

Stricken language would be deleted from and underlined language would be added to present law.

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As Engrossed: H3/19/15
A Bill

HOUSE BILL 1111

By: Representatives Sabin, Bragg, House, E. Armstrong, M.J. Gray, G. Hodges, Baltz, Jett

For An Act To Be Entitled

AN ACT TO CREATE THE PARTNERSHIP FOR PUBLIC FACILITIES AND INFRASTRUCTURE ACT; TO REGULATE PUBLIC-PRIVATE PARTNERSHIPS FOR PUBLIC FACILITIES AND INFRASTRUCTURE; AND FOR OTHER PURPOSES.

Subtitle

TO CREATE THE PARTNERSHIP FOR PUBLIC FACILITIES AND INFRASTRUCTURE ACT; AND TO REGULATE PUBLIC-PRIVATE PARTNERSHIPS FOR PUBLIC FACILITIES AND INFRASTRUCTURE.

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

SECTION 1. Arkansas Code Title 22 is amended to add an additional chapter to read as follows:

CHAPTER 10

PARTNERSHIP FOR PUBLIC FACILITIES AND INFRASTRUCTURE ACT

Subchapter 1 – General Provisions

22-10-101. Title.

This chapter shall be known and may be cited as the “Partnership for Public Facilities and Infrastructure Act”.

22-10-102. Legislative findings.

The General Assembly finds that:

(1) There is a public need for the timely acquisition, design,



construction, improvement, renovation, expansion, equipping, maintenance, operation, implementation, and installation of public infrastructure and government facilities within the state that serve a public purpose;

(2) The public need for government facilities and public infrastructure may not be satisfied by existing methods of procurement and the funding methods available to state and local government jurisdictions within the state;

(3) There are inadequate resources to develop public infrastructure and government facilities for the benefit of citizens of the state, and there is demonstrated evidence that public-private partnerships can promote the timely and cost-efficient development of public infrastructure and governmental facilities, provide alternative and innovative funding sources to governmental entities, and allow governmental entities to leverage and supplement the developmental cost of the public infrastructure or governmental facility, through private funding and participation by the private sector in governmental incentive and tax programs that are not otherwise available to governmental entities; and

(4) The necessity exists for authorizing the formation of public-private partnerships that may result in the ability to develop public infrastructure and governmental facility private projects in a more timely and cost-efficient manner, thereby resulting in increased benefits to the public safety and welfare of the citizens of the state and substantial cost benefits to the governmental entities and the public.

22-10-103. Definitions.

As used in this chapter:

(1) "Comprehensive agreement" means a final written agreement between a private entity and a public entity that is executed under § 22-10-303, provides for the development of a qualifying project, and addresses all issues related to the qualifying project;

(2) "Develop", "developed", and "development of" mean the planning, designing, developing, ownership, financing, leasing, acquisition, installation, construction, operation, maintenance, or expansion of a qualifying project;

(3) "Interim agreement" means a preliminary written agreement between a private entity and a public entity that is executed under § 22-10-

302, identifies the development, scope, and feasibility of a qualifying project, and addresses all issues related to the qualifying project;

(4) "Private entity" means a natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity, and other business entity;

(5) "Public entity" means one (1) or more of the following:

(A) A department of the state;

(B) An agency of the state;

(C) A board or commission of the state;

(D) A federal governmental entity; and

(E) A political subdivision of the state, including without limitation a city, county, institution of higher education, water authority, public facilities board, or other political subdivision or affiliate of an entity listed in this subdivision (5)(E);

(6) "Publish" or "published" means the publication by a public entity of a request for proposals one (1) time each week for three (3) consecutive weeks in:

(A) A newspaper of statewide circulation; and

(B) Either:

(i) In a statewide construction industry trade magazine; or

(ii) On a website approved by the public entity that is regularly subscribed to by members of the construction and development industry;

(7) "Qualified respondent" means the private entity selected as the most qualified entity to undertake a qualifying project that is the subject of a request for proposals issued under this chapter;

(8) "Qualifying project" means a capital development or improvement of any nature that:

(A) Benefits a public entity, including without limitation a vehicle parking facility, power generation facility, fuel supply facility, combined heating and power facility, central utility plant facility, distributed generation facility, oil or gas pipeline, water supply facility, water treatment intake and distribution facility, waste water treatment and collection facility, waste treatment facility, hospital,

library, medical or nursing care facility, recreational facility, city hall or related administrative facility, law enforcement facility, fire department facility, public administrative office, toll road, correctional facility, technology infrastructure facility, public building, or other similar facility currently available or to be made available to a public entity for public use, including without limitation a structure, parking area, appurtenance, and other related or unrelated infrastructure that might otherwise be described in a comprehensive agreement; and

(B) Has one (1) or more of the following characteristics:

(i) It is developed using a long-term operations and maintenance agreement, management agreement, or services agreement entered into with a private entity;

(ii) It is designed and built in whole or in part by a private entity;

(iii) It is a capital development or improvement in which a private entity:

(a) Invests its own capital or third-party capital arranged by the private entity;

(b) Sources or uses indebtedness, available funds, revenues, or financial or tax incentives to fund the project; or

(c) Provides other consideration in the form of goods or services to the public entity to fund the project;

(iv) It is owned in whole or in part by a private entity for the benefit of the public entity;

(v) It involves real or personal property owned by a public entity that is sold, leased, or exchanged with a private entity for leaseback or for use by the public entity; or

(vi) It is a project as defined by the Office of State Procurement;

(9) "Request for proposals" means a notice that is issued by a public entity announcing the public entity's interest in developing a qualifying project and seeking proposals from private entities to develop the qualifying project that identifies without limitation the following:

(A) The anticipated scope and purpose of the qualifying project;

(B) The financial and nonfinancial benefits related to the

qualifying project;

(C) The proposed timeline under which the qualifying project is to be completed; and

(D) All other issues that the public entity determines are necessary to accomplish the qualifying project; and

(10) "Revenues" means the rates, revenues, income, earnings, user fees, lease payments, service payments, other available funds, and other revenue and cash flow of any nature arising out of or in connection with the development of a qualifying project, including without limitation the funds derived from the operation of a qualifying project or otherwise provided by the parties as stated in the comprehensive agreement.

22-10-104. Construction.

(a) This chapter shall be liberally construed to effectuate its purpose.

(b)(1) Except as limited by the Arkansas Constitution, this chapter exclusively governs the manner and procedures by which a qualifying project may be developed by and between a public entity and a private entity.

(2) If this chapter conflicts with any other state law, then this chapter governs with respect to the manner and procedures by which a qualifying project may be developed by and between a public entity and a private entity.

Subchapter 2 – Proposals for Qualifying Projects

22-10-201. Requests for proposals.

(a)(1) A public entity considering the development of a qualifying project shall prepare and publish a request for proposals.

(2)(A) The public entity may specify a period of time during which responses to the request for proposals may be submitted by private entities.

(B) However, the time allowed for responses to a request for proposals under this chapter shall be at least sixty (60) days from the date the request for proposals is published.

(b)(1) If a proposed qualifying project may materially affect the governmental operations of another public entity, then the public entity

proposing the qualifying project shall provide written notice to each potentially affected public entity before the request for proposals is published.

(2) If the public entity and the other affected public entities agree to pursue a qualifying project, the public entities may jointly issue the request for proposals and undertake the qualifying project.

(c)(1) A public entity shall review each proposal submitted in response to a request for proposals to determine whether the proposal fulfills the goals and purposes of the public entity and the potential qualifying project.

(2) In assessing the proposals submitted in response to the request for proposals, a public entity may interview one (1) or more of the private entities submitting a response to determine which entity is the qualified respondent.

(d) A public entity may select the qualified respondent to undertake a qualifying project based on a variety of factors, including without limitation:

(1) The cost of the potential qualifying project as proposed by the private entity;

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

(3) The design of the qualifying project as proposed by the private entity;

(4) The plan of finance proposed by the private entity;

(5) Local citizens' comments;

(6) Comments from other public entities;

(7) The benefits to the public of the qualifying project as proposed by the private entity;

(8) The public entity's participation in a minority business enterprise plan adopted by the public entity;

(9) The private entity's plan to employ local contractors and residents; and

(10) Any other factor that the public entity determines would be useful in assessing the proposals submitted in response to the request for proposals.

(e)(1) A public entity is not required to determine or select the

qualified respondent based on the lowest project development cost or life cycle cost submitted by a private entity.

(2) However, a public entity may consider cost as one (1) factor in evaluating the submitted proposals and selecting the qualified respondent.

(f) A public entity may:

(1) Reject all proposals submitted in response to a request for proposals;

(2) Amend or modify the public entity's request for proposals;

(3) Publish an amended request for proposals; and

(4) Cease further development of a qualified project any time before entering into an interim agreement with the qualified respondent.

(g) After selecting the qualifying respondent and sending written notice to the qualified respondent of its selection, a public entity shall provide written notice to all private entities that submitted a proposal in response to the public entity's request for proposals within ten (10) days of notifying the qualified respondent of its selection as the qualified respondent.

22-10-202. Unsolicited proposals.

(a) A public entity shall not solicit or request a proposal from a private entity to develop a qualifying project that is not procured under § 22-10-201.

(b)(1) However, a public entity may receive and consider unsolicited ideas and development concepts from a private entity or another public entity.

(2) If a public entity decides to pursue an unsolicited idea or development concept, the public entity shall publish a request for proposals under § 22-10-201.

Subchapter 3 – Contracts Between Public Entity and Private Entity

22-10-301. Procurement requirements.

A public entity may enter into an interim agreement or a comprehensive agreement only in accordance with this subchapter.

22-10-302. Interim agreement.

(a)(1) Except as otherwise provided in this subsection, after a public entity has selected the qualified respondent pursuant to a request for proposals, the public entity and the qualified respondent shall negotiate an interim agreement.

(2) A public entity may enter into an interim agreement with the qualified respondent either before or in connection with the negotiation of a comprehensive agreement under § 22-10-303.

(3)(A)(i) If an interim agreement is necessary to develop a qualifying project and an interim agreement cannot be negotiated and executed within sixty (60) days after the selection of the qualified respondent or within the time period mutually agreed to by the public entity and the qualified respondent, the public entity may begin negotiations with the next most qualified private entity that submitted a proposal in response to the request for proposals.

(ii) A public entity is not required to republish the request for proposals before beginning negotiations with the next most qualified private entity under subdivision (a)(3)(A)(i) of this section.

(B) If an interim agreement is not necessary to develop a qualifying project, the public entity and the qualified respondent shall negotiate a comprehensive agreement under § 22-10-303.

(4)(A) Before a public entity may enter into an interim agreement under this section, the public entity shall contract with an attorney and a certified public accountant or other financial or economics professional to provide a written evaluation of the proposed qualifying project.

(B) A written evaluation provided by a certified public accountant or other financial or economics professional under subdivision (a)(4)(A) of this section shall include without limitation the certified public accountant's or other financial or economics professional's independent assessment of the financial viability of the proposed qualifying project, identifying all preliminary costs, financial liabilities, advantages, and disadvantages of the qualifying project.

(C) A written evaluation provided by an attorney under subdivision (a)(4)(A) of this section shall include the attorney's independent assessment of the terms and conditions under which the proposed qualifying project will be developed.

(D) An attorney, certified public accountant, or other financial or economics professional providing a written evaluation under this subsection may be a public employee of the public entity undertaking the qualifying project or a private person who has current professional liability insurance in an amount determined to be necessary by the public entity.

(b) An interim agreement entered into under this section may:

(1) Allow the private entity to commence activities and perform tasks for which it shall be compensated relating to the proposed qualifying project, including without limitation project planning and developing, design and engineering, environmental analysis and mitigation, surveying, and ascertaining the availability of financing for the proposed qualifying project;

(2) Establish the process and timing of the negotiation of the comprehensive agreement; and

(3) Contain any other provisions related to the development of the proposed qualifying project that are agreed upon by the public entity and the private entity.

22-10-303. Comprehensive agreement.

(a)(1) If a public entity and the qualified respondent have entered into an interim agreement, agree on the findings and conclusions stated in the interim agreement, and desire to proceed with the development of the qualifying project, the public entity and qualified respondent shall negotiate and enter into a comprehensive agreement.

(2) If it is unnecessary for a public entity and the qualified respondent to enter into an interim agreement, the public entity and the qualified respondent shall negotiate and enter into a comprehensive agreement following selection of the qualified respondent.

(3) Before developing or operating the qualifying project, the qualified respondent shall enter into a comprehensive agreement with the public entity.

(b)(1) Before a public entity may enter into a comprehensive agreement under this section, the public entity shall contract with an attorney to negotiate the relevant agreements and a certified public accountant or other financial or economics professional to provide a written evaluation of the proposed comprehensive agreement.

(2) The attorney with which the public entity contracts under subdivision (b)(1) of this section shall negotiate the contracts and agreement related to the development of the qualifying project, including without limitation the revenue contracts, construction contracts, management contracts, services contracts, and other agreements related to the qualifying project.

(3) The written evaluation required under subdivision (b)(1) of this section shall include the certified public accountant's or other financial or economics professional's independent assessment of the costs of the qualifying project, the financial viability of the qualifying project, and all other financial and operating assumptions related to the qualifying project.

(4) A certified public accountant or other financial or economics professional providing a written evaluation under this subsection may be a public employee of the public entity undertaking the qualifying project or a private person who has current professional liability insurance in an amount determined to be necessary by the public entity.

(5) The fees and expenses associated with engaging an attorney, certified public accountant, or other financial or economics professional under this section may be included in the costs of the qualifying project.

(c) The comprehensive agreement shall include without limitation the following:

(1) A thorough description of the duties of the public entity and the qualified respondent in relation to the development and operation of the qualifying project;

(2) Dates and schedules for the completion of the qualifying project, including any available extensions or renewals of the qualifying project;

(3) A pro forma analysis or budget under which the qualifying project shall be developed, financed, constructed, operated, and maintained;

(4) The source of all revenues derived from the operation and maintenance of the qualifying project and any process for modifying the revenues during the term of the comprehensive agreement;

(5) Financing and funding sources for the qualifying project and any contractual provisions related to the financing and funding sources for the qualifying project;

(6) A copy of each contract related to the development of the qualifying project;

(7) Reimbursements to be paid to the public entity for services provided by the qualified respondent, if any;

(8) A process for the review of plans and specifications for the qualifying project by the public entity and the engineering and architectural consultants of the public entity, if any;

(9) A process for the periodic and final inspection of the qualifying project by the public entity or its designee to ensure that the qualified respondent's development activities comply with the comprehensive agreement;

(10) For the components of the qualifying project that involve construction, provisions for the:

(A)(i) Delivery of maintenance, payment, and performance bonds in the amounts that may be specified by the public entity in the comprehensive agreement.

(ii) However, a payment bond related to a qualifying project shall:

(a) Be based only on the construction costs of the qualifying project; and

(b) Comply with the requirements of § 18-44-503; and

(B) Posting and delivery of all other bonds, letters of credit, or other forms of security acceptable to the public entity in connection with the development of the qualifying project;

(11) Submission to the public entity by the qualified respondent of proof of workers compensation, property casualty, general liability, and other policies of insurance related to the development and operation of the qualifying project in the amounts and subject to the terms that may be specified by the public entity in the comprehensive agreement;

(12) A process for the public entity's monitoring of the practices of the qualified respondent to ensure that the qualifying project is properly developed, constructed, operated, and maintained;

(13) The filing by the qualified respondent of appropriate financial statements with the public entity related to the operations of the qualifying project within the timeframes established in the comprehensive

agreement; and

(14) Policies and procedures governing the rights and responsibilities of the public entity and the qualified respondent if the comprehensive agreement is terminated according to the terms of the comprehensive agreement or as the result of a default under the terms of the comprehensive agreement.

(d) A modification of or an amendment to the terms of the comprehensive agreement shall be:

(1) Agreed upon by the public entity and the qualified respondent; and

(2) Added to the comprehensive agreement by written amendment.

22-10-304. Financing of a qualifying project.

(a)(1) Financing of a qualifying project may be in the amounts and upon the terms and conditions stated in the interim agreement or the comprehensive agreement.

(2)(A) A qualifying project may be financed by the qualified respondent or the public entity, or both, and the qualified respondent and public entity may utilize any funding resources available to them, including without limitation to the fullest extent permitted by applicable law, issuing debt, equity, or other securities or obligations, entering into leases, accessing designated trust funds, and borrowing or accepting grants from a state infrastructure bank.

(B) Debt issued for the development of a qualifying project may be evidenced by the issuance of taxable or tax-exempt bonds, promissory notes, lease purchase agreements, or other evidences of indebtedness that are specified in the comprehensive agreement.

(3) Financing for a qualifying project may be secured by a pledge of, security interest in, or lien on the real or personal property of the public entity or the qualified respondent, including without limitation any property interests in the qualifying project or the qualifying project revenues.

(b)(1) The public entity may take action to obtain federal, state, or local assistance for a qualifying project that serves the public purpose of this chapter, including without limitation entering into any contracts required to receive such assistance.

(2) All or any portion of the costs of a qualifying project may be paid, directly or indirectly, from the proceeds of a grant or loan made by a local government, the state government, the federal government, or an agency or instrumentality of a local government, the state government, or the federal government if it would serve the public purpose of this chapter.

(c) In addition to the financing methods allowed under subsection (a) of this section, a qualifying project may be financed through:

(1) Capital provided by either the public entity or the qualified respondent;

(2) The available funds of the public entity;

(3) The operating expenses of the public entity;

(4) Revenues of the qualifying project;

(5) Any tax credits or other incentives for which the qualifying project or the qualified respondent may qualify;

(6) Governmental or third-party grants; and

(7) Any other available capital or funding sources of the public entity or the qualified respondent.

22-10-305. Service contracts.

A public entity may contract with the qualified respondent for the delivery of services to be provided as part of a qualifying project in exchange for service payments or other consideration that the public entity deems appropriate.

Subchapter 4 – Other Powers and Responsibilities

22-10-401. Eminent domain – Dedication.

(a)(1) A public entity may exercise its right of eminent domain under applicable law in connection with the development of a qualifying project.

(2) The power of eminent domain shall not be delegated to a private entity with respect to a qualifying project commenced or proposed under this chapter.

(3) Damages awarded to a third party in an eminent domain action may be included in the development budget for the qualifying project.

(b)(1) A public entity may dedicate any real or personal property interest, including land, improvements, and tangible personal property,

through lease, sale, or otherwise, to the qualified respondent to facilitate a qualifying project if so doing will serve the public purpose of this chapter.

(2) The consideration for the dedication, lease, sale, or exchange of any real or personal property interest under subdivision (b)(1) of this section may include an agreement by the qualified respondent to operate or develop the qualifying project or provide other services to the public entity.

(3) The property interests that a responsible public entity may convey to the qualified respondent in connection with a dedication under this section may include licenses, franchises, easements, or other rights or interests that the public entity deems appropriate.

22-10-402. Sovereign immunity.

This chapter does not waive the sovereign immunity of the public entity or the officers or employees of the public entity under state law.

22-10-403. Open meetings – Disclosure of records.

(a) This chapter does not abrogate the obligation of a public entity or the Office of State Procurement to comply with the Freedom of Information Act of 1967, § 25-19-101 et seq.

(b) However, records that would otherwise be exempt from disclosure under the Freedom of Information Act of 1967, § 25-19-101 et seq., remain exempt when in the custody or control of a public entity or the office.

22-10-404. Transparency.

A public entity shall publish on its website:

(1) A description of each proposed qualifying project, the intended benefits of each proposed qualifying project, a proposed schedule for each qualifying project, and any other information that is essential to allow a public review of each proposed qualifying project;

(2) Each request for proposals published by a public entity; and

(3) A copy of each negotiated interim agreement and comprehensive agreement before the interim agreement or comprehensive agreement has been executed.

Subchapter 5 – Administration by the Office of State Procurement

22-10-501. Review and approval.

The Office of State Procurement shall review and approve each qualifying project before the public entity and qualified respondent execute the comprehensive agreement.

22-10-502. Powers and duties.

(a) The Office of State Procurement shall promulgate rules regarding the definitions and guidelines related to the development of qualifying projects under this chapter within one hundred eighty days (180) of the effective date of this chapter.

(b) The guidelines promulgated under this section shall include without limitation the following:

(1) Criteria for selecting qualifying projects to be undertaken by a public entity;

(2) Criteria for selecting among competing proposals submitted according to a request for proposals under § 22-10-201;

(3) Time lines for selecting a qualified respondent under the process for requests for proposals under § 22-10-201;

(4) Guidelines for negotiating a comprehensive agreement; and

(5) Guidelines for allowing the accelerated selection of a qualified respondent and the review and approval of a qualifying project that is determined to be a priority by the Governor and is funded in whole or substantial part by dedicated revenues.

/s/Sabin