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133rd General Assembly
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Sub. H. B. No. 218

A BILL

To enact sections 168.01, 168.02, 168.03, 168.04, 168.05, 168.06, 168.07, 168.08, 168.09, 168.10, 168.11, 168.12, 168.13, 168.14, and 168.15 of the Revised Code to authorize certain public entities to enter into public-private initiatives with a private party through a public-private agreement regarding public facilities.

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

Section 1. That sections 168.01, 168.02, 168.03, 168.04, 168.05, 168.06, 168.07, 168.08, 168.09, 168.10, 168.11, 168.12, 168.13, 168.14, and 168.15 of the Revised Code be enacted to read as follows:

Sec. 168.01. "Affected jurisdiction" means any unit of government within the state in which all or part of a facility is located or any other public entity directly affected by the facility.

"Contracting authority" means the director or chief

executive officer in the case of a state agency, the board of trustees in the case of a state institution of higher education, the board of county commissioners in the case of a county, the board of township trustees in the case of a township, the legislative authority in the case of a municipal corporation, the board of library trustees in the case of a library or library district, the board of directors in the case of a port authority, the board of education in the case of a school district, the governing authority in the case of a community school, the governing body in the case of a STEM school, and the board of trustees in the case of a college-preparatory boarding school.

"Facility" means any existing or new public building, public improvement, or public infrastructure, or part of such building, improvement, or public infrastructure, that is used or will be used by a public body or the public at large, or is used in support of a public purpose or for the delivery of services to the public.

"Force majeure" means an uncontrollable force or natural disaster not within the power of the operator or the public body.

"Maintenance" includes routine maintenance, major maintenance, and any other categories of maintenance that may be designated by the public body.

"Material default" means any failure of an operator to perform any duties under a public-private agreement that jeopardizes delivery of adequate service to the public and remains unsatisfied after a reasonable period of time and after the operator has received written notice from the public body of the failure.

"Operate" means any action to maintain, repair, improve, equip, or modify a facility.

"Operator" means a private entity that has entered into a public-private agreement under sections 168.01 to 168.15 of the Revised Code.

"Political subdivision" means a county, township, municipal corporation, library or library district created under Chapter 3375. of the Revised Code, or port authority created under Chapter 4582. of the Revised Code.

"Private entity" means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity, or other business entity.

"Public body" means a state agency, state institution of higher education, political subdivision, or public school.

"Public-private agreement" means the agreement between a private entity and the public body that relates to the design, build, financing, operation, or maintenance of a facility subject to sections 168.01 to 168.15 of the Revised Code.

"Public-private initiative" means an arrangement between the public body and a private entity, the terms of which are stated in a public-private agreement, that provides for both of the following:

(A) Sharing of resources and the means of providing a project or service for a facility;

(B) Cooperation in researching, developing, and implementing projects or services for a facility.

"Public school" means a school district created under

Chapter 3311., community school created under Chapter 3314., STEM school created under Chapter 3326., or college-preparatory boarding school created under Chapter 3328. of the Revised Code.

"State agency" has the meaning defined in section 1.60 of the Revised Code but does not include the department of transportation.

"State institution of higher education" has the meaning defined in section 3345.011 of the Revised Code.

"Utility" means a privately, publicly, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, alternative or renewable energy sources such as wind or solar, or any other similar commodity, including a fire or police signal system or street lighting system that directly or indirectly serves the public.

Sec. 168.02. A facility subject to a public-private agreement under sections 168.01 to 168.15 of the Revised Code shall be owned by the public body unless the public body, in its discretion, elects to provide for ownership of the facility by the private entity through a lease agreement that is part of the public-private agreement. Notwithstanding any provision of the Revised Code, the lease agreement shall provide for the lease of all or a portion of the facility to, or ownership by, the private entity for a term of up to forty years. In consideration therefor, the agreement shall provide for complete reversion of the facility, in good or better condition, to the public body at the expiration of the lease.

Sec. 168.03. (A) A public body may solicit, receive, consider, evaluate, and accept a proposal for a public-private initiative.

(B) In soliciting and selecting a private entity with which to enter into a public-private initiative, the public body shall use one or both of the following:

(1) Sealed bidding;

(2) Selection of proposals, with or without negotiations, based on qualifications, best value, or both.

(C)(1) The public body shall consider the following factors in evaluating and selecting a bid or proposal to enter into a public-private initiative:

(a) The ability of the facility to serve a public purpose;

(b) The proposed aggregate cost of and financial plan for the facility, including costs for labor, fringe benefits, equipment and materials, and costs of administering, monitoring, and inspecting the facility;

(c) The general reputation, qualifications, industry experience, and financial capacity of the private entity;

(d) The proposed design, operation, and feasibility of the facility;

(e) Comments from local citizens and affected jurisdictions;

(f) Benefits to the public and the affected facility;

(g) The safety record of the private entity;

(h) 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 thirty per cent of the estimated design fee, the primary construction contractor representing not less than thirty per cent of the estimated construction dollar value amount, and the primary financier representing not less than fifty per cent of the total project cost;

(i) Any other criteria that the public body considers appropriate.

(2) The public body may consider the following factors in evaluating and selecting a bid or proposal to enter into a public-private initiative:

(a) The bidder's estimates of capital expenditures and operating expenses for the proposed facility;

(b) The schedule for completion of the proposed facility;

(c) Whether user fees, lease payments, or other charges will be collected for use of the proposed facility over the term of the public-private agreement;

(d) The proposed length of time before ownership of the facility reverts to the public body.

(D) The public body shall select a private entity for a public-private initiative on a competitive basis.

(E) Any materials or data submitted to, made available to, or received by the contracting authority, to the extent that the materials or data consist of trade secrets, as defined in section 1333.61 of the Revised Code, are confidential and are not public records for the purposes of section 149.43 of the Revised Code. Financial information received by the contracting authority that is related to a proposal is confidential and not

a public record for purposes of section 149.43 of the Revised Code until such time as a proposal is selected. Before submission of a solicited proposal, a private entity may request a review by the public body of information that the private entity has identified as confidential, to determine whether such information would be subject to disclosure under section 149.43 of the Revised Code.

(F)(1) The public body may reimburse a private entity for a portion of the actual costs the entity incurred in submitting a proposal for a public-private initiative that was solicited by the public body under this section. When considering the reimbursement of such costs, the contracting authority shall describe, in the request for proposals for a specific public-private initiative, the specific terms and conditions for reimbursing a private entity. The contracting authority may include in the terms and conditions a requirement that the private entity execute an agreement to transfer to the public body the rights to the use of the work product contained in the proposal in exchange for receiving the reimbursement.

(2) The contracting authority shall make all decisions related to the reimbursement of a specific private entity and related to the maximum amount of the reimbursement. However, the public body shall not reimburse a private entity if that entity enters into the public-private agreement that is the subject of the solicited proposal, except as set forth in the request for proposals or in the public-private agreement. The reimbursement of costs under division (F) of this section is exempt from any competitive bidding required by law.

(3) If the public body, pursuant to division (F)(1) of this section, includes a reimbursement provision in a request

for proposals and the public body subsequently terminates the solicitation before the solicitation expiration date, the public body shall prorate the amount of the reimbursement that is to be paid to each private entity participating in the solicitation on the date the public body terminates the solicitation. The public body shall calculate the proration percentage by determining the number of days from the date the solicitation first was offered until the date the public body terminated the solicitation and dividing that number by the number of days of the original solicitation period.

(4) Except as otherwise provided in writing by the public body, if, pursuant to division (F)(1) of this section, the public body includes a reimbursement provision in a request for proposals and subsequently enters into negotiations based on the selection of a desired proposal and the public body elects to terminate those negotiations for the convenience of the public body and through no fault of the proposer, the proposer is entitled to the full reimbursement amount.

Sec. 168.04. (A) The public body may receive, consider, evaluate, and accept or reject an unsolicited proposal for a public-private initiative if the proposal meets all of the following:

(1) Is independently originated and developed by the proposer;

(2) Benefits the public;

(3) Is prepared without public body supervision;

(4) 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;

(5) Is made by a private entity that is not prohibited from making an unsolicited proposal under section 3517.13 of the Revised Code.

(B) Within ninety days after receiving an unsolicited proposal, the public body may undertake a preliminary evaluation of the unsolicited proposal to determine if the proposal complies with the requirements of division (A) of this section.

(C) Any materials or data submitted to, made available to, or received by the contracting authority under this section, to the extent that the materials or data consist of trade secrets, as defined in section 1333.61 of the Revised Code, are confidential and are not public records for the purposes of section 149.43 of the Revised Code. Financial information received by the contracting authority that is related to a proposal is confidential and not a public record for purposes of section 149.43 of the Revised Code until the public body accepts or rejects the proposal. Before submission of an unsolicited proposal or a competing proposal, a private entity may request a review by the public body of information that the private entity has identified as confidential to determine whether such information would be subject to disclosure under section 149.43 of the Revised Code.

(D) If the unsolicited proposal does not comply with division (A) of this section, the public body shall return the proposal without further action.

(E) If the unsolicited proposal complies with division (A) of this section, the public body may continue to evaluate the

proposal in accordance with this section.

(F)(1) If the unsolicited proposal complies with division (A) of this section, the public body shall advertise the unsolicited proposal for the purpose of receiving competitive proposals for the proposed facility.

(2) The advertisement shall outline the general nature and scope of the unsolicited proposal, including the location of the facility and the work to be performed on or in connection with the facility and shall specify an address to which a competing proposal may be submitted.

(3) The advertisement shall specify a reasonable time period by which competitors must submit a competing proposal to the public body.

(G) The public body shall charge a reasonable fee to cover its costs to process, review, and evaluate an unsolicited proposal and any competing proposals.

(H) Upon receipt of any competing proposals, the public body shall evaluate the unsolicited proposal and any competing proposals using the factors set forth under division (C) of section 168.03 of the Revised Code.

(I) After evaluating the unsolicited proposal and any competing proposals, the public body may do any of the following:

(1) Accept the unsolicited proposal and reject any competing proposals;

(2) Reject the unsolicited proposal and accept a comparable competing proposal if the public body determines that the comparable competing proposal is the most advantageous to

the jurisdictions served by the public body;

(3) Reject the unsolicited proposal and any competing proposals.

Sec. 168.05. (A) After selecting a solicited or unsolicited proposal for a public-private initiative, the public body shall enter into a public-private agreement for a facility with the selected private entity. An affected jurisdiction may be a party to a public-private agreement entered into by the public body and a selected private entity.

(B)(1) A public-private agreement under this section shall provide for all of the following:

(a) Planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing, or operation of a facility. A public-private agreement that provides for the construction or reconstruction of a facility also shall provide for maintenance after the construction or reconstruction;

(b) Term of the public-private agreement;

(c) Type of property interest, if any, the private entity will have in the facility;

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

(e) Compliance with applicable federal, state, and local laws, including laws applicable to public improvements to the extent those laws do not conflict with the provisions of Chapter 168. of the Revised Code;

(f) Grounds for termination of the public-private agreement by the public body or operator;

(g) Disposition of the facility upon completion of the agreement;

(h) Inspection by the public body of construction of or improvements to the facility;

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

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

(k) Procedures for amendment of the agreement;

(l) If the agreement contains a construction services component, a contract performance bond executed by a surety authorized by the department of insurance to write surety bonds in an amount specified by the contracting authority, conditioned upon the private entity or contractor performing the construction services portion of the work in accordance with the agreed upon terms, within the time prescribed;

(m) If the agreement contains a construction services component, a payment bond executed by a surety authorized by the department of insurance to write surety bonds in an amount specified by the contracting authority, conditioned upon the payment for all labor, work performed, and materials furnished in connection with the construction services portion of the work.

(2) As used in divisions (B)(1)(l) and (m) of this

section, "construction services" means design-build, construction, reconstruction, replacement, improvement, or repair services.

(C) A public-private agreement under this section may provide for any of the following:

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

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

(3) Financing obligations of the operator and the public body;

(4) Apportionment of expenses between the operator and the public body;

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

(6) Rights and remedies available in the event of default or delay;

(7) Terms and conditions of indemnification of the operator by the public body;

(8) 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;

(9) Sale or lease to the operator of private property related to the facility.

(D) The contracting authority may include in any public-private agreement under sections 168.01 to 168.15 of the Revised Code a provision authorizing a binding dispute resolution method for any controversy subsequently arising out of the contract. The binding dispute resolution method may proceed only upon agreement of all parties to the controversy.

As used in this division, "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.

(E) No public-private agreement entered into under this section shall be construed to transfer to a private entity the contracting authority's authority to appropriate property under Chapter 163. of the Revised Code or otherwise provided under the Revised Code.

(F) Money collected by the public body pursuant to an agreement entered into under this section shall be deposited into a fund created for this purpose or as otherwise determined by the public body or as specified in the agreement.

(G) Any provision of law requiring competitive bidding does not apply to public-private agreements under sections 168.01 to 168.15 of the Revised Code.

(H) Any agreement entered into under this section is subject to sections 4115.03 to 4115.21 of the Revised Code.

Sec. 168.06. In the event of termination of the public-private agreement, the authority and duties of the operator

cease, except for any duties and obligations that extend beyond the termination as provided in the public-private agreement, and the facility reverts to the public body and shall be dedicated to the public body for public use.

Sec. 168.07. (A) Upon the occurrence and during the continuation of material default by an operator, not related to an event of force majeure, the public body may do the following:

(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 private entity;

(2) Terminate the public-private agreement and exercise any other available rights and remedies.

(B) In the event that the public body elects to take over a facility, the public body shall collect and pay any revenues that are subject to lien to satisfy any obligation and may do the following:

(1) Develop and operate the facility and comply with any service contracts;

(2) Solicit proposals for the maintenance and operation of the facility under section 168.03 of the Revised Code.

Sec. 168.08. A public body having authority to issue obligations may issue, in accordance with that authority, obligations for the purpose of providing funds to carry out sections 168.01 to 168.15 of the Revised Code with respect to the development or financing of a facility.

Sec. 168.09. (A) For the purposes of carrying out sections 168.01 to 168.15 of the Revised Code, the public body may do all

of the following:

(1) Accept, subject to applicable terms and conditions, available funds from the United States or any of its agencies, whether the funds are made available by grant, loan, or other financial assistance;

(2) Enter into agreements or other arrangements with the United States or any of its agencies as may be necessary;

(3) For the purpose of completing a facility under an agreement, accept from any source any grant, donation, gift, or other form of conveyance of land, money, other real or personal property, or other item of value made to the public body.

(B) Any facility may be financed in whole or in part by contribution of any funds or property made by any private entity or affected jurisdiction that is party to a public-private agreement under sections 168.01 to 168.15 of the Revised Code.

(C) The public body may use federal, state, local, and private funds to finance a facility under sections 168.01 to 168.15 of the Revised Code and shall comply with any requirements and restrictions governing the use of the funds, including maintaining the funds separately when necessary.

Sec. 168.10. A facility and any tangible personal property used exclusively with a facility that is owned by the 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 all ad valorem property taxes and special assessments levied against property by the state or any political subdivision of the state. Building and construction materials that will be incorporated into a facility pursuant to a public-

private agreement are exempt from the taxes imposed under Chapters 5739. and 5741. of the Revised Code.

As used in this section, "political subdivision" means a county, township, municipal corporation, or any other body corporate and politic that is responsible for government activities in a geographic area smaller than that of the state.

Sec. 168.11. The public body may acquire property, rights-of-way, or other rights in property for public use in connection with projects that are part of a public-private initiative in accordance with Chapter 163. of the Revised Code. If the public body proposes to acquire property, rights-of-way, or other rights in property for such public use at the request of a private entity, the acquisition shall be by the public body, in accordance with Chapter 163. of the Revised Code, and only if the contracting authority first makes a finding that the acquisition is for a public use and serves the public purposes of sections 168.01 to 168.15 of the Revised Code; the contracting authority also shall require the private party to pay the costs of the acquisition.

Sec. 168.12. All law enforcement officers of the state and of an affected local jurisdiction shall have the same powers and jurisdiction within the limits of the facility as they have in their respective areas of jurisdiction and access to the facility at any time for the purpose of exercising such powers and jurisdiction.

Sec. 168.13. An operator under sections 168.01 to 168.15 of the Revised Code and any utility whose facility is to be crossed or relocated shall cooperate fully in planning and arranging the manner of the crossing or relocation of the utility facility.

Sec. 168.14. Nothing in sections 168.01 to 168.15 of the Revised Code shall be construed or deemed to affect any waiver of the sovereign immunity of the public body or any officer or employee of the public body with respect to the participation in or approval of all or any part of the facility or its operation.

A municipal corporation may adopt ordinances regarding public-private initiatives that vary from sections 168.01 to 168.15 of the Revised Code.

If, during the term of the public-private agreement, an improvement is made to the facility and that improvement is not part of the public-private agreement, the improvement shall be made in accordance with laws applicable to public improvements.

Sec. 168.15. A state agency may adopt rules under Chapter 119. of the Revised Code, a county or township may adopt resolutions, a municipal corporation may adopt ordinances, a state institution of higher education may adopt rules, and a public school, library or library district, or port authority may adopt resolutions to carry out sections 168.01 to 168.15 of the Revised Code.