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HOUSE BILL NO. 2244

Offered January 11, 2017

Prefiled January 11, 2017

A BILL to amend and reenact §§ 33.2-1801, 33.2-1803, 33.2-1803.1, 33.2-1803.2, and 33.2-1809 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 33.2-1803.3, relating to the Public-Private Transportation Act of 1995.

Patron—Jones

Referred to Committee on Appropriations

Be it enacted by the General Assembly of Virginia:

1. That §§ 33.2-1801, 33.2-1803, 33.2-1803.1, 33.2-1803.2, and 33.2-1809 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 33.2-1803.3 as follows:

§ 33.2-1801. Policy.

A. The General Assembly finds that:

1. There is a public need for timely development and/or operation of transportation facilities within the Commonwealth that address the needs identified by the appropriate state, regional, or local transportation plan by improving safety, reducing congestion, increasing capacity, enhancing economic efficiency, or any combination thereof and that such public need may not be wholly satisfied by existing methods of procurement in which qualifying transportation facilities are developed and/or operated;

2. Such public need may not be wholly satisfied by existing ways in which transportation facilities are developed and/or operated; and

3. Authorizing private entities to develop and/or operate one or more transportation facilities may result in the development and/or operation of such transportation facilities to the public in a more timely, more efficient, or less costly fashion, thereby serving the public safety and welfare.

~~B. An action, other than the approval of the responsible public entity under § 33.2-1803, shall serve the public purpose of this chapter if such action, including undertaking a concession, facilitates the timely development and/or operation of a qualifying transportation facility. A public-private partnership may be in the best interest of the public only if the requirements of subdivisions C 1 through 5 of § 33.2-1803 have been met.~~

C. It is the intent of this chapter, among other things, to encourage investment in the Commonwealth by private entities that facilitates the development and/or operation of transportation facilities *when such investment is in the best interest of the public*. Accordingly, public and private entities may have the greatest possible flexibility in contracting with each other for the provision of the public services that are the subject of this chapter.

D. This chapter shall be liberally construed in conformity with the purposes hereof.

§ 33.2-1803. 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 locality or public entity;

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's, locality's, or political subdivision's facilities, if any, that will be crossed by the transportation facility or facilities and a statement of the plans of the private entity to

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59 accommodate such crossings;

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

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

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

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

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

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

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

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

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

83 C. The responsible public entity may grant approval of the development and/or operation of the
84 transportation facility or facilities as a qualifying transportation facility if the responsible public entity
85 determines that it ~~serves the public purpose of this chapter is in the best interest of the public.~~ The
86 responsible public entity may determine that the development and/or operation of the transportation
87 facility or facilities as a qualifying transportation facility serves ~~such public purpose the best interest of~~
88 ~~the public~~ if:

89 1. ~~The private entity can develop and/or operate the transportation facility or facilities with a public~~
90 ~~contribution amount that is less than the maximum public contribution determined pursuant to~~
91 ~~subdivision B 2 of § 33.2-1803.3 for transportation facilities where the Department of Transportation or~~
92 ~~the Department of Rail and Public Transportation is the responsible public entity;~~

93 2. There is a public need for the transportation facility or facilities the private entity proposes to
94 develop and/or operate as a qualifying transportation facility ~~and for transportation facilities where the~~
95 ~~Department of Transportation or the Department of Rail and Public Transportation is the responsible~~
96 ~~public entity, such facility or facilities are included in the plan developed pursuant to § 33.2-353;~~

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

103 3. The estimated cost of developing and/or operating plan for the development and/or operation of
104 the transportation facility or facilities is reasonable in relation to similar facilities anticipated to have
105 significant benefits as determined pursuant to subdivision B 1 of § 33.2-1803.3;

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

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

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

114 D. The responsible public entity shall not enter into a comprehensive agreement unless the chief
115 executive officer of the responsible public entity certifies in writing to the Governor and the General
116 Assembly that the transfer, assignment, and assumption of risks, liabilities, and permitting
117 responsibilities ~~or and the mitigation of revenue risk by the private sector enumerated in the finding of~~
118 ~~public interest issued pursuant to § 33.2-1803.1 have not materially changed since the finding of public~~
119 ~~interest was issued pursuant to § 33.2-1803.1 and that:~~

120 1. The public contribution requested by the private entity does not exceed the maximum public

contribution determined pursuant to subdivision B 2 of § 33.2-1803.3; and the

2. The finding of public interest is still valid.

Changes to the project scope that do not impact the assignment of risks or liabilities or the mitigation of revenue risk shall not be considered material changes to the finding of public interest, provided that such change was presented in a public meeting to the Commonwealth Transportation Board, other state board, or the governing body of a locality, as appropriate.

E. 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 reasonable attorney 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, have 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.

F. 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.

G. 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.

H. 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.

I. 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.

§ 33.2-1803.1. Finding of public interest.

A. Prior to the initiation of a procurement issuance of a draft or final request for proposals pursuant to § 33.2-1803, the chief executive officer of the responsible public entity shall make a finding of public interest. Such finding shall include information set forth in subsection B. *For transportation facilities where the Department of Transportation or the Department of Rail and Public Transportation is the responsible public entity, the Secretary of Transportation, in his role as chairman of the Board, must concur with the finding of public interest.*

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

1. A description of the benefits expected to be realized by the responsible public entity through the development and/or operation of the transportation facility, including person throughput, congestion mitigation, safety, economic development, environmental quality, and land use.

2. An analysis of the public contribution necessary for the development and/or operation of the facility or facilities pursuant to subdivision B 2 of § 33.2-1803.3, including a maximum public contribution that will be allowed under the procurement.

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

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

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

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

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

189 ~~3.~~ 5. The determination of whether the project has a high, medium, or low level of project delivery
190 risk and a description of how such determination was made. If the qualifying transportation facility is
191 determined to contain high risk, a description of how the public's interest will be protected through the
192 transfer, assignment, or assumption of risks or responsibilities by the private entity in the event that
193 issues arise with the development and/or operation of the qualifying transportation facility.

194 4. 6. If the responsible public entity proposes to enter into an interim or comprehensive agreement
195 pursuant to subdivision 2 of § 33.2-1819, information and the rationale demonstrating that proceeding in
196 this manner is more beneficial than proceeding pursuant to subdivision 1 of § 33.2-1819.

197 **§ 33.2-1803.2. Transportation Public-Private Partnership Steering Committee.**

198 A. Procurement pursuant to § 33.2-1803 shall be initiated by the Department of Transportation or the
199 Department of Rail and Public Transportation only after the Transportation Public-Private Partnership
200 ~~Advisory Steering Committee~~ (the Committee) has determined that the development and/or operation of
201 the transportation facility or facilities as a qualifying transportation facility serves the public interest
202 pursuant to § 33.2-1803.1. *However, request for qualifications may be issued prior to such*
203 *determination.* The determination shall be evidenced by an affirmative vote of a majority of the
204 members of the Committee.

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

206 1. Two members of the Commonwealth Transportation Board;

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

209 3. A Deputy Secretary of Transportation *who shall serve as the chairman;*

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

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

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

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

220 **§ 33.2-1803.3. Public sector analysis and competition.**

221 A. *For any transportation facility under consideration for development and/or operation under this*
222 *chapter by the Department of Transportation or the Department of Rail and Public Transportation, the*
223 *responsible public entity shall ensure competition throughout the procurement process, including a*
224 *public sector option to develop and/or operate the facility or facilities.*

225 B. *The responsible public entity shall develop, in cooperation with the Secretary of Transportation*
226 *and the Secretary of Finance, a public sector analysis of the cost for the responsible entity to develop*
227 *and/or operate the transportation facility or facilities being considered for development and/or operation*
228 *pursuant to this chapter. At a minimum, such analysis shall contain the following information:*

229 1. *User fees expected to be generated by the transportation facility, including any mitigation of risk*
230 *of such user fees through assumptions related to competing facilities or restrictions on exemptions from*
231 *tolls for high-occupancy vehicles.*

232 2. *Public contribution, if any, required for the development and/or operation of the transportation*
233 *facility should the General Assembly authorize the use of debt secured by a pledge of net revenues*
234 *derived from rates, fees, or other charges and the full faith and credit of the Commonwealth pursuant to*
235 *Article X, Section 9 (c) of the Constitution of Virginia.*

236 3. *Funds provided to support nonuser fee generating components of the project that contribute to the*
237 *benefits expected to be realized from the transportation facility pursuant to subdivision B 1 of*
238 *§ 33.2-1803.1.*

239 **§ 33.2-1809. Interim agreement.**

240 A. Prior to or in connection with the negotiation of the comprehensive agreement, the responsible
241 public entity may enter into an interim agreement with the private entity proposing the development
242 and/or operation of the facility or facilities. Such interim agreement may (i) permit the private entity to
243 commence activities for which it may be compensated relating to the proposed qualifying transportation

244 facility, including project planning and development, advance right-of-way acquisition, design and
245 engineering, environmental analysis and mitigation, survey, conducting transportation and revenue
246 studies, and ascertaining the availability of financing for the proposed facility or facilities; (ii) establish
247 the process and timing of the negotiation of the comprehensive agreement; and (iii) contain any other
248 provisions related to any aspect of the development and/or operation of a qualifying transportation
249 facility that the parties may deem appropriate.

250 B. Notwithstanding any provision of this chapter to the contrary, a responsible public entity may
251 enter in to an interim agreement with multiple private entities if the responsible public entity determines
252 in writing that it is in the public interest to do so.

253 C. *The Department of Transportation and the Department of Rail and Public Transportation shall*
254 *not enter into an interim agreement for the development of a transportation facility under this chapter.*