

# VIRGINIA ACTS OF ASSEMBLY -- 2015 SESSION

## CHAPTER 612

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

[H 1886]

Approved March 26, 2015

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

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

**§ 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 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, enhancing economic efficiency, or any combination thereof; ~~and~~

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

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

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

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

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

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

C. The responsible public entity may grant approval of the development and/or operation of the transportation facility or facilities as a qualifying transportation facility if the responsible public entity determines that it serves the public purpose of this chapter. The responsible public entity may determine

that the development and/or operation of the transportation facility or facilities as a qualifying transportation facility serves such public purpose if:

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

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

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

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

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

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

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

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 use of this chapter compared with the development and/or operation of the transportation facility through other options available to the responsible public entity.

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

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

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

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

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

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

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

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

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

1. Two members of the Commonwealth Transportation Board;

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

3. A Deputy Secretary of Transportation;

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

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

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

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

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

A. Conceptual proposals submitted in accordance with subsection A or B of § 33.2-1803 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. For proposals submitted pursuant to subsection A of § 33.2-1803, the notice posted shall (i) provide for a period of 120 days for the submission of competing proposals; (ii) include specific information regarding the proposed nature, timing, and scope of the qualifying transportation facility; and (iii) outline the opportunities that will be provided for public comment during the review process; 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~~ *the following shall apply:*

1. *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 at the sole discretion of the responsible public entity. After the end of the public comment period, no additional posting shall be required.*

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

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 projected use of any public funds, on the Department of General Services' central electronic procurement website; (ii) outline how the public can submit comments on those major business points; and (iii) 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.

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