

VIRGINIA ACTS OF ASSEMBLY -- 2003 SESSION

CHAPTER 1034

An Act to amend and reenact §§ 56-575.1 through 56-575.4, 56-575.8, 56-575.9, 56-575.11 and 56-575.16 of the Code of Virginia, relating to the addition of technology infrastructure as a qualifying project under the Public-Private Education Facilities and Infrastructure Act of 2002.

[H 1925]

Approved May 1, 2003

Be it enacted by the General Assembly of Virginia:

1. That §§ 56-575.1 through 56-575.4, 56-575.8, 56-575.9, 56-575.11 and 56-575.16 of the Code of Virginia are amended and reenacted as follows:

§ 56-575.1. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Affected local jurisdiction" means any county, city or town in which all or a portion of a qualifying project is located.

"Commission" means the State Corporation Commission.

"Comprehensive agreement" means the comprehensive agreement between the operator and the responsible public entity required by § 56-575.9.

"Lease payment" means any form of payment, including a land lease, by a public entity to the operator for the use of a qualifying project.

"Material default" means any default by the operator in the performance of its duties under subsection E of § 56-575.8 that jeopardizes adequate service to the public from a qualifying project.

"Operator" means the private or other non-governmental entity that is responsible for any and all of the stages of a qualifying project, or a portion thereof, including (i) acquisition, (ii) design, (iii) construction, (iv) improvement, (v) renovation, (vi) expansion, (vii) equipping, (viii) maintenance, ~~and~~ (ix) operation, (x) *implementation*, and (xi) *installation*.

"Private entity" means any natural person, corporation, limited liability company, partnership, joint venture or other private business entity.

"Public entity" means the Commonwealth and any agency or authority thereof, any county, city or town and any other political subdivision of the Commonwealth or any regional entity that serves a public purpose.

"Qualifying project" means (i) any education facility, including, but not limited to a school building, any functionally related and subordinate facility and land to a school building (including any stadium or other facility primarily used for school events), and any depreciable property provided for use in a school facility that is operated as part of the public school system or as an institution of higher education; (ii) any building or facility for principal use by any public entity; (iii) any improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity; (iv) utility and telecommunications and other communications infrastructure; ~~or~~ (v) a recreational facility; *or (vi) technology infrastructure, including, but not limited to, telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services.*

"Responsible public entity" means a public entity that has the power to acquire, design, construct, improve, renovate, expand, equip, maintain, ~~or~~ operate, *implement, or install* the applicable qualifying project.

"Revenues" means user fees, lease payments, or other service payments generated by a qualifying project.

"Service contract" means a contract entered into between a public entity and the operator pursuant to § 56-575.5.

"Service payments" means payments to the operator of a qualifying project pursuant to a service contract.

"State" means the Commonwealth of Virginia.

"User fees" mean the rates, fees or other charges imposed by the operator of a qualifying project for use of all or a portion of such qualifying project pursuant to the comprehensive agreement pursuant to § 56-575.9.

§ 56-575.2. Declaration of public purpose.

A. The General Assembly finds that:

1. There is a public need for timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, ~~or~~ operation, *implementation, or installation* of education facilities, *technology infrastructure* and other public infrastructure and government facilities within the Commonwealth that serve a public need and purpose;

2. Such public need may not be wholly satisfied by existing methods of procurement in which qualifying projects are acquired, designed, constructed, improved, renovated, expanded, equipped, maintained, ~~or~~ operated, *implemented, or installed*;

3. There are inadequate resources to develop new education facilities, *technology infrastructure* and other public infrastructure and government facilities for the benefit of citizens of the Commonwealth, and there is demonstrated evidence that public-private partnerships can meet these needs by improving the schedule for delivery, lowering the cost, and providing other benefits to the public;

4. Financial incentives exist under state and federal tax provisions that promote public entities to enter into partnerships with private entities to develop qualifying projects; and

5. Authorizing private entities to acquire, design, construct, improve, renovate, expand, equip, maintain, ~~or~~ operate, *implement, or install* one or more qualifying projects may result in the availability of such projects to the public in a more timely or less costly fashion, thereby serving the public safety, benefit, and welfare.

B. An action under § 56-575.4 shall serve the public purpose of this chapter if such action facilitates the timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, ~~or~~ operation, *implementation, or installation* of qualifying projects.

C. It is the intent of this chapter, among other things, to facilitate the bond financing provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 or other similar financing mechanisms, private capital and other funding sources that support the acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, ~~or~~ operation, *implementation, or installation* of qualifying projects, to the end that financing for qualifying projects be expanded and accelerated to improve and add to the convenience of the public, and such that public and private entities may have the greatest possible flexibility in contracting with each other for the provision of the public services that are the subject of this chapter.

D. This chapter shall be liberally construed in conformity with the purposes hereof.

§ 56-575.3. Prerequisite for operation of a qualifying project.

Any private entity seeking authorization under this chapter to acquire, design, construct, improve, renovate, expand, equip, maintain, ~~or~~ operate, *implement, or install* a qualifying project shall first obtain approval of the responsible public entity under § 56-575.4. Such private entity may initiate the approval process by requesting approval pursuant to subsection A of § 56-575.4 or the responsible public entity may request proposals or invite bids pursuant to subsection B of § 56-575.4.

§ 56-575.4. Approval of qualifying projects by the responsible public entity.

A. A private entity may request approval of a qualifying project by the responsible public entity. Any such request shall be accompanied by the following material and information unless waived by the responsible public entity:

1. A topographic map (1:2,000 or other appropriate scale) indicating the location of the qualifying project;

2. A description of the qualifying project, including the conceptual design of such facility or facilities or a conceptual plan for the provision of services *or technology infrastructure*, and a schedule for the initiation of and completion of the qualifying project to include the proposed major responsibilities and timeline for activities to be performed by both the public and private entity;

3. A statement setting forth the method by which the operator proposes to secure any necessary property interests required for the qualifying project. The statement shall include: (i) the names and addresses, if known, of the current owners of the property needed for the qualifying project, (ii) the nature of the property interests to be acquired, and (iii) any property that the responsible public entity expects it will be requested to condemn;

4. Information relating to the current plans for development of facilities *or technology infrastructure* to be used by a public entity that are similar to the qualifying project being proposed by the private entity, if any, of each affected local jurisdiction;

5. A list of all permits and approvals required for the qualifying project from local, state, or federal agencies and a projected schedule for obtaining such permits and approvals;

6. A list of public utility facilities, if any, that will be crossed by the qualifying project and a statement of the plans of the operator to accommodate such crossings;

7. A statement setting forth the operator's general plans for financing the qualifying project including the sources of the operator's funds;

8. The names and addresses of the persons who may be contacted for further information concerning the request;

9. User fees, lease payments, and other service payments over the term of the comprehensive agreement pursuant to § 56-575.9 and the methodology and circumstances for changes to such user fees, lease payments, and other service payments over time; and

10. Such additional material and information as the responsible public entity may reasonably request.

B. The responsible public entity may request proposals or invite bids from private entities for the acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, ~~or~~ operation, *implementation, or installation* of qualifying projects.

C. The responsible public entity may grant approval of the acquisition, construction, improvement, renovation, expansion, maintenance, ~~or~~ operation, *implementation, or installation* of the education facility, *technology infrastructure* or other public infrastructure or government facility needed by a public entity as a qualifying project, or the design or equipping of a qualifying project so acquired, constructed, improved, renovated, expanded, maintained, ~~or~~ operated, *implemented, or installed*, if the responsible public entity determines that the project serves the public purpose of this chapter. The responsible public entity may determine that the acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, ~~or~~ operation, *implementation, or installation* of the qualifying project as a qualifying project serves such public purpose if:

1. There is a public need for or benefit derived from the qualifying project of the type the private entity proposes as a qualifying project;
2. The estimated cost of the qualifying project is reasonable in relation to similar facilities; and
3. The private entity's plans will result in the timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, ~~or~~ operation, *implementation, or installation* of the qualifying project.

In evaluating any request, the responsible public entity may rely upon internal staff reports prepared by personnel familiar with the operation of similar facilities or the advice of outside advisors or consultants having relevant experience.

D. The responsible public entity may charge a reasonable fee to cover the costs of processing, reviewing and evaluating the request, including without limitation, reasonable attorney's fees and fees for financial, *technical*, and other necessary advisors or consultants.

E. The approval of the responsible public entity shall be subject to the private entity's entering into a comprehensive agreement pursuant to § 56-575.9 with the responsible public entity.

F. In connection with its approval of the qualifying project, the responsible public entity shall establish a date for the commencement of activities related to the qualifying project. The responsible public entity may extend such date from time to time.

G. The responsible public entity shall take appropriate action to protect confidential and proprietary information provided by the operator pursuant to an agreement under subdivision A 56 of § 2.2-3705.

H. Nothing in this chapter or in a comprehensive agreement entered into pursuant to this chapter shall be deemed to enlarge, diminish or affect the authority, if any, otherwise possessed by the responsible public entity to take action that would impact the debt capacity of the Commonwealth.

§ 56-575.8. Powers and duties of the operator.

A. The operator shall have all power allowed by law generally to a private entity having the same form of organization as the operator and shall have the power to acquire, design, construct, improve, renovate, maintain, expand, equip, ~~or~~ operate, *implement, or install* the qualifying project and collect lease payments, impose user fees or enter into service contracts in connection with the use thereof.

B. The operator may own, lease or acquire any other right to use or operate the qualifying project.

C. Any financing of the qualifying project may be in such amounts and upon such terms and conditions as may be determined by the operator. Without limiting the generality of the foregoing, the operator may issue debt, equity or other securities or obligations, enter into sale and leaseback transactions and secure any financing with a pledge of, security interest in, or lien on, any or all of its property, including all of its property interests in the qualifying project.

D. In operating the qualifying project, the operator may:

1. Make classifications according to reasonable categories for assessment of user fees; and
2. With the consent of the responsible public entity, make and enforce reasonable rules to the same extent that the responsible public entity may make and enforce rules with respect to similar facilities.

E. The operator shall:

1. Acquire, design, construct, improve, renovate, expand, equip, maintain, ~~or~~ operate, *implement, or install* the qualifying project in a manner that is acceptable to the responsible public entity, all in accordance with the provisions of the comprehensive agreement pursuant to § 56-575.9;

2. Keep the qualifying project open for use by the members of the public at all times, or as appropriate based upon the use of the facility, after its initial opening upon payment of the applicable user fees, lease payments, or service payments; provided that the qualifying project may be temporarily closed because of emergencies or, with the consent of the responsible public entity, to protect the safety of the public or for reasonable construction or maintenance procedures. *In the event that a qualifying project is technology infrastructure, access may be limited as determined by the conditions of the comprehensive agreement;*

3. Maintain, or provide by contract for the maintenance *or upgrade* of the qualifying project, if required by the comprehensive agreement;

4. Cooperate with the responsible public entity in making best efforts to establish any interconnection with the qualifying project requested by the responsible public entity; and

5. Comply with the provisions of the comprehensive agreement and any service contract.

F. Nothing shall prohibit an operator of a qualifying project from providing additional services for the qualifying project to public or private entities other than the responsible public entity so long as the

provision of additional service does not impair the operator's ability to meet its commitments to the responsible public entity pursuant to the comprehensive agreement as provided for in § 56-575.9.

§ 56-575.9. Comprehensive agreement.

A. Prior to acquiring, designing, constructing, improving, renovating, expanding, equipping, maintaining, ~~or~~ operating, *implementing, or installing* the qualifying project, the private entity shall enter into a comprehensive agreement with the responsible public entity. The comprehensive agreement shall provide for:

1. Delivery of maintenance, performance and payment bonds or letters of credit in connection with the acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, ~~or~~ operation, *implementation, or installation* of the qualifying project, in the forms and amounts satisfactory to the responsible public entity;

2. Review of plans and specifications for the qualifying project by the responsible public entity and approval by the responsible public entity if the plans and specifications conform to standards acceptable to the responsible public entity. This shall not be construed as requiring the private entity to complete design of a qualifying project prior to the execution of a comprehensive agreement;

3. Inspection of the qualifying project by the responsible public entity to ensure that the operator's activities are acceptable to the responsible public entity in accordance with the provisions of the comprehensive agreement;

4. Maintenance of a policy or policies of public liability insurance (copies of which shall be filed with the responsible public entity accompanied by proofs of coverage), self-insurance, in form and amount satisfactory to the responsible public entity and reasonably sufficient to insure coverage of tort liability to the public and employees and to enable the continued operation of the qualifying project;

5. Monitoring of the practices of the operator by the responsible public entity to ensure that the qualifying project is properly maintained;

6. Reimbursement to be paid to the responsible public entity for services provided by the responsible public entity;

7. Filing of appropriate financial statements on a periodic basis; and

8. Policies and procedures governing the rights and responsibilities of the responsible public entity and the operator in the event the comprehensive agreement is terminated or there is a material default by the operator. Such policies and procedures shall include conditions governing assumption of the duties and responsibilities of the operator by the responsible public entity and the transfer or purchase of property or other interests of the operator by the responsible public entity.

B. The comprehensive agreement shall provide for such user fees, lease payments, or service payments as may be established from time to time by agreement of the parties. A copy of any service contract shall be filed with the responsible public entity. In negotiating user fees under this section, the parties shall establish payments or fees that are the same for persons using the facility under like conditions and that will not materially discourage use of the qualifying project. The execution of the comprehensive agreement or any amendment thereto shall constitute conclusive evidence that the user fees, lease payments, or service payments provided for comply with this chapter. User fees or lease payments established in the comprehensive agreement as a source of revenues may be in addition to, or in lieu of, service payments.

C. In the comprehensive agreement, the responsible public entity may agree to make grants or loans to the operator from time to time from amounts received from the federal, state, or local government or any agency or instrumentality thereof.

D. The comprehensive agreement shall incorporate the duties of the operator under this chapter and may contain such other terms and conditions that the responsible public entity determines serve the public purpose of this chapter. Without limitation, the comprehensive agreement may contain provisions under which the responsible public entity agrees to provide notice of default and cure rights for the benefit of the operator and the persons specified therein as providing financing for the qualifying project. The comprehensive agreement may contain such other lawful terms and conditions to which the operator and the responsible public entity mutually agree, including, without limitation, provisions regarding unavoidable delays or provisions providing for a loan of public funds to the operator to acquire, design, construct, improve, renovate, expand, equip, maintain, ~~or~~ operate, *implement, or install* one or more qualifying projects. The comprehensive agreement may also contain provisions where the authority and duties of the operator under this chapter shall cease, and the qualifying project is dedicated to the responsible public entity or, if the qualifying project was initially dedicated by an affected local jurisdiction, to such affected local jurisdiction for public use.

E. Any changes in the terms of the comprehensive agreement, as may be agreed upon by the parties from time to time, shall be added to the comprehensive agreement by written amendment.

F. When a responsible public entity that is not an agency or authority of the Commonwealth enters into a comprehensive agreement pursuant to this chapter, it shall within ~~thirty~~ 30 days thereafter submit a copy of the comprehensive agreement to the Auditor of Public Accounts.

§ 56-575.11. Material default; remedies.

A. In the event of a material default by the operator, the responsible public entity may elect to

assume the responsibilities and duties of the operator of the qualifying project, and in such case, it shall succeed to all of the right, title and interest in such qualifying project, subject to any liens on revenues previously granted by the operator to any person providing financing thereof.

B. Any responsible public entity having the power of condemnation under state law may exercise such power of condemnation to acquire the qualifying project in the event of a material default by the operator. Any person who has provided financing for the qualifying project, and the operator, to the extent of its capital investment, may participate in the condemnation proceedings with the standing of a property owner.

C. The responsible public entity may terminate, with cause, the comprehensive agreement and exercise any other rights and remedies that may be available to it at law or in equity.

D. The responsible public entity may make or cause to be made any appropriate claims under the maintenance, performance, or payment bonds; or lines of credit required by subsection A 1 of § 56-575.9.

E. In the event the responsible public entity elects to take over a qualifying project pursuant to subsection A, the responsible public entity may acquire, design, construct, improve, renovate, operate, expand, equip, ~~or~~ maintain, *implement, or install* the qualifying project, impose user fees, impose and collect lease payments for the use thereof and comply with any service contracts as if it were the operator. Any revenues that are subject to a lien shall be collected for the benefit of and paid to secured parties, as their interests may appear, to the extent necessary to satisfy the operator's obligations to secured parties, including the maintenance of reserves. Such liens shall be correspondingly reduced and, when paid off, released. Before any payments to, or for the benefit of, secured parties, the responsible public entity may use revenues to pay current operation and maintenance costs of the qualifying project, including compensation to the responsible public entity for its services in operating and maintaining the qualifying project. The right to receive such payment, if any, shall be considered just compensation for the qualifying project. The full faith and credit of the responsible public entity shall not be pledged to secure any financing of the operator by the election to take over the qualifying project. Assumption of operation of the qualifying project shall not obligate the responsible public entity to pay any obligation of the operator from sources other than revenues.

§ 56-575.16. Procurement.

The Virginia Public Procurement Act (§ 2.2-4300 et seq.) and any interpretations, regulations, or guidelines of the Division of Engineering and Buildings of the Department of General Services *or the Department of Information Technology*, including the Capital Outlay Manual and those interpretations, regulations or guidelines developed pursuant to §§ 2.2-1131, 2.2-1132, 2.2-1133, 2.2-1149, and 2.2-1502, except those developed by the Division *or the Department of Information Technology* in accordance with this chapter when the Commonwealth is the responsible public entity, shall not apply to this chapter. However, a responsible public entity may enter into a comprehensive agreement only in accordance with procedures adopted by it as follows:

1. A responsible public entity may enter into a comprehensive agreement in accordance with procedures adopted by it that are consistent with procurement through competitive sealed bidding as defined in § 2.2-4301 and subsection B of § 2.2-4310.

2. A responsible public entity may enter into a comprehensive agreement in accordance with procedures adopted by it that are consistent with the procurement of "other than professional services" through competitive negotiation as defined in § 2.2-4301 and subsection B of § 2.2-4310. Such responsible public entity shall not be required to select the proposal with the lowest price offer, but may consider price as one factor in evaluating the proposals received. A responsible public entity shall proceed in accordance with the procedures adopted by it pursuant to subdivision 1 unless it determines that proceeding in accordance with the procedures adopted by it pursuant to this subdivision is likely to be advantageous to the responsible public entity and the public, based on (i) the probable scope, complexity or urgency of the project, or (ii) risk sharing, added value, an increase in funding or economic benefit from the project that would not otherwise be available. When the responsible public entity determines to proceed according to the procedures adopted by it pursuant to this subdivision, it shall state the reasons for its determination in writing. If a state agency is the responsible public entity, the approval of the responsible Governor's Secretary, or the Governor, shall be required before the responsible public entity may enter into a comprehensive agreement pursuant to this subdivision.

3. Nothing in this chapter shall authorize or require that a responsible public entity obtain professional services through any process except in accordance with procedures adopted by it that are consistent with the procurement of "professional services" through competitive negotiation as defined in § 2.2-4301 and subsection B of § 2.2-4310.

4. A responsible public entity shall not proceed to consider any request by a private entity for approval of a qualifying project pursuant to subsection A of § 56-575.4 until the responsible public entity has adopted and made publicly available procedures that are sufficient to enable the responsible public entity to comply with this chapter. Such procedures shall include provision for the posting and publishing of public notice of a private entity's request for approval of a qualifying project pursuant to subsection A of § 56-575.4 and a reasonable time period, to be no less than ~~forty-five~~ 45 days, during

which the responsible public entity will receive competing proposals pursuant to that subsection.

5. A responsible public entity that is a school board or a county, city or town may enter into a comprehensive agreement under this chapter only with the approval of the local governing body.