

20 Lewis St
Providence, RI 02906
June 10, 2024

House Corporations Committee
Rhode Island State House
82 Smith St
Providence, RI 02903

Dear Chair and Committee Members:

I write in opposition to H8344 and its Senate companion S3122, which are up for hearings June 10 (H8344) and June 11 (S3122).

These bills authorize state departments to enter into a long-term contract where a single private vendor is hired in advance not only to design a new facility, but also to construct it and then to operate and maintain it for decades afterwards. The vendor is allowed to take on a financing role for the facility as well, and since the bill suggests that debt will be borrowed by the public sector, the vendor is likely to be on the creditor side of the debt, giving the vendor a serious conflict of interest which may jeopardize project quality. Design-build-finance-operate-maintain contracts are highly risky. It is unlikely that a DBFOM contract will give the best deal for the taxpayers, since DBFOM requires the state to choose the same vendor for construction work, for operation of the facility and for financing, even if it would have been more financially efficient to divide that work among different vendors each chosen for their separate skills and attractive bids.

Not all states even allow design-build deals, whose costs can be extremely open-ended over the decades-long period of the deal. Those states that do allow design-build deals often include statutory requirements for a guaranteed minimum price to be included as part of the contract, so that costs do not balloon in unpredictable ways. This bill completely omits any mention of requiring a guaranteed minimum price. Rhode Island will come to regret it if this bill is passed.

The bill allows a department of state government to go into major debt without consulting voters. Because the debt would be borrowed by a full-fledged department, credit agencies would treat the debt as nearly indistinguishable from state debt, and the state's credit rating would be very much on the line if the debt goes bad. Putting the state's credit rating at risk like that with an actual state department legally on the hook shouldn't be allowed without voter approval.

Nothing in this bill prevents public-private partnerships from taking on moral-obligation debt, the deadly type of debt we saw in 38 Studios that the state had to spend years paying back even though it had become clear there would be no benefit for the state from the project.

The bill gives the governor, together with a commission wholly appointed by the governor, an excessive amount of control over the legal terms of each public-private partnership deal. There would be no oversight by the legislature if a governor who has a pet project to promote wanted to have his or her commission approve a PPP which contains legal terms that are grossly unfair to the taxpayer. It's worth remembering how Gov. Carcieri got us Rhode Islanders into 38 Studios debt to help a political ally of his -- that can happen again with this bill.

The bill exempts PPPs from existing state requirements on price-based competitive bidding and transparency. Key requirements of existing law, such as RIGL 37-2-18 which calls for competitive sealed bidding and immediate public disclosure of bid documents when the bids are opened, would be waived by this bill. See page 6 of the bill, line 20 and lines 27-28. Although the bill has cursory mentions of price, contracts under this bill can be awarded in a way that makes price only a tiny factor. The bill allows choosing a bidder who is not the lowest bidder or even the lowest responsive and responsible bidder.

Some parts of the bill are just gibberish. Page 11, line 20 says “the department and duties of the private entity/operator shall cease”, which is meaningless unless it means that the department will cease to exist.

The bill even allows the vendor to use the state’s eminent domain powers to take over land from owners who are unwilling to sell. Public-private partnerships are often more advantageous to the vendor than to the state, so they’re not good candidates for the extremely coercive power of eminent domain. Eminent domain should be limited to projects that are primarily in the state’s interest

If a PPP deal goes bad, this bill has vague language that might perhaps allow the vendor to be removed in the event of a “material default”. But the definition of a material default is so vague and so generous to the vendor that the state would be sure to be tied up in lawsuits for years struggling to shake off its obligated payments to a vendor who is not doing anything good for the state. Given that design-build PPP deals are so untested in RI, we should not start out by putting language into the statute books that is excessively favorable to the vendor. These are hugely expensive contracts, and it’s more prudent to start with language that’s favorable to the taxpayer instead of the language in this bill which starts out putting the taxpayer at a disadvantage.

This is not the sort of bill to be rushed through at the end of the legislative session. It imposes a largely untested procurement system to be used for “large-scale” projects in a way that would tie the state down to a particular vendor for decades. Before putting a bill like this on the books, it should be vetted with a more deliberative legislative process and more lengthy public discussion.

Sincerely,

Randall Rose