

As Introduced

**133rd General Assembly
Regular Session
2019-2020**

H. B. No. 218

Representative Patton

A BILL

To enact sections 168.01, 168.02, 168.03, 168.04, 1
168.05, 168.06, 168.07, 168.08, 168.09, 168.10, 2
168.11, 168.12, 168.13, 168.14, and 168.15 of 3
the Revised Code to authorize certain public 4
entities to enter into public-private 5
initiatives with a private party through a 6
public-private agreement regarding public 7
facilities. 8

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 168.01, 168.02, 168.03, 168.04, 9
168.05, 168.06, 168.07, 168.08, 168.09, 168.10, 168.11, 168.12, 10
168.13, 168.14, and 168.15 of the Revised Code be enacted to 11
read as follows: 12

Sec. 168.01. "Affected jurisdiction" means any unit of 13
government within the state in which all or part of a facility 14
is located or any other public entity directly affected by the 15
facility. 16

"Contracting authority" means the director or chief 17
executive officer in the case of a state agency, the board of 18
trustees in the case of a state institution of higher education, 19

the board of county commissioners in the case of a county, the 20
board of township trustees in the case of a township, the 21
legislative authority in the case of a municipal corporation, 22
the board of library trustees in the case of a library or 23
library district, the board of directors in the case of a port 24
authority, the board of education in the case of a school 25
district, the governing authority in the case of a community 26
school, the governing body in the case of a STEM school, and the 27
board of trustees in the case of a college-preparatory boarding 28
school. 29

"Facility" means any existing or new public building, 30
public improvement, or public infrastructure, or part of such 31
building, improvement, or public infrastructure, that is used or 32
will be used by a public body or the public at large, or is used 33
in support of a public purpose or for the delivery of services 34
to the public. 35

"Force majeure" means an uncontrollable force or natural 36
disaster not within the power of the operator or the public 37
body. 38

"Maintenance" includes routine maintenance, major 39
maintenance, and any other categories of maintenance that may be 40
designated by the public body. 41

"Material default" means any failure of an operator to 42
perform any duties under a public-private agreement that 43
jeopardizes delivery of adequate service to the public and 44
remains unsatisfied after a reasonable period of time and after 45
the operator has received written notice from the public body of 46
the failure. 47

"Operate" means any action to maintain, repair, improve, 48

equip, or modify a facility. 49

"Operator" means a private entity that has entered into a 50
public-private agreement under sections 168.01 to 168.15 of the 51
Revised Code. 52

"Political subdivision" means a county, township, 53
municipal corporation, library or library district created under 54
Chapter 3375. of the Revised Code, or port authority created 55
under Chapter 4582. of the Revised Code. 56

"Private entity" means any natural person, corporation, 57
general partnership, limited liability company, limited 58
partnership, joint venture, business trust, public benefit 59
corporation, nonprofit entity, or other business entity. 60

"Public body" means a state agency, state institution of 61
higher education, political subdivision, or public school. 62

"Public-private agreement" means the agreement between a 63
private entity and the public body that relates to the design, 64
build, financing, operation, or maintenance of a facility 65
subject to sections 168.01 to 168.15 of the Revised Code. 66

"Public-private initiative" means an arrangement between 67
the public body and a private entity, the terms of which are 68
stated in a public-private agreement, that provides for both of 69
the following: 70

(A) Sharing of resources and the means of providing a 71
project or service for a facility; 72

(B) Cooperation in researching, developing, and 73
implementing projects or services for a facility. 74

"Public school" means a school district created under 75
Chapter 3311., community school created under Chapter 3314., 76

STEM school created under Chapter 3326., or college-preparatory 77

boarding school created under Chapter 3328. of the Revised Code. 78

"State agency" has the meaning defined in section 1.60 of 79
the Revised Code but does not include the department of 80
transportation. 81

"State institution of higher education" has the meaning 82
defined in section 3345.011 of the Revised Code. 83

"Utility" means a privately, publicly, or cooperatively 84
owned line, facility, or system for producing, transmitting, or 85
distributing communications, cable television, power, 86
electricity, light, heat, gas, oil, crude products, water, 87
steam, waste, storm water not connected with highway drainage, 88
alternative or renewable energy sources such as wind or solar, 89
or any other similar commodity, including a fire or police 90
signal system or street lighting system that directly or 91
indirectly serves the public. 92

Sec. 168.02. A facility subject to a public-private 93
agreement under sections 168.01 to 168.15 of the Revised Code 94
shall be owned by the public body unless the public body, in its 95
discretion, elects to provide for ownership of the facility by 96
the private party through a lease agreement that is part of the 97
public-private agreement. Notwithstanding any provision of the 98
Revised Code, the lease agreement shall provide for the lease of 99
all or a portion of the facility to, or ownership by, the 100
private party for a term of up to forty years. In consideration 101
therefor, the agreement shall provide for complete reversion of 102
the facility, in good or better condition, to the public body at 103
the expiration of the lease. 104

Sec. 168.03. (A) A public body may solicit, receive, 105

<u>consider, evaluate, and accept a proposal for a public-private</u>	106
<u>initiative.</u>	107
<u>(B) In soliciting and selecting a private entity with</u>	108
<u>which to enter into a public-private initiative, the public body</u>	109
<u>shall use one or both of the following:</u>	110
<u>(1) Sealed bidding;</u>	111
<u>(2) Selection of proposals, with or without negotiations,</u>	112
<u>based on qualifications, best value, or both.</u>	113
<u>(C) (1) The public body shall consider the following</u>	114
<u>factors in evaluating and selecting a bid or proposal to enter</u>	115
<u>into a public-private initiative:</u>	116
<u>(a) The ability of the facility to serve a public purpose;</u>	117
<u>(b) The proposed cost of and financial plan for the</u>	118
<u>facility;</u>	119
<u>(c) The general reputation, qualifications, industry</u>	120
<u>experience, and financial capacity of the private entity;</u>	121
<u>(d) The proposed design, operation, and feasibility of the</u>	122
<u>facility;</u>	123
<u>(e) Comments from local citizens and affected</u>	124
<u>jurisdictions;</u>	125
<u>(f) Benefits to the public and the affected facility;</u>	126
<u>(g) The safety record of the private entity;</u>	127
<u>(h) The inclusion of a teaming agreement in the bid or</u>	128
<u>proposal that identifies the primary designer of record or</u>	129
<u>design firm representing not less than thirty per cent of the</u>	130
<u>estimated design fee, the primary construction contractor</u>	131
<u>representing not less than thirty per cent of the estimated</u>	132

<u>construction dollar value amount, and the primary financier</u>	133
<u>representing not less than fifty per cent of the total project</u>	134
<u>cost;</u>	135
<u>(i) Any other criteria that the public body considers</u>	136
<u>appropriate.</u>	137
<u>(2) The public body may consider the following factors in</u>	138
<u>evaluating and selecting a bid or proposal to enter into a</u>	139
<u>public-private initiative:</u>	140
<u>(a) The bidder's estimates of capital expenditures and</u>	141
<u>operating expenses for the proposed facility;</u>	142
<u>(b) The schedule for completion of the proposed facility;</u>	143
<u>(c) Whether user fees, lease payments, or other charges</u>	144
<u>will be collected for use of the proposed facility over the term</u>	145
<u>of the public-private agreement;</u>	146
<u>(d) The proposed length of time before ownership of the</u>	147
<u>facility reverts to the public body.</u>	148
<u>(D) The public body shall select a private entity for a</u>	149
<u>public-private initiative on a competitive basis.</u>	150
<u>(E) Any materials or data submitted to, made available to,</u>	151
<u>or received by the contracting authority, to the extent that the</u>	152
<u>materials or data consist of trade secrets, as defined in</u>	153
<u>section 1333.61 of the Revised Code, are confidential and are</u>	154
<u>not public records for the purposes of section 149.43 of the</u>	155
<u>Revised Code. Financial information received by the contracting</u>	156
<u>authority that is related to a proposal is confidential and not</u>	157
<u>a public record for purposes of section 149.43 of the Revised</u>	158
<u>Code until such time as a proposal is selected. Before</u>	159
<u>submission of a solicited proposal, a private entity may request</u>	160

a review by the public body of information that the private 161
entity has identified as confidential, to determine whether such 162
information would be subject to disclosure under section 149.43 163
of the Revised Code. 164

(F) (1) The public body may reimburse a private entity for 165
a portion of the actual costs the entity incurred in submitting 166
a proposal for a public-private initiative that was solicited by 167
the public body under this section. When considering the 168
reimbursement of such costs, the contracting authority shall 169
describe in the request for proposals for a specific public- 170
private initiative the specific terms and conditions for 171
reimbursing a private entity. The contracting authority may 172
include in the terms and conditions a requirement that the 173
private entity execute an agreement to transfer to the public 174
body the rights to the use of the work product contained in the 175
proposal in exchange for receiving the reimbursement. 176

(2) The contracting authority shall make all decisions 177
related to the reimbursement of a specific private entity and 178
related to the maximum amount of the reimbursement. However, the 179
public body shall not reimburse a private entity if that entity 180
enters into the public-private agreement that is the subject of 181
the solicited proposal, except as set forth in the request for 182
proposals or in the public-private agreement. The reimbursement 183
of costs under division (G) of this section is exempt from any 184
competitive bidding required by law. 185

(3) If the public body, pursuant to division (G) (1) of 186
this section, includes a reimbursement provision in a request 187
for proposals and the public body subsequently terminates the 188
solicitation before the solicitation expiration date, the public 189
body shall prorate the amount of the reimbursement that is to be 190

paid to each private entity participating in the solicitation on 191
the date the public body terminates the solicitation. The public 192
body shall calculate the proration percentage by determining the 193
number of days from the date the solicitation first was offered 194
until the date the public body terminated the solicitation and 195
dividing that number by the number of days of the original 196
solicitation period. 197

(4) Except as otherwise provided in writing by the public 198
body, if, pursuant to division (G)(1) of this section, the 199
public body includes a reimbursement provision in a request for 200
proposals and subsequently enters into negotiations based on the 201
selection of a desired proposal and the public body elects to 202
terminate those negotiations for the convenience of the public 203
body and through no fault of the proposer, the proposer is 204
entitled to the full reimbursement amount. 205

Sec. 168.04. (A) The public body may receive, consider, 206
evaluate, and accept or reject an unsolicited proposal for a 207
public-private initiative if the proposal meets all of the 208
following: 209

(1) Is independently originated and developed by the 210
proposer; 211

(2) Benefits the public; 212

(3) Is prepared without public body supervision; 213

(4) Includes sufficient detail and information for the 214
public body to evaluate the proposal in an objective and timely 215
manner, including the conceptual design or plan for the proposed 216
facility, project costs, and a schedule for starting and 217
completing the facility; 218

(5) Is made by a private entity that is not prohibited 219

from making an unsolicited proposal under section 3517.13 of the 220
Revised Code. 221

(B) Within ninety days after receiving an unsolicited 222
proposal, the public body shall undertake a preliminary 223
evaluation of the unsolicited proposal to determine if the 224
proposal complies with the requirements of division (A) of this 225
section. 226

(C) Any materials or data submitted to, made available to, 227
or received by the contracting authority under this section, to 228
the extent that the materials or data consist of trade secrets, 229
as defined in section 1333.61 of the Revised Code, are 230
confidential and are not public records for the purposes of 231
section 149.43 of the Revised Code. Financial information 232
received by the contracting authority that is related to a 233
proposal is confidential and not a public record for purposes of 234
section 149.43 of the Revised Code until the public body accepts 235
or rejects the proposal. Before submission of an unsolicited 236
proposal or a competing proposal, a private entity may request a 237
review by the public body of information that the private entity 238
has identified as confidential to determine whether such 239
information would be subject to disclosure under section 149.43 240
of the Revised Code. 241

(D) If the unsolicited proposal does not comply with 242
division (A) of this section, the public body shall return the 243
proposal without further action. 244

(E) If the unsolicited proposal complies with division (A) 245
of this section, the public body may continue to evaluate the 246
proposal in accordance with this section. 247

(F) (1) If the unsolicited proposal complies with division 248

(A) of this section, the public body shall advertise the 249
unsolicited proposal for the purpose of receiving competitive 250
proposals for the proposed facility. 251

(2) The advertisement shall outline the general nature and 252
scope of the unsolicited proposal, including the location of the 253
facility and the work to be performed on or in connection with 254
the facility and shall specify an address to which a competing 255
proposal may be submitted. 256

(3) The advertisement shall specify a reasonable time 257
period by which competitors must submit a competing proposal to 258
the public body. 259

(G) The public body shall charge a reasonable fee to cover 260
its costs to process, review, and evaluate an unsolicited 261
proposal and any competing proposals. 262

(H) Upon receipt of any competing proposals, the public 263
body shall do all of the following: 264

(1) Determine if any competing proposal is comparable in 265
nature and scope to the original unsolicited proposal; 266

(2) Evaluate the original unsolicited proposal and any 267
comparable competing proposal; 268

(3) Conduct any good faith discussions and, if necessary, 269
any negotiations concerning each qualified proposal. 270

(I) The public body shall evaluate an unsolicited proposal 271
and any comparable competing proposal using the following 272
factors: 273

(1) Novel methods, approaches, or concepts demonstrated by 274
the proposal; 275

<u>(2) Scientific, technical, or socioeconomic merits of the proposal;</u>	276 277
<u>(3) Potential contribution of the proposal to the public body's mission;</u>	278 279
<u>(4) Capabilities, related experience, facilities, or techniques of the private entity or unique combinations of these qualities that are integral factors for achieving the proposal objectives;</u>	280 281 282 283
<u>(5) Qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel, who are critical to achieving the proposal objectives;</u>	284 285 286
<u>(6) How the proposal benefits the public;</u>	287
<u>(7) Any other factors appropriate to a particular proposal.</u>	288 289
<u>(J) After evaluating the unsolicited proposal and any competing proposals, the public body may do any of the following:</u>	290 291 292
<u>(1) Accept the unsolicited proposal and reject any competing proposals;</u>	293 294
<u>(2) Reject the unsolicited proposal and accept a comparable competing proposal if the public body determines that the comparable competing proposal is the most advantageous to the jurisdictions served by the public body;</u>	295 296 297 298
<u>(3) Reject the unsolicited proposal and any competing proposals.</u>	299 300
<u>Sec. 168.05. (A) After selecting a solicited or unsolicited proposal for a public-private initiative, the public</u>	301 302

body shall enter into a public-private agreement for a facility 303
with the selected private entity. An affected jurisdiction may 304
be a party to a public-private agreement entered into by the 305
public body and a selected private entity. 306

(B) (1) A public-private agreement under this section shall 307
provide for all of the following: 308

(a) Planning, acquisition, financing, development, design, 309
construction, reconstruction, replacement, improvement, 310
maintenance, management, repair, leasing, or operation of a 311
facility; 312

(b) Term of the public-private agreement; 313

(c) Type of property interest, if any, the private entity 314
will have in the facility; 315

(d) A specific plan to ensure proper maintenance of the 316
facility throughout the term of the agreement and a return of 317
the facility to the public body, if applicable, in good 318
condition and repair; 319

(e) Compliance with applicable federal, state, and local 320
laws; 321

(f) Grounds for termination of the public-private 322
agreement by the public body or operator; 323

(g) Disposition of the facility upon completion of the 324
agreement; 325

(h) Procedures for amendment of the agreement; 326

(i) If the agreement contains a construction services 327
component, a contract performance bond executed by a surety 328
authorized by the department of insurance to write surety bonds 329

in an amount specified by the contracting authority, conditioned 330
upon the private entity or contractor performing the 331
construction services portion of the work in accordance with the 332
agreed upon terms, within the time prescribed; 333

(j) If the agreement contains a construction services 334
component, a payment bond executed by a surety authorized by the 335
department of insurance to write surety bonds in an amount 336
specified by the contracting authority, conditioned upon the 337
payment for all labor, work performed, and materials furnished 338
in connection with the construction services portion of the 339
work. 340

(2) As used in divisions (B) (1) (i) and (j) of this 341
section, "construction services" means design-build, 342
construction, reconstruction, replacement, improvement, or 343
repair services. 344

(C) A public-private agreement under this section may 345
provide for any of the following: 346

(1) Review and approval by the public body of the 347
operator's plans for the development and operation of the 348
facility; 349

(2) Inspection by the public body of construction of or 350
improvements to the facility; 351

(3) Maintenance by the operator of a policy of liability 352
insurance or self-insurance; 353

(4) Filing by the operator, on a periodic basis, of 354
appropriate financial statements in a form acceptable to the 355
public body; 356

(5) Filing by the operator, on a periodic basis, of 357

<u>reports as determined by the public body in a form acceptable to</u>	358
<u>the public body;</u>	359
<u>(6) Financing obligations of the operator and the public</u>	360
<u>body;</u>	361
<u>(7) Apportionment of expenses between the operator and the</u>	362
<u>public body;</u>	363
<u>(8) Rights and duties of the operator, the public body,</u>	364
<u>and other state and local governmental entities with respect to</u>	365
<u>use of the facility;</u>	366
<u>(9) Rights and remedies available in the event of default</u>	367
<u>or delay;</u>	368
<u>(10) Terms and conditions of indemnification of the</u>	369
<u>operator by the public body;</u>	370
<u>(11) Assignment, subcontracting, or other delegation of</u>	371
<u>responsibilities of the operator or the public body under the</u>	372
<u>agreement to third parties, including other private entities and</u>	373
<u>other public bodies;</u>	374
<u>(12) Sale or lease to the operator of private property</u>	375
<u>related to the facility.</u>	376
<u>(D) (1) The contracting authority may include in any</u>	377
<u>public-private agreement under sections 168.01 to 168.15 of the</u>	378
<u>Revised Code a provision authorizing a binding dispute</u>	379
<u>resolution method for any controversy subsequently arising out</u>	380
<u>of the contract. The binding dispute resolution method may</u>	381
<u>proceed only upon agreement of all parties to the controversy.</u>	382
<u>If all parties do not agree to proceed to a binding dispute</u>	383
<u>resolution, a party having a claim against the public body shall</u>	384
<u>exhaust its administrative remedies specified in the public-</u>	385

private agreement before filing any action against the public 386
body in the court of claims. 387

No appeal from the determination of a technical expert 388
lies to any court, except that the court of common pleas of 389
Franklin county may issue an order vacating such a determination 390
upon the application of any party to the binding dispute 391
resolution if any of the following applies: 392

(a) The determination was procured by corruption, fraud, 393
or undue means. 394

(b) There was evidence of partiality or corruption on the 395
part of the technical expert. 396

(c) The technical expert was guilty of misconduct in 397
refusing to postpone the hearing, upon sufficient cause shown, 398
or in refusing to hear evidence pertinent and material to the 399
controversy, or of any other misbehavior by which the rights of 400
any party have been prejudiced. 401

(2) As used in this division, "binding dispute resolution" 402
means a binding determination after review by a technical expert 403
of all relevant items, which may include documents, and by 404
interviewing appropriate personnel and visiting the project site 405
involved in the controversy. "Binding dispute resolution" does 406
not involve representation by legal counsel or advocacy by any 407
person on behalf of any party to the controversy. 408

(E) No public-private agreement entered into under this 409
section shall be construed to transfer to a private entity the 410
contracting authority's authority to appropriate property under 411
Chapter 163. of the Revised Code or otherwise provided under the 412
Revised Code. 413

(F) Money collected by the public body pursuant to an 414

agreement entered into under this section shall be deposited 415
into a fund created for this purpose or as otherwise determined 416
by the public body or as specified in the agreement. 417

(G) Any provision of law requiring competitive bidding 418
does not apply to public-private agreements under sections 419
168.01 to 168.15 of the Revised Code. 420

Sec. 168.06. In the event of termination of the public- 421
private agreement, the authority and duties of the operator 422
cease, except for any duties and obligations that extend beyond 423
the termination as provided in the public-private agreement, and 424
the facility reverts to the public body and shall be dedicated 425
to the public body for public use. 426

Sec. 168.07. (A) Upon the occurrence and during the 427
continuation of material default by an operator, not related to 428
an event of force majeure, the public body may do the following: 429

(1) Elect to take over the facility, including the 430
succession of all right, title, and interest in the facility, 431
subject to any liens on revenues previously granted by the 432
private entity; 433

(2) Terminate the public-private agreement and exercise 434
any other available rights and remedies. 435

(B) In the event that the public body elects to take over 436
a facility, the public body shall collect and pay any revenues 437
that are subject to lien to satisfy any obligation and may do 438
the following: 439

(1) Develop and operate the facility and comply with any 440
service contracts; 441

(2) Solicit proposals for the maintenance and operation of 442

the facility under section 168.03 of the Revised Code. 443

Sec. 168.08. A public body having authority to issue 444
obligations may issue, in accordance with that authority, 445
obligations for the purpose of providing funds to carry out 446
sections 168.01 to 168.15 of the Revised Code with respect to 447
the development or financing of a facility. 448

Sec. 168.09. (A) For the purposes of carrying out sections 449
168.01 to 168.15 of the Revised Code, the public body may do all 450
of the following: 451

(1) Accept, subject to applicable terms and conditions, 452
available funds from the United States or any of its agencies, 453
whether the funds are made available by grant, loan, or other 454
financial assistance; 455

(2) Enter into agreements or other arrangements with the 456
United States or any of its agencies as may be necessary; 457

(3) For the purpose of completing a facility under an 458
agreement, accept from any source any grant, donation, gift, or 459
other form of conveyance of land, money, other real or personal 460
property, or other item of value made to the public body. 461

(B) Any facility may be financed in whole or in part by 462
contribution of any funds or property made by any private entity 463
or affected jurisdiction that is party to a public-private 464
agreement under sections 168.01 to 168.15 of the Revised Code. 465

(C) The public body may use federal, state, local, and 466
private funds to finance a facility under sections 168.01 to 467
168.15 of the Revised Code and shall comply with any 468
requirements and restrictions governing the use of the funds, 469
including maintaining the funds separately when necessary. 470

Sec. 168.10. A facility and any tangible personal property 471
used exclusively with a facility that is owned by the public 472
body and leased, licensed, financed, or otherwise conveyed to an 473
operator, or that is acquired, constructed, or otherwise 474
provided by an operator on behalf of the public body, is exempt 475
from all ad valorem property taxes and special assessments 476
levied against property by the state or any political 477
subdivision of the state. Building and construction materials 478
that will be incorporated into a facility pursuant to a public- 479
private agreement are exempt from the taxes imposed under 480
Chapters 5739. and 5741. of the Revised Code. 481

As used in this section, "political subdivision" means a 482
county, township, municipal corporation, or any other body 483
corporate and politic that is responsible for government 484
activities in a geographic area smaller than that of the state. 485

Sec. 168.11. The public body may acquire property, rights- 486
of-way, or other rights in property for public use in connection 487
with projects that are part of a public-private initiative in 488
accordance with Chapter 163. of the Revised Code. If the public 489
body proposes to acquire property, rights-of-way, or other 490
rights in property for such public use at the request of a 491
private entity, the acquisition shall be by the public body, in 492
accordance with Chapter 163. of the Revised Code, and only if 493
the contracting authority first makes a finding that the 494
acquisition is for a public use and serves the public purposes 495
of sections 168.01 to 168.15 of the Revised Code; the 496
contracting authority also shall require the private party to 497
pay the costs of the acquisition. 498

Sec. 168.12. All law enforcement officers of the state and 499
of an affected local jurisdiction shall have the same powers and 500

jurisdiction within the limits of the facility as they have in 501
their respective areas of jurisdiction and access to the 502
facility at any time for the purpose of exercising such powers 503
and jurisdiction. 504

Sec. 168.13. An operator under sections 168.01 to 168.15 505
of the Revised Code and any utility whose facility is to be 506
crossed or relocated shall cooperate fully in planning and 507
arranging the manner of the crossing or relocation of the 508
utility facility. 509

Sec. 168.14. Nothing in sections 168.01 to 168.15 of the 510
Revised Code shall be construed or deemed to affect any waiver 511
of the sovereign immunity of the public body or any officer or 512
employee of the public body with respect to the participation in 513
or approval of all or any part of the facility or its operation. 514

Sec. 168.15. A state agency may adopt rules under Chapter 515
119. of the Revised Code, a county or township may adopt 516
resolutions, a municipal corporation may adopt ordinances, a 517
state institution of higher education may adopt rules, and a 518
public school may adopt resolutions to carry out sections 168.01 519
to 168.15 of the Revised Code. 520