

VIRGINIA ACTS OF ASSEMBLY -- 2017 SESSION

CHAPTER 539

An Act 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 33.2-1803.1:1, relating to the Public-Private Transportation Act of 1995.

[H 2244]

Approved March 16, 2017

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 33.2-1803.1:1 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 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;

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 Steering 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 best interest of the public*.

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 is in the best interest of the public*. 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 the best interest of the public* if:

1. *The private entity can develop and/or operate the transportation facility or facilities with a public contribution amount that is less than the maximum public contribution determined pursuant to subsection A of § 33.2-1803.1:1 for transportation facilities where the Department of Transportation or the Department of Rail and Public Transportation is the responsible public entity;*

2. *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 and for transportation facilities where the Department of Transportation or the Department of Rail and Public Transportation is the responsible public entity, such facility or facilities meet a need included in the plan developed pursuant to § 33.2-353;*

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 plan for the development and/or operation of the transportation facility or facilities is reasonable in relation to similar facilities anticipated to have significant benefits as determined pursuant to subdivision B 1 of § 33.2-1803.1;*

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~~:

1. *The finding of public interest issued pursuant to § 33.2-1803.1 is still valid;*

2. *The transfer, assignment, and assumption of risks, liabilities, and permitting responsibilities or and 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 of public interest was issued and the finding of public interest is still valid pursuant to § 33.2-1803.1; and*

3. *The public contribution requested by the private entity does not exceed the maximum public contribution determined pursuant to subsection A of § 33.2-1803.1:1.*

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~~ *changes were* 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, C, *and* D. 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,~~ *meeting of the Committee pursuant to subsection C of § 33.2-1803.2,* 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 subsection A of § 33.2-1803.1:1, 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.

~~2-~~ 4. 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. 5. 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. 6. 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.

§ 33.2-1803.1:1. Public sector analysis and competition.

A. For any transportation facility under consideration for development and/or operation under this chapter by the Department of Transportation or the Department of Rail and Public Transportation, the responsible public entity shall ensure competition throughout the procurement process by developing a public sector option based on the analysis conducted in subsection B. The public sector option shall identify a maximum public contribution.

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

1. Any mitigation of risk of user-fee financing through assumptions related to competing facilities, compensation for high usage of the facility by high-occupancy vehicles, or other considerations that may mitigate the risk of user-fee financing.

2. Whether the Department of Transportation or the Department of Rail and Public Transportation intends to maintain and operate the facility, or if the public sector option is based on the transfer of such responsibilities to the private sector.

3. Public contribution, if any, that would still be required to cover all costs necessary for the development and/or operation of the transportation facility in excess of financing available should the General Assembly authorize the use of debt secured by a pledge of net revenues derived from rates, fees, or other charges and the full faith and credit of the Commonwealth pursuant to Article X, Section 9 (c) of the Constitution of Virginia.

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

§ 33.2-1803.2. Transportation Public-Private Partnership Steering 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 There is hereby established the Transportation Public-Private Partnership Advisory Steering 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 to evaluate and review financing options for the development and/or operation of transportation facility or facilities.

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 who shall serve as the chairman;
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.

B. Prior to the initiation of any procurement pursuant to § 33.2-1803 by the Department of Transportation or the Department of Rail and Public Transportation, the Committee shall meet to review the public sector analysis and competition developed pursuant to § 33.2-1803.1:1 and concur that:

1. The assumptions regarding the project scope, benefits, and costs of the public sector option developed pursuant to § 33.2-1803.1:1 were fully and reasonably developed;

2. The assumed financing costs and valuation of both financial and construction risk mitigation included in the public sector option are financially sound and reflect the best interest of the public; and

3. The terms sheet developed for the proposed procurement contains all necessary elements.

C. After receipt of responses to the request for qualifications, but prior to the issuance of the first draft request for proposals, the Committee shall meet to determine 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. If the Committee makes an affirmative determination, as evidenced by an affirmative vote of a majority of the members of the Committee, the Department of Transportation or the Department of Rail and Public Transportation may proceed with the procurement

pursuant to § 33.2-1803.

~~C.~~ D. 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~~ *the Committee may convene a closed session pursuant to the provisions of subdivisions A 6 and 29 of § 2.2-3711 to allow the Committee to review the public sector analysis and competition and to review proposals received pursuant to a request for qualifications.*

~~D.~~ E. 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~~ *on the findings of such meeting.* 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.

F. Within 60 days of the execution of a comprehensive agreement pursuant to § 33.2-1803, the Department of Transportation or the Department of Rail and Public Transportation, as appropriate, shall, in closed session, brief the Committee on the details of the final bids received and the details of the evaluation of such bids.

§ 33.2-1809. Interim agreement.

A. Prior to or in connection with the negotiation of the comprehensive agreement, the responsible public entity may enter into an interim agreement with the private entity proposing the development and/or operation of the facility or facilities. Such interim agreement may (i) permit the private entity to commence activities for which it may be compensated relating to the proposed qualifying transportation facility, including project planning and development, advance right-of-way acquisition, design and engineering, environmental analysis and mitigation, survey, conducting transportation and revenue studies, and ascertaining the availability of financing for the proposed facility or facilities; (ii) establish the process and timing of the negotiation of the comprehensive agreement; and (iii) contain any other provisions related to any aspect of the development and/or operation of a qualifying transportation facility that the parties may deem appropriate.

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

C. *The Department of Transportation and the Department of Rail and Public Transportation shall not enter into an interim agreement for the development of a transportation facility under this chapter that either (i) establishes a process and timing of the negotiations of the comprehensive agreement or (ii) allows for competitive negotiations as set forth in § 2.2-4302.2.*

2. That the provisions of subsection C of § 33.2-1809 as added by this act shall not apply to any amendment made to any comprehensive agreement originally entered into prior to July 1, 2017.