

TOPIC: Proposed Board of Regents Policy VIII-17.00—Policy on Public-Private Partnerships

COMMITTEE: Finance

DATE OF COMMITTEE MEETING: June 8, 2017

SUMMARY: During the 2013 General Assembly session, legislation was passed that required certain review and approvals relating to public-private partnerships, and requiring state agencies to adopt regulations or policy to implement and adopt the required process. The legislation requirements exempt public private partnerships for facilities that are not funded with state monies.

The University System of Maryland submits its capital facilities request (as approved by the Board of Regents) to the Governor, who then constructs a Governor’s Capital Budget Bill for consideration by the General Assembly. Prior to the 2013 legislation, there were no similar requirements for a corresponding review and approval process for state-supported facilities provided by or used under public-private partnership arrangements.

The proposed Policy on Public-Private Partnerships establishes a process and requirements that provide the Governor’s Office, the Board of Public Works, and the budget committees of the General Assembly with a similar review and approval over public-private partnerships associated with facilities to be funded with state-supported budget monies.

ALTERNATIVE(S): The Finance Committee could choose to direct further reconsideration of particular terms and mechanisms that do not conflict with legislatively mandated process requirements.

FISCAL IMPACT: No fiscal impact.

CHANCELLOR’S RECOMMENDATION: That the Finance Committee recommend that the Board of Regents approve the proposed Policy on Public-Private Partnerships.

COMMITTEE RECOMMENDATION: RECOMMEND APPROVAL

DATE: 6/8/17

BOARD ACTION:

DATE:

SUBMITTED BY: Joseph F. Vivona (301) 445-1923

VIII-17.00—POLICY ON PUBLIC-PRIVATE PARTNERSHIPS

(Approved by the Board of Regents)

I. Purpose

This policy establishes processes for identification, review, and evaluation of potential opportunities, consideration of solicited and unsolicited proposals, and reporting requirements associated with pursuing public-private partnerships for the purpose of financing, development, construction, operation and maintenance of state-supported facilities and infrastructure. The provisions of this policy are intended to complement, rather than replace, policy requirements and processes set forth in other Board of Regents Policies, for example the Board of Regents Policy VIII-4.00 Policy on Acquisition and Disposition of Real Property and other associated policies relating to the acquisition, disposition, or leasing of real property, or the Board of Regents Policy VIII-12.00 Policy on Debt Capacity.

II. Definitions

(1) “Budget Committees” has the meaning stated in State Finance and Procurement Article, §10A-101, Annotated Code of Maryland.¹

(2) “Private entity” has the meaning stated in State Finance and Procurement Article, §10A-101, Annotated Code of Maryland.

(3) “Program” means the structure, process, methodology and terms and conditions applicable to the University System of Maryland’s development, solicitation, evaluation, award, and delivery of the System’s public infrastructure assets for which it is responsible in accordance with State law and applicable Board of Regents policy.

(4) “Public infrastructure asset” has the meaning stated in State Finance and Procurement Article, §10A-101, Annotated Code of Maryland.

(5) “Public-private partnership” has the meaning stated in State Finance and Procurement Article, §10A-101, Annotated Code of Maryland.

(6) “State-supported public-private partnership” refers to public-private partnerships that relate to facilities or infrastructure used for state-supported activities such as “academic facilities” as defined in Education Article §19-101, which includes facilities to be used for education, research and public service where state funds are used to fund or finance any part of the facilities or infrastructure.

(7) “Non-state-supported public-private partnership” describes public-private partnerships that are related to facilities and infrastructure used for activities which are not state-supported, such as “auxiliary facilities” as defined in Education Article §19-101, which includes facilities to be used for housing, dining, intercollegiate athletics, bookstores, parking and other needs, where State funds are not used to support the construction of the facilities and infrastructure.

¹ All references to the Maryland Code are to the Code as amended from time to time.

USM Bylaws, Policies and Procedures of the Board of Regents

(8) “Reporting agency” has the meaning stated in State Finance and Procurement Article, §10A-101, Annotated Code of Maryland, and includes the System.

(9) “Responsibility determination” has the meaning stated in State Finance and Procurement Article, §10A-101, Annotated Code of Maryland.

III. Scope

Public-private partnerships can be useful means of acquiring and managing facilities and infrastructure used for either state-supported or non-state-supported activities. This policy does not apply to short-term space or operating leases, or purchasing and procurement activities. The requirements of this policy do not apply to non-state-supported public-private partnerships – that is where no State funds are used to fund or finance any portion of a capital project.

All potential public-private partnerships require Board of Regents approval before formal solicitation of proposals. Public-private partnerships submitted to the Board of Regents for approval are to be supported by both economic and programmatic justifications, as well as an analysis of the risks and benefits seen as the basis for pursuing a public-private partnership. University System staff and advisers will develop and disclose criteria for evaluation of potential projects to determine the suitability for a public-private partnership approach to delivery and present justification for the project as a potential public-private partnership to the Board of Regents.

IV. State-supported public-private partnerships

A. Statutory Requirements

Public-private partnerships for facilities used for state-supported activities and purposes must follow the processes and reporting requirements set forth in State Finance and Procurement Article, Title 10A. They are also subject to the legal requirements listed in § 11 – 203(h) of that Article (including, among other things, the requirements of Title 17, Subtitles 1 (Security for Construction Contracts) 2 (Prevailing Wage Rates – Public Works Projects) and Title 18 (Living Wage) . The provisions of the Minority Business Enterprise Program found at Title 14 subtitle 3 of the State Finance and Procurement Article also apply. Other provisions that may apply if applicable include ‘High Performance Building’ requirements found in the State Finance and Procurement Article, §3 – 602.1 and, and the Environment Article

Unless waived by the Board of Public Works, state-supported public-private partnerships are to have a term of no longer than 50 years, including all renewals and extensions.

B. Incorporating formal consideration of state-supported public-private partnerships as a delivery alternative into the System’s Capital Planning Process

The University System of Maryland plans for and manages its capital needs through a planning process that begins with institutional campus master plans and supported by space gap analysis and surveys. These processes are formalized in institutional priorities that annually constitute state-funded capital improvement plan budget requests. The capital budget requests result in a set of System-wide priorities tentatively scheduled for each year over the future ten year horizon.

For University System of Maryland projects in the plan for years 6 through 10 to be considered in the State Capital Improvement Plan, an evaluation of each project for its susceptibility to delivery as a state-supported public-private partnership is to be done, and provided as a part of the System’s Capital Budget process, prior to inclusion in the System’s request for years 1 through 5. The evaluation and assessment of susceptibility of a project to delivery as a state-supported public-private partnership must take into account any potential impact on other commitments and pledges the System has extended, for instance, the pledge of tuition and net auxiliary fees to support the revenue bond program, as well as the impact on the System’s debt capacity. This evaluation and conclusion must be coordinated with the System Office and reflect the input of System Office staff, the Attorney General’s office and the System’s financial advisors.

Projects identified as susceptible to delivery as a state-supported public-private partnership are to be approved by the Board of Regents for the use of the methodology before being presented to the Budget Committees or the Board of Public Works for their consideration.

C. Presolicitation report

Any state-supported capital project determined to be susceptible to delivery as a state-supported public-private partnership as described in paragraph IVC above must follow the submission, review and approval requirements set forth in the State Finance and Procurement Article, §10A – 201. Pre-solicitation reports submitted will include:

1. The specific policy, operational, and financial reasons for pursuing a public-private partnership;
2. Identification of the anticipated value of the public-private partnership, the risks and benefits to the institution and University System, and any potential workforce, economic development, or environmental implications;
3. An evaluation of the risks and benefits of a public-private partnership, including benefits such as expedited asset delivery, cost savings, risk transfer, net new revenue, state-of-the-art techniques for asset development or operations, efficiency of operations, maintenance via innovative management techniques, and expertise in accessing and organizing the widest range of financial resources;
4. A preliminary analysis of the debt affordability and credit rating implications (if any);
5. A preliminary summary of the proposed solicitation process;
6. An active statement of intention to use the exemption from the requirements of the System’s Policy on Procurement; and
7. A request for official designation and approval of the project as a public-private partnership.

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The pre-solicitation report must exclude any information deemed confidential, proprietary, or otherwise exempt from disclosure under applicable law, and be posted online in accordance with the requirements of State Finance and Procurement Article, §10A – 201(b)(1)(vi).

Only upon the approval and designation by the Board of Public Works as a public-private partnership may the institution issue a solicitation for a state-supported public-private partnership.

D. Solicitation

Institutions may solicit requests for proposals for state-supported public-private partnerships that comply with the requirements of State Finance and Procurement Article, §10A – 202. Bid documents and submissions in response to requests for proposals may include proprietary ideas, unique deal provisions or relationship attributes, or new and alternative financing and delivery mechanisms that the University System or its institutions would like to incorporate into further refinements of potential public-private partnerships, either in a best and final proposal process, or in other requests for proposals on other public-private partnership opportunities. In situations where innovative and unique approaches to delivering a state-supported public-private partnership are identified by private entities responding to requests for proposals, and are subsequently used as a basis for engaging other private entities in their proposals, reimbursement of documented proposal costs, or agreed-upon fair-value compensation for proprietary knowledge of the proposers who originally provided the approach can be agreed-upon up to a limit of 3% of the total project cost, or \$500,000, whichever is lower.

The institution is to make a Responsibility determination for any private entity considered for a role, whether as the sole entity, or one of a group of entities participating in any state-supported public-private partnership in accordance with State Finance and Procurement Article, §10A-202, Annotated Code of Maryland.

E. Evaluation

Evaluation of proposals is to follow a standard and predetermined method established in the solicitation. This may include developing a short-list of qualified bidders, and engaging several qualified potential private entities or groups in a best and final proposal process that is designed to provide optimal value to the institution. The evaluation process will be transparent and laid out clearly for each solicitation with criteria for selection known well in advance of submission of bids.

F. Award

The successful proposer, the institution, System Office officials, and the Office of the Attorney General are to collaborate in developing contract documents and other agreements needed to document terms of the partnership. Agreements for state-supported public-private partnerships should be guided by each of the provisions, requirements, constraints and limitations found in State Finance and Procurement Article, §10A - 401, as may be amended. Once the terms of the state-supported public-private partnership are agreed to by all parties, the arrangement is to be presented to the Board of Regents for its review and approval, and then to the State Comptroller, Treasurer, the Budget Committees and the State Department of Legislative Services for their review and comment, all before submission to Board of Public Works for its approval. In accordance with Section 10A-203, the institution shall post the proposed agreement.

G. Unsolicited proposals for state-supported public-private partnerships

Unsolicited proposals may be considered for state-supported public-private partnerships for projects in the 10 year University System of Maryland Capital Improvement Plan that have been identified as susceptible to delivery as a state-supported public-private partnership. A fee of \$250,000 will be paid to the institution by the proposer to defray the internal and external costs of consideration of the state-supported public-private partnership unsolicited proposal.

If the institution determines that an unsolicited proposal is advantageous and meets the needs of the institution, it must under § 10A-301, conduct a competitive solicitation, in which the unsolicited proposer may compete.

Compensation for innovative and unique or proprietary approaches to state-supported public-private partnerships that [are in an unsolicited proposal and that] are used in developing solicitations for state-supported public-private partnerships can be agreed-upon by the institution up to 3% of the expected project cost, or \$500,000, whichever is less.

V. Non-state-supported public-private partnerships

This policy does not apply to public-private partnerships where no state-supported funds are used to fund or finance the capital project, consistent with §10A-101(f)(2)(iii) of the State Finance and Procurement Article.

VI. Reporting requirements

As a 'Reporting agency' defined by State law, the System must submit a report annually, by January 1, to the State Budget Committees a detailed listing of each state-supported public-private partnership under consideration not yet reviewed or approved by the General Assembly.

Additionally, the System must submit annually, by January 1, to the State Budget Committees a status report on each state-supported public-private partnership in which the System is involved.