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Public-Private Partnerships (P3s)

On April 15, 2024, Florida Governor Ron DeSantis signed House Bill 781 into law. The law (Chapter 2024-96), effective July 1, 2024, amends section 255.065, Florida Statutes, which facilitates increased private sector involvement in building, upgrading, operating, owning, or financing facilities for the benefit of the public.



Section 255.065 provides that responsible public entities (RPEs)¹ may receive unsolicited proposals **or** may solicit proposals² from private entities for qualifying projects,³ and may thereafter enter into a comprehensive agreement, if certain requirements are met. Chapter 2024-96 amends the statute to create an alternative procurement procedure⁴ for accepting unsolicited proposals.

Overview

In light of the recent revisions, a general overview of the current procedures relating to soliciting or receiving unsolicited proposals for P3s are provided below. This Tips and Trends does not address the provisions in section 255.065, F.S. relating to project qualification and approval, the content of interim and comprehensive agreements, and private-source financing agreements that were not impacted by Chapter 2024-96.

Solicited proposal:

- The RPE may request a proposal from private entities for a qualifying project.

¹ §255.065(1)(j), F.S.- 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.

² §255.065(1)(h), F.S.- “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.

³ §255.065(1)(i), F.S.

⁴ These new procurement process is provided in addition to those procedures originally outlined in 2013, and amended from time to time. §287.05712, F.S. (2013) (Renumbered as §255.065 and amended by Laws 2016, c. 2016-153, § 1, eff. July 1, 2016).

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- If the RPE solicited a proposal that includes design work, the solicitation must include a design criteria package prepared by an architect, a landscape architect, or an engineer. The design criteria package must specify reasonably specific criteria for the qualifying project, and the licensed design professional who prepares the design criteria package must be retained to serve the RPE through completion of the design and construction of the project.
- Before approving a comprehensive agreement, the RPE must determine that the proposed project:
 - Is in the public's best interest,
 - Is for a facility that is owned by the RPE or for a facility for which ownership will be conveyed to the RPE,
 - 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 comprehensive agreement by the RPE,
 - Has adequate safeguards in place to ensure that the RPE or private entity has the opportunity to add capacity to the proposed project or other facilities serving 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.
- Prior to signing a comprehensive agreement for a solicited proposal, the RPE must consider a reasonable financing plan (consistent with section 255.065(9)), project cost, revenues, available financing, major assumptions, internal rate of return on private investments, and a total cash flow analysis for the term of the agreement.

Unsolicited proposals:

- An RPE may receive unsolicited proposals from private entities for a qualifying project.
- The RPE may establish a reasonable application fee, which must be received at the same time as the unsolicited proposal. If the RPE's evaluation costs exceed the initial application fee, the RPE must request the additional amount in writing. The additional fee must be paid within 30 days after the receipt of notice. The RPE may stop its review if the additional amount is not provided. If the RPE decides not to evaluate the unsolicited proposal, the application fee must be returned.
- If the RPE chooses to evaluate an unsolicited proposal involving architecture, engineering, or landscape architecture, the RPE must ensure a professional review and evaluation of the design and construction be done to assure material quality standards, interior space utilization, budget estimates, design and construction schedules, and sustainable design and construction standards consistent with public projects. The review must be performed by an architect, a landscape architect, or an engineer who will advise the RPE through completion of the design and construction of the project.

- If the RPE intends to enter into a comprehensive agreement for the project described in the unsolicited proposal, the RPE may utilize one of two procurement options:

Procurement Option 1 (Accept Other Proposals)

- The RPE may publish notice in the Florida Administrative Register (FAR) and newspaper of general circulation at least once a week for 2 weeks stating it received a proposal and will accept other proposals for the project;
- The RPE must include in the published notice a timeframe for accepting other proposals of at least 21 days, but no more than 120 days⁵ after the initial date of publication;
- The RPE must mail a copy of the notice to each local government in the affected area.
- After the public notification period has expired, the RPE must rank the proposals received in order of preference, and may begin negotiations or reject all proposals.⁶
- Before approving a comprehensive agreement, the RPE must determine that the proposed project:
 - Is in the public's interest based upon an evaluation of the factors in section 255.065(3)(c), F.S.,
 - 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 comprehensive agreement by the RPE,
 - Has adequate safeguards in place to ensure that the RPE or private entity has the opportunity to add capacity to the proposed project or other facilities serving similar predominantly public purposes,
 - Is for a facility that is owned by the RPE or for a facility for which ownership will be conveyed to the RPE, or if ownership will not be conveyed to the RPE within 10 years after initial public operation begins, the RPE must identify and state the public benefits apart from ownership in the public interest determination required by section 255.065(3)(c).

Procurement Option 2 (No Public Bidding Process - Effective July 1, 2024)

The RPE may proceed with an unsolicited proposal for a qualifying project without a public bidding process, if the RPE:

- Holds a public meeting where the proposal is presented and affected public entities and the public may comment,

⁵ The timeframe will be determined by the RPE on a project-by-project basis based on the complexity of the project. If approved by a majority vote of the governing body, the RPE may alter the timeframe to more adequately suit the needs of the project.

⁶ §255.065(5)(c), F.S.

- Holds a subsequent public meeting at which the RPE considers the factors below to determine whether the proposal is in the public's interest as provided in section 255.065(3)(c), F.S.:
 - Benefits to the public;
 - Financial structure of and economic efficiencies achieved by the proposal;
 - The qualifications and experience of the private entity and the ability to perform;
 - Project compatibility with regional infrastructure plans; and
 - The RPE must provide a statement that explains why the proposal should proceed and addresses public comments.
- Publishes in FAR for at least 7 days a report that includes the public interest determination required in section 255.065(3)(c), the factors considered to make the determination, and the findings based on each factor.
- Before approving a comprehensive agreement, the RPE must determine that the proposed project:
 - Is in the public's interest based upon an evaluation of the factors in section 255.065(3)(c), F.S.,
 - 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 comprehensive agreement by the RPE,
 - Has adequate safeguards in place to ensure that the RPE or private entity has the opportunity to add capacity to the proposed project or other facilities serving similar predominantly public purposes,
 - Is owned by the RPE or for a facility for which ownership will be conveyed to the RPE, or if ownership will not be conveyed to the RPE within 10 years after initial public operation begins, the RPE must identify and state the public benefits apart from ownership in the public interest determination required by section 255.065(3)(c).
- Prior to signing a comprehensive agreement relating to an unsolicited proposal, the RPE must consider a reasonable financing plan (consistent with section 255.065(9)); project cost, revenues, available financing, major assumptions, internal rate of return on private investments, and a total cash flow analysis for the term of the agreement; and
- The RPE 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 RPE 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.



Recommendations

Responsible public entities should carefully review and assess their procurement ordinances, policies, and procedures, along with section 255.065, F.S., to ensure they enable the RPEs to fully capitalize on opportunities to increase private sector involvement in the construction, improvement, operation, ownership, or financing of facilities that serve the public interest.

Additionally, local governments should train decision-makers, personnel, managers, and/or administrators on procurement methods for P3s prior to approving comprehensive agreements for qualifying projects.