014.*

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