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SENATE BILL NO. 174

Offered January 11, 2006

Prefiled January 10, 2006

A BILL to amend and reenact §§ 56-557, 56-575.1, 56-575.3:1, and 56-575.16 of the Code of Virginia and to amend the Code of Virginia by adding in Title 30 a chapter numbered 40, consisting of sections numbered 30-266 and 30-267, and by adding a section numbered 56-557.1, relating to the Public-Private Transportation and Public-Private Education Facilities and Infrastructure Acts; guidelines; Public-Private Partnership Advisory Commission.

Patron—Wampler

Referred to Committee on Finance

Be it enacted by the General Assembly of Virginia:

1. That §§ 56-557, 56-575.1, 56-575.3:1, and 56-575.16 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Title 30 a chapter numbered 40, consisting of sections numbered 30-266 and 30-267, and by adding a section numbered 56-557.1, as follows:

CHAPTER 40.**PUBLIC-PRIVATE PARTNERSHIP ADVISORY COMMISSION.**

§ 30-266. Public-Private Partnership Advisory Commission established; membership; terms; compensation; staff; quorum.

A. The Public-Private Partnership Advisory Commission (the Commission) is hereby created as an advisory commission in the legislative branch. The purpose of the Commission shall be to review and provide advisory opinions regarding the terms of interim and comprehensive agreements under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) and the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) prior to execution of such agreements by the responsible public entity that is an agency or institution of the Commonwealth.

B. The Commission shall consist of eight members as follows: the chairmen, or their designees, of the Senate Finance Committee, the House Finance Committee, the House Appropriations Committee, the House General Laws Committee, and the Senate General Laws Committee, and the Secretaries of Administration, Finance, and Transportation or their designees. Legislative members shall serve on the Commission until the expiration of their terms of office or until their successors shall qualify. Executive branch agency members shall serve only as long as they retain their positions.

C. The members of the Commission shall elect from among the legislative membership a chairman and a vice-chairman who shall serve for two-year terms. The Commission shall hold meetings quarterly or upon the call of the chairman. A majority of the Commission shall constitute a quorum.

D. Members of the Commission shall receive no compensation for their services but shall be reimbursed for all reasonable and necessary expenses incurred in the performance of their duties as provided in §§ 2.2-2813, 2.2-2825 and 30-19.12, as appropriate.

E. Administrative staff support shall be provided by the Office of the Clerk of the Senate or the Office of the Clerk of the House of Delegates as may be appropriate for the house in which the chairman of the Commission serves. Additional assistance as needed shall be provided by the staffs of the House Committee on Appropriations and the Senate Finance Committee.

§ 30-267. Review of interim and comprehensive agreements; submission by responsible public entities.

A. The Commission may review the terms of interim or comprehensive agreements being negotiated under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) and the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) prior to signing by the responsible public entity when the entity is an agency or institution of the Commonwealth. Based on its review, the Commission may issue an advisory, nonbinding opinion regarding the terms and conditions of the agreement.

B. Each responsible public entity that is an agency or institution of the Commonwealth shall notify the Commission of proposed qualifying projects that are intended to be approved or for which such responsible public entity intends to seek additional competition. The Commission may decline to accept for review the terms and conditions of any proposed interim or comprehensive agreement.

C. The Commission shall review the terms and conditions of all interim or comprehensive agreements accepted for review within 45 days of receiving notification from the responsible public entity, and issue an advisory, nonbinding opinion regarding (i) whether the terms of the interim or

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SB174

59 *comprehensive agreement would represent a claim or material commitment against the bond capacity of*
60 *the Commonwealth, (ii) whether the terms and conditions of the proposed agreement are in the best*
61 *interests of the Commonwealth, and (iii) whether the qualifying project that is proposed pursuant to the*
62 *agreement should proceed initially to an interim agreement. Review by the Commission shall not*
63 *constitute approval of any appropriation necessary to implement the interim or comprehensive*
64 *agreement.*

65 *D. The Commission shall notify in writing the Governor, the General Assembly, and each affected*
66 *state agency of its decision. Upon receipt of the opinion of the Commission, the responsible public entity*
67 *shall report to the Commission on the extent to which any concerns or recommendations contained in*
68 *the opinion will be addressed in the interim or comprehensive agreement.*

69 § 56-557. Definitions.

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

71 "Affected jurisdiction" means any county, city or town in which all or a portion of a qualifying
72 transportation facility is located and any other responsible public entity directly affected by the
73 qualifying transportation facility.

74 "Appropriating body" means the body responsible for appropriating or authorizing funding to pay for
75 a qualifying project.

76 "Asset management" means a systematic process of operating and maintaining the state system of
77 highways by combining engineering practices and analyses with sound business practices and economic
78 theory to achieve cost-effective outcomes.

79 "Commission" means the State Corporation Commission.

80 "Comprehensive agreement" means the comprehensive agreement between the private entity and the
81 responsible public entity required by § 56-566 of this chapter.

82 "Develop" or "development" means to plan, design, develop, finance, lease, acquire, install, construct,
83 or expand.

84 "Interim agreement" means an agreement, including a memorandum of understanding or binding
85 preliminary agreement, between the private entity and the responsible public entity that provides for
86 completion of studies and any other activities to advance the development and/or operation of a
87 qualifying transportation facility.

88 "Maintenance" means that term as defined in § 33.1-23.02.

89 "Material default" means any default by the private entity in the performance of its duties under
90 subsection E of § 56-565 of this chapter that jeopardizes adequate service to the public from a
91 qualifying transportation facility and remains unremedied after the responsible public entity has provided
92 notice to the private entity and a reasonable cure period has elapsed.

93 "Multimodal transportation facility" means a transportation facility consisting of multiple modes of
94 transportation.

95 "Operate" or "operation" means to finance, maintain, improve, equip, modify, repair, or operate.

96 "Private entity" means any natural person, corporation, general partnership, limited liability company,
97 limited partnership, joint venture, business trust, public benefit corporation, non-profit entity or other
98 business entity.

99 "Public entity" means the Commonwealth and any agency or authority thereof, any county, city, or
100 town and any other political subdivision of any of the foregoing, but shall not include any public service
101 company.

102 "Qualifying transportation facility" means one or more transportation facilities developed and/or
103 operated by a private entity pursuant to this chapter.

104 "Responsible public entity" means a public entity, including local governments and regional
105 authorities, that has the power to develop and/or operate the qualifying transportation facility.

106 "Revenues" means all revenues, including, but not limited to, income, earnings, user fees, lease
107 payments, allocations, federal, state and local appropriations, bond proceeds, equity investments, and/or
108 service payments arising out of or in connection with supporting the development and/or operation of a
109 qualifying transportation facility, including without limitation, money received as grants or otherwise
110 from the United States of America, from any public entity, or from any agency or instrumentality of the
111 foregoing in aid of such facility.

112 "Service contract" means a contract entered into between a public entity and the private entity
113 pursuant to § 56-561 of this chapter.

114 "Service payments" means payments to the private entity in connection with the development and/or
115 operation of a qualifying transportation facility pursuant to a service contract.

116 "State" means the Commonwealth of Virginia.

117 "Transportation facility" means any road, bridge, tunnel, overpass, ferry, airport, mass transit facility,
118 vehicle parking facility, port facility or similar commercial facility used for the transportation of persons
119 or goods, together with any buildings, structures, parking areas, appurtenances, and other property
120 needed to operate such facility.

"User fees" mean the rates, tolls, fees, or other charges imposed by the private entity for use of all or a portion of a qualifying transportation facility pursuant to the interim or comprehensive agreement.

§ 56-557.1. *Adoption of guidelines by responsible public entities.*

A. A responsible public entity shall, prior to requesting or considering a proposal for a qualifying facility, adopt and make publicly available guidelines that are sufficient to enable the responsible public entity to comply with this chapter. Such guidelines shall guide the selection of projects under the purview of the responsible public entity.

B. Such guidelines shall include, but not be limited to, provisions for:

1. Reasonable criteria for ensuring competition, choosing among competitive proposals, and suggested timelines for selecting proposals and negotiating an interim or comprehensive agreement;

2. Authorization for accelerated selection, review, and documentation timelines for proposals involving a qualifying facility that the responsible public entity deems a priority;

3. Financial review and analysis procedures that shall include, at a minimum, a cost-benefit analysis, an assessment of opportunity cost, and consideration of the results of all studies and analyses related to the proposed qualifying project. These procedures shall also include requirements for disclosure of such analysis to the appropriating body before finalizing either the interim or comprehensive agreement;

4. Consideration of the nonfinancial benefits of the proposed qualifying project;

5. A mechanism for the appropriating body to review the interim or comprehensive agreement before it is finalized;

6. Establishment of criteria for the creation of and the responsibilities of a public-private partnership oversight committee with members representing the responsible public entity and the appropriating body. Such criteria shall include the scope, costs, and duration of the qualifying project, as well as whether the project involves or impacts multiple public entities. The oversight committee, if formed, shall be an advisory committee to review the terms of any interim or comprehensive agreement;

7. Analysis of the adequacy of the information released when seeking competing proposals and providing for the enhancement of that information, if deemed necessary, to encourage competition pursuant to subsection G of § 56-575.4; and

8. Establishment of criteria, key decision points, and approvals required to ensure that the responsible public entity considers the extent of competition before selecting proposals and negotiating an interim or comprehensive agreement.

§ 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.

"Appropriating body" means the body responsible for appropriating or authorizing funding to pay for a qualifying project.

"Commission" means the State Corporation Commission.

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

"Develop" or "development" means to plan, design, develop, finance, lease, acquire, install, construct, or expand.

"Interim agreement" means an agreement between a private entity and a responsible public entity that provides for phasing of the development or operation, or both, of a qualifying project. Such phases may include, but are not limited to, design, planning, engineering, environmental analysis and mitigation, financial and revenue analysis, or any other phase of the project that constitutes activity on any part of the qualifying project.

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

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

"Operate" means to finance, maintain, improve, equip, modify, repair, or operate.

"Private entity" means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, non-profit entity, or other 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, any public body politic and corporate, 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

182 education; (ii) any building or facility that meets a public purpose and is developed or operated by or
183 for any public entity; (iii) any improvements, together with equipment, necessary to enhance public
184 safety and security of buildings to be principally used by a public entity; (iv) utility and
185 telecommunications and other communications infrastructure; (v) a recreational facility; (vi) technology
186 infrastructure, including, but not limited to, telecommunications, automated data processing, word
187 processing and management information systems, and related information, equipment, goods and
188 services; or (vii) any improvements necessary or desirable to any unimproved locally- or state-owned
189 real estate.

190 "Responsible public entity" means a public entity that has the power to develop or operate the
191 applicable qualifying project.

192 "Revenues" means all revenues, income, earnings, user fees, lease payments, or other service
193 payments arising out of or in connection with supporting the development or operation of a qualifying
194 project, including without limitation, money received as grants or otherwise from the United States of
195 America, from any public entity, or from any agency or instrumentality of the foregoing in aid of such
196 facility.

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

199 "Service payments" means payments to the private entity of a qualifying project pursuant to a service
200 contract.

201 "State" means the Commonwealth of Virginia.

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

205 § 56-575.3:1. Adoption of guidelines by responsible public entities.

206 A. ~~Any~~ A responsible public entity *shall, prior to requesting or considering a proposal for a*
207 *qualifying facility shall, adopt and make publicly available guidelines that are sufficient to enable the*
208 *responsible public entity to comply with this chapter. Such guidelines shall guide the selection of*
209 *projects under the purview of the responsible public entity and include, but not be limited to, reasonable*
210 *criteria for choosing among competitive proposals and timelines for selecting proposals and negotiating*
211 *an interim or comprehensive agreement.*

212 B. Such guidelines shall ~~permit accelerated selection, review and documentation timelines for~~
213 ~~proposals involving a qualifying facility that the responsible public entity deems a priority-include, but~~
214 ~~not be limited to, provisions for:~~

215 1. *Reasonable criteria for ensuring competition, choosing among competitive proposals, and*
216 *suggested timelines for selecting proposals and negotiating an interim or comprehensive agreement;*

217 2. *Authorization for accelerated selection, review, and documentation timelines for proposals*
218 *involving a qualifying facility that the responsible public entity deems a priority;*

219 3. *Financial review and analysis procedures that shall include, at a minimum, a cost-benefit analysis,*
220 *an assessment of opportunity cost, and consideration of the results of all studies and analyses related to*
221 *the proposed qualifying project. These procedures shall also include requirements for disclosure of such*
222 *analysis to the appropriating body before finalizing either the interim or comprehensive agreement;*

223 4. *Consideration of the nonfinancial benefits of the proposed qualifying project;*

224 5. *A mechanism for the appropriating body to review the interim or comprehensive agreement before*
225 *it is finalized;*

226 6. *Establishment of criteria for the creation of and the responsibilities of a public-private partnership*
227 *oversight committee with members representing the responsible public entity and the appropriating body.*
228 *Such criteria shall include the scope, costs, and duration of the qualifying project, as well as whether*
229 *the project involves or impacts multiple public entities. The oversight committee, if formed, shall be an*
230 *advisory committee to review the terms of any interim or comprehensive agreement;*

231 7. *Analysis of the adequacy of the information released when seeking competing proposals and*
232 *providing for the enhancement of that information, if deemed necessary, to encourage competition*
233 *pursuant to subsection G of § 56-575.4;*

234 8. *Establishment of criteria, key decision points, and approvals required to ensure that the*
235 *responsible public entity considers the extent of competition before selecting proposals and negotiating*
236 *an interim or comprehensive agreement;*

237 9. *If the responsible public entity is not an agency or authority of the Commonwealth, a requirement*
238 *that the responsible public entity engage the services of qualified professionals, which may include an*
239 *architect, professional engineer, or certified public accountant, not employed by the responsible public*
240 *entity to provide to the responsible public entity independent analysis regarding the specifics,*
241 *advantages, disadvantages, and the long- and short-term costs of any request by a private entity for*
242 *approval of a qualifying project, unless the governing body of the responsible public entity determines*
243 *that such analysis of a request by a private entity for approval of a qualifying project shall be*

performed by employees of the responsible public entity; and

10. The posting and publishing of public notice of a private entity's request for approval of a qualifying project, including specific information and documentation to be released regarding the nature, timing, and scope of the qualifying project pursuant to subsection A of § 56-575.4 and a reasonable time period, determined by the responsible public entity to be appropriate to encourage competition and public-private partnerships pursuant to the goals of this chapter, such reasonable period not to be less than 45 days, during which the responsible public entity will receive competing proposals pursuant to that subsection. In addition, a requirement for advertising the public notice in the Virginia Business Opportunities publication and posting a notice on the Commonwealth's electronic procurement website shall be included.

§ 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 Virginia Information Technologies Agency, 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 Virginia Information Technologies Agency 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 guidelines adopted by it as follows:

1. A responsible public entity may enter into a comprehensive agreement in accordance with guidelines 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 guidelines 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. Other factors that may be considered include (i) the proposed cost of the qualifying facility; (ii) the general reputation, industry experience, and financial capacity of the private entity; (iii) the proposed design of the qualifying project; (iv) the eligibility of the facility for accelerated selection, review, and documentation timelines under the responsible public entity's guidelines; (v) local citizen and government comments; (vi) benefits to the public; (vii) the private entity's compliance with a minority business enterprise participation plan or good faith effort to comply with the goals of such plan; (viii) the private entity's plans to employ local contractors and residents; and (ix) other criteria that the responsible public entity deems appropriate.

A responsible public entity shall proceed in accordance with the guidelines adopted by it pursuant to subdivision 1 unless it determines that proceeding in accordance with the guidelines 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 priority of the project; (ii) risk sharing including guaranteed cost or completion guarantees, added value or debt or equity investments proposed by the private entity; or (iii) an increase in funding, dedicated revenue source or other economic benefit that would not otherwise be available. When the responsible public entity determines to proceed according to the guidelines 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 guidelines 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 guidelines pursuant to § 56-575.3:1 that are sufficient to enable the responsible public entity to comply with this chapter. Such guidelines shall:

a. If the responsible public entity is not an agency or authority of the Commonwealth, require the responsible public entity to engage the services of qualified professionals, which may include an architect, professional engineer or certified public accountant, not employed by the responsible public entity to provide to the responsible public entity independent analysis regarding the specifics, advantages, disadvantages, and the long- and short-term costs of any request by a private entity for approval of a qualifying project, unless the governing body of the responsible public entity determines that such analysis of a request by a private entity for approval of a qualifying project shall be performed by employees of the responsible public entity.

305 b. Provide for the posting and publishing of public notice of a private entity's request for approval of
306 a qualifying project pursuant to subsection A of § 56-575.4 and a reasonable time period, determined by
307 the responsible public entity to be appropriate to encourage competition and public-private partnerships
308 pursuant to the goals of this chapter, such reasonable period not to be less than 45 days, during which
309 the responsible public entity will receive competing proposals pursuant to that subsection.

310 Such guidelines shall also require advertising the public notice in the Virginia Business Opportunities
311 publication and posting a notice on the Commonwealth's electronic procurement website.

312 5. Once a comprehensive agreement has been entered into, and the process of bargaining of all
313 phases or aspects of the comprehensive agreement is complete, a responsible public entity shall make
314 available, upon request, procurement records in accordance with § 2.2-4342.

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

318 **2. That the chairmen of the Senate and House Committees on General Laws and Transportation,**
319 **respectively, shall convene a working group consisting of representatives of public and private**
320 **entities to revise the current model guidelines to incorporate amendments to the Public-Private**
321 **Transportation Act of 1995 (§ 56-556 et seq. of the Code of Virginia) and the Public-Private**
322 **Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq. of the Code of Virginia) in**
323 **accordance with this act. The working groups shall make their recommendations available to the**
324 **responsible public entities by September 30, 2006.**

325 **3. That the provisions of this act shall apply to prospective qualifying projects as defined under**
326 **the Public-Private Education Facilities and Infrastructure Act of 2002.**