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SENATE BILL NO. 860

Offered January 9, 2013

Prefiled January 3, 2013

A *BILL to amend and reenact §§ 30-278, 30-279, 56-560, 56-575.3:1, and 56-575.4 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 2.2-1156.1 and 30-280.1, relating to procurement by state entities using public private partnerships; Public-Private Transportation Act; Public-Private Education Facilities and Infrastructure Act of 2002.*

Patron—Lucas

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 30-278, 30-279, 56-560, 56-575.3:1, and 56-575.4 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 2.2-1156.1 and 30-280.1 as follows:

§ 2.2-1156.1. Limitations regarding certain real property assets.

No real property asset that produces annual average revenue for the Commonwealth of \$10 million or more over the five most recent fiscal years or \$10 million revenue for the Commonwealth in the most recent fiscal year shall be (i) the subject of any lease, concession agreement, or similar type of agreement that transfers to a private entity possession or control of the asset for more than 10 years at a time, including any renewal, (ii) sold, or (iii) securitized as a part of a qualified transportation facility under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or a qualified project under the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) unless the real property asset has been declared to be surplus property by the Department or the Department of Transportation. As used in this section, "private entity" means the same as the term is defined in the Public-Private Transportation Act of 1995 or in the Public-Private Education Facilities and Infrastructure Act of 2002.

§ 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 Transportation Act of 1995* (§ 56-556 et seq.) or 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 Transportation Act of 1995* (§ 56-556 et seq.) or 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*.

"Qualifying transportation facility" means the same as that term is defined in the *Public-Private Transportation Act of 1995* (§ 56-556 et seq.).

"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 12 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, and the Secretary of 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.

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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. The Division of Legislative Services shall provide legal, research, and policy analysis services to the Commission. Technical assistance shall be provided by the staffs of the House Committee on Appropriations and the Senate Finance Committee and the Auditor of Public Accounts. Additional assistance as needed shall be provided by the Department of General Services.

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

§ 30-280.1. Notice of receipt of proposals; review of major business points of comprehensive agreements for qualifying transportation facilities prior to execution.

A. The responsible public entity receiving a detailed proposal from a private entity for a qualifying transportation facility shall provide notice of the receipt of such proposal to the Commission.

B. Prior to executing any comprehensive agreement for a qualifying transportation facility, the responsible public entity shall provide a summary containing the major business points of the agreement to the Commission. Based on the review of the major business points, the Commission may provide comment on (i) whether the agreement and proposed qualifying transportation facility create state tax-supported debt, taking into consideration the specific findings of the Secretary of Finance with respect to such recommendation, (ii) the policy aspects of the qualifying transportation facility, and (iii) the major business points. The comments of the Commission, if any, shall be provided within 45 days of receiving a complete summary of the major business points of the agreement.

Review by the Commission shall not be construed to constitute approval of any appropriations necessary to implement any subsequent comprehensive agreement.

§ 56-560. Approval by the responsible public entity.

A. The private entity may request approval by the responsible public entity. Any such request shall be accompanied by the following material and information unless waived by the responsible public entity in its guidelines or other instructions given, in writing, to the private entity with respect to the transportation facility or facilities that the private entity proposes to develop and/or operate as a qualifying transportation facility:

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

2. A description of the transportation facility or facilities, including the conceptual design of such facility or facilities and all proposed interconnections with other transportation facilities;

3. The proposed date for development and/or operation of the transportation facility or facilities along with an estimate of the life-cycle cost of the transportation facility as proposed;

4. A statement setting forth the method by which the private entity proposes to secure any property interests required for the transportation facility or facilities;

5. Information relating to the current transportation plans, if any, of each affected jurisdiction;

6. A list of all permits and approvals required for developing and/or operating improvements to the transportation facility or facilities from local, state, or federal agencies and a projected schedule for obtaining such permits and approvals;

7. A list of public utility facilities, if any, that will be crossed by the transportation facility or facilities and a statement of the plans of the private entity to accommodate such crossings;

8. A statement setting forth the private entity's general plans for developing and/or operating the transportation facility or facilities, including identification of any revenue, public or private, or proposed debt or equity investment or concession proposed by the private entity;

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

10. Information on how the private entity's proposal will address the needs identified in the appropriate state, regional, or local transportation plan by improving safety, reducing congestion, increasing capacity, and/or enhancing economic efficiency; and

11. Such additional material and information as the responsible public entity may reasonably request pursuant to its guidelines or other written instructions.

B. The responsible public entity may request proposals from private entities for the development and/or operation of transportation facilities. The responsible public entity shall not charge a fee to cover the costs of processing, reviewing, and evaluating proposals received in response to such requests.

C. The responsible public entity may grant approval of the development and/or operation of the

transportation facility or facilities as a qualifying transportation facility if the responsible public entity determines that it serves the public purpose of this chapter. The responsible public entity may determine that the development and/or operation of the transportation facility or facilities as a qualifying transportation facility serves such public purpose if:

1. There is a public need for the transportation facility or facilities the private entity proposes to develop and/or operate as a qualifying transportation facility;

2. The transportation facility or facilities and the proposed interconnections with existing transportation facilities, and the private entity's plans for development and/or operation of the qualifying transportation facility or facilities, are, in the opinion of the responsible public entity, reasonable and will address the needs identified in the appropriate state, regional, or local transportation plan by improving safety, reducing congestion, increasing capacity, and/or enhancing economic efficiency;

3. The estimated cost of developing and/or operating the transportation facility or facilities is reasonable in relation to similar facilities; and

4. The private entity's plans will result in the timely development and/or operation of the transportation facility or facilities or their more efficient operation.

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 submitted by a private entity pursuant to subsection A, including without limitation, reasonable attorney's fees and fees for financial and other necessary advisors or consultants. The responsible public entity shall also develop guidelines that establish the process for the acceptance and review of a proposal from a private entity pursuant to subsections A and B. Such guidelines shall establish a specific schedule for review of the proposal by the responsible public entity, a process for alteration of that schedule by the responsible public entity if it deems that changes are necessary because of the scope or complexity of proposals it receives, the process for receipt and review of competing proposals, and the type and amount of information that is necessary for adequate review of proposals in each stage of review. For qualifying transportation facilities that have approved or pending state and federal environmental clearances, secured significant right of way, have previously allocated significant state or federal funding, or exhibit other circumstances that could reasonably reduce the amount of time to develop and/or operate the qualifying transportation facility in accordance with the purpose of this chapter, the guidelines shall provide for a prioritized documentation, review, and selection process.

E. The approval of the responsible public entity shall be subject to the private entity's entering into an interim agreement or a comprehensive agreement with the responsible public entity. For any project with an estimated construction cost of over \$50 million, the responsible public entity also shall require the private entity to pay the costs for an independent audit of any and all traffic and cost estimates associated with the private entity's proposal, as well as a review of all public costs and potential liabilities to which taxpayers could be exposed (including improvements to other transportation facilities that may be needed as a result of the proposal, failure by the private entity to reimburse the responsible public entity for services provided, and potential risk and liability in the event the private entity defaults on the comprehensive agreement or on bonds issued for the project). This independent audit shall be conducted by an independent consultant selected by the responsible public entity, and all such information from such review shall be fully disclosed.

F. In connection with its approval of the development and/or operation of the transportation facility or facilities as a qualifying transportation facility, the responsible public entity shall establish a date for the acquisition of or the beginning of construction of or improvements to the qualifying transportation facility. The responsible public entity may extend such date from time to time.

G. The responsible public entity shall take appropriate action, as more specifically set forth in its guidelines, to protect confidential and proprietary information provided by the private entity pursuant to an agreement under subdivision 11 of § 2.2-3705.6.

H. The responsible public entity may also apply for, execute, and/or endorse applications submitted by private entities to obtain federal credit assistance for qualifying projects developed and/or operated pursuant to this chapter.

I. No real property asset that produces annual average revenue for the Commonwealth of \$10 million or more over the five most recent fiscal years or \$10 million revenue for the Commonwealth in the most recent fiscal year shall be (i) the subject of any lease, concession agreement, or similar type of agreement that transfers to a private entity possession or control of the asset for more than 10 years at a time, including any renewal, (ii) sold, or (iii) securitized as a part of a qualified transportation facility unless the real property asset has been declared to be surplus property.

J. When the responsible public entity is an agency or institution of the Commonwealth, then a

182 *summary containing the major business points of the agreement shall be provided to the Public-Private*
183 *Partnership Advisory Commission prior to executing any comprehensive agreement for a qualifying*
184 *transportation facility as provided by Chapter 42 (§ 30-278 et seq.) of Title 30.*

185 *K. When the responsible public entity is an agency or institution of the Commonwealth, then any*
186 *proposed comprehensive agreement for a qualifying transportation facility that (i) creates state*
187 *tax-supported debt, (ii) requires a level of appropriation beyond the appropriation received by the*
188 *responsible public entity in the most recent appropriation act, or (iii) alters the Commonwealth's*
189 *discretion to change the level of services or the funding for such services over time shall be reviewed by*
190 *the General Assembly prior to execution.*

191 **§ 56-575.3:1. Adoption of guidelines by responsible public entities.**

192 A. A responsible public entity shall, prior to requesting or considering a proposal for a qualifying
193 project, adopt and make publicly available guidelines that are sufficient to enable the responsible public
194 entity to comply with this chapter. Such guidelines shall be reasonable, encourage competition, and
195 guide the selection of projects under the purview of the responsible public entity.

196 B. For a responsible public entity that is an agency or institution of the Commonwealth, the
197 guidelines shall include, but not be limited to:

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

200 2. Reasonable criteria for choosing among competing proposals;

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

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

205 5. Financial review and analysis procedures that shall include, at a minimum, a cost-benefit analysis,
206 an assessment of opportunity cost, and consideration of the results of all studies and analyses related to
207 the proposed qualifying project. These procedures shall also include requirements for the disclosure of
208 such analysis to the appropriating body for review prior to execution of an interim or comprehensive
209 agreement;

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

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

214 8. Establishment of criteria for (i) the creation of and the responsibilities of a public-private
215 partnership oversight committee with members representing the responsible public entity and the
216 appropriating body or (ii) compliance with the requirements of Chapter 42 (§ 30-278 et seq.) of Title 30.
217 Such criteria shall include the scope, costs, and duration of the qualifying project, as well as whether the
218 project involves or impacts multiple public entities. The oversight committee, if formed, shall be an
219 advisory committee to review the terms of any proposed interim or comprehensive agreement;

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

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

226 11. The posting and publishing of public notice of a private entity's request for approval of a
227 qualifying project, including (i) specific information and documentation to be released regarding the
228 nature, timing, and scope of the qualifying project pursuant to subsection A of § 56-575.4; (ii) a
229 reasonable time period as determined by the responsible public entity to encourage competition and
230 public-private partnerships in accordance with the goals of this chapter, such reasonable period not to be
231 less than 45 days, during which time the responsible public entity shall receive competing proposals
232 pursuant to subsection A of § 56-575.4; and (iii) a requirement for advertising the public notice in the
233 Virginia Business Opportunities publication and posting a notice on the Commonwealth's electronic
234 procurement website shall be included.

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

239 1. A requirement that it engage the services of qualified professionals, which may include an
240 architect, professional engineer, or certified public accountant, not otherwise employed by the
241 responsible public entity, to provide independent analysis regarding the specifics, advantages,
242 disadvantages, and the long- and short-term costs of any request by a private entity for approval of a
243 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

305 responsible public entity to take action that would impact the debt capacity of the Commonwealth.

306 I. Prior to entering into the negotiation of an interim or comprehensive agreement, each responsible
307 public entity that is an agency or institution of the Commonwealth shall submit No real property asset
308 that produces annual average revenue for the Commonwealth of \$10 million or more over the five most
309 recent fiscal years or \$10 million revenue for the Commonwealth in the most recent fiscal year shall be
310 (i) the subject of any lease, concession agreement, or similar type of agreement that transfers to a
311 nongovernmental entity possession or control of the asset for more than 10 years at a time, including
312 any renewal, (ii) sold, or (iii) securitized as a part of a qualified project unless the real property asset
313 has been declared to be surplus property.

314 J. When the responsible public entity is an agency or institution of the Commonwealth, then copies
315 of detailed proposals shall be submitted to the Public-Private Partnership Advisory Commission prior to
316 entering into the negotiation of an interim or comprehensive agreement as provided by Chapter 42
317 (§ 30-278 et seq.) of Title 30.

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