

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact §§ 33.2-1803 and 33.2-1820 of the Code of Virginia and to amend the*
 3 *Code of Virginia by adding sections numbered 33.2-1803.1 and 33.2-1803.2, relating to the*
 4 *Public-Private Transportation Act; finding of public interest.*

5 [H 1886]

6 Approved

7 **Be it enacted by the General Assembly of Virginia:**

8 **1. That §§ 33.2-1803 and 33.2-1820 of the Code of Virginia are amended and reenacted and that**
 9 **the Code of Virginia is amended by adding sections numbered 33.2-1803.1 and 33.2-1803.2 as**
 10 **follows:**

11 **§ 33.2-1803. Approval by the responsible public entity.**

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

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

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

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

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

25 5. Information relating to the current transportation plans, if any, of each affected locality or public
 26 entity;

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

30 7. A list of public utility's, locality's, or political subdivision's facilities, if any, that will be crossed
 31 by the transportation facility or facilities and a statement of the plans of the private entity to
 32 accommodate such crossings;

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

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

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

41 11. *A statement of the risks, liabilities, and responsibilities to be transferred, assigned, or assumed*
 42 *by the private entity for the development and/or operation of the transportation facility, including*
 43 *revenue risk and operations and maintenance; and*

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

46 B. The responsible public entity may request proposals from private entities for the development
 47 and/or operation of transportation facilities *subject to the following:*

48 1. *For transportation facilities where the Department of Transportation or the Department of Rail*
 49 *and Public Transportation is the responsible public entity, the Transportation Public-Private Partnership*
 50 *Advisory Committee established pursuant to § 33.2-1803.2 has determined that moving forward with the*
 51 *development and/or operation of the facility pursuant to this article serves the public interest.*

52 2. *A finding of public interest pursuant to § 33.2-1803.1 has been issued by the responsible public*
 53 *entity.*

54 3. The responsible public entity shall not charge a fee to cover the costs of processing, reviewing,
 55 and evaluating proposals received in response to such requests.

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

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

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

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

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

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

73 5. *The risks, liabilities, and responsibilities transferred, assigned, or assumed by the private entity
74 provide sufficient benefits to the public to not proceed with the development and/or operation of the
75 transportation facility through other means of procurement available to the responsible public entity.*

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

79 *D. The responsible public entity shall not enter into a comprehensive agreement unless the chief
80 executive officer of the responsible public entity certifies in writing to the Governor and the General
81 Assembly that the transfer, assignment, and assumption of risks, liabilities, and permitting
82 responsibilities or the mitigation of revenue risk by the private sector enumerated in the finding of
83 public interest issued pursuant to § 33.2-1803.1 have not materially changed since the finding was
84 issued and the finding of public interest is still valid. Changes to the project scope that do not impact
85 the assignment of risks or liabilities or the mitigation of revenue risk shall not be considered material
86 changes to the finding of public interest, provided that such change was presented in a public meeting
87 to the Commonwealth Transportation Board, other state board, or the governing body of a locality, as
88 appropriate.*

89 *E.* The responsible public entity may charge a reasonable fee to cover the costs of processing,
90 reviewing, and evaluating the request submitted by a private entity pursuant to subsection A, including
91 reasonable attorney fees and fees for financial and other necessary advisors or consultants. The
92 responsible public entity shall also develop guidelines that establish the process for the acceptance and
93 review of a proposal from a private entity pursuant to subsections A and B. Such guidelines shall
94 establish a specific schedule for review of the proposal by the responsible public entity, a process for
95 alteration of that schedule by the responsible public entity if it deems that changes are necessary because
96 of the scope or complexity of proposals it receives, the process for receipt and review of competing
97 proposals, and the type and amount of information that is necessary for adequate review of proposals in
98 each stage of review. For qualifying transportation facilities that have approved or pending state and
99 federal environmental clearances, have secured significant right-of-way, have previously allocated
100 significant state or federal funding, or exhibit other circumstances that could reasonably reduce the
101 amount of time to develop and/or operate the qualifying transportation facility in accordance with the
102 purpose of this chapter, the guidelines shall provide for a prioritized documentation, review, and
103 selection process.

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

115 *F. G.* In connection with its approval of the development and/or operation of the transportation
116 facility or facilities as a qualifying transportation facility, the responsible public entity shall establish a
117 date for the acquisition of or the beginning of construction of or improvements to the qualifying

118 transportation facility. The responsible public entity may extend such date.

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

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

125 **§ 33.2-1803.1. Finding of public interest.**

126 A. Prior to the initiation of a procurement pursuant to § 33.2-1803, the chief executive officer of the
127 responsible public entity shall make a finding of public interest. Such finding shall include information
128 set forth in subsection B.

129 B. At a minimum, a finding of public interest shall contain the following information:

130 1. A description of the benefits expected to be realized by the responsible public entity through the
131 use of this chapter compared with the development and/or operation of the transportation facility
132 through other options available to the responsible public entity.

133 2. A statement of the risks, liabilities, and responsibilities to be transferred, assigned, or assumed by
134 the private entity, which shall include the following:

135 a. A discussion of whether revenue risk will be transferred to the private entity and the degree to
136 which any such transfer may be mitigated through other provisions in the interim or comprehensive
137 agreements;

138 b. A description of the risks, liabilities, and responsibilities to be retained by the responsible public
139 entity; and

140 c. Other items determined appropriate by the responsible public entity in the guidelines for this
141 chapter.

142 3. The determination of whether the project has a high, medium, or low level of project delivery risk
143 and a description of how such determination was made. If the qualifying transportation facility is
144 determined to contain high risk, a description of how the public's interest will be protected through the
145 transfer, assignment, or assumption of risks or responsibilities by the private entity in the event that
146 issues arise with the development and/or operation of the qualifying transportation facility.

147 4. If the responsible public entity proposes to enter into an interim or comprehensive agreement
148 pursuant to subdivision 2 of § 33.2-1819, information and the rationale demonstrating that proceeding
149 in this manner is more beneficial than proceeding pursuant to subdivision 1 of § 33.2-1819.

150 **§ 33.2-1803.2. Transportation Public-Private Partnership Advisory Committee.**

151 A. Procurement pursuant to § 33.2-1803 shall be initiated by the Department of Transportation or
152 the Department of Rail and Public Transportation only after the Transportation Public-Private
153 Partnership Advisory Committee (the Committee) has determined that the development and/or operation
154 of the transportation facility or facilities as a qualifying transportation facility serves the public interest
155 pursuant to § 33.2-1803.1. The determination shall be evidenced by an affirmative vote of a majority of
156 the members of the Committee.

157 B. The Committee is established and shall consist of the following members:

158 1. Two members of the Commonwealth Transportation Board;

159 2. The staff director of the House Committee on Appropriations, or his designee, and the staff
160 director of the Senate Committee on Finance, or his designee;

161 3. A Deputy Secretary of Transportation;

162 4. The chief financial officer of either the Department of Transportation or the Department of Rail
163 and Public Transportation, as appropriate; and

164 5. A nonagency public financial expert, as selected by the Secretary of Transportation.

165 C. Meetings of the Committee shall be open to the public, and meetings will be scheduled on an
166 as-needed basis. However, at a minimum, public notice shall be posted at least 30 days prior to a
167 meeting of the Committee.

168 D. The Committee shall, within 10 business days of any meeting, report whether or not the projects
169 evaluated at such meeting have been found to serve the public interest. Such report shall be made to the
170 Chairmen of the House and Senate Committees on Transportation, the House Committee on
171 Appropriations, and the Senate Committee on Finance.

172 **§ 33.2-1820. Posting of conceptual proposals; public comment; public access to procurement**
173 **records.**

174 A. Conceptual proposals submitted in accordance with subsection A or B of § 33.2-1803 to a
175 responsible public entity shall be posted by the responsible public entity within 10 working days after
176 acceptance of such proposals as follows:

177 1. For responsible public entities that are state agencies, authorities, departments, institutions, and
178 other units of state government, posting shall be on the Department of General Services' central

179 electronic procurement website. For proposals submitted pursuant to subsection A of § 33.2-1803, the
180 notice posted shall (i) provide for a period of 120 days for the submission of competing proposals; (ii)
181 include specific information regarding the proposed nature, timing, and scope of the qualifying
182 transportation facility; and (iii) outline the opportunities that will be provided for public comment during
183 the review process; and

184 2. For responsible public entities that are local public bodies, posting shall be on the responsible
185 public entity's website or on the Department of General Services' central electronic procurement website.
186 In addition, such public bodies may publish in a newspaper of general circulation in the area in which
187 the contract is to be performed a summary of the proposals and the location where copies of the
188 proposals are available for public inspection. Such local public bodies are encouraged to utilize the
189 Department of General Services' central electronic procurement website to provide the public with
190 centralized visibility and access to the Commonwealth's procurement opportunities.

191 In addition to the posting requirements, at least one copy of the proposals shall be made available for
192 public inspection. Nothing in this section shall be construed to prohibit the posting of the conceptual
193 proposals by additional means deemed appropriate by the responsible public entity so as to provide
194 maximum notice to the public of the opportunity to inspect the proposals. Trade secrets, financial
195 records, or other records of the private entity excluded from disclosure under the provisions of
196 subdivision 11 of § 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the
197 responsible public entity and the private entity.

198 B. In addition to the posting requirements of subsection A, ~~for the following shall apply:~~

199 1. For 30 days prior to entering into an interim ~~or comprehensive~~ agreement, a responsible public
200 entity shall provide an opportunity for public comment on the proposals. The public comment period
201 required by this subsection may include a public hearing ~~in~~ at the sole discretion of the responsible
202 public entity. After the end of the public comment period, no additional posting shall be required.

203 2. For 30 days prior to the planned issuance of a final request for proposals, a responsible public
204 entity shall provide an opportunity for public comment on the draft comprehensive agreement. The
205 public comment period may include a public hearing at the sole discretion of the responsible public
206 entity.

207 C. Once the negotiation phase for the development of an interim or a comprehensive agreement is
208 complete and a decision to award has been made by a responsible public entity, the responsible public
209 entity shall (i) post the major business points of the interim or comprehensive agreement, including the
210 projected use of any public funds, on the Department of General Services' central electronic procurement
211 website; (ii) outline how the public can submit comments on those major business points; and (iii)
212 present the major business points of the interim or comprehensive agreement, including the use of any
213 public funds, to its oversight board at a regularly scheduled meeting of the board that is open to the
214 public.

215 D. Once an interim agreement or a comprehensive agreement has been entered into, a responsible
216 public entity shall make procurement records available for public inspection, in accordance with the
217 Virginia Freedom of Information Act (§ 2.2-3700 et seq.). For the purposes of this subsection,
218 procurement records shall not be interpreted to include (i) trade secrets of the private entity as defined in
219 the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or (ii) financial records, including balance sheets or
220 financial statements of the private entity that are not generally available to the public through regulatory
221 disclosure or otherwise.

222 E. Cost estimates relating to a proposed procurement transaction prepared by or for a responsible
223 public entity shall not be open to public inspection.

224 F. Any inspection of procurement transaction records under this section shall be subject to reasonable
225 restrictions to ensure the security and integrity of the records.

226 G. The provisions of this section shall apply to accepted proposals regardless of whether the process
227 of bargaining will result in an interim or a comprehensive agreement.

228 **2. That the Department of Transportation, by September 1, 2015, shall develop a risk assessment**
229 **model to identify the relative risks associated with a proposed transportation project and facilitate**
230 **the identification of high-risk projects in advance of project procurement. Further, the Department**
231 **of Transportation shall establish procurement processes and guidelines for identified high-risk**
232 **projects to ensure the protection of the public interest.**