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SENATE BILL NO. 541

Offered January 11, 2006

Prefiled January 11, 2006

A BILL 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 Chapter 25 of title 2.2 an article numbered 8, consisting of sections numbered 2.2-2524 and 2.2-2525, relating to the Public-Private Education Facilities and Infrastructure Act; review and implementation of qualifying projects; Public-Private Partnership Advisory Council.

Patrons—Stosch and Devolites Davis

Referred to Committee on General Laws and Technology

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 Chapter 25 of Title 2.2 an article numbered 8, consisting of sections numbered 2.2-2524 and 2.2-2525 as follows:

*Article 8.**Public-Private Partnership Advisory Council.*

§ 2.2-2524. *Public-Private Partnership Advisory Council; membership; terms; meetings; compensation and expenses; staff; chairman's executive summary.*

A. *The Public-Private Partnership Advisory Council (the Council) is established as an advisory council within the meaning of § 2.2-2100, in the executive branch of state government. The purpose of the Council shall be to review and advise the Governor and responsible public entities on proposed interim and comprehensive agreements under the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) prior to execution of such agreements by a responsible public entity that is an agency or institution of the Commonwealth.*

B. *The Council shall consist of seven members, including three legislative members, as follows: (i) the Chairmen of the House Committee on Appropriations and the House Committee on Finance or their designees, (ii) the Chair of the Senate Committee on Finance or his designee, (iii) the Secretaries of Administration, Commerce and Trade and Finance, or their designees, and (iv) the State Internal Auditor. Legislative members shall serve on the Council 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 Council shall annually elect its chairman and vice-chairman from among its members. The Council shall meet at such times as it deems appropriate to carry out its duties or on call of the chairman. A majority of the members of the Council shall constitute a quorum. Legislative members shall be compensated as specified in § 30-19.12. All members of the Council shall be reimbursed for their reasonable and necessary expenses incurred in the performance of their duties as provided in §§ 2.2-2813 and 2.2-2825.*

D. *The Department of General Services shall provide staff support to the Council.*

E. *The chairman of the Council shall submit to the Governor and the General Assembly an annual executive summary of the interim activity and work of the Council no later than the first day of each regular session of the General Assembly. The executive summary shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports and shall be posted on the General Assembly's website.*

§ 2.2-2525. *Review of interim and comprehensive agreements; submission by responsible public entities.*

A. *The Council may review the terms of interim or comprehensive agreements that are intended to be approved by a responsible public entity that is an agency or institution of the Commonwealth under the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.). Such review shall occur prior to execution of such agreement. The Council may decline to accept for review the terms and conditions of any proposed project.*

B. *Each responsible public entity that is an agency or institution of the Commonwealth shall notify the Council of proposed qualifying projects that are intended to be approved and provide a copy of the proposed interim or comprehensive agreement.*

C. *The Council shall review the proposed interim or comprehensive agreements accepted for review to determine whether the terms and conditions represent a claim or material commitment against the bond capacity of the Commonwealth. In addition, the Council may make recommendations to the*

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59 *responsible public entity regarding the sufficiency of the terms and conditions including (i) whether*
60 *additional terms or conditions should be considered, (ii) whether the qualifying project should be*
61 *approved to proceed only to an interim agreement, and (iii) whether the terms and conditions should*
62 *not be approved. Review by the Council shall not constitute approval of any appropriations necessary to*
63 *implement the interim or comprehensive agreement.*

64 *D. The Council shall provide its findings and recommendations to the Governor and the responsible*
65 *public entity within 45 days of receiving the terms and conditions of the proposed interim or*
66 *comprehensive agreement. Upon receipt of any recommendation of the Council, the responsible public*
67 *entity shall report to the Council on the extent to which such recommendations will be addressed in the*
68 *interim or comprehensive agreement.*

69 § 56-575.1. Definitions.

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

71 "Affected ~~local~~ jurisdiction" means any county, city or town in which all or a portion of a qualifying
72 project is located.

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

75 "Commission" means the State Corporation Commission.

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

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

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

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

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

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

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

93 "Public entity" means the Commonwealth and any agency or authority thereof, any county, city or
94 town and any other political subdivision of the Commonwealth, any public body politic and corporate,
95 or any regional entity that serves a public purpose.

96 "Qualifying project" means (i) any education facility, including, but not limited to a school building,
97 any functionally related and subordinate facility and land to a school building (including any stadium or
98 other facility primarily used for school events), and any depreciable property provided for use in a
99 school facility that is operated as part of the public school system or as an institution of higher
100 education; (ii) any building or facility that meets a public purpose and is developed or operated by or
101 for any public entity; (iii) any improvements, together with equipment, necessary to enhance public
102 safety and security of buildings to be principally used by a public entity; (iv) utility and
103 telecommunications and other communications infrastructure; (v) a recreational facility; (vi) technology
104 infrastructure *and technology services*, including, but not limited to, telecommunications, automated data
105 processing, word processing and management information systems, and related information, equipment,
106 goods and services; or (vii) any improvements necessary or desirable to any unimproved locally- or
107 state-owned real estate.

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

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

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

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

119 "State" means the Commonwealth of Virginia.

120 "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 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 guidelines shall ~~permit accelerated selection, review and documentation timelines for proposals involving a qualifying facility that the responsible public entity deems a priority.~~ include:

1. Provisions for providing 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, review, and documentation timelines for proposals involving a qualifying project that the responsible public entity deems a priority;

5. Financial review and analysis of the proposals and 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;

8. If the responsible public entity is not an agency or institution of the Commonwealth, a requirement that the responsible public entity 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 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; and

9. Provisions 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.

C. Guidelines adopted by a responsible public entity shall be reasonable, encourage competition, and follow the model guidelines developed pursuant to this Chapter.

§ 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

182 the request;

183 9. User fees, lease payments, and other service payments over the term of the interim or
184 comprehensive agreement pursuant to § 56-575.9 or 56-575.9:1 and the methodology and circumstances
185 for changes to such user fees, lease payments, and other service payments over time; and

186 10. Such additional material and information as the responsible public entity may reasonably request.

187 B. The responsible public entity may request proposals or invite bids from private entities for the
188 development or operation of qualifying projects.

189 C. The responsible public entity may grant approval of the development or operation of the education
190 facility, technology infrastructure or other public infrastructure or government facility needed by a public
191 entity as a qualifying project, or the design or equipping of a qualifying project so developed or
192 operated, if the responsible public entity determines that the project serves the public purpose of this
193 chapter. The responsible public entity may determine that the development or operation of the qualifying
194 project as a qualifying project serves such public purpose if:

195 1. There is a public need for or benefit derived from the qualifying project of the type the private
196 entity proposes as a qualifying project;

197 2. The estimated cost of the qualifying project is reasonable in relation to similar facilities; and

198 3. The private entity's plans will result in the timely development or operation of the qualifying
199 project.

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

203 D. The responsible public entity may charge a reasonable fee to cover the costs of processing,
204 reviewing and evaluating the request, including without limitation, reasonable attorney's fees and fees for
205 financial, technical, and other necessary advisors or consultants.

206 E. The approval of the responsible public entity shall be subject to the private entity's entering into
207 an interim or comprehensive agreement pursuant to § 56-575.9 with the responsible public entity.

208 F. In connection with its approval of the qualifying project, the responsible public entity shall
209 establish a date for the commencement of activities related to the qualifying project. The responsible
210 public entity may extend such date from time to time.

211 G. The responsible public entity shall take appropriate action to protect confidential and proprietary
212 information provided by the private entity pursuant to an agreement under subdivision 11 of
213 § 2.2-3705.6.

214 H. Nothing in this chapter or in an interim or comprehensive agreement entered into pursuant to this
215 chapter shall be deemed to enlarge, diminish or affect the authority, if any, otherwise possessed by the
216 responsible public entity to take action that would impact the debt capacity of the Commonwealth.

217 *I. The aspects of an interim or comprehensive agreement that require an appropriation or a*
218 *continuing appropriation shall not be developed or operated by a private entity pursuant to this chapter*
219 *until such time as the appropriation is approved as part of the appropriation act or otherwise approved*
220 *by the appropriating body.*

221 *J. Prior to final approval, each responsible public entity that is an agency or institution of the*
222 *Commonwealth shall notify the Public-Private Partnership Advisory Council established pursuant to*
223 *§ 2.2-2524 of proposed qualifying projects that are intended to be approved and provide to the Council*
224 *a copy of the proposed interim or comprehensive agreement.*

225 § 56-575.16. Procurement.

226 The Virginia Public Procurement Act (§ 2.2-4300 et seq.) and any interpretations, regulations, or
227 guidelines of the Division of Engineering and Buildings of the Department of General Services or the
228 Virginia Information Technologies Agency, including the Capital Outlay Manual and those
229 interpretations, regulations or guidelines developed pursuant to §§ 2.2-1131, 2.2-1132, 2.2-1133,
230 2.2-1149, and 2.2-1502, except those developed by the Division or the Virginia Information
231 Technologies Agency in accordance with this chapter when the Commonwealth is the responsible public
232 entity, shall not apply to this chapter. However, a responsible public entity may enter into a
233 comprehensive agreement only in accordance with guidelines adopted by it as follows:

234 1. A responsible public entity may enter into a comprehensive agreement in accordance with
235 guidelines adopted by it that are consistent with procurement through competitive sealed bidding as
236 defined in § 2.2-4301 and subsection B of § 2.2-4310.

237 2. A responsible public entity may enter into a comprehensive agreement in accordance with
238 guidelines adopted by it that are consistent with the procurement of "other than professional services"
239 through competitive negotiation as defined in § 2.2-4301 and subsection B of § 2.2-4310. Such
240 responsible public entity shall not be required to select the proposal with the lowest price offer, but may
241 consider price as one factor in evaluating the proposals received. Other factors that may be considered
242 include (i) the proposed cost of the qualifying facility; (ii) the general reputation, industry experience,
243 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.

2. That the Chairmen of the Senate and House Committees 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 in accordance with this act. The group shall make its recommendations available to the responsible public entities by September 30, 2006.

3. That the provisions of this act shall apply to proposals submitted to a responsible public entity after July 1, 2006.