

VIRGINIA ACTS OF ASSEMBLY -- 2007 SESSION

CHAPTER 764

An Act to amend and reenact §§ 56-575.1, 56-575.3:1, 56-575.4, and 56-575.16 of the Code of Virginia and to amend the Code of Virginia by adding in Title 30 a chapter numbered 42, consisting of sections numbered 30-278 through 30-281, and by adding in Chapter 22.1 of Title 56 a section numbered 56-575.18, relating to the Public-Private Partnership Advisory Commission.

[S 756]

Approved March 23, 2007

Be it enacted by the General Assembly of Virginia:

1. That §§ 56-575.1, 56-575.3:1, 56-575.4, 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 42, consisting of sections numbered 30-278 through 30-281, and by adding in Chapter 22.1 of Title 56 a section numbered 56-575.18 as follows:

CHAPTER 42.

PUBLIC-PRIVATE PARTNERSHIP ADVISORY COMMISSION.

§ 30-278. Definitions.

As used in this chapter:

"Commission" means the Public-Private Partnership Advisory Commission.

"Comprehensive agreement" means the same as the term is defined in the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.).

"Detailed proposal" means a proposal accepted by a responsible public entity beyond a conceptual level of review and at which time issues such as fixing costs, payment schedules, financing, deliverables, and project schedule are defined.

"Interim agreement" means the same as the term is defined in the Public-Private Education Facilities and Infrastructure Act of 2002.

"Qualifying project" means the same as that term is defined in the Public-Private Education Facilities and Infrastructure Act of 2002.

"Responsible public entity" means a public entity that is an agency or institution of the Commonwealth and that has the power to develop or operate a qualifying project.

§ 30-279. Public-Private Partnership Advisory Commission established; membership; terms; compensation; staff; quorum.

A. The Public-Private Partnership Advisory Commission (the Commission) is established as an advisory commission in the legislative branch. The purpose of the Commission shall be to advise responsible public entities that are agencies or institutions of the Commonwealth on proposals received pursuant to the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.).

B. The Commission shall consist of 11 members, including eight legislative members, as follows: (i) the Chair of the House Committee on Appropriations or his designee and four members of the House of Delegates appointed by the Speaker of the House, (ii) the Chair of the Senate Committee on Finance or his designee and two members of the Senate appointed by the Senate Committee on Rules, and (iii) the Secretary of Administration, the Secretary of Finance, and the Secretary of Technology 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 and the Auditor of Public Accounts.

F. A copy of the proceedings of the Commission shall be filed with the Division of Legislative Services.

§ 30-280. Submission by responsible public entities of detailed proposals for qualifying projects; exclusion of certain qualifying projects; review of detailed proposals; copies of interim and comprehensive agreements to be provided.

A. Each responsible public entity receiving detailed proposals from private entities for a qualifying project shall provide copies of such proposals to the Commission prior to entering into the negotiation of an interim or comprehensive agreement.

B. The following qualifying projects shall not be subject to review by the Commission:

1. Any proposed qualifying project with a total cost of less than \$3 million.

2. Any proposed qualifying project with a total cost of more than \$3 million but less than \$50 million for which funds have been specifically appropriated as a public-private partnership in the general appropriation act or capital construction projects that have been authorized in the appropriation act, provided such project does not increase in size more than five percent beyond the plans and justifications that were the basis of the appropriation. For any qualifying project that will be completed in phases and for which no appropriation has been made for phases other than the current phase of the project, the Commission may undertake additional reviews of such projects.

C. Within 10 days of receipt of a complete copy of the detailed proposals for a qualifying project, the Commission shall determine whether to accept or decline such proposals for review and notify the responsible public entity of its decision. If the Commission accepts a proposal for review, the findings and recommendations of the Commission shall be provided to the responsible public entity within 45 days of receiving complete copies of the detailed proposals. If no findings or recommendations are provided by the Commission to the responsible public entity within the 45-day period, the Commission shall be deemed to have no findings or recommendations. Upon acceptance for review, the responsible public entity shall provide any additional information regarding the qualifying project upon the request of the Commission, provided such information is available to or can be obtained by the responsible public entity.

D. The Commission shall review accepted detailed proposals and provide findings and recommendations to the responsible public entity, including (i) whether the terms and conditions of the proposals and proposed qualifying project create state tax-supported debt taking into consideration the specific findings of the Secretary of Finance with respect to such recommendation, (ii) an analysis of the potential financial impact of the qualifying project, (iii) a review of the policy aspects of the detailed proposals and the qualifying project, and (iv) proposed general business terms and conditions. Review by the Commission shall not be construed to constitute approval of any appropriations necessary to implement any subsequent interim or comprehensive agreement.

E. The responsible public entity shall not commence negotiation of an interim or comprehensive agreement until the Commission has submitted its recommendations or declined to accept the detailed proposals for review.

F. The responsible public entity shall submit a copy of the proposed interim or comprehensive agreement to the Commission at least 30 days prior to execution of the agreement along with a report describing the extent to which the Commission's recommendations were addressed in the proposed interim or comprehensive agreement.

§ 30-281. Confidentiality of certain records submitted to the Commission.

Records and information afforded the protection under subdivision 11 of § 2.2-3705.6 that are provided by a responsible public entity to the Commission shall continue to be protected from disclosure when in the possession of the Commission.

§ 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 education; (ii) any building or facility that meets a public purpose and is developed or operated by or for 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; (v) a recreational facility; (vi) technology infrastructure *and services*, including, but not limited to, telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services; or (vii) any improvements necessary or desirable to any unimproved locally- or state-owned real estate.

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

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

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

"Service payments" means payments to the private entity 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 private entity 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.

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

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

B. ~~Such~~ For a responsible public entity that is an agency or institution of the Commonwealth, the guidelines shall ~~permit accelerated selection, review and documentation timelines for proposals involving a qualifying facility that the responsible public entity deems a priority.~~ *include, but not be limited to:*

1. *Opportunities for competition through public notice and availability of representatives of the responsible public entity to meet with private entities considering a proposal;*

2. *Reasonable criteria for choosing among competing proposals;*

3. *Suggested timelines for selecting proposals and negotiating an interim or comprehensive agreement;*

4. *Authorization for accelerated selection and review and documentation timelines for proposals involving a qualifying project that the responsible public entity deems a priority;*

5. *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 the disclosure of such analysis to the appropriating body for review prior to execution of an interim or comprehensive agreement;*

6. *Consideration of the nonfinancial benefits of a proposed qualifying project;*

7. *A mechanism for the appropriating body to review a proposed interim or comprehensive agreement prior to execution, which shall be in compliance with applicable law and the provisions of subsection 1 of § 56-575.4 pertaining to the approval of qualifying projects;*

8. *Establishment of criteria for (i) the creation of and the responsibilities of a public-private partnership oversight committee with members representing the responsible public entity and the appropriating body or (ii) compliance with the requirements of Chapter 42 (§ 30-278 et seq.) of Title 30. 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 proposed interim or comprehensive agreement;*

9. *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;

10. 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; and

11. The posting and publishing of public notice of a private entity's request for approval of a qualifying project, including (i) 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; (ii) a reasonable time period as determined by the responsible public entity to encourage competition and public-private partnerships in accordance with the goals of this chapter, such reasonable period not to be less than 45 days, during which time the responsible public entity shall receive competing proposals pursuant to subsection A of § 56-575.4; and (iii) 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.

C. For a responsible public entity that is not an agency or institution of the Commonwealth the guidelines may include the provisions set forth in subsection B in the discretion of such public entity. However, the guidelines of a responsible public entity that is not an agency or institution of the Commonwealth shall include:

1. A requirement that it engage the services of qualified professionals, which may include an architect, professional engineer, or certified public accountant, not otherwise employed by the responsible public entity, to provide 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; and

2. A mechanism for the appropriating body to review a proposed interim or comprehensive agreement prior to execution.

§ 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 private entity proposes to secure necessary property interests required for the qualifying project;

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 private entity to accommodate such crossings;

7. A statement setting forth the private entity's general plans for financing the qualifying project including the sources of the private entity's funds and identification of any dedicated revenue source or proposed debt or equity investment on the behalf of the private entity;

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 interim or comprehensive agreement pursuant to § 56-575.9 or 56-575.9:1 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 development or operation of qualifying projects.

C. The responsible public entity may grant approval of the development or operation 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 developed or operated, if the responsible public entity determines that the project serves the public purpose of this chapter. The responsible public entity may determine that the development or operation 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 development or operation 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 an interim or 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 private entity pursuant to an agreement under subdivision 11 of § 2.2-3705.6.

H. Nothing in this chapter or in an interim or 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.

I. Prior to entering into the negotiation of an interim or comprehensive agreement, each responsible public entity that is an agency or institution of the Commonwealth shall submit copies of detailed proposals to the Public-Private Partnership Advisory Commission as provided by Chapter 42 (§ 30-278 et seq.) of Title 30.

J. Any proposed comprehensive agreement for a qualifying project where the responsible public entity is an agency or institution of the Commonwealth that (i) creates state tax-supported debt, (ii) requires a level of appropriation significantly beyond the appropriation received by the responsible public entity in the most recent appropriation act, or (iii) significantly alters the Commonwealth's discretion to change the level of services or the funding for such services over time, shall be reviewed by the appropriating body prior to execution.

§ 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.

b. Provide 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, 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.

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

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

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

§ 56-575.18. Auditor of Public Accounts.

The Auditor of Public Accounts shall periodically review interim and comprehensive agreements entered into pursuant to this chapter to ensure compliance with the provisions of this chapter.

2. That the provisions of this act shall apply to proposals submitted to a responsible public entity on or after July 1, 2007.

3. That the Chairmen of the Senate Committee on General Laws and Technology and the House Committee on General Laws shall convene a working group of representatives of public and private entities to revise the current model guidelines to incorporate amendments to the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) in accordance with this act. The group shall make its recommendations available to the responsible public entities by September 30, 2007.