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Bill Analysis

Version: As Introduced

Primary Sponsor: Rep. Patton

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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.

DETAILED ANALYSIS

Overview

The bill provides a framework to allow certain public bodies, including state agencies,¹ state institutions of higher education, counties, townships, municipal corporations, school districts, community schools, STEM schools, college-preparatory boarding schools, library districts, and port authorities, to execute a public-private agreement (“PPA”) with a private entity 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.² The facility either

¹ 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.

² R.C. 168.01.

must be owned by the public body or owned by the private entity through a lease agreement under which the facility reverts to the public body upon expiration of the agreement.³

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.⁴ 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 becomes a public record when a proposal is selected (in the case of a solicited proposal) or when a proposal is accepted or rejected (in the case of an unsolicited proposal). 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.⁵

Solicited proposals

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

- The ability of the facility to serve a public purpose;
- 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;
- 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;⁷
- 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

³ R.C. 168.02.

⁴ R.C. 168.03(D) (solicited proposals) and 168.04(F)(1) (unsolicited proposals).

⁵ R.C. 168.03(E) and 168.04(C).

⁶ R.C. 168.03(B).

⁷ An affected jurisdiction is any unit of government within Ohio where all or part of a facility is located or any other public entity directly affected by the facility. R.C. 168.01.

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.⁸

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;
- The proposed length of time before ownership of the facility reverts to the public body.⁹

Reimbursement of cost for submitting proposal

The bill authorizes a public body to reimburse a private entity 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.¹⁰

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.¹¹

Unsolicited proposals

If a private entity provides an unsolicited proposal to a public body, the public body decides whether or not to evaluate the proposal. A public body that evaluates a proposal has 90 days from when the public body received the proposal to determine if it meets all of the following requirements:

- Is independently originated and developed by the proposer;
- Benefits the public;
- Is prepared without public body supervision;

⁸ R.C. 168.03(C)(1).

⁹ R.C. 168.03(C)(2).

¹⁰ Generally, only the private entities the public body does not enter into an agreement with, unless the public body agrees otherwise. R.C. 168.03(F)(1) and (F)(2).

¹¹ R.C. 168.03(F)(3) and (F)(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;
- Is made by a private entity that is not prohibited from making a proposal under the Campaign Finance Law.¹²

If a proposal does not meet the requirements, the public body returns the proposal.¹³ If a proposal does meet the requirements, the public body may continue to evaluate the proposal¹⁴ 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.¹⁵ The unsolicited proposal and any comparable proposal are evaluated using the same factors set forth above for solicited proposals.¹⁶

After its evaluation of the proposals, the public body may: accept the original proposal; accept or reject all proposals; or reject the original 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.¹⁷

A public body must charge a reasonable fee for its costs to process, review, and evaluate an unsolicited proposal and competing proposals.¹⁸

Public-private agreements

After selecting a proposal (whether via the solicited or unsolicited process), the public body enters into the PPA with the private entity, called the “operator.”¹⁹ 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,²⁰ is entitled to become a party to the PPA.²¹ The PPA must provide for the following:

¹² R.C. 168.04(A) and (B).

¹³ R.C. 168.04(D).

¹⁴ R.C. 168.04(E).

¹⁵ R.C. 168.04(F).

¹⁶ R.C. 168.04(H).

¹⁷ R.C. 168.04(I).

¹⁸ R.C. 168.04(G).

¹⁹ R.C. 168.01.

²⁰ R.C. 168.01.

²¹ R.C. 168.05(A).

- Planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing, or operation of a facility (the bill specifies that a public-private agreement that provides for the construction or reconstruction of a facility also must provide for maintenance after the construction or reconstruction);
- 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, including laws applicable to public improvements²² to the extent those laws do not conflict with the bill's provisions;
- Grounds for termination of the PPA by the public body or operator;
- Disposition of the facility upon completion of the PPA;
- Inspection by the public body of construction of or improvements to the facility;
- 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;
- Procedures for amendment of the PPA;
- If the PPA contains a construction services²³ 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 equal to the construction services component contract price, 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 equal to the construction services component contract price, conditioned upon the payment for all labor, work performed, and

²² This would include, for instance, Chapter 153 of the Revised Code. The bill also specifies that if an improvement is made during the term of the PPA but the improvement is not part of the PPA, then the improvement must be made in accordance with laws applicable to public improvements. R.C. 168.14.

²³ This means design-build, construction, reconstruction, replacement, improvement, or repair services. R.C. 168.05(B)(2).

materials furnished in connection with the construction services portion of the work.²⁴

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;
- Maintenance by the operator of a policy of liability insurance or self-insurance;
- 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;
- 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;²⁵
- A provision authorizing a binding dispute resolution²⁶ method for controversies arising from the PPA, but the method may proceed only upon agreement of all parties to the controversy.²⁷

Material default

If the operator materially defaults²⁸ 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,

²⁴ R.C. 168.05(B)(1).

²⁵ R.C. 168.05(C).

²⁶ "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.

²⁷ R.C. 168.05(D).

²⁸ A material default is any failure of an operator to perform any duties under a PPA 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. R.C. 168.01.

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 operation of the facility in accordance with the process set forth above under “**Solicited proposals.**”²⁹

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.³⁰

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.³¹ 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.³²

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.³³ Building and construction materials that will be incorporated into the facility are exempt from sales and use tax.³⁴

²⁹ R.C. 168.07.

³⁰ R.C. 168.06.

³¹ R.C. 168.08.

³² R.C. 168.09.

³³ “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.

³⁴ R.C. 168.10.

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 property³⁵ 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.³⁶ The bill specifies it does not confer on the operator the public body's authority to appropriate property.³⁷

Miscellaneous

The bill specifies that a public body *is not subject* to competitive bidding laws when executing a PPA,³⁸ and that a PPA *is subject* to Prevailing Wage Law.³⁹

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.⁴⁰

A municipal corporation may adopt ordinances regarding PPAs that vary from the bill's provisions.⁴¹

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.⁴²

³⁵ See Chapter 163. of the Revised Code, not in the bill.

³⁶ 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.

³⁷ R.C. 168.05(E).

³⁸ R.C. 168.05(G).

³⁹ R.C. 168.05(H).

⁴⁰ R.C. 168.05(F).

⁴¹ R.C. 168.14. This is probably already the case under the Home Rule Amendment to the Ohio Constitution (art. XVIII, sec. 3) – at least for chartered municipal corporations – because the Ohio Supreme Court has found that the improvement, leasing, and conveyance of municipal property are matters of local self-government. See *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).

⁴² R.C. 168.12.

If a utility⁴³ 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.⁴⁴

The bill specifies its provisions do not affect a waiver of 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.⁴⁵

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.⁴⁶

HISTORY

Action	Date
Introduced	02-09-21

H0091-I-134/ts

⁴³ Defined for purposes of the bill under R.C. 168.01.

⁴⁴ R.C. 168.13.

⁴⁵ R.C. 168.14.

⁴⁶ R.C. 168.15.