



# OHIO LEGISLATIVE SERVICE COMMISSION

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## Bill Analysis

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### H.B. 668

132nd General Assembly  
(As Introduced)

Rep. Patton

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### BILL SUMMARY

- Allows certain public bodies to enter into public-private agreements based on solicited and unsolicited proposals from private entities relating to public facilities and establishes the governing terms and procedures applicable to the agreements.
  - Exempts from real property taxes and special assessments the property involved in a public-private agreement.
  - Exempts from sales and use taxes the building and construction materials that will be incorporated into a facility subject to a public-private agreement.
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## CONTENT AND OPERATION

### Overview

The bill provides a framework to allow certain public bodies, including state agencies,<sup>1</sup> state institutions of higher education, counties, townships, municipal corporations, school districts, community schools, STEM schools, and college-preparatory boarding schools, to execute a public-private agreement ("PPA") with a private party for the planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing, or operation of a facility. Only a new or existing public building, public improvement, or public infrastructure used by a public body, by the public at large, in support of a public purpose, or for the delivery of services to the public constitutes a "facility" under the bill.<sup>2</sup> The facility either must be owned by the public body or owned by the private party through a lease agreement under which the facility reverts to the public body upon expiration of the agreement.<sup>3</sup>

### Proposals: solicited and unsolicited

To initiate the PPA process, the public body may either solicit proposals for a public-private initiative or may receive unsolicited proposals. In either case, the public body must conduct a competitive selection process before entering into a PPA.<sup>4</sup> The bill establishes that trade secrets are confidential and are not public records. Financial information that is related to a proposal is confidential and not a public record, but only until a proposal is selected. The bill allows a private entity, before submitting a proposal, to request that the public body review information to determine whether it would be subject to disclosure as a public record.<sup>5</sup>

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<sup>1</sup> Not including the Department of Transportation, which already has similar authority to that granted under the bill. See R.C. 5501.70 to 5501.83, not in the bill.

<sup>2</sup> R.C. 168.01.

<sup>3</sup> R.C. 168.02.

<sup>4</sup> R.C. 168.03(E) (solicited proposals) and 168.04(F) (unsolicited proposals).

<sup>5</sup> R.C. 168.03(F) and 168.04(C).



## Solicited proposals

The public body may select solicited proposals through sealed bidding or based on qualifications and/or best value.<sup>6</sup> When evaluating and selecting a bid or proposal,<sup>7</sup> the public body must consider the following:

- The ability of the facility to serve a public purpose;
- The proposed cost of and financial plan for the facility;
- The general reputation, qualifications, industry experience, and financial capacity of the private entity;
- The proposed design, operation, and feasibility of the facility;
- Comments from local citizens and affected jurisdictions;
- Benefits to the public and the affected facility;
- The safety record of the private entity;
- The inclusion of a teaming agreement in the bid or proposal that identifies the primary designer of record or design firm representing not less than 30% of the estimated design fee, the primary construction contractor representing not less than 30% of the estimated construction dollar value amount, and the primary financier representing not less than 50% of the total project cost;
- Any other criteria that the public body considers appropriate.<sup>8</sup>

And, the public body may consider the following, additional factors:

- The bidder's estimates of capital expenditures and operating expenses for the proposed facility;
- The schedule for completion of the proposed facility;
- Whether user fees, lease payments, or other charges will be collected for use of the proposed facility over the term of the PPA;

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<sup>6</sup> R.C. 168.03(B).

<sup>7</sup> A public body may select multiple private entities for a facility if it is in the public interest to do so. R.C. 168.03(D).

<sup>8</sup> R.C. 168.03(C)(1).



--The proposed length of time before ownership of the facility reverts to the public body.<sup>9</sup>

### **Reimbursement of cost for submitting proposal**

The bill authorizes public bodies to reimburse private entities<sup>10</sup> for the cost of submitting a solicited proposal if the public body describes in a solicitation for proposals the terms and conditions for reimbursement. The public body may condition the reimbursement on the private entity transferring to the public body any work product contained in its proposal.<sup>11</sup>

If a public body includes the option for reimbursement in its solicitation for proposals, but terminates the solicitation or terminates negotiations with a private entity that submitted a proposal, the private entity may be entitled to a pro-rated portion of the reimbursement or the full reimbursement under the bill.<sup>12</sup>

### **Unsolicited proposals**

If a private entity provides an unsolicited proposal to a public body, the public body may consider the proposal if it meets all of the following conditions:

--Is independently originated and developed by the proposer;

--Benefits the public;

--Is prepared without public body supervision;

--Includes sufficient detail and information for the public body to evaluate the proposal in an objective and timely manner, including the conceptual design or plan for the proposed facility, project costs, and a schedule for starting and completing the facility;

--Is made by a private entity that is not prohibited from making a proposal under the Campaign Finance Law.<sup>13</sup>

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<sup>9</sup> R.C. 168.03(C)(2).

<sup>10</sup> Generally, only the private entities the public body does not enter into an agreement with, unless the public body agrees otherwise.

<sup>11</sup> R.C. 168.03(G)(1) and (G)(2).

<sup>12</sup> R.C. 168.03(G)(3) and (G)(4).

<sup>13</sup> R.C. 168.04(A).

The public body must determine within 90 days of receiving a proposal if the proposal satisfies these requirements.<sup>14</sup> If not, the public body returns the proposal.<sup>15</sup> The public body may continue to evaluate a proposal that satisfies the requirements<sup>16</sup> and must advertise the proposal for the purpose of receiving competitive proposals. The advertisement must include: the nature and scope of the unsolicited proposal, the location of the facility, the work to be performed on or in connection with the facility, where to submit a proposal, and a reasonable time period by which competitors must submit their proposals.<sup>17</sup> The public body must determine if any competing proposal is comparable to the unsolicited proposal, evaluate the proposals, and conduct good faith discussions and negotiations concerning each qualified proposal.<sup>18</sup> The unsolicited proposal and any comparable proposal must be evaluated using the following factors:

- Novel methods, approaches, or concepts demonstrated by the proposal;
- Scientific, technical, or socioeconomic merits of the proposal;
- Potential contribution of the proposal to the public body's mission;
- Capabilities, related experience, facilities, or techniques of the private entity or unique combinations of these qualities that are integral factors for achieving the proposal objectives;
- Qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel, who are critical to achieving the proposal objectives;
- How the proposal benefits the public;
- Any other factors appropriate to a particular proposal.<sup>19</sup>

After its evaluation of the proposals, the public body may accept or reject all proposals, accept the unsolicited proposal and a competing proposal if doing so is advantageous to the jurisdictions the public body serves, or reject the unsolicited

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<sup>14</sup> R.C. 168.04(B).

<sup>15</sup> R.C. 168.04(D).

<sup>16</sup> R.C. 168.04(E).

<sup>17</sup> R.C. 168.04(F).

<sup>18</sup> R.C. 168.04(H).

<sup>19</sup> R.C. 168.04(I).

proposal and accept a comparable competing proposal if the public body determines the comparable competing proposal is the most advantageous to the jurisdictions the public body serves.<sup>20</sup>

A public body must charge a reasonable fee for its costs to process, review, and evaluate an unsolicited proposal and competing proposals.<sup>21</sup>

## **Public-private agreements**

After selecting a proposal or proposals, the public body enters into the PPA with the private entity or entities, called the "operator."<sup>22</sup> Any affected jurisdiction, which includes any government unit where part or all of the facility is located or any public entity directly affected by the facility,<sup>23</sup> is entitled to become a party to the PPA.<sup>24</sup> The PPA must provide for the following:

--Planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing, or operation of a facility;

--Term of the PPA;

--Type of property interest, if any, the operator will have in the facility;

--A specific plan to ensure proper maintenance of the facility throughout the term of the PPA and a return of the facility to the public body, if applicable, in good condition and repair;

--Compliance with applicable federal, state, and local laws;

--Grounds for termination of the PPA by the public body or operator;

--Disposition of the facility upon completion of the PPA;

--Procedures for amendment of the PPA;

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<sup>20</sup> R.C. 168.04(J).

<sup>21</sup> R.C. 168.04(G).

<sup>22</sup> R.C. 168.01.

<sup>23</sup> R.C. 168.01.

<sup>24</sup> R.C. 168.05(A).

--If the PPA contains a construction services<sup>25</sup> component, both of the following:

- A contract performance bond executed by a surety authorized by the Department of Insurance to write surety bonds in an amount specified by the public body, conditioned upon the operator or contractor performing the construction services portion of the work in accordance with the agreed upon terms, within the time prescribed;
- Payment bond executed by a surety authorized by the Department of Insurance to write surety bonds in an amount specified by the public body, conditioned upon the payment for all labor, work performed, and materials furnished in connection with the construction services portion of the work.<sup>26</sup>

Further, a PPA may provide for the following:

--Review and approval by the public body of the operator's plans for the development and operation of the facility;

--Inspection by the public body of construction of or improvements to the facility;

--Maintenance by the operator of a policy of liability insurance or self-insurance;

--Filing by the operator, on a periodic basis, of appropriate financial statements in a form acceptable to the public body;

--Filing by the operator, on a periodic basis, of reports as determined by the public body in a form acceptable to the public body;

--Financing obligations of the operator and the public body;

--Apportionment of expenses between the operator and the public body;

--Rights and duties of the operator, the public body, and other state and local governmental entities with respect to use of the facility;

--Rights and remedies available in the event of default or delay;

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<sup>25</sup> This means design-build, construction, reconstruction, replacement, improvement, or repair services. R.C. 168.05(B)(2).

<sup>26</sup> R.C. 168.05(B)(1).

--Terms and conditions of indemnification of the operator by the public body;

--Assignment, subcontracting, or other delegation of responsibilities of the operator or the public body under the agreement to third parties, including other private entities and other public bodies;

--Sale or lease to the operator of private property related to the facility.<sup>27</sup>

### **Binding dispute resolution**

A PPA may include a provision authorizing a binding dispute resolution<sup>28</sup> method for controversies arising from the PPA, but the method may proceed only upon agreement of all parties to the controversy. If all parties do not agree to proceed to a binding dispute resolution, a party having a claim against the public body must exhaust its administrative remedies specified in the PPA before filing any action against the public body in the Court of Claims. A party to the PPA may appeal the determination of a technical expert only to the Franklin County Court of Common Pleas, which may issue an order vacating such a determination if the determination was procured by corruption, fraud, or undue means, if there was evidence of partiality or corruption on the part of the technical expert, or if the technical expert was guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party were prejudiced.<sup>29</sup>

### **Material default**

If the operator materially defaults<sup>30</sup> on the PPA, the public body may either: (1) elect to take over the facility, including the succession of all right, title, and interest in the facility, subject to any liens on revenues previously granted by the operator, or (2) terminate the PPA and exercise any other available rights and remedies. If the public body takes over the facility, the public body must collect and pay revenues subject to a lien to satisfy any obligation. The public body may develop and operate the facility and comply with service contracts or may solicit proposals for the maintenance and

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<sup>27</sup> R.C. 168.05(C).

<sup>28</sup> "Binding dispute resolution" means a binding determination after review by a technical expert of all relevant items, which may include documents, and by interviewing appropriate personnel and visiting the project site involved in the controversy. "Binding dispute resolution" does not involve representation by legal counsel or advocacy by any person on behalf of any party to the controversy.

<sup>29</sup> R.C. 168.05(D).

<sup>30</sup> Defined for purposes of the bill in R.C. 168.01.

operation of the facility in accordance with the process set forth above under "**Solicited proposals**."<sup>31</sup>

### **Termination**

When a PPA terminates, the operator's authority and duties cease unless the PPA provides otherwise. And, the facility reverts to the public body and must be dedicated for public use.<sup>32</sup>

### **Miscellaneous**

The bill specifies that a public body is not subject to competitive bidding laws when executing a PPA,<sup>33</sup> and that a PPA does not confer on the operator the public body's authority to appropriate property.<sup>34</sup> The public body must deposit funds collected pursuant to a PPA into a fund the public body creates for this purpose or as the public body otherwise determines as specified in the PPA.<sup>35</sup>

### **Financing**

A public body that has authority under continuing law to issue obligations may issue obligations for the purpose of funding the development or financing of a facility under a PPA.<sup>36</sup> A public body may accept a grant, loan, or other financial assistance from the United States or any of its agencies or may enter into agreements with the United States as necessary. A public body may accept from any source any grant, donation, gift, or other form of conveyance of land, money, other real or personal property or other items of value, and the public body may use federal, state, local, and private funds to finance a facility. Finally, a facility may be financed in whole or in part by contribution of any funds or property made by any operator or an affected jurisdiction that is a party to a PPA.<sup>37</sup>

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<sup>31</sup> R.C. 168.07.

<sup>32</sup> R.C. 168.06.

<sup>33</sup> R.C. 168.05(G).

<sup>34</sup> R.C. 168.05(E).

<sup>35</sup> R.C. 168.05(F).

<sup>36</sup> R.C. 168.08.

<sup>37</sup> R.C. 168.09.

## Taxes

The bill specifies that a facility and any tangible personal property used exclusively with a facility that is owned by a public body and leased, licensed, financed, or otherwise conveyed to an operator, or that is acquired, constructed, or otherwise provided by an operator on behalf of the public body is exempt from property taxes and special assessments levied by the state or a political subdivision.<sup>38</sup> Building and construction materials that will be incorporated into the facility are exempt from sales and use tax.<sup>39</sup>

## Appropriation of property

The bill allows a public body to acquire property, rights-of-way, or other rights in property in accordance with continuing law regarding appropriation of property<sup>40</sup> for public use in connection with projects that are part of a PPA. If the public body proposes to appropriate property at the request of a private entity, the private entity must pay the costs and the public body must first make a finding that the appropriation is for a public use and serves a public purpose.<sup>41</sup>

## Miscellaneous

The bill specifies that law enforcement officers have the same powers and jurisdiction within the limits of a facility as they have in their areas of jurisdiction, and that law enforcement officers have access to a facility at any time for the purpose of exercising those powers and jurisdiction.<sup>42</sup>

If a utility<sup>43</sup> facility will be crossed or relocated, the operator under a PPA and the utility company must cooperate in planning and arranging the manner of the crossing or relocation.<sup>44</sup>

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<sup>38</sup> "Political subdivision" includes any county, township, municipal corporation, or other body corporate and politic that is responsible for government activities in a geographic area smaller than that of the state.

<sup>39</sup> R.C. 168.10.

<sup>40</sup> See Chapter 163. of the Revised Code, not in the bill.

<sup>41</sup> R.C. 168.11. The Appropriation Law already requires that any real property be appropriated only as necessary and for a public use. R.C. 163.021, not in the bill.

<sup>42</sup> R.C. 168.12.

<sup>43</sup> Defined for purposes of the bill under R.C. 168.01.

<sup>44</sup> R.C. 168.13.



The bill specifically does not waive the public body's sovereign immunity with respect to the participation in or approval of all or any part of the facility or its operation.<sup>45</sup>

Finally, the bill gives public bodies the authority to adopt rules, resolutions, or ordinances, as the case may be, to carry out the provisions of the bill.<sup>46</sup>

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## COMMENT

Under the Ohio Constitution, a municipal corporation may regulate all matters of local self-government.<sup>47</sup> Because the Ohio Supreme Court has found that the improvement, leasing, and conveyance of municipal property are matters of local self-government,<sup>48</sup> contracting with private entities for the development, construction, operation, or other conduct regarding public facilities is likely a matter of local self-government. For this reason, chartered municipal corporations probably have the authority to enter into the types of agreements the bill purports to authorize, and probably may deviate from the bill's requirements for such agreements.

However, it is not clear whether the bill's authority is necessary to allow a nonchartered municipal corporation to enter into PPAs and whether the bill's requirements can be enforced against nonchartered municipal corporations. The Court has determined that chartered municipalities may deviate from state law on both *procedural* and *substantive* matters of state government, while nonchartered municipal corporations may deviate on substantive matters but must follow state laws that establish procedures for self-government.<sup>49</sup> If a reviewing court finds that the bill's provisions are procedural, nonchartered municipal corporations would be required to follow them. But, if the provisions are substantive, a nonchartered municipal corporation could enter into a PPA subject to the municipality's own requirements in the same manner as a chartered municipal corporation.

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<sup>45</sup> R.C. 168.14.

<sup>46</sup> R.C. 168.15.

<sup>47</sup> Ohio Const., art. XVIII, sec. 3.

<sup>48</sup> *State ex rel. Leach v. Redick*, 168 Ohio St. 543 (1959); *Babin v. Ashland*, 160 Ohio St. 328 (1953); and *Dies Electric Co. v. Akron*, 62 Ohio St.2d 322 (1980).

<sup>49</sup> *Northern Ohio Patrolmen's Benevolent Ass'n. v. Parma*, 61 Ohio St.2d 375 (1980).



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## HISTORY

ACTION

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