

SUBJECT: Relating to the continuation of the Texas Facilities Commission

COMMITTEE: State Affairs — favorable, without amendment

VOTE: 11 ayes — Cook, Giddings, Craddick, Farrar, Frullo, Geren, Harless, Hilderbran, Huberty, Smithee, Sylvester Turner

0 nays

2 absent — Menéndez, Oliveira

SENATE VOTE: On final passage, April 11 — 31-0

WITNESSES: (*On House companion bill, HB 2107:*)
For — David Lancaster, Texas Society of Architects

Against — None

On — Terry Keel, Texas Facilities Commission; Christian Ninaud, Sunset Commission; (*Registered, but did not testify:* Shyra Darr, Michael Lacy, and John Raff, Texas Facilities Commission; Mark Wolfe, Texas Historical Commission)

BACKGROUND: According to Government Code, ch. 2152, the Texas Facilities Commission (TFC) is governed by a commission of seven public members, with five of the members appointed by the governor and two appointed by the lieutenant governor. Of the five gubernatorial appointees, two are nominated by the speaker of the House.

Government Code, ch. 2165 directs TFC to manage the state's public buildings, grounds, and property. As the provider of centralized project management for state agency construction and repair projects, TFC currently oversees about 100 projects with a total value of \$316 million. Thirty-five of these projects have to do with deferred maintenance needs, such as repairs to ensure the safety of facilities. TFC estimates that the state's deferred maintenance needs across all facilities total about \$403 million.

In 2011, the 82nd Legislature passed the Public and Private Facilities and Infrastructure Act (P3 Act), which put in place Government Code, ch. 2267 permitting governmental entities to enter into comprehensive agreements with private parties. As a means for developing new state facilities and performing maintenance of existing infrastructure, private industry was given the ability to submit proposals for development on government-owned land.

The P3 Act also created the Partnership Advisory Commission (PAC) under Government Code, ch. 2268 to review and comment on a public-private partnership (P3) proposal before an agency negotiates and finalizes a contract. Government entities are required to submit copies of public-private proposals to the PAC before negotiating a comprehensive agreement.

Since passage of the P3 Act, TFC has received unsolicited proposals for nine locations, with combined project costs of \$824 million. As of January 2013, the commission had voted to move one project proposal forward to the conceptual evaluation phase.

DIGEST:

SB 211 would require the Texas Facilities Commission to create a long-term master plan for the Capitol Complex, change the way it administers public-private partnerships on state property, and make general changes to the public-private partnership review process affecting all state agencies.

CAPITOL COMPLEX

Capitol Complex Master Plan. The bill would require the TFC to prepare a master plan for the Capitol Complex. Minimum requirements for the plan would include:

- a summary of previous plans for the complex;
- an articulation of a strategic vision and long-term goals for the complex;
- an analysis of the state property and buildings within the complex and determination of the extent the state satisfied its space needs through this property;
- specific proposals for state property in the complex, which would include use of the property for public sector purposes;
- an analysis of and recommendations for building design guidelines to ensure appropriate quality on any future construction or

- remodeling projects;
- an analysis of and recommendations for the infrastructure needs of the complex;
- an analysis of and recommendations for financing options of projects identified in the plan;
- time frames for implementing components of the plan;
- consideration of other options for meeting state space needs outside of the complex; and
- other relevant information to the complex.

TFC would be required to submit the initial master plan to the governor, lieutenant governor, speaker of the House, comptroller, and the Legislative Budget Board (LBB) by July 1, 2014, with subsequent updated reports coming on the same date every even-numbered year. TFC also would have to ensure that the master plan for the complex did not conflict with its master facilities plan for state agencies.

SB 221 generally would require TFC to seek input on the Capitol Complex Master Plan from the GLO, the State Preservation Board (SPB), and the Texas Historical Commission. Specific provisions would require a review by the SPB and GLO. TFC would have to submit the proposed plan to the SPB and GLO for review and comment at least 90 days before a public meeting on the initial master plan. If the public meeting was to discuss an update to the master plan, TFC would have to submit the proposed update to the SPB and GLO at least 60 days in advance.

The bill would authorize the State Preservation Board to disapprove the Capitol Complex Master Plan or an updated plan if the board determined the plan was not in the best interests of the state or complex. The SPB also would have the option to instead submit written comments to TFC with recommended modifications.

The bill would require that any changes to SPB's plan for the Capitol and Capitol grounds conform to TFC's master plan for the complex. It also would exempt the complex from the state properties the GLO is required to evaluate for sale, lease, or other use recommendations.

After the proposed master plan was reviewed by the SPB but before TFC finally approved the plan, the proposed plan would have to be submitted to the Partnership Advisory Commission (PAC) for review and comment. The PAC would have to hold a vote in a public hearing on the plan, which

could include submitting recommended modifications to TFC.

The bill would also prevent the TFC from entering into a sale or lease of property within the Capitol Complex. TFC would be able to continue current leases, such as the lease of state parking garages.

P3s in the Capitol Complex. Public-private partnership (P3) proposals for the Capitol Complex would be subject to certain requirements. The State Preservation Board would have the authority to vote to disapprove final proposals.

The bill would require that only solicited P3 proposals would be allowed for the complex. Additionally, P3 proposals in the complex would be required to be submitted to the SPB. The SPB would have the authority to vote to disapprove final proposals. No P3 proposal could be approved before September 1, 2015.

A separate provision would make the statute on public-private facilities, Government Code, sec. 2267.003 not apply to the Capitol Complex.

SB 221 states that if SB 894 by Whitmire or similar legislation relating to the Capitol Complex became law, certain provisions in SB 221 would have no effect.

P3s GENERALLY

Reviewing public-private partnership proposals. The bill would result in additional requirements for TFC at the various stages of planning and implementing P3 projects. At a minimum, the criteria for the initial review of substantially complete P3 proposals would have to include:

- whether the qualifying project met a public need;
- the extent to which the project aligned with the TFC's objectives and any applicable TFC plans, such as the master plan for the Capitol Complex;
- the technical and legal feasibility of the project;
- whether the private entity or person submitting the proposal had adequate qualifications, experience, and financial capacity;
- the existence of potentially unacceptable risks to the state; and
- whether another kind of project would be feasible and better meet the state's goals.

Agency staff would be required to conduct an initial review of each qualifying project proposal and provide a summary of the review to the commission. The summary would include analysis and recommendations.

As a means of comparing the entire project cost of the P3 project versus a traditional public sector project, the bill would require the use of a value for money analysis in evaluating a project proposal. This kind of analysis would be used to identify specific risks shared between the state and the private partner and subject these risks to negotiation in the contract. This analysis would also be used to determine if the project would be in the best long-term financial interest of the state and provide tangible public benefit to the state. The bill would allow TFC staff to use other methods of analysis if a specific project warranted this decision.

Changes would be made to the oversight committee review process, which follows initial review by the staff. TFC guidelines would have to require the oversight committee for each project to report to the commission with its evaluation of the project along with its documentation. The oversight committee's evaluation of a proposal along with accompanying documents would have to be posted on TFC's website. All confidential information, such as a company's financial records, would be redacted.

The bill would make changes to the documentation required for the part of the review process involving the Partnership Advisory Commission. The TFC would have to hold an initial public hearing on a project proposal before the TFC submitted a copy of that proposal to the PAC. The TFC would post a copy of the qualifying project proposal on its website before the public hearing. All confidential information would be redacted.

Following the hearing, TFC would have to modify the proposal as the agency determined was appropriate based on public comments. TFC would include all public comments from the initial hearing in the documents submitted for the PAC's review.

In reviewing qualifying P3 projects, TFC's guidelines would have to specify what kind of professional expertise was necessary to protect the state's interest in implementing the project. In order to cover the costs of reviewing qualifying project proposals, the bill specifically would authorize TFC to charge a fee. TFC would have to develop a fee schedule to at a minimum cover its costs for processing, reviewing, and evaluating

the proposals. Money from fees could be used to contract with or hire persons with the professional expertise required for evaluating a project proposal.

Other public-private partnership oversight. In reviewing P3 proposals, TFC would be required to include the comptroller's Contract Advisory Team, which assists agencies with contract management. TFC would have to submit documentation of modifications made during its review of the proposal to the Contract Advisory Team at least 60 days before a scheduled vote by the commission on the project. Documentation would include a final draft of the contract, the qualifying project proposal, and any interim agreements that had been executed.

The Contract Advisory Team would have to review this documentation and provide its recommendations in writing to the TFC. The recommendations would have to emphasize contract management best practices. TFC staff would then prepare responses to the Contract Advisory Team's recommendations and submit the recommendations and responses to the commission.

Broadly applicable P3 changes. The bill would require any government entity considering a P3 proposal to utilize certain review guidelines. Before considering a P3 proposal, the government entity would have to submit a copy of its guidelines to the PAC for approval. Once the government entity approved a proposal, the entity would have to seek out other potential bidders before selecting a contractor. A best value determination based on factors, such as overall quality, would be required in selecting the contractor. Provisions would also prevent conflict of interest situations where a P3 developer was related to or a former employee of the state contracting entity.

PAC membership. The composition of the PAC would be altered to consist of five members. The chair of the House Appropriations Committee, one state representative, the chair of the Senate Finance Committee, one senator, and one public member appointed by the governor would serve on the PAC. The PAC would have to vote to approve or disapprove a P3 proposal submitted for its review. Administrative support for the PAC would have to be provided by the SPB.

OTHER PROVISIONS

Soliciting public input. TFC would have to adopt by rule a comprehensive process for planning and developing state property in its inventory. TFC would have to include in this comprehensive process clear steps and specific time frames for obtaining input from the public, interested parties, and state agencies during the planning and development process. The process would require specific schedules for ensuring the commission was updated on planning and development efforts.

The comprehensive process would require a policy ensuring that before the commission made a decision regarding state property, interested parties had the chance to review and comment on TFC's plans. TFC's process would have to conform to existing confidentiality policies in state law.

Conflict-of-interest provisions. The bill would prohibit an agency employee from working for another person when the outside work duties related to that employee's review, development, and implementation of a qualifying project. To determine whether outside employment would result in a conflict of interest, TFC would request information on outside employment from each of its employees. If an employee's duties did not relate to a qualifying project and none of the agency's policies were violated, an agency employee could perform outside work.

Compliance with local zoning regulations. The bill would require P3 proposals to conform to local zoning regulations. A special board would be established for reviewing a proposal, when a rezoning request based on the proposal had been denied by a municipality. The review board could override a municipality's decision if the rezoning denial was determined to be detrimental to the state's interest.

Reporting. Required TFC reports would not be discontinued, but reporting requirements would be altered. Due dates of various reports would be aligned. Also, recipients of the master facilities plan and other agency reports would be made consistent to include the governor, lieutenant governor, speaker of the House, the Legislative Budget Board, and comptroller. Third, in compliance with recent changes in law, TFC's reports to the Legislature would have to be submitted electronically.

Other provisions. The bill would require TFC to provide facilities

maintenance services for the Texas School for the Blind and Texas School for the Deaf. This would include facilities construction or facilities reconfiguration. Also, the bill would add standard Sunset Commission provisions governing the development of policies encouraging negotiated rulemaking and alternative dispute resolution procedures.

SB 211 would continue TFC until September 1, 2021.

This bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2013.

SUPPORTERS
SAY:

SB 211 would improve state management of its facilities, by among other things, requiring the Texas Facilities Commission (TFC) to develop a long-range master plan for the Capitol Complex and improve its review and implementation of public-private partnerships (P3s).

Capitol complex master plan. By providing the State Preservation Board a substantial role in the Capitol Complex planning process, the bill would bring valuable expertise to the process and ensure a more coordinated approach to planning the its future development.

By requiring the General Land Office to review and comment on the proposed master plan, the bill would provide GLO a clear role in the Capitol Complex planning process, which would bring additional expertise and coordination to the process.

Soliciting public input. In adopting, by rule, a process for planning the development of state-owned facilities with input from the public and stakeholders, the Texas Facilities Commission would promote constructive participation that provided critical perspectives necessary to balance competing needs. Such an approach also would be clear and provide specific timeframes for obtaining this important input.

Reviewing public-private partnership proposals. The bill would result in additional safeguards for the state at the various stages of planning and implementing public-private partnership projects. Given the concerns of various stakeholders that TFC moved too quickly in implementing the P3 program, a more deliberate approach would be warranted. At the same time, the bill would not foreclose implementation of public-private partnership projects. Such projects likely would result in significant

financial benefits to the state over the coming years.

The bill also would ensure that TFC used the professional expertise necessary to effectively protect the state's interest when considering and implementing a P3 project. Specifically authorizing TFC to charge fees to developers for reviewing P3 proposals would offset costs for the state in reviewing these proposals.

Other public-private partnership oversight. The comptroller's Contract Advisory Team would be well positioned to offer review and comment to TFC on P3 proposals. Staff at the comptroller's office, which already assists the Public Advisory Commission with P3 proposals, would be able to share information with Contract Advisory Team. The Contract Advisory Team would benefit from this expertise in its review.

TFC's current outside employment policies are not adequate to fully protect the state when working on large real estate and development projects, such as the proposed public-private partnerships. By requiring TFC to obtain information on outside employment from all of its employees, the agency would be able to determine whether any potential conflict of interest existed between employees' duties and their outside employment.

P3s in the Capitol Complex. SB 894 by Whitmire, which is referenced in this bill, would prohibit P3s in the Capitol Complex. The Capitol Complex belongs to all Texans, and their elected officials should have a direct say in how it is developed for future generations. The Legislature should specifically authorize a public-private partnership project, if any, that is worthy for this invaluable state land.

Broadly applicable P3 changes. The bill would require the Partnership Advisory Commission to vote on P3 proposals, including proposals for the Capitol Complex. Members of the PAC, which includes legislators, should have this opportunity to weigh in on P3 projects.

OPPONENTS
SAY:

Capitol complex master plan. In addition to the General Land Office's input on a proposed master plan, the Texas Historical Commission (THC) should be included at this stage of the planning process. This would enable THC to provide guidance on any potential effects of proposed development on the state's historical resources or on historic properties outside of the state's ownership but adjacent to the Capitol Complex. This

would also be consistent with existing requirements that the THC review bids and qualifications for major repair of any state structure deemed a Texas Historic Landmark.

Soliciting public input. The bill's requirement that TFC obtain more public input throughout its planning and development process would prove unnecessary. Existing laws require public hearings, which provide adequate opportunities for public and stakeholder input. Open meeting and public information laws, for example, ensure opportunities for public input. The public and interested parties have ample opportunity to review and comment on the commission's plans.

Reviewing public-private partnership proposals. TFC should not be required to have its P3 guidelines specify what kinds of professional expertise would be necessary to review a P3 proposal. The P3 guidelines instruct private entities in submitting proposals. The scope of work for the necessary advisors or consultants is drafted specific to each proposal or qualifying project and follows TFC's internal policies and statutory purchasing requirements.

Other public-private partnership oversight. The comptroller's Contract Advisory Team would not be qualified to review and comment on a P3 contract. The Contract Advisory Team reviews and comments on large contracts for goods and services, not real estate contracts such as a comprehensive agreement for P3 projects. Review and comment by the Office of the Attorney General would be more appropriate.

Specifically directing TFC to obtain information on the outside employment of its employees would be inappropriate. The P3 Act is a state law applicable to nearly all state agencies as well as multiple levels of local governments. If attention were to be directed toward an undefined conflict of interest related to the project, it should be addressed as a state policy matter applicable and directed to all state agencies and political subdivisions. Furthermore, TFC already takes steps to ensure that its employees are aware of the agency's ethics and conflict-of-interest policies.

NOTES:

According to the LBB, SB 211 would have a negative impact on general revenue funds of \$95,000 in fiscal 2014-15. These costs would be associated with the State Preservation Board providing administrative support for the Partnership Advisory Commission.

HB 2107 by Dutton, the companion bill was reported favorably by the House State Affairs Committee on March 27.

SB 894 by Whitmire, a related bill preventing the Texas Facilities Commission from leasing or selling Capitol Complex property and prohibiting the use of public-private partnerships within the Capitol Complex, passed the Senate by 30-0 on April 4 and was reported favorably as substituted, by the House State Affairs Committee on April 26.

SB 507 by Watson, a related bill requiring only solicited P3 proposals to be allowed for the Capitol Complex and instituting a two-year moratorium on P3 projects within the complex, passed the Senate by 30-0 on April 4 and was reported favorably as substituted, by the House Economic and Small Business Development Committee on May 8.

HB 3436 by Cook, a related bill preventing a government entity from taking formal action on a public-private partnership proposal before September 1, 2013, passed the House by 142-0 on May 3 and has been referred to the Senate Committee on Economic Development.