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HOUSE BILL NO. 1692

Offered January 9, 2013

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A BILL to amend and reenact §§ 56-559, 56-560, 56-566.2, and 56-573.1:1 of the Code of Virginia, relating to the Public-Private Transportation Act; receipt of competing proposals; disclosure of major business points.

Patrons—Jones and James

Referred to Committee on Transportation

Be it enacted by the General Assembly of Virginia:

1. That §§ 56-559, 56-560, 56-566.2, and 56-573.1:1 of the Code of Virginia are amended and reenacted as follows:

§ 56-559. Prerequisite for operation.

A. Any private entity seeking authorization under this chapter to develop and/or operate a transportation facility shall first obtain approval of the responsible public entity under § 56-560. Such private entity may initiate the approval process by requesting approval pursuant to subsection A of § 56-560 or the responsible public entity may request proposals pursuant to subsection B C of § 56-560.

B. Any responsible public entity that is an agency or institution of the Commonwealth receiving a detailed proposal from a private entity for a qualifying transportation facility that is a port facility as defined in § 62.1-140 shall provide notice of the receipt of such proposal to the Public-Private Partnership Advisory Commission established in § 30-279.

§ 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. *Within 30 days of the receipt of an unsolicited proposal, a responsible public entity shall post a public notice of the unsolicited proposal on the Department of General Service's electronic procurement website and provide 120 days for the submission of any competing proposals. The notice shall include specific information regarding the nature, timing, and scope of the qualifying transportation facility. The responsible public entity shall afford opportunities for public comment on the proposals submitted.*

C. The responsible public entity may request proposals from private entities for the development

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59 and/or operation of transportation facilities. The responsible public entity shall not charge a fee to cover
60 the costs of processing, reviewing, and evaluating proposals received in response to such requests.

61 ~~C.~~ D. The responsible public entity may grant approval of the development and/or operation of the
62 transportation facility or facilities as a qualifying transportation facility if the responsible public entity
63 determines that it serves the public purpose of this chapter. The responsible public entity may determine
64 that the development and/or operation of the transportation facility or facilities as a qualifying
65 transportation facility serves such public purpose if:

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

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

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

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

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

80 ~~D.~~ E. The responsible public entity may charge a reasonable fee to cover the costs of processing,
81 reviewing, and evaluating the request submitted by a private entity pursuant to subsection A, including
82 without limitation, reasonable attorney's fees and fees for financial and other necessary advisors or
83 consultants. The responsible public entity shall also develop guidelines that establish the process for the
84 acceptance and review of a proposal from a private entity pursuant to subsections A and ~~BC~~. Such
85 guidelines shall establish a specific schedule for review of the proposal by the responsible public entity,
86 a process for alteration of that schedule by the responsible public entity if it deems that changes are
87 necessary because of the scope or complexity of proposals it receives, the process for receipt and review
88 of competing proposals, and the type and amount of information that is necessary for adequate review of
89 proposals in each stage of review. For qualifying transportation facilities that have approved or pending
90 state and federal environmental clearances, secured significant right of way, have previously allocated
91 significant state or federal funding, or exhibit other circumstances that could reasonably reduce the
92 amount of time to develop and/or operate the qualifying transportation facility in accordance with the
93 purpose of this chapter, the guidelines shall provide for a prioritized documentation, review, and
94 selection process.

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

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

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

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

116 **§ 56-566.2. Multiple public entities.**

117 A. If a private entity submits a proposal pursuant to subsection A of § 56-560 to develop and/or
118 operate a qualifying transportation facility or a multimodal transportation facility that may require
119 approval by more than one public entity, representatives of each of the affected public entities shall,
120 prior to acceptance of such proposal, convene and determine which public entity shall serve as the

coordinating responsible public entity. Such determination shall occur within 60 days of the receipt of a proposal by the respective public entities.

B. If public entities request proposals from private entities for the development and/or operation of a qualifying transportation facility or a multimodal transportation facility pursuant to subsection B C of § 56-560, the determination of which public entity shall serve as the coordinating responsible public entity shall be made prior to any request for proposals.

C. Once a determination has been made in accordance with subsections A or B, the coordinating responsible public entity and the private entity shall proceed in accordance with this chapter.

§ 56-573.1:1. Posting of conceptual proposals; public comment; public access to procurement records.

A. Conceptual proposals submitted in accordance with subsection A ~~or~~, B, or C of § 56-560 to a responsible public entity shall be posted by the responsible public entity within 10 working days after acceptance of such proposals as follows:

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

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

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

B. In addition to the posting requirements of subsection A, for 30 days prior to entering into an interim or comprehensive agreement, a responsible public entity shall provide an opportunity for public comment on the proposals. The public comment period required by this subsection may include a public hearing in the sole discretion of the responsible public entity. After the end of the public comment period, no additional posting shall be required.

C. Once the negotiation phase for the development of an interim or a comprehensive agreement is complete and a decision to award has been made by a responsible public entity, the responsible public entity shall (i) *post the major business points of the interim or comprehensive agreement, including the use of any public funds, in the manner provided in subsection B of § 56-560* and (ii) present the major business points of the interim or comprehensive agreement, including the use of any public funds, to its oversight board at a regularly scheduled meeting of the board that is open to the public.

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

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

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

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