

# TEXAS FACILITIES COMMISSION

*Christian Ninaud, Project Manager*

## Agency at a Glance

The Texas Facilities Commission (TFC) manages the building construction, maintenance, and leasing needs of state agencies. TFC carries out the following key activities.

- Provides office space for state agencies through acquisition or design and construction of facilities, or through leasing services.
- Maintains state-owned facilities in a secure and cost-efficient manner.
- Provides various support services to state agencies, such as operating state and federal surplus property programs and coordinating the recycling program.

## Summary

The origins of the Texas Facilities Commission as a central services agency date back to 1919, but the Legislature has since reduced its responsibilities to focus TFC on planning for and managing the space needs of state government. This role has now placed TFC front and center in a major initiative to consolidate state agency leases and develop state-owned properties in the Capitol Complex and elsewhere to house state employees.

TFC's growing role in making significant decisions on the use and development of key state assets coincides with the Legislature's adoption of a new approach for procuring public facilities under the Public and Private Facilities and Infrastructure Act (P3 Act) in 2011. The Sunset Commission determined that while TFC is at the forefront of implementing P3 projects, it has stepped into these efforts without adequate guidance, planning, and resources needed to ensure protection of the State's best interests.

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*Developing the Capitol Complex without a leadership-approved plan seems hasty.*

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The Capitol Complex is the centerpiece of government for Texas. Given that the most recent plan for the future of the Capitol Complex was developed and adopted by the State Preservation Board in 1989, proceeding to develop the Complex without a current plan developed with and agreed to by state leadership seems hasty, particularly given the complicated long-term nature of public-private partnership agreements.

While the Sunset Commission determined the State has a continuing need for TFC, it identified the need to ensure TFC has the statutory direction and

tools in place to operate with greater transparency, collaboration, and accountability. The following material summarizes the Sunset Commission's recommendations for the Texas Facilities Commission.

## *Issue 1*

### **The State Lacks a Coordinated, Transparent Approach to Planning Future Development of the Capitol Complex.**

While TFC works to cost-effectively meet the long-term space needs of Texas government, its efforts to develop the Capitol Complex are hampered by the lack of a clear plan built upon coordination with key partners in the Complex. Though several agencies have responsibilities related to the Capitol Complex, none is clearly charged with leading or planning for its development.

Recently, TFC has taken the lead in planning not just office space needs, but also the development of state-owned properties throughout Austin, including the Capitol Complex. However, TFC's efforts are not based on a collaborative, approved vision for the properties, particularly the Complex's future.

## **Recommendations**

### ***Change in Statute***

#### **1.1 Require TFC to develop and formally adopt a Capitol Complex Master Plan to guide decision making on the Complex's future development.**

The Plan would outline the overall strategy and goals for developing the Capitol Complex and provide recommendations for meeting the goals. The Plan would include an overview of previous planning efforts; a strategic vision and long term goals for the Capitol Complex; analysis of Capitol Complex properties and space needs; site specific proposals for development of properties; analysis and recommendations related to real estate market conditions, design guidelines, infrastructure and parking needs, and financing options; and timeframes for implementing the Plan. The Plan would be submitted to the Governor, Comptroller of Public Accounts, Lieutenant Governor, Speaker of the House, and Legislative Budget Board by July 1, 2014 and updated biennially.

#### **1.2 Require TFC to develop and adopt, in rule, a comprehensive planning process that guides and ensures more meaningful public and stakeholder input for its planning and development responsibilities.**

This recommendation would require TFC to implement a process for planning the development of its state-owned facilities, including those in the Capitol Complex and when assisting other state agencies with space development plans. The process would include a clear approach and specific timeframes for obtaining input throughout the entire planning process from the public, stakeholders, and affected agencies in the Capitol Complex, as well as a public involvement policy that ensures the public and stakeholders have the opportunity to review and comment on any development plans well in advance of Commission decisions. The process would also specify timeframes for Commission updates regarding planning and development efforts and have confidentiality policies consistent with state open records laws.

**1.3 Require TFC to submit the Capitol Complex Master Plan to the State Preservation Board for review, comment, and possible action.**

Under this recommendation, the State Preservation Board (SPB) would have the opportunity to review and comment on the first Plan at least 90 days before the Commission is scheduled to discuss it in a public meeting. SPB would be authorized to disapprove the Plan if it determines the goals or recommendations are not in the best interest of the State or the Capitol Complex. Absent this vote, the Plan would be considered approved by SPB. For subsequent Plan updates, TFC would provide SPB a draft for review and comment at least 60 days before the Commission discusses it in a public meeting.

**1.4 Require the State Preservation Board's long-range plan to conform to the Capitol Complex Master Plan.**

Under this recommendation, if SPB chooses to update its long-range master plan for the capitol buildings and their grounds in the future, the plan would be required to conform to the Capitol Complex Master Plan.

**1.5 Require TFC to submit the Capitol Complex Master Plan to the General Land Office for review and comment.**

Under this recommendation, the General Land Office (GLO) would have the opportunity to review and comment on the first Plan at least 90 days before the Commission is scheduled to discuss it in a public meeting. For subsequent Plan updates, TFC would provide GLO a draft at least 60 days before the Commission discusses it in a public meeting. GLO would not have approval or disapproval authority.

**1.6 Exempt 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.**

This recommendation exempts properties within the Capitol Complex from GLO's current review requirements. GLO would no longer identify properties within the Capitol Complex that are underutilized or make recommendations on the best use of or sale of these properties, since the Capitol Complex Master Plan would cover these properties.

***Management Action*****1.7 Direct 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 statewide.**

This recommendation would give the Commission time to fully consider and deliberate before voting on an item related to the agency's efforts to develop state properties. During the 30 days prior to a vote, staff could better prepare the Commission for its deliberations and address any Commissioner questions or concerns. Having these items on the agenda would give the public the opportunity to provide comments as well.

## *Issue 2*

### **TFC's Current Approach to Public-Private Partnerships Needs Additional Safeguards to Avoid Exposing the State to Significant Risks.**

As authorized by the recently enacted Public and Private Facilities and Infrastructure Act (P3 Act), TFC is embarking on significant efforts to redevelop state-owned properties within the Capitol Complex and other areas of the state using P3 projects. TFC has received unsolicited P3 proposals affecting nine potential sites with a total construction value of about \$824 million. The P3 procurement method presents the opportunity for great benefits to the State, but also brings the potential for new and more complex risks that TFC is not fully prepared to mitigate. The Sunset Commission found TFC lacks sufficient transparency, controls, resources and staff expertise needed to ensure effective protection of the State's interest when planning, negotiating, and overseeing P3 projects.

## **Recommendations**

### ***Change in Statute***

#### **2.1 Require TFC to include a complete and clearly documented process for evaluating P3 proposals in its P3 Guidelines, and make the evaluation results publicly available.**

Under this recommendation, the Commission would amend its P3 Guidelines to include criteria and documentation to guide the initial review of all substantially complete P3 proposals the agency receives. The initial review criteria should include, at a minimum: the extent to which the project meets a public need and the agency's objectives; the overall feasibility of the project; the adequacy of the proposer's qualifications, experience, and financial capacity; any potentially unacceptable risks to the State; and whether an alternative delivery is appropriate.

A summary of the initial review would be provided to the Commission, including any analysis and recommendations. The P3 Guidelines would also require the Oversight Committee to report the results of its evaluation of any P3 proposals to the Commission and specify the timeframes, procedures, and documentation required. TFC would also make P3 evaluation documents available on the agency's website, with any confidential information redacted.

#### **2.2 Require TFC to use a value for money analysis, but authorize TFC to use an alternative analysis methodology if a value for money analysis is not appropriate for a specific proposal.**

This recommendation would require TFC to use a value for money assessment when evaluating P3 proposals to determine if the P3 approach is in the best long-term financial interest of the State, and if the project will provide a tangible public benefit. Under this recommendation, TFC would conduct a thorough risk analysis of a proposed P3 project that identifies specific risks to be shared between the State and the private partner, and subjects these risks to negotiation in the contract.

TFC would be authorized to use an alternative analysis methodology if more appropriate for a specific proposal, but must document in writing to the Commission the reasons for using an alternative methodology. Finally, TFC would coordinate with its Office of Internal Audit for review and comment on the appropriateness of assumptions used in any analysis.

**2.3 Require TFC to hold a public hearing on a P3 proposal before submitting it to the Partnership Advisory Commission, and to incorporate public comments into the proposal submission.**

TFC would post a copy of the detailed proposal on the agency's website in advance of the hearing; however, with any confidential information redacted. The recommendation would require TFC to incorporate public comments into the proposal submission and allow TFC to provide any additional information or modify the proposal based on consideration of the public input. The Commission must hold a public hearing before finalizing the contract.

**2.4 Require the Commission's P3 Guidelines to include policies on acquiring needed professional expertise to evaluate, negotiate, and oversee P3 proposals and contracts.**

This recommendation would require TFC to amend its P3 Guidelines to specify types of professional expertise needed at each stage of the P3 process, including financial and legal expertise, to protect the State's interest when considering and implementing a P3 project. The P3 Guidelines would specify a range of expertise needed to carry out the evaluation of P3 proposals, assess and allocate risk, negotiate a contract, and oversee the performance of the contract over its lifetime. The Commission would use this information to determine the cost of a reasonable proposal fee, which could also include direct costs, such as staff time required to process a proposal.

**2.5 Require TFC to submit each P3 contract to the Comptroller's Contract Advisory Team for review and comment before adoption by the Commission.**

This recommendation would require TFC to submit a copy of each final draft P3 contract, including a copy of the detailed proposal and agreement, to the Contract Advisory Team (CAT) for review and comment, but not approval. The contract would be provided to CAT at least 60 days before the Commission is scheduled to vote on the approval of the contract. The recommendation specifies that the CAT review would focus on contract management and administration best practices.

**2.6 Specifically authorize TFC to charge a reasonable proposal fee to recover the costs of processing, reviewing, and evaluating P3 proposals.**

Under this recommendation, TFC would develop and adopt a fee schedule sufficient to recover the costs associated with processing, reviewing, and evaluating P3 proposals.

**2.7 Prohibit outside employment of TFC P3 program staff in fields or activities related to their responsibilities at the agency.**

TFC would ensure it has sufficient information to determine whether any potential conflict of interest exists between an employee's duties and their outside employment, and that each employee is aware of and agrees in writing to the agency's ethics and conflict of interest policies. This recommendation would not prohibit other agency staff such as engineers or maintenance workers, from engaging in outside employment, to the extent allowed under current TFC policies.

## ***Management Action***

### **2.8 Direct the Commission to delay formal action on P3 proposals until after September 1, 2013.**

This recommendation gives the Legislature an opportunity to assess and make any needed changes to the P3 Act before moving forward on proposals that could affect the Capitol Complex and other areas. TFC would not have to discontinue the P3 program or end its efforts at developing state assets generally under this recommendation.

### **2.9 Direct TFC to provide financial information and analysis related to any P3 revenues to the Legislative Budget Board.**

TFC should provide information to the Legislative Budget Board on a regular basis regarding any potential and actual revenues generated from P3 developments, as well as financial analysis, forecasts, or other information resulting from the evaluation and implementation of P3 projects.

## ***Issue 3***

### **TFC's Contracting Functions Lack Standard Elements Necessary to Improve Contract Transparency and Management.**

TFC has a large contracting function that carries significant risk due to the multi-million dollar service contracts involved, such as for facilities construction, and in the near future, public-private partnerships that bring new complexities and risks to the procurement process. However, TFC lacks a range of contracting best practices related to contracting methods, procurement, and contract administration needed to reduce risks and better protect the State's financial interests.

## **Recommendations**

### ***Management Action***

#### **3.1 Direct the Commission to formally adopt policies on contracting methods and indefinite delivery/indefinite quantity contracts in a public meeting.**

Under this recommendation, the Commission's contracting policy should specify the circumstances when one delivery method is more appropriate than another, and TFC staff should report information justifying the recommended method to the Commission. The policy should require the Commission to approve indefinite delivery/indefinite quantity contract assignments over \$25,000 and ensure the use of these contracts only for emergencies by having staff report specific reasons for why such an assignment is urgent.

#### **3.2 Direct TFC to revise its policy on the use of interagency contracts and develop a policy for bundled contracts.**

TFC should revise its policy on interagency contracts to restrict their use for procurements under \$100,000 except in emergencies. The Commission should approve any contracts over that amount and staff should report justification as to why the contract is an emergency. TFC should also develop general guidelines for the use of bundled contracts and criteria on the appropriate scope and price for such contracts.

### 3.3 TFC should improve its procedures for soliciting and awarding contracts, including performing risk and needs assessments and documenting needed information.

This recommendation directs the agency to implement the following improvements to better guide agency staff and provide needed information to the Commission regarding the solicitation and awarding of contracts.

- **Risk and needs assessment.** TFC should perform a risk and needs assessment for each contract and clearly document this analysis in the contract files.
- **Contract Advisory Team recommendations.** TFC procurement staff should clearly document CAT recommendations, indicate which ones were implemented, and give a written explanation for any not adopted in the master contract files.
- **Insurance requirements review.** TFC should develop a centralized insurance review function performed by staff qualified to review insurance policies and coverages.
- **Negotiation plans and outcomes.** TFC should develop a written negotiation plan before each contract negotiation and document negotiation outcomes. Staff should use this information to evaluate the negotiation outcomes compared to the original plans, and report this analysis to the Commission on a regular basis.

### 3.4 Direct TFC to apply certain contracting standards to better align its contract administration procedures with commonly accepted best practices.

TFC should implement the following standards to improve its contract administration and close out procedures.

- **Administration plans.** The agency should develop clear administration plans for each of its contracts, which would include standard elements, such as identification of risk areas and monitoring plans, needed to administer the contract.
- **Training.** TFC should develop a written policy requiring all contract administrators, procurement staff, and legal staff dealing with contracts to receive contract training specifically geared toward each program area with responsibilities over contracts.
- **Documentation and reporting on monitoring efforts.** Each TFC program area should timely update and document contract monitoring efforts, including contract monitoring plans and any information related to contract sanctions.
- **Use of building commissioning.** The agency should develop criteria for determining whether to use building commissioning for each TFC or client agency project. These criteria should include risk-based analysis to factor in the size and complexity of a project, and TFC should obtain outside expertise when developing the criteria and using commissioning.
- **Close out.** TFC should establish procedures where staff in each program would assess overall contractor and agency performance at contract closeout, including lessons learned, and report this information to the Commission. Specifically, staff should perform a comprehensive evaluation of change orders and amendments and explain significant changes.
- **Master files.** TFC should develop centralized master files for contracts, including documentation of the contracting process from initial planning to final close out and assessment.

- **Vendor oversight.** TFC should revise its childcare center contract to include a clear contract monitoring plan and a range of sanctions, including a corrective action plan. The monitoring plan should specify the frequency of any inspections and reporting requirements and include the review of state inspection reports and accreditation requirements.

### **3.5 TFC should develop a policy to apply contracting standards to P3 contracts when applicable.**

The agency should have a formal policy that ensures it applies contracting best practices and standards to P3 contracts as appropriate. This recommendation applies particularly to the need for thorough procedures and documentation relating to planning, risk assessment, performance measures, and ongoing contract oversight.

## ***Issue 4***

### **TFC Struggles to Effectively Plan for and Manage Its Deferred Maintenance Needs.**

TFC's deferred maintenance program manages large construction projects to address maintenance and capital needs and delayed repairs of equipment and building systems. Already a high-risk area because of the millions of dollars of repairs involved, deferred maintenance has risen to the forefront lately as TFC's inventory of state properties continues to deteriorate.

TFC does not have the information necessary to effectively manage or assess performance of its deferred maintenance program, and lacks comprehensive information on future needs, such as for capital renewal. This lack of information prevents TFC from effectively planning for and informing the Legislature about the deferred maintenance needs of state facilities.

## **Recommendations**

### ***Change in Statute***

#### **4.1 Require TFC to develop and regularly update a comprehensive plan for all of its maintenance and capital improvement needs.**

TFC would develop a comprehensive planning process for its deferred maintenance, capital improvement, and emergency needs to ensure the agency can identify and predict both current and future needs. The plan would include a full list of deferred maintenance and capital improvement needs, how the agency plans to address these needs, and an estimate of costs. For emergency needs, the agency would plan for potential emergency projects on a biennial basis and identify a potential pool of bonds or other funds that could be used to address them.

Under this recommendation, each element in the plan would include a prioritized list of projects with an estimate of individual and aggregate project costs. The plan would also show prioritized projects by facility. The agency would include the plan in its Facilities Master Plan and update it on a regular basis. The recommendation specifies that the agency would report this information to the Commission and Legislature to tie these needs to the expected level of needed funding.

## ***Management Action***

### **4.2 Direct TFC to better track and report management and performance data about its deferred maintenance program and the condition of its building systems.**

This recommendation directs TFC to collect accurate, up-to-date information on budgetary and project changes to deferred maintenance projects, including justification for why these changes were made. The information should include a comparison of the contract amount before and after any significant changes; the source of funds used to finance the changes; and for project changes requiring Commission approval, justification for their need. Upon project completion, TFC should analyze its performance and report information showing the projects that finished within the original budget and timeline, and explain any variances.

## ***Issue 5***

### **The Texas Facilities Commission's Statute Contains Inefficient Reporting Requirements and Does Not Reflect Standard Elements of Sunset Reviews.**

Among the standard elements considered in a Sunset review, the Texas Sunset Act directs the Sunset Commission to recommend the continuation or abolishment of each reporting requirement established in law for an agency under review. The Texas Facilities Commission has 21 reporting requirements. The Sunset Commission determined that all of these reporting requirements should be continued; however, the due dates and recipients of six of these reports should be aligned to allow for more efficient reporting.

In addition, the Sunset Commission adopted Across-the-Board Recommendations as standards for state agencies to reflect criteria in the Sunset Act designed to ensure open, responsive, and effective government. One of these provisions is missing from TFC's statute and should be applied.

## **Recommendations**

### ***Change in Statute***

#### **5.1 Continue all of TFC's reporting requirements, but align the due dates and recipients of selected reports to allow for report consolidation.**

This recommendation would continue all of TFC's reporting requirements, but would align the due dates of the Report on Improvements and Repairs to State Buildings, State Buildings — Status and Construction Costs, and Report on Space Needs with the Facilities Master Plan Report due date of July 1 of even numbered years. In addition, this recommendation would make the recipients of these reports consistent to include the Governor, Comptroller of Public Accounts, Lieutenant Governor, Speaker of the House, and LBB. This recommendation would also align the due dates of the Report on Parking Programs and the Report on Lease of Space in State-Owned Parking Lots and Garages to December 1 of each even-numbered year and align the recipients to include both the Legislature and LBB.

## **5.2 Apply the standard Sunset Across-the-Board Recommendation for the Commission to develop a policy regarding negotiated rulemaking and alternative dispute resolution.**

This recommendation would require TFC to develop and implement a policy to encourage alternative procedures for rulemaking and dispute resolution. The agency would also coordinate implementation of the policy, provide training as needed, and collect data concerning the effectiveness of these procedures.

## ***Issue 6***

### **The State Has a Continuing Need for the Texas Facilities Commission.**

The State continues to need the Texas Facilities Commission to manage the buildings, grounds, and properties, and their associated infrastructure, which support state government operations. TFC manages 130 state-owned facilities and 25.5 million square feet of leased office space for 103 state agencies in 288 Texas cities. Since 2007 the Legislature has focused TFC more squarely on its state facilities planning and management duties, and the Sunset Commission did not find any significant advantages that would result from transferring TFC's statewide support functions to another state agency. However, Texas has chosen a decentralized approach towards managing the administrative support needs of state agencies and also maintains key support services at the Department of Information Resources (DIR) and the Comptroller's Texas Procurement and Support Services Division.

### **Recommendation**

#### ***Change in Statute***

#### **6.1 Continue the Texas Facilities Commission for eight years to align its review with other state agencies that provide administrative support services in Texas.**

This recommendation would continue the Texas Facilities Commission as an independent agency and align its Sunset date with the recommended next Sunset dates of DIR and the Division to allow for a comprehensive review of the State's overall approach to providing administrative support services.

### **Fiscal Implication Summary**

Overall, these recommendations would not result in a direct fiscal impact to the State. Other potential impacts are summarized below.

***Issue 1*** — The recommendation to produce a Capitol Complex Master Plan would not have a significant fiscal impact to the State. TFC already produces a Facilities Master Plan Report, which contains some components that would be included in the Capitol Complex Master Plan and is hiring a design firm to produce a more detailed plan related, in part, to the Capitol Complex which could be used in the recommended Master Plan.

***Issue 2*** — Recommendations relating to the implementation of public-private partnerships, and the resulting financial benefits, have the potential for a significant positive fiscal impact for the State. This potential would likely be tapped in the next five fiscal years, but the amounts could not be estimated due to significant variance in the types of projects and their financial structure. Specifically authorizing TFC to charge fees to developers to cover the costs of reviewing P3 proposals would offset these costs for the State.