

1 **H. B. 2511**

2
3 (By Mr. Speaker, (Mr. Thompson) and Delegate Armstead)

4 [By Request of the Executive]

5 [Introduced February 15, 2013; referred to the

6 Committee on Roads and Transportation then Finance.]

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10 A BILL to amend and reenact §17-27-5 and §17-27-9 of the Code of
11 West Virginia, 1931, as amended, all relating to the funding
12 of transportation public-private partnership projects and
13 their corresponding comprehensive agreements; eliminating
14 requirement that money from the State Road Fund only be used
15 for public-private partnership projects where the money serves
16 as a required match for federal funds specifically earmarked
17 in a federal authorization or appropriation bill and does not
18 exceed four percent of the immediate preceding three fiscal
19 years' average of the Division of Highway's construction
20 contracts awarded under the competitive bid process; allowing
21 public-private partnership projects to use money from the
22 State Road Fund when the projects are in excess of
23 \$20 million, constructed by the Division of Highways, and
24 contained in its six-year plan; providing that any earnings in

1 excess of maximum rate of return that is negotiated in
2 comprehensive agreements be deposited in the State Road Fund;
3 eliminating a sunset provision prohibiting comprehensive
4 agreements for public-private partnership projects after June
5 30, 2013; eliminating the requirement that a comprehensive
6 agreement for public-private partnership projects be approved
7 by concurrent resolution of the Legislature and be submitted
8 to the Governor for his or her approval or disapproval before
9 the Division of Highways enters into the comprehensive
10 agreement; and instead mandating that the Division of Highways
11 provide a copy of any comprehensive agreement to the
12 Legislature's Joint Committee on Government and Finance at
13 least thirty days prior to said agreement being executed by
14 the Division of Highways for a public-private partnership
15 project.

16 *Be it enacted by the Legislature of West Virginia:*

17 That §17-27-5 and §17-27-9 of the Code of West Virginia, 1931,
18 as amended, be amended and reenacted, all to read as follows:

19 **ARTICLE 27. PUBLIC-PRIVATE TRANSPORTATION FACILITIES ACT.**

20 **§17-27-5. Submission and review of conceptual proposals; approval**
21 **by the Commissioner of Highways.**

22 (a) A private entity may submit in writing a solicited
23 conceptual proposal for a transportation facility to the division

1 for consideration. The conceptual proposal shall include the
2 following:

3 (1) A statement of the private entity's qualifications and
4 experience;

5 (2) A description of the proposed transportation facility;

6 (3) A description of the financing for the transportation
7 facility; and

8 (4) A statement setting forth the degree of public support for
9 the proposed transportation facility, including a statement of the
10 benefits of the proposed transportation facility to the public and
11 its compatibility with existing transportation facilities.

12 (b) Following review by the division, the division shall
13 submit to the Commissioner of Highways the conceptual proposals and
14 priority ranking for review for final selection.

15 (c) The conceptual proposal shall be accompanied by the
16 following material and information unless waived by the division
17 with respect to the transportation facility or facilities that the
18 private entity proposes to develop as a qualifying transportation
19 facility:

20 (1) A topographic map (1:2,000 or other appropriate scale)
21 indicating the location of the transportation facility or
22 facilities;

23 (2) A description of the transportation facility or
24 facilities, including the conceptual design of the facility or

1 facilities and all proposed interconnections with other
2 transportation facilities;

3 (3) The projected total life-cycle cost of the transportation
4 facility or facilities and the proposed date for acquisition of or
5 the beginning of construction of, or improvements to, the
6 transportation facility or facilities;

7 (4) A statement setting forth the method by which the
8 developer proposes to secure all property interests required for
9 the transportation facility or facilities: *Provided*, That with the
10 approval of the division, the private entity may request that the
11 comprehensive agreement assign the division with responsibility for
12 securing all property interests, including public utility
13 facilities, with all costs, including costs of acquiring the
14 property, to be reimbursed to the division by the private entity.
15 The statement shall include the following information regarding the
16 property interests or rights, including, but not limited to, rights
17 to extract mineable minerals:

18 (A) The names and addresses, if known, of the current owners
19 of the property needed for the transportation facility or
20 facilities;

21 (B) The nature of the property interests to be acquired;

22 (C) Any property that the division may expect to condemn; and

23 (D) The extent to which the property has been or will be
24 subjected to the extraction of mineable minerals.

- 1 (5) Information relating to the current transportation plans,
2 if any, of each affected local jurisdiction;
- 3 (6) A list of all permits and approvals required for
4 acquisition or construction of or improvements to the
5 transportation facility or facilities from local, state or federal
6 agencies and a projected schedule for obtaining the permits and
7 approvals: *Provided*, That the acquisition, construction,
8 improvement or operation of a qualifying transportation facility
9 that includes the extraction of mineable minerals is required to
10 obtain all necessary permits or approvals from all applicable
11 authorities in the same manner as if it were not a qualifying
12 transportation facility under this article;
- 13 (7) A list of public utility facilities, if any, that will be
14 crossed or affected by or as the result of the construction or
15 improvement of the public port transportation facility or
16 facilities and a statement of the plans of the developer to
17 accommodate the crossings or relocations;
- 18 (8) A statement setting forth the developer's general plans
19 for financing and operating the transportation facility or
20 facilities;
- 21 (9) The names and addresses of the persons who may be
22 contacted for further information concerning the request;
- 23 (10) Information about the developer, including, but not
24 limited to, an organizational chart of the developer,

1 capitalization of the developer, experience in the operation of
2 transportation facilities and references and certificates of good
3 standing from the Tax Commissioner, Insurance Commissioner and the
4 Division of Unemployment Compensation evidencing that the developer
5 is in good standing with state tax, workers' compensation and
6 unemployment compensation laws, respectively; and

7 (11) Any additional material and information requested by the
8 Commissioner of Highways.

9 (d) The division, with approval of the Commissioner of
10 Highways, may solicit proposals from private entities for the
11 acquisition, construction or improvement of transportation
12 facilities in a form and with the content determined by the
13 division.

14 (e) The division may solicit any proposal for the acquisition,
15 construction or improvement of the transportation facility or
16 facilities as a qualifying transportation facility if it is
17 determined that it serves the public purpose of this article. The
18 division may determine that the acquisition, construction or
19 improvement of the transportation facility or facilities as a
20 qualifying transportation facility serves a public purpose if:

21 (1) There is a public need for the transportation facility of
22 the type the private entity proposes to operate as a qualifying
23 transportation facility;

24 (2) The transportation facility and the proposed

1 interconnections with existing transportation facilities and the
2 developer's plans for development of the qualifying transportation
3 facility are reasonable and compatible with the state
4 transportation plan and with the local comprehensive plan or plans;

5 (3) The estimated cost of the transportation facility or
6 facilities is reasonable in relation to similar facilities;

7 (4) The acquisition, construction, improvement or the
8 financing of the transportation facility or facilities does not
9 involve any moneys from the State Road Fund: ~~unless those moneys~~
10 ~~from the State Road Fund serve as a required match for federal~~
11 ~~funds specifically earmarked in a federal authorization or~~
12 ~~appropriation bill for a transportation facility to be acquired,~~
13 ~~constructed or equipped pursuant to this article: Provided, That~~
14 ~~the dedication of State Road Fund moneys in any fiscal year as~~
15 ~~state required match for the federal earmark does not exceed four~~
16 ~~percent of the immediate preceding three fiscal years' average of~~
17 ~~division's construction contracts awarded under the competitive bid~~
18 ~~process: Provided, That moneys from the State Road Fund may be~~
19 ~~used if the project is constructed by the division, is in excess of~~
20 ~~\$20 million, and is contained in the division's six-year plan:~~

21 *Provided, however,* That the moneys from the General Revenue Fund
22 may also be used if so designated and approved by the Legislature.

23 (5) The use of federal funds in connection with the financing
24 of a qualifying transportation facility has been determined by the

1 division to be compatible with the state transportation plan and
2 with the local comprehensive plan or plans; and

3 (6) The private entity's plans will result in the timely
4 acquisition or construction of or improvements to the
5 transportation facility for their more efficient operation and that
6 the private entity's plans will result in a more timely and
7 economical delivery of the transportation facility than otherwise
8 available under existing delivery systems.

9 (f) Notwithstanding any provision of this article to the
10 contrary, the recommendation of the division to the Commissioner of
11 Highways is subject to:

12 (1) The private entity's entering into a comprehensive
13 agreement with the division; and

14 (2) With respect to transportation facilities, the requirement
15 that public information dissemination with regard to any proposal
16 under consideration comply with the division's policy on the public
17 involvement process, as revised.

18 (g) In connection with its approval of the development of the
19 transportation facility as a qualifying transportation facility,
20 the division shall establish a date for the acquisition of or the
21 beginning of construction of or improvements to the qualifying
22 transportation facility. The division may extend that date.

23 (h) Selection by the Commissioner of Highways.

24 (1) Upon presentations of proposals received by the division,

1 the commissioner shall make his or her decision for the project.

2 (2) The commissioner shall notify the division and the public
3 of the final selection for the project.

4 **§17-27-9. Comprehensive agreement.**

5 (a) Prior to acquiring, constructing or improving the
6 qualifying transportation facility, the developer shall enter into
7 a comprehensive agreement with the division. The comprehensive
8 agreement shall provide for:

9 (1) Delivery of performance or payment bonds in connection
10 with the construction of or improvements to the qualifying
11 transportation facility, in the forms and amounts satisfactory to
12 the division;

13 (2) Review and approval of the final plans and specifications
14 for the qualifying transportation facility by the division;

15 (3) Inspection of the construction of or improvements to the
16 qualifying transportation facility to ensure that they conform to
17 the engineering standards acceptable to the division;

18 (4) Maintenance of a policy or policies of public liability
19 insurance or self-insurance, in a form and amount satisfactory to
20 the division and reasonably sufficient to insure coverage of tort
21 liability to the public and employees and to enable the continued
22 operation of the qualifying transportation facility: *Provided,*
23 That in no event may the insurance impose any pecuniary liability
24 on the state, its agencies or any political subdivision of the

1 state. Copies of the policies shall be filed with the division
2 accompanied by proofs of coverage;

3 (5) Monitoring of the maintenance and operating practices of
4 the developer by the division and the taking of any actions the
5 division finds appropriate to ensure that the qualifying
6 transportation facility is properly maintained and operated;

7 (6) Itemization and reimbursement to be paid to the division
8 for the review and any services provided by the division;

9 (7) Filing of appropriate financial statements on a periodic
10 basis;

11 (8) A reasonable maximum rate of return on investment for the
12 developer;

13 (9) The date of termination of the developer's duties under
14 this article and dedication to the division; and

15 (10) That a transportation facility shall accommodate all
16 public utilities on a reasonable, nondiscriminatory and completely
17 neutral basis and in compliance with the provisions of section
18 seventeen-b, article four, chapter seventeen of this code.

19 (b) The comprehensive agreement may require user fees
20 established by agreement of the parties. Any user fees shall be set
21 at a level that, taking into account any service payments, allows
22 the developer the rate of return on its investment specified in the
23 comprehensive agreement: *Provided*, That the schedule and amount of
24 the initial user fees to be imposed and any increase of the user

1 fees must be approved by the Commissioner of the Division of
2 Highways. A copy of any service contract shall be filed with the
3 division. A schedule of the current user fees shall be made
4 available by the developer to any member of the public on request.
5 In negotiating user fees under this section, the parties shall
6 establish fees that are the same for persons using the facility
7 under like conditions and that will not unreasonably discourage use
8 of the qualifying transportation facility. The execution of the
9 comprehensive agreement or any amendment to the comprehensive
10 agreement constitutes conclusive evidence that the user fees
11 provided in the comprehensive agreement comply with this article.
12 User fees established in the comprehensive agreement as a source of
13 revenues may be in addition to, or in lieu of, service payments.

14 (c) In the comprehensive agreement, the division may agree to
15 accept grants or loans from the developer, from time to time, from
16 amounts received from the state or federal government or any agency
17 or instrumentality of the state or federal government.

18 (d) The comprehensive agreement shall incorporate the duties
19 of the developer under this article and may contain any other terms
20 and conditions that the division determines serve the public
21 purpose of this chapter. Without limitation, the comprehensive
22 agreement may contain provisions under which the division agrees to
23 provide notice of default and cure rights for the benefit of the
24 developer and the persons specified in the comprehensive agreement

1 as providing financing for the qualifying transportation facility.
2 The comprehensive agreement may contain any other lawful terms and
3 conditions to which the developer and the division mutually agree,
4 including, without limitation, provisions regarding unavoidable
5 delays or provisions providing for a loan of public funds to the
6 developer to acquire, construct or improve one or more qualifying
7 transportation facilities.

8 (e) The comprehensive agreement shall require the deposit of
9 any earnings in excess of the maximum rate of return as negotiated
10 in the comprehensive agreement in the ~~Economic Development Project~~
11 ~~Bridge Loan Fund~~ State Road Fund established pursuant to ~~section~~
12 ~~eighteen-a, article twenty-two, chapter twenty-nine~~ section one,
13 article three, chapter seventeen of this code.

14 (f) Any changes in the terms of the comprehensive agreement,
15 agreed upon by the parties ~~and subject to the requirements of~~
16 ~~subsection (h) of this section,~~ shall be added to the comprehensive
17 agreement by written amendment.

18 (g) Notwithstanding any provision of this article to the
19 contrary, ~~the division may not enter into any comprehensive~~
20 ~~agreements with a developer after the thirtieth day of June, two~~
21 ~~thousand thirteen~~

22 ~~(h) Notwithstanding any provision of this article to the~~
23 ~~contrary, the division may not enter into any comprehensive~~
24 ~~agreements with a developer after the thirtieth day of June, two~~

1 ~~thousand thirteen.~~

2 ~~(i) Notwithstanding any provision of this article to the~~
3 ~~contrary, the division may not enter into a comprehensive agreement~~
4 ~~until the comprehensive agreement has been approved by the~~
5 ~~Legislature by the adoption of a concurrent resolution: *Provided,*~~
6 ~~That all voting on the floor of both houses on the question of the~~
7 ~~adoption of any concurrent resolution approving a comprehensive~~
8 ~~agreement shall be by yeas and nays to be entered on the Journals.~~
9 ~~If the Legislature approves the comprehensive agreement, the~~
10 ~~division shall submit the comprehensive agreement to the Governor~~
11 ~~for his or her approval or disapproval. at least thirty days prior~~
12 ~~to execution, the commissioner shall provide a copy of a~~
13 ~~comprehensive agreement to the Joint Committee on Government and~~
14 ~~Finance.~~

NOTE: The purpose of this bill is to allow the Division of Highways to participate in funding a needed public-private transportation project, to eliminate the sunset provision for comprehensive agreements for public-private partnership projects currently set for June 30, 2013, and to require the division to provide a copy of a comprehensive agreement to the Joint Committee on Government and Finance at least thirty days prior to said agreement being executed by the Commissioner of Highways.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.