

BOARD OF CONTRIBUTORS A win-win for public-sector projects

Legislation would encourage public-private partnerships

Commentary by Lee A. Weintraub

The Florida construction industry continues to limp along but relief may be on the way from the Florida Legislature. House Bill 337 and its companion, Senate Bill 576, have become the springboard for educating public agencies and contractors about the availability of public-private partnerships (P3) as the new means for delivering public construction projects in Florida.



Weintraub

Although P3 projects have already been available in some form in Florida, they have been infrequently used and familiarity with these types of projects among public entities and contractors has been scant. The legislation has increased awareness of the opportunities for P3 projects. But the bills, in their current form, may inadvertently burden the process with well-intentioned, but impractical, requirements.

P3 projects take many forms, but at their most fundamental level they are projects in which private entities finance, in whole or part, construction of public facilities in exchange for the opportunity to operate the facilities for decades thereafter. The private entities recoup their investment by retaining a portion of the fees generated by the facility.

The most prevalent examples thus far of P3 projects have been toll roads. Recent examples also include the Port of Miami Tunnel, sports arenas for the Florida Panthers and the Miami Marlins, the Florida Atlantic University football stadium and dorm construction, as well as dormitories at the University of Central Florida. The University of Florida is currently engaged in a significant P3 project combining private business enterprises and

university educational facilities within a new mixed use complex approximately a half-mile away from campus.

With the current public budget crisis, combined with Gov. Rick Scott's recent request that \$250 million of Public Education Capital Outlay funds be returned to the state, public agencies are at a loss about how to fund new facilities, let alone maintain old and aging facilities. Private enterprise could come to the rescue by offering a P3 arrangement.

THE LEGISLATION

Under the pending legislation, private entities may approach a public agency at any level of government with ideas for P3 projects. Under the current version of the bills, the public entities would already have policies in place for receiving such ideas from the private sector, addressing issues such as opportunities for competition through public notice (but not traditional bidding or procurement procedures), criteria for choosing among competing proposals, financial analyses of the proposals, etc. The public agency would not be required to select the proposal with the lowest bid amount, but rather may consider price as only one of many factors in evaluating competing P3 proposals.

The bills also permit private entities, who have determined the unmet need for specific public facilities or infrastructure, to submit unsolicited bids pursuant to which the private companies would build and operate the facilities or infrastructure using private funds, rather than wait for public agencies to put P3 projects out for bid. Customarily public agencies request bids from private contractors, but under the pending legislation private contractors may solicit the opportunity to build those facilities before the public agency ever issues a request for bids or



proposals. In fact, the private entities could propose P3 projects even before the public agency ever realized there was a need for the facility in the first place. Giving private construction consortiums the opportunity to generate their own work could provide a much-needed economic stimulus in Florida public construction.

BUSINESS OPPORTUNITIES

The construction industry has noticed the business opportunities P3 projects may provide. People are getting excited about the prospect of builders creating their own business by approaching public agencies with unsolicited ideas for P3 opportunities.

This is a win-win situation: It could put many contractors back to work on lucrative deals as long as the builders can carry the construction costs for a little while. It can also provide public agencies with the much-needed facilities, infrastructure and maintenance they seek, but for which public funding is not available.

CONCERNS

The trade association Construction Owners Association of America presented a very successful seminar on the pending legislation and P3 projects in general, generating high attendance from public agencies, contractors, lenders, insurers and other industry participants. But as momentum for P3 projects increases, concern grows over whether the pending legislation may contain too many rigid requirements to induce free enterprise to jump on the bandwagon.

For instance, the legislation mandates onerous guidelines be implemented by private agencies before they can

consider any P3 project. It also provides that, after the private entity invested significant time and money in developing an unsolicited proposal, it would be put out for competition to other contractors who could submit competing bids without having incurred the costs of developing the initial idea. The legislation would require legislative approval for every P3 proposal at the state government level although the approval procedure is much simpler at every other level of government.

Issues such as these could stifle private interest in P3 projects unless they are addressed before the bill becomes law. Otherwise many industry participants anticipate they will have to work together to fix some of these glitches in a glitch bill to be presented next year.

Despite these misgivings, indications are that visionary private entities and public agencies will plan on working together on P3 projects, regardless of what Tallahassee does. The pending legislation does not appear to hurt momentum, but a well-drafted bill could stimulate this process more than anyone initially envisioned.

If passed, the new legislation would take effect July 1, 2012. It will usher in a new era of public construction in Florida, fueled by creative public-private partnerships. The bill presents fascinating and promising opportunities and potential as long as it is not weighed down by bureaucratic requirements and impractical procedures. Many interested and affected parties are working with legislators to try to streamline the bill. In the meantime, you can follow the bill's status by visiting www.flsenate.gov and typing in SB 576.

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EVENTS

March 8

Dade County Bar Association Probate and Guardianship Committee: "The New Creditor Claim Trap and How to Avoid It," with Hung V. Nguyen, partner of Welbaum Guernsey, noon, Lawson Thomas Courthouse Center, 175 NW First

Ave., 11th floor, Miami. Cost: \$10 members, \$20 nonmembers. Call (305) 371-2220.

Federal Bar Association Broward County chapter: Luncheon with U.S. District Judge Marcia G. Cooke, noon, Riverside Hotel, 620 E. Las Olas Blvd., Fort Lauderdale. Cost: \$40 members, \$45 nonmembers, \$25 government attorneys, \$20 law clerks and judges. Email: gilmourlaw@aol.com.

Coral Gables Bar Association: Judicial reception, 5:30 p.m., Becker & Poliakoff, 121 Alhambra Plaza, 10th floor, Coral Gables. Cost: \$50 members, \$75 nonmembers, free for judges. Call (305) 476-8300.

Cuban American Bar Association Young Lawyers Section: Happy hour, 6 p.m., Mayfair Hotel, Pool Lounge, 3000 Florida Ave., Coconut Grove. Free. Email: garcia1134@msn.com.

March 9

Dade County Bar Association: Bench & Bar Conference, 8:30 a.m., Hyatt Regency Miami, 400 SE Second Ave., Miami. Cost: \$125 members, \$200 nonmembers. Call (305) 371-2220.

Broward County Bar Association Young Lawyers Section: Breakfast with Broward County judges, 8:30 a.m., Broward County Courthouse Law Library, 201 SE Sixth St., Fort Lauderdale. Cost: \$25. Email: lindsay@brydgerporras.com.

Palm Beach County Bar Association: Bench Bar Conference, 9 a.m., Palm Beach County Convention Center, 650 Okeechobee Blvd., West

Palm Beach. Cost: \$165 members, \$195 nonmembers, \$35 government employees. Email: sspence@palmbeachbar.com.

March 14

Miami-Dade Gay & Lesbian Chamber of Commerce and Gay & Lesbian Lawyers Association: Luncheon, 11:30 a.m., Morton's Steakhouse, 1200 Brickell Ave., Miami. Cost: \$35 members, \$50 potential members. Call (305) 673-4440.

Dade County Bar Association Young Lawyers Section: "Procuring Professional Liability Coverage and Your Rights and Obligations Under the Policy," noon, Lawson E. Thomas Courthouse Center, 11th Floor Conference Center, 175 NW First Ave., Miami. Cost: \$30 members, \$35 nonmembers, \$35 at the door. Call (305) 371-2220.

Dade County Bar Association Young Lawyers Section: St. Patrick's Day happy hour, 6:30 p.m., Lucky Clover Irish Pub, 1111 SW First Ave., second floor, Miami. Cost: \$4 happy hour cocktails, \$5 draught beer. Email: ss@lydeckerdiaz.com.

March 15

Estate Planning Council of Greater Miami: Dinner and workshop on "Life Insurance Technical Manual" and "Investment Policy Statements for Trusts," 5:30 p.m., Bankers Club, 2 S. Biscayne Blvd., Miami. Free for members, \$65 nonmembers. Call (305) 310-2127.

South Broward Bar Association: Installation dinner, 6 p.m., Signature Grand, 6900 W. State Road

84, Davie. Cost: \$75 members, \$95 nonmembers. Email: southbrowardbarassoc@gmail.com

March 17

Association of South Florida Mediators & Arbitrators and Florida Academy of Professional Mediators: Educational seminar on "Your successful mediation is at the end of the rainbow," 7:30 a.m., Marriott North, 6650 N. Andrews Ave., Fort Lauderdale. Cost: \$195 members, \$225 nonmembers. Email: asfma1@gmail.com.

March 21

Family Court Services: Lunch & Learn discussion series on "Risk Management and Ethical Challenges in High Conflict Cases: Are Health Professionals', Lawyers' and Judges' Ethics and Risk Management at Odds in Family Law Cases," noon, Courthouse Center, 11th floor, 175 NW 1st Ave., Miami. Email: lfieldstone@jud11.flcourts.org.


March 24

Broward County Bar Association Young Lawyers Section and Abi's Place: Bowl-A-Thon, 5 p.m., Manor Lanes, 1517 NE 26th St., Wilton Manors. Cost: \$50. Email: jbh@kbgllaw.com.

March 29

American Inns of Court Spellman-Hoeverler chapter: Passing the Gavel judicial reception, 6 p.m., The Bankers Club, 14th floor, 2 S. Biscayne Blvd., Miami. Cost: \$50.

**Circuit, District, Appellate
MEDIATOR**



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