Texas Facilities Commission

S.B. 211 Nichols (Dutton) *Staff Contact: Christian Ninaud*

The Sunset review of the Texas Facilities Commission (TFC) brought to light the combined concerns of legislators and the public regarding the use of public-private partnerships (P3s) to develop state land under the relatively untested Public-Private Facilities Infrastructure Act (P3 Act). These concerns — including TFC's quick acceptance and use of this authority with limited direction, involvement, or oversight — dominated the discussion about the need for and role of the agency throughout the review. Ultimately, the review of TFC produced needed changes to ensure that TFC specifically, and other governmental entities generally, proceed more carefully with private development of public land.

Senate Bill 211, the TFC Sunset bill, makes significant strides toward developing state land with appropriate planning, greater transparency, stakeholder involvement, consideration of local community needs, and external oversight. These changes also aim to better balance the undeniable tension between developing state properties for a public purpose, while still benefiting both the State and private partners. In particular, the bill ensures that the development of the Capitol Complex, the heart of Texas government, is done carefully in collaboration with key stakeholders, and is agreed to and approved by state leadership.

The continuing controversy and concerns about the use of P3s to develop state properties also resulted in the Legislature enacting House Bill 3436, which places a statewide ban on any state agency P3 developments for one year. This ban is an extension of a nonstatutory Sunset Commission recommendation that directed TFC to delay any formal action on P3 proposals until September 1, 2013. Senate Bill 211 specifically improves TFC's approach to development of P3s by requiring TFC to provide sufficient rational and information to the public to justify decisions to pursue P3 proposals, and requires the expertise needed to effectively evaluate, implement, and oversee these projects. Beyond TFC's use of P3s, S.B. 211 also enacts significant changes to the broad P3 Act to protect the State's property rights, ensure consideration of local zoning and land use regulations, and require P3 projects to have a clear public purpose.

Considering the significance and importance of the changes in S.B. 211 regarding TFC's responsibilities, the Legislature chose to continue TFC for only two years. House Bill 1675 continues TFC until September 1, 2015 and requires the agency to undergo a limited Sunset review. This shorter review date provides the Legislature the opportunity to evaluate TFC's progress in implementing S.B. 211 sooner, and make any additional statutory changes that may be needed.

The following material summarizes results of the Sunset review of TFC, including management actions that do not require statutory change. For additional information see the *Texas Facilities Commission Sunset Final Report with Legislative Action* available on the Sunset Commission website at www.sunset.state.tx.us.

Development of the Capitol Complex and State Land

- Requires TFC to develop and formally adopt a Capitol Complex Master Plan to guide decision making on the Complex's future development.

- Prohibits TFC from selling, leasing (other than space in state office buildings and garages), or disposing of real property within the Capitol Complex.
- Requires TFC to submit the Capitol Complex Master Plan to the State Preservation Board (SPB), General Land Office, and Partnership Advisory Commission (PAC) for review and comment, and final approval by SPB and the PAC.
- Requires the Legislature to authorize, and the PAC to approve, each P3 project within the Capitol Complex, and otherwise excludes projects within the Capitol Complex from the P3 Act.
- Exempts the Capitol Complex from the state-owned properties the General Land Office is required to evaluate and make recommendations on regarding highest and best use, and possible sale.
- Requires TFC to develop and adopt a comprehensive planning process that guides and ensures more meaningful public and stakeholder input for its planning and development responsibilities.
- Ensures TFC Commission members receive advance notice of development projects in municipalities.
- Clarifies that Chapter 2166, Government Code, relating to construction and acquisition of state buildings, applies to property bought and sold for state purposes.
- Directs TFC staff to present information to the Commission at least 30 days before the Commission votes on an item related to development of TFC property. (management action – nonstatutory)

TFC's P3 Projects

- Requires TFC to include in its P3 Guidelines, specific review criteria and documentation to guide the initial review of P3 proposals, including professional expertise needed, and to make the evaluation results publicly available.
- Requires the Commission to use a value for money analysis, but authorizes the use of an alternative analysis methodology if a value for money analysis is not appropriate.
- Requires TFC to hold a public hearing on a P3 proposal before submitting it to the PAC, and to incorporate the public comments into the proposal submission.
- Requires TFC to submit each P3 contract to the Contract Advisory Team for review and comment before adoption by the Commission.
- Specifically authorizes TFC to charge a reasonable proposal fee to recover the costs of processing, reviewing, and evaluating P3 proposals.
- Prohibits outside employment of TFC P3 program staff in fields or activities related to their responsibilities at the agency.
- Directs the Commission to delay formal action on P3 proposals until after September 1, 2013. (management action – nonstatutory) The Legislature expanded this recommendation by enacting a statewide ban on any state agency P3 developments before September 1, 2014. (H.B. 3436)
- Directs TFC to provide financial information and analysis related to any P3 revenues to the Legislative Budget Board. (management action – nonstatutory)

Other P3 Projects

- Partnership Advisory Commission (PAC)
  - Requires the PAC to approve all state entities' P3 guidelines.
  - Requires the PAC to approve or disapprove each P3 proposal submitted for review and prohibits further negotiation of any P3 proposal disapproved by the PAC.
  - Specifies PAC meetings are subject to the Open Meetings Act.
  - Requires TFC to provide professional services to support the PAC in its review and evaluation of P3 proposals with the costs of these services recovered from fees.
- Public-Private Facilities and Infrastructure Act (P3 Act)
  - Ensures protection of the State's property and financial interests over those of private partners.
  - Authorizes the adoption of development plans on state property to conserve and enhance the value of the property, and sets out requirements of these plans.
  - Establishes a Special Board of Review and process to hear appeals of decisions on application of local zoning regulations to development on state property.
  - Adds new requirements for state and local government P3 Guidelines, including criteria for evaluating project design quality and life-cycle costs.
  - Establishes new criteria for P3 proposals, including requiring a statement of public purpose and evaluation of quality, conformity with community plans, historical significance, and environmental impact.
  - Clarifies proposal information not subject to public disclosure, including trade secrets and work products that would provide a competing proposer an unjust advantage.
  - Creates new requirements for public hearings and notice of P3 proposals.
  - Establishes conflict-of-interest and employment-prohibition requirements for employees involved in developing and implementing a P3 project.
  - Clarifies definitions in the P3 Act, including revenue, improvement, private entity, property, proposer, real property, revenue, and state entity.

Contracting

- Directs the Commission to formally adopt policies on contracting methods and indefinite delivery/indefinite quantity contracts in a public meeting. (management action – nonstatutory)
- Directs TFC to revise its policy on the use of interagency contracts and develop a policy for bundled contracts. (management action – nonstatutory)
- TFC should improve its procedures for soliciting and awarding contracts, including performing risk and needs assessments and documenting needed information. (management action – nonstatutory)

- Directs TFC to apply certain contracting standards to better align its contract administration procedures with commonly accepted best practices. (management action – nonstatutory)
- TFC should develop a policy to apply contracting standards to P3 contracts when applicable. (management action – nonstatutory)

TFC Deferred Maintenance

- Requires TFC to develop and regularly update a comprehensive capital improvement and deferred maintenance plan.
- Directs TFC to better track and report management and performance data about its deferred maintenance program and the condition of its building systems. (management action – nonstatutory)
- Transfers facilities maintenance services for the Texas School for the Blind and Visually Impaired and Texas School for the Deaf to TFC.

Other TFC Programs

- Specifies that lease revenues equal to certain costs associated with the parking program be appropriated back to TFC.
- Prohibits recipients of state surplus property from disposing of property for two years.

Continuation

- Continues TFC until 2015 and places the agency under a limited-scope Sunset review in the 2014-15 biennium. (H.B. 1675)

Standard Sunset Review Elements

- Continues all of TFC's reporting requirements, but aligns the due dates and recipients of selected reports to allow for report consolidation.
- Applies the standard Sunset Across-the-Board recommendation for the Commission to develop a policy regarding negotiated rulemaking and alternative dispute resolution.

Fiscal Implication

Senate Bill 211 will not have a significant fiscal impact to the State, but could result in an estimated $35,000 annual decrease in parking program revenues deposited to the General Revenue Fund and an increase by the same amount in Appropriated Receipts to TFC for parking lot and garage maintenance.