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HOUSE BILL NO. 2340

Offered January 23, 2015

A *BILL to amend and reenact §§ 33.2-1807, 33.2-1808, 33.2-1809, 33.2-1813, 33.2-1819, and 33.2-1820 of the Code of Virginia, relating to the Public-Private Transportation Act of 1995.*

Patron—Marshall, R.G.

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 33.2-1807, 33.2-1808, 33.2-1809, 33.2-1813, 33.2-1819, and 33.2-1820 of the Code of Virginia are amended and reenacted as follows:

§ 33.2-1807. Powers and duties of the private entity.

A. The private entity shall have all power allowed by law generally to a private entity having the same form of organization as the private entity and shall have the power to develop and/or operate the qualifying transportation facility and impose user fees and/or enter into service contracts in connection with the use thereof. However, ~~no~~:

1. No tolls or user fees may be imposed by the private entity (i) on Interstate 81 without the prior approval of the General Assembly and (ii) on interstate and primary highways, except Interstate 81, without the prior approval of the Commission; and

2. No schedule of tolls or user fees, or any amendment to such schedule, for any interstate or primary highway shall be included in any comprehensive or interim agreement unless the schedule has been approved by the Commission.

B. The private entity may own, lease, or acquire any other right to use or develop and/or operate the qualifying transportation facility.

C. Subject to applicable permit requirements, the private entity shall have the authority to cross any canal or navigable watercourse so long as the crossing does not unreasonably interfere with then current navigation and use of the waterway.

D. In operating the qualifying transportation facility, the private entity may:

1. Make classifications according to reasonable categories for assessment of user fees; and

2. With the consent of the responsible public entity, make and enforce reasonable rules to the same extent that the responsible public entity may make and enforce rules with respect to a similar transportation facility.

E. The private entity shall:

1. Develop and/or operate the qualifying transportation facility in a manner that meets the standards of the responsible public entity for transportation facilities operated and maintained by such responsible public entity, all in accordance with the provisions of the interim agreement or the comprehensive agreement;

2. Keep the qualifying transportation facility open for use by the members of the public in accordance with the terms and conditions of the interim or comprehensive agreement after its initial opening upon payment of the applicable user fees and/or service payments, provided that the qualifying transportation facility may be temporarily closed because of emergencies or, with the consent of the responsible public entity, to protect the safety of the public or for reasonable construction or maintenance procedures;

3. Maintain, or provide by contract for the maintenance of, the qualifying transportation facility;

4. Cooperate with the responsible public entity in establishing any interconnection with the qualifying transportation facility requested by the responsible public entity; and

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

§ 33.2-1808. Comprehensive agreement.

A. Prior to developing and/or operating the qualifying transportation facility, the private entity shall enter into a comprehensive agreement with the responsible public entity that has been approved by the Commission. The comprehensive agreement shall, as appropriate, provide for:

1. Delivery of performance and payment bonds in connection with the development and/or operation of the qualifying transportation facility, in the forms and amounts satisfactory to the responsible public entity;

2. Review of plans for the development and/or operation of the qualifying transportation facility by the responsible public entity and approval by the responsible public entity if the plans conform to standards acceptable to the responsible public entity;

3. Inspection of construction of or improvements to the qualifying transportation facility by the

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59 responsible public entity to ensure that such construction or improvements conform to the standards
60 acceptable to the responsible public entity;

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

66 5. Monitoring of the maintenance practices of the private entity by the responsible public entity and
67 the taking of such actions as the responsible public entity finds appropriate to ensure that the qualifying
68 transportation facility is properly maintained;

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

71 7. Filing of appropriate financial statements in a form acceptable to the responsible public entity on a
72 periodic basis;

73 8. Compensation to the private entity that may include a reasonable development fee, a reasonable
74 maximum rate of return on investment, and/or reimbursement of development expenses in the event of
75 termination for convenience by the responsible public entity as agreed upon between the responsible
76 public entity and the private entity;

77 9. The date of termination of the private entity's authority and duties under this chapter and
78 dedication to the appropriate public entity; and

79 10. Guaranteed cost and completion guarantees related to the development and/or operation of the
80 qualified transportation facility and payment of damages for failure to meet the completion guarantee.

81 B. The comprehensive agreement shall provide for such user fees as may be established by
82 agreement of the parties *and approved by the Commission*. Any user fees shall be set at a level that
83 takes into account any lease payments, service payments, and compensation to the private entity or as
84 specified in the comprehensive agreement. A copy of any service contract shall be filed with the
85 responsible public entity. A schedule of the current user fees shall be made available by the private
86 entity to any member of the public on request. In negotiating user fees under this section, the parties
87 shall establish fees that are the same for persons using the facility under like conditions except as
88 required by agreement between the parties to preserve capacity and prevent congestion on the qualifying
89 transportation facility. The execution of the comprehensive agreement or any amendment thereto shall
90 constitute conclusive evidence that the user fees provided for therein comply with this chapter. User fees
91 established in the comprehensive agreement as a source of revenues may be in addition to or in lieu of
92 service payments.

93 C. In the comprehensive agreement, the responsible public entity may agree to make grants or loans
94 for the development and/or operation of the qualifying transportation facility from amounts received
95 from the federal government or any agency or instrumentality thereof.

96 D. The comprehensive agreement shall incorporate the duties of the private entity under this chapter
97 and may contain such other terms and conditions that the responsible public entity determines serve the
98 public purpose of this chapter. Without limitation, the comprehensive agreement may contain provisions
99 under which the responsible public entity agrees to provide notice of default and cure rights for the
100 benefit of the private entity and the persons specified therein as providing financing for the qualifying
101 transportation facility. The comprehensive agreement may contain such other lawful terms and
102 conditions to which the private entity and the responsible public entity mutually agree, including
103 provisions regarding unavoidable delays or provisions providing for a loan of public funds for the
104 development and/or operation of one or more qualifying transportation facilities.

105 E. The comprehensive agreement shall provide for the distribution of any earnings in excess of the
106 maximum rate of return as negotiated in the comprehensive agreement. Without limitation, excess
107 earnings may be distributed to the Transportation Trust Fund, to the responsible public entity, or to the
108 private entity for debt reduction or they may be shared with appropriate public entities. Any payments
109 under a concession arrangement for which the Commonwealth is the responsible public entity shall be
110 paid into the Transportation Trust Fund.

111 F. Any changes in the terms of the comprehensive agreement, as may be agreed upon by the parties
112 *and approved by the Commission*, shall be added to the comprehensive agreement by written
113 amendment.

114 G. Notwithstanding any contrary provision of this chapter, a responsible public entity may enter into
115 a comprehensive agreement with multiple private entities if the responsible public entity determines in
116 writing that it is in the public interest to do so *and such agreement is approved by the Commission*.

117 H. The comprehensive agreement may provide for the development and/or operation of phases or
118 segments of the qualifying transportation facility.

119 **§ 33.2-1809. Interim agreement.**

120 A. Prior to or in connection with the negotiation of the comprehensive agreement, the responsible

121 public entity may enter into an interim agreement with the private entity proposing the development
 122 and/or operation of the facility or facilities. Such interim agreement *shall be approved by the*
 123 *Commission and* may (i) permit the private entity to commence activities for which it may be
 124 compensated relating to the proposed qualifying transportation facility, including project planning and
 125 development, advance right-of-way acquisition, design and engineering, environmental analysis and
 126 mitigation, survey, conducting transportation and revenue studies, and ascertaining the availability of
 127 financing for the proposed facility or facilities; (ii) establish the process and timing of the negotiation of
 128 the comprehensive agreement; and (iii) contain any other provisions related to any aspect of the
 129 development and/or operation of a qualifying transportation facility that the parties may deem
 130 appropriate.

131 B. Notwithstanding any provision of this chapter to the contrary, a responsible public entity may
 132 enter ~~in to~~ into an interim agreement with multiple private entities if the responsible public entity
 133 determines in writing that it is in the public interest to do so *and such agreement is approved by the*
 134 *Commission.*

135 **§ 33.2-1813. Material default; remedies.**

136 A. Upon the occurrence and during the continuation of material default, the responsible public entity
 137 may exercise any or all of the following remedies:

138 1. The responsible public entity may elect to take over the transportation facility or facilities and in
 139 such case shall succeed to all of the right, title, and interest in such transportation facility or facilities,
 140 subject to any liens on revenues previously granted by the private entity to any person providing
 141 financing therefor.

142 2. The responsible public entity may terminate the interim or comprehensive agreement and exercise
 143 any other rights and remedies that may be available at law or in equity.

144 3. The responsible public entity may make or cause to be made any appropriate claims under the
 145 performance and/or payment bonds required by § 33.2-1808.

146 B. In the event the responsible public entity elects to take over a qualifying transportation facility
 147 pursuant to subsection A, the responsible public entity may develop and/or operate the qualifying
 148 transportation facility, impose user fees for the use thereof *after such fees have been approved by the*
 149 *Commission*, and comply with any service contracts as if it were the private entity. Any revenues that
 150 are subject to a lien shall be collected for the benefit of, and paid to, secured parties, as their interests
 151 may appear, to the extent necessary to satisfy the private entity's obligations to secured parties, including
 152 the maintenance of reserves, and such liens shall be correspondingly reduced and, when paid off,
 153 released. Before any payments to, or for the benefit of, secured parties, the responsible public entity may
 154 use revenues to pay current operation and maintenance costs of the qualifying transportation facility or
 155 facilities, including compensation to the responsible public entity for its services in operating and
 156 maintaining the qualifying transportation facility. Remaining revenues, if any, after all payments for
 157 operation and maintenance of the transportation facility or facilities, and to, or for the benefit of, secured
 158 parties, have been made, shall be paid to the private entity, subject to the negotiated maximum rate of
 159 return. The right to receive such payment, if any, shall be considered just compensation for the
 160 transportation facility or facilities. The full faith and credit of the responsible public entity shall not be
 161 pledged to secure any financing of the private entity by the election to take over the qualifying
 162 transportation facility. Assumption of operation of the qualifying transportation facility shall not obligate
 163 the responsible public entity to pay any obligation of the private entity from sources other than
 164 revenues.

165 **§ 33.2-1819. Procurement.**

166 The Virginia Public Procurement Act (§ 2.2-4300 et seq.) shall not apply to this chapter; however, a
 167 responsible public entity may enter into an interim or a comprehensive agreement only *after approval by*
 168 *the Commission and* in accordance with guidelines adopted by it as follows:

169 1. A responsible public entity may enter into an interim or a comprehensive agreement in accordance
 170 with guidelines adopted by it that are consistent with procurement through "competitive sealed bidding"
 171 as set forth in § 2.2-4302.1 and subsection B of § 2.2-4310.

172 2. A responsible public entity may enter into an interim or a comprehensive agreement in accordance
 173 with guidelines adopted by it that are consistent with the procurement of "other than professional
 174 services" through competitive negotiation as set forth in § 2.2-4302.2 and subsection B of § 2.2-4310.
 175 Such responsible public entity shall not be required to select the proposal with the lowest price offer,
 176 but may consider price as one factor in evaluating the proposals received. Other factors that may be
 177 considered include (i) the proposed cost of the qualifying transportation facility; (ii) the general
 178 reputation, qualifications, industry experience, and financial capacity of the private entity; (iii) the
 179 proposed design, operation, and feasibility of the qualifying transportation facility; (iv) the eligibility of
 180 the facility for priority selection, review, and documentation timelines under the responsible public
 181 entity's guidelines; (v) local citizen and public entity comments; (vi) benefits to the public; (vii) the

182 private entity's compliance with a minority business enterprise participation plan or good faith effort to
183 comply with the goals of such plan; (viii) the private entity's plans to employ local contractors and
184 residents; (ix) the safety record of the private entity; (x) the ability of the facility to address the needs
185 identified in the appropriate state, regional or local transportation plan by improving safety, reducing
186 congestion, increasing capacity, enhancing economic efficiency, or any combination thereof; and (xi)
187 other criteria that the responsible public entity deems appropriate.

188 A responsible public entity shall proceed in accordance with the guidelines adopted by it pursuant to
189 subdivision 1 unless it determines that proceeding in accordance with the guidelines adopted by it
190 pursuant to this subdivision is likely to be advantageous to the responsible public entity and the public,
191 based on (a) the probable scope, complexity, or urgency of a project; (b) risk sharing including
192 guaranteed cost or completion guarantees, added value, or debt or equity investments proposed by the
193 private entity; or (c) an increase in funding, dedicated revenue source or other economic benefit that
194 would not otherwise be available. When the responsible public entity determines to proceed according to
195 the guidelines adopted by it pursuant to this subdivision, it shall state the reasons for its determination in
196 writing. If a state agency is the responsible public entity, the approval of the Secretary shall be required
197 as more specifically set forth in the guidelines before the comprehensive agreement is signed.

198 3. Interim or comprehensive agreements for maintenance or asset management services for a
199 transportation facility that is a highway, bridge, tunnel, or overpass, and any amendment or change order
200 thereto that increases the highway lane-miles receiving services under such an agreement, shall be
201 procured in accordance with guidelines that are consistent with procurement through "competitive sealed
202 bidding" as set forth in § 2.2-4302.1 and subsection B of § 2.2-4310. Furthermore, such contracts shall
203 be of a size and scope to encourage maximum competition and participation by agency prequalified
204 contractors and otherwise qualified contractors.

205 4. The provisions of subdivision 3 shall not apply to maintenance or asset management services
206 agreed to as part of the initial provisions of any interim or comprehensive agreement entered into for the
207 original construction, reconstruction, or improvement of any highway pursuant to this chapter and shall
208 not apply to any concession that, at a minimum, provides for (i) the construction, reconstruction, or
209 improvement of any transportation facility or (ii) the operation and maintenance of any transportation
210 facility with existing toll facilities.

211 5. Nothing in this section shall require that professional services be procured by any method other
212 than competitive negotiation in accordance with the Virginia Public Procurement Act (§ 2.2-4300 et
213 seq.).

214 **§ 33.2-1820. Posting of conceptual proposals; public comment; public access to procurement**
215 **records.**

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

219 1. For responsible public entities that are state agencies, authorities, departments, institutions, and
220 other units of state government, posting shall be on the Department of General Services' central
221 electronic procurement website. For proposals submitted pursuant to subsection A of § 33.2-1803, the
222 notice posted shall (i) provide for a period of 120 days for the submission of competing proposals; (ii)
223 include specific information regarding the proposed nature, timing, and scope of the qualifying
224 transportation facility; and (iii) outline the opportunities that will be provided for public comment during
225 the review process; and

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

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

240 B. In addition to the posting requirements of subsection A, for 30 days prior to entering into an
241 interim or comprehensive agreement, a responsible public entity shall provide an opportunity for public
242 comment on the proposals. The public comment period required by this subsection may include a public
243 hearing in the sole discretion of the responsible public entity. After the end of the public comment

244 period, no additional posting shall be required.

245 C. Once the negotiation phase for the development of an interim or a comprehensive agreement is
246 complete, *such agreement has been approved by the Commission*, and a decision to award has been
247 made by a responsible public entity, the responsible public entity shall (i) post the major business points
248 of the interim or comprehensive agreement, including the projected use of any public funds, on the
249 Department of General Services' central electronic procurement website; (ii) outline how the public can
250 submit comments on those major business points; and (iii) present the major business points of the
251 interim or comprehensive agreement, including the use of any public funds, to its oversight board at a
252 regularly scheduled meeting of the board that is open to the public.

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

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

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

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