

(P)3s Company

Legal Issues Related to Public
Private Partnerships

Evan Rosenthal

Nabors, Giblin & Nickerson, P.A.

erosenthal@ngnlaw.com

850-224-4070



Outline



- What is a P3? Public-Private Partnerships Defined
- Section 255.065, Florida Statutes and Recent Legislative Changes (ch. 2024-204, Laws of Florida)
- Qualifying Project and “Public Purpose”
- P3 Examples
- Unsolicited Proposals and Other Procurement Considerations. What do I do if I receive an Unsolicited P3 proposal?
- Interim and Comprehensive Agreements
- Financing Options
- Additional Considerations

Public-Private Partnerships Defined



- Textbook Definitions:
 - A contractual agreement between a government entity and a private entity partner to provide a public service or develop a public facility in a manner that divides the risks, rewards, and responsibilities between the public and private sectors.
 - A public facility designed, constructed, financed, and operated by a private party
- But what does this *REALLY* mean?

Examples of P3s:

City of Ft. Lauderdale & Miami Beckham United, LLC



Inter Miami Soccer Stadium (Ft. Lauderdale)

FXE Futbol, LLC v. City of Fort Lauderdale CACE19-008041 (17th Judicial Circuit – Broward County)

Examples of P3s:

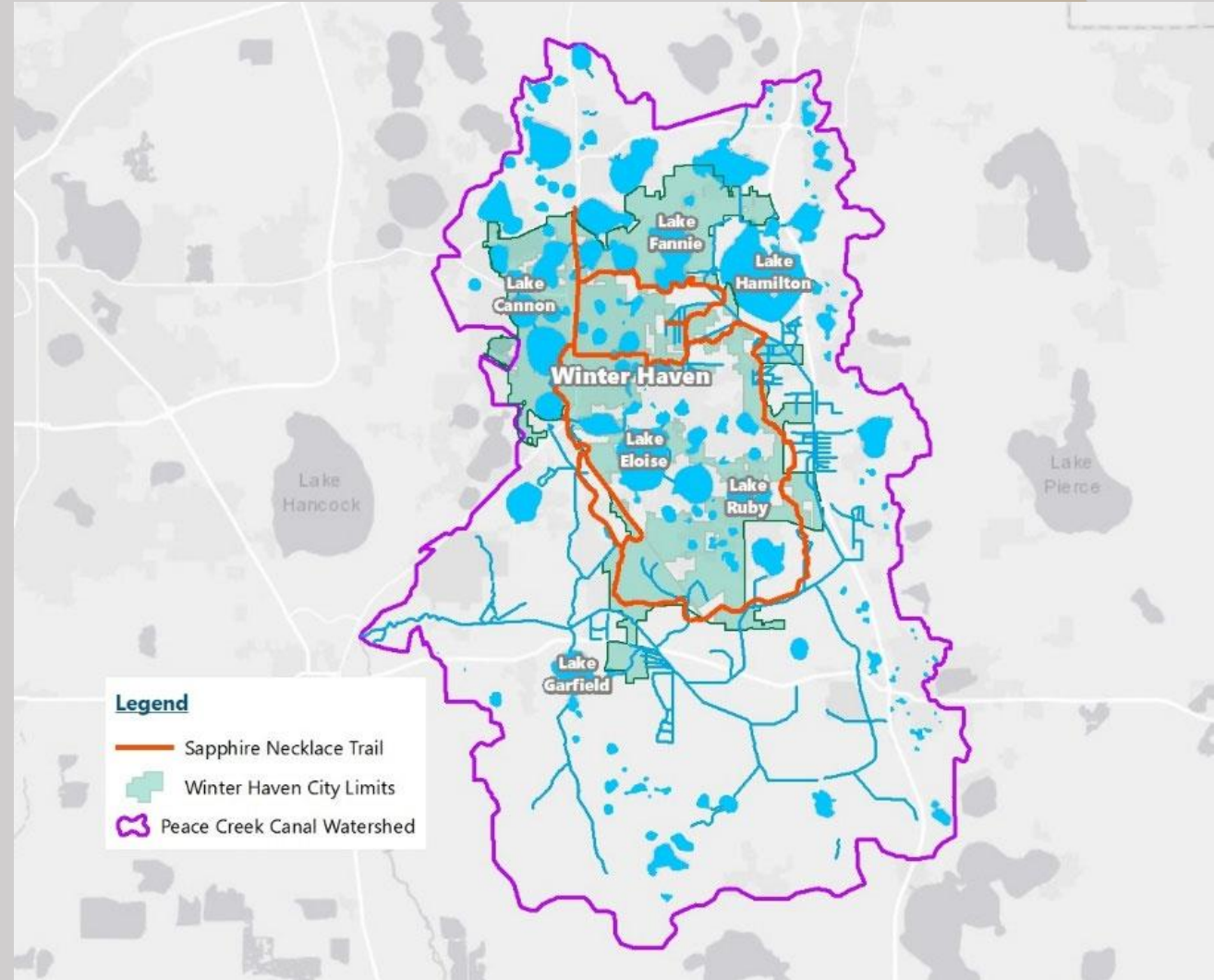
City of Bradenton City Hall Sale and Re-development (pending)



Examples of P3s:

City of Winter Haven (pending)

- City received unsolicited proposal to design (including land acquisition), build and operate a turnkey aquifer recharge and wetland restoration project along City's "Sapphire Necklace" chain of lakes
- City and Consultant currently negotiating Preliminary Agreement

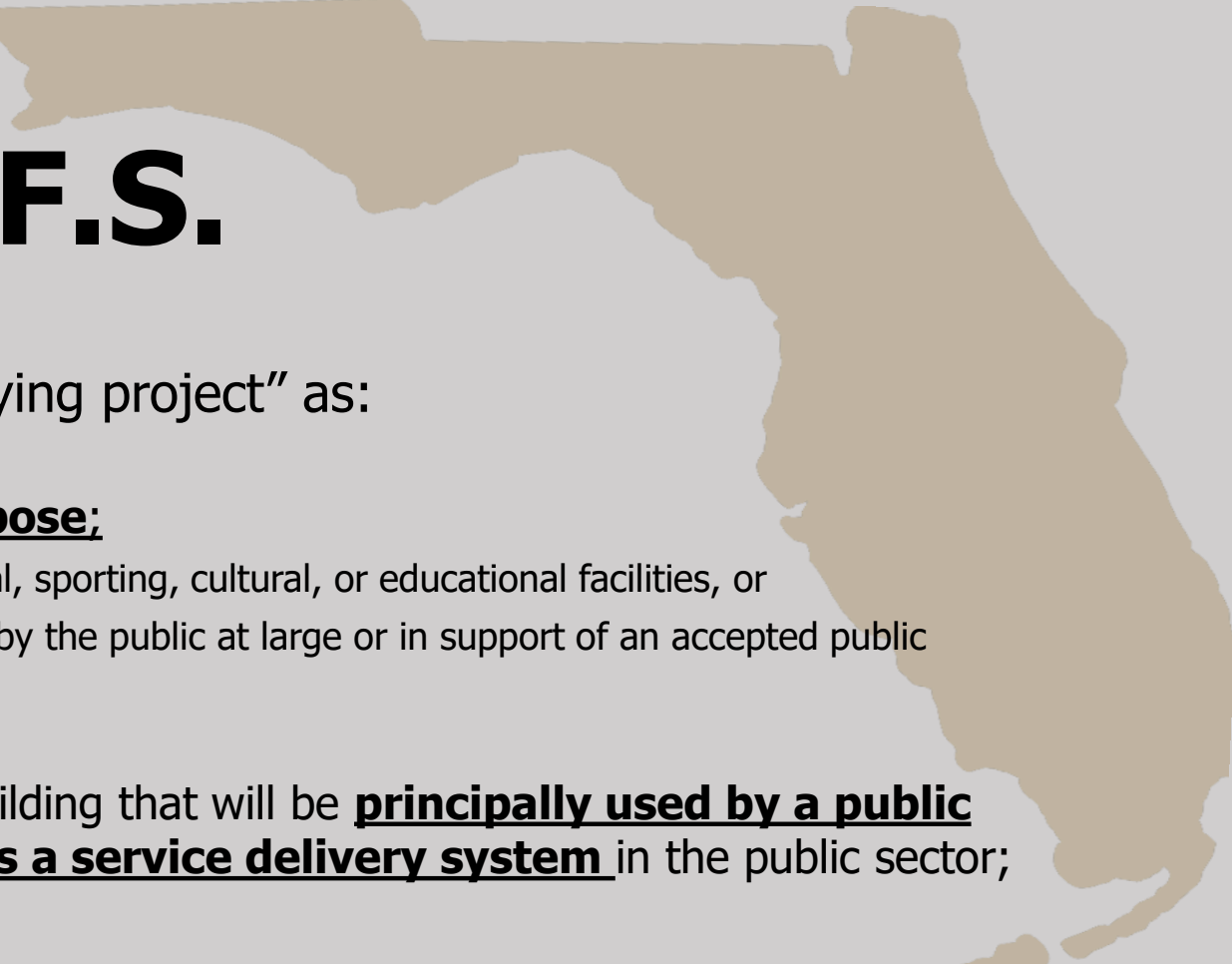


A Brief History of the Statutory Scheme Governing P3s



- In 2013, Legislature created Section 255.065, Fla. Stat, standardizing the P3 process and creating a statutory framework for local governments when procuring a P3 for a “qualifying project”.
- Statute has since been amended multiple times (including most recently in 2024) to:
 - Clarify authorization of alternative home rule P3 procurement processes (more about this later)
 - Create public records exemption, which was subsequently rescinded
 - Allow public entities to move forward with unsolicited P3 proposals without first soliciting alternative proposals (more about this later)

Section 255.065, F.S.



- Florida Statute 255.065(1)(i) defines a “qualifying project” as:
 - 1. A facility or project that **serves a public purpose**;
 - transit, parking, airport, seaport, medical, recreational, sporting, cultural, or educational facilities, or
 - other buildings/facilities that are used or will be used by the public at large or in support of an accepted public purpose or activity
 - 2. An improvement, including equipment, of a building that will be **principally used by a public entity or the public at large or that supports a service delivery system** in the public sector;
 - 3. A **water, wastewater, or surface water management facility** or related infrastructure; or
 - 4. For Projects that **involve a facility owned or operated by the governing board** of a county, district, or municipal hospital or health care system, or projects that involve a facility owned or operated by a municipal electric utility, only **those projects that the governing board designates as qualifying projects** pursuant to this section.

Procurement Procedures

Section 255.065, F.S.

A public entity may receive unsolicited proposals or may solicit proposals. *See Fla. Stat. 255.065(3)*

Unsolicited Proposals

Section 255.065, F.S.

Public entity may establish a **reasonable application fee** for the submission of an unsolicited proposal. *See Fla. Stat. 255.065(3)(a)*

- fees should be related to actual, reasonable costs associated with the review & not revenue generation
- The fee must be paid concurrently with the proposal. Personal checks may not be accepted.
- If the initial application fee does not cover the entity's costs, the public entity must request in writing the additional amounts required, which shall be due within 30 days. If fees not received, the public entity may stop its review, and return the application fee.

Unsolicited Proposals

Section 255.065, F.S.

- If it involves architecture, engineering, or landscape architecture, must ensure a professional review;
- Such review shall be performed by a state licensed architect, landscape architect, or an engineer; and
- such professional shall advise the responsible public entity through completion of the design and construction of the project.

See Fla. Stat. 255.065(3)(a)(5)

Unsolicited Proposals - Procurement

Section 255.065, F.S.

- Two Options:


- Option 1 (*New as of 2024*) – Conduct Public Hearing, Make Findings, Proceed with Proposal.

*Not required to solicit alternative proposals.

- Must hold two public meetings at which proposal is presented, public comment is taken, and local gov determines the proposal is in the public's interest.
- In making the public interest determination, the public entity must consider all of the following factors:
 1. The benefits to the public.
 2. The financial structure of and the economic efficiencies achieved by the proposal.
 3. The qualifications and experience of the private entity that submitted the proposal and such entity's ability to perform the project.
 4. The project's compatibility with regional infrastructure plans.
 5. Public comments submitted at the meeting. Must provide a statement that explains why the proposal should proceed and addresses such comments.
- If local gov decides to proceed with an unsolicited proposal without engaging in a public bidding process, must publish in the Florida Administrative Register for at least 7 days a report that includes all of the following:
 1. The public interest determination
 2. The factors considered in making such public interest determination.
 3. The City's findings based on each considered factor.

Unsolicited Proposals - Procurement

Section 255.065, F.S.



- Option 2 – Solicit Alternative Proposals
- Publish notice in the FAR and a newspaper of general circulation at least once a week for 2 weeks stating that local gov has received a proposal and will accept other proposals for the same project.
- Establish timeframe for accepting other proposals
 - Timeframe shall be determined by the public entity on a project-by-project basis based upon the complexity of the qualifying project and the public benefit to be gained
 - however, the timeframe for **must be at least 21 days, but no more than 120 days**, after the initial date of publication.
 - If approved **by a majority vote** of the responsible public entity's **governing body**, the responsible public entity **may alter the timeframe** for accepting proposals to more adequately suit the needs of the qualifying project.
- A copy of the **notice must be mailed to each local government in the affected area.**

Unsolicited Proposals Procurement Considerations



- After the public notification period has expired, the public entity shall rank the proposals received in order of preference, and may consider factors that include, but are not limited to:
 - professional qualifications,
 - general business terms,
 - innovative design techniques or cost-reduction terms, and
 - finance plans.
- The responsible public entity may then begin negotiations for a comprehensive agreement with the highest-ranked firm, and if not satisfied, terminate those negotiations, and negotiate with the second-ranked, etc.

See Fla. Stat. 255.065(5)(c)

Unsolicited Proposals Procurement Considerations

- If only one proposal is received, the public entity may negotiate in good faith, and if the public entity is not satisfied with the results of the negotiations, the public entity may terminate negotiations with the proposer.
- The public entity may also reject all proposals at any point in the process until a contract with a proposer is executed.

See Fla. Stat. 255.065(5)(c)

Solicited Proposals Procurement Considerations



- If project includes design work, RFP package must include “design criteria package” prepared by architect or engineer. May include:
 - legal description/survey
 - interior space requirements
 - material quality standards
 - schematic layouts and conceptual design criteria for the qualifying project
 - cost or budget estimates
 - design and construction schedules
 - site development and utility requirements.
- The design professional who prepares the design criteria package shall be retained to serve the public entity through completion of the design and construction of the project.

See Fla. Stat. 255.065(3)(e)

Interim Agreement

Section 255.065, F.S.

Before or in connection with the negotiation of a comprehensive agreement, the parties may enter into an interim agreement:

- Entering into an interim agreement is discretionary.
- An interim agreement does not obligate the public entity to enter into a comprehensive agreement.
- Section 255.065(6), F.S., sets forth the limitations of an interim agreement.

See Fla. Stat. 255.065(6)

Interim Agreement

Section 255.065, F.S.

When is an interim agreement necessary or useful:

- Want to allow private entity to commence activities (such as surveys, environmental analysis, planning studies, etc.) related to the qualified project, but subject to certain terms and conditions, such as:
 - Minimum insurance requirements
 - Indemnification
 - Establishing a process and timing for preliminary activities, including access to the property, and how long to complete said activities
 - Establishing a process and timing of the negotiation of the comprehensive agreement

See Fla. Stat. 255.065(6)

Comprehensive Agreement

Section 255.065, F.S.

- Before signing a Comprehensive Agreement, the public entity must consider:
 1. Is in the public interest;
 2. Is for a facility that is owned by the public entity **or** for a facility for which ownership will be conveyed to the public entity;
(*New as of 2024*) – For unsolicited projects, if ownership will not be conveyed to the public entity within 10 years after public operation begins, the public benefits apart from ownership must be identified and stated by the responsible public entity in the public interest determination.
 3. Has adequate safeguards in place to ensure that additional costs or service disruptions are not imposed on the public in the event of material default or cancellation of the comprehensive agreement by the public entity;
 4. Has adequate safeguards in place to ensure that the responsible public entity or private entity has the opportunity to add capacity to the proposed project or other facilities serving similar predominantly public purposes;
 5. Will be owned by the responsible public entity upon completion, expiration, or termination of the comprehensive agreement and upon payment of the amounts financed.
- Comprehensive Agreement must address:
 - Payment/Performance bond requirements (subject to Sec. 255.05, Fla. Stat.)
 - Termination for material default

See Fla. Stat. 255.065(3)(f)

Comprehensive Agreement - Financing

Section 255.065, F.S.



Before signing a comprehensive agreement, the public entity must consider:

- A reasonable finance plan consistent with subsection (9) [discussed on a subsequent slide]
- The qualifying project cost
- Revenues by source
- Available financing
- Major assumptions
- Internal rate of return on private investments (if governmental funds are assumed in order to deliver a cost-feasible project)
- Total cash flow analysis beginning with the implementation of the project and extending for the term of the comprehensive agreement

See Fla. Stat. 255.065(3)(d)

Financing

Section 255.065, F.S.

“Reasonable Finance Plan” consistent with subsection (9):

- (a) A private entity may enter into a private-source financing agreement.
- (b) The public entity may lend funds to private entities that construct projects containing facilities.
- (c) The public entity may use “innovative finance techniques”, including, but not limited to
 - federal loans, commercial bank loans, and hedges against inflation from commercial banks or other private sources.
 - In addition, the public entity may:
 - Use its own capital or operating budget.
 - Use the proceeds of debt issuances.
 - Use the model financing agreement provided in s. 489.145(6) (i.e., a guaranteed energy, water, and wastewater performance savings contract).

See Fla. Stat. 255.065(9)

Financing

Section 255.065, F.S.

A financing agreement may **not**:

- require the public entity to indemnify the financing source,
- subject the responsible public entity's facility to liens in violation of s. 11.066(5), or
- secure financing of the responsible public entity by a mortgage on, or security interest in, the real or tangible personal property of the responsible public entity in a manner that could result in the loss of the fee ownership of the property by the responsible public entity, and any such provision is void.

See Fla. Stat. 255.065(9)

Comprehensive Agreement



Section 255.065(7), Florida Statutes, sets forth minimum terms that must be included in a comprehensive agreement:

1. Delivery of performance and payment bonds, letters of credit, or other security;
2. Review of the design for the qualifying project by the responsible public entity;
3. Inspection of the qualifying project by the responsible public entity to ensure that the private entity's activities are acceptable to the responsible;
4. Maintenance of a policy of public liability insurance, sufficient to ensure coverage of tort liability and to enable the continued operation of the qualifying project.
5. Monitoring by the responsible public entity of the maintenance practices to be performed by the private entity;
6. Periodic filing by the private entity of the appropriate financial statements;
7. Procedures that govern the rights and responsibilities of the public entity and the private entity in the course of the construction and operation of the qualifying project and in the event of the termination or default of the comprehensive agreement;
8. Fees, lease payments, or service payments; and
9. Duties of the private entity, including the terms and conditions that the responsible public entity determines serve the public purpose.

Additional Considerations



1. Ability of the local government to do a “home rule” P3 process. What does the statute *really* do for you?

Fla. Stat. § 255.065 (14) Construction.

(b) This section shall be construed as cumulative and supplemental to any other authority or power vested in or exercised by the governing body of a county, municipality, special district, or municipal hospital or health care system including those contained in acts of the Legislature

(c) This section provides an alternative method and does not limit a county, municipality, special district, or other political subdivision of the state in the procurement or operation of a qualifying project pursuant to other statutory or constitutional authority.

2. Once a local government picks a firm to negotiate with, how much can things change from what the proposer originally proposed?
3. Allocation of Risk.
4. How can the P3 private party’s obligations be secured?



Questions???