

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Committee Substitute

for

House Bill 2721

BY MR. SPEAKER (MR. ARMSTEAD) AND DELEGATE MILEY

(BY REQUEST OF THE EXECUTIVE)

[Originating in the Committee on Finance;

March 21, 2017]

1 A BILL to amend and reenact §17-27-5 and §17-27-9 of the Code of West Virginia, 1931, as
2 amended, all relating to the public-private transportation facilities act; reducing the cost
3 threshold limitation on projects completed by the Division of Highways that are eligible for
4 funding from the state road fund; extending time limitation by which agreements must be
5 made; and requiring certain reporting.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 27. PUBLIC-PRIVATE TRANSPORTATION FACILITIES ACT.

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

1 (a) A private entity may submit in writing a solicited conceptual proposal for a
2 transportation facility to the division for consideration. The conceptual proposal shall include the
3 following:

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

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

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

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

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

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

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

17 (2) A description of the transportation facility or facilities, including the conceptual design
18 of the facility or facilities and all proposed interconnections with other transportation facilities;

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

22 (4) A statement setting forth the method by which the developer proposes to secure all
23 property interests required for the transportation facility or facilities: *Provided*, That with the
24 approval of the division, the private entity may request that the comprehensive agreement assign
25 the division with responsibility for securing all property interests, including public utility facilities,
26 with all costs, including costs of acquiring the property, to be reimbursed to the division by the
27 private entity. The statement shall include the following information regarding the property
28 interests or rights, including, but not limited to, rights to extract mineable minerals:

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

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

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

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

35 (5) Information relating to the current transportation plans, if any, of each affected local
36 jurisdiction;

37 (6) A list of all permits and approvals required for acquisition or construction of or
38 improvements to the transportation facility or facilities from local, state or federal agencies and a
39 projected schedule for obtaining the permits and approvals: *Provided*, That the acquisition,
40 construction, improvement or operation of a qualifying transportation facility that includes the

41 extraction of mineable minerals is required to obtain all necessary permits or approvals from all
42 applicable authorities in the same manner as if it were not a qualifying transportation facility under
43 this article;

44 (7) A list of public utility facilities, if any, that will be crossed or affected by or as the result
45 of the construction or improvement of the public port transportation facility or facilities and a
46 statement of the plans of the developer to accommodate the crossings or relocations;

47 (8) A statement setting forth the developer's general plans for financing and operating the
48 transportation facility or facilities;

49 (9) The names and addresses of the persons who may be contacted for further information
50 concerning the request;

51 (10) Information about the developer, including, but not limited to, an organizational chart
52 of the developer, capitalization of the developer, experience in the operation of transportation
53 facilities and references and certificates of good standing from the Tax Commissioner, Insurance
54 Commissioner and the Division of Unemployment Compensation evidencing that the developer
55 is in good standing with state tax, workers' compensation and unemployment compensation laws,
56 respectively; and

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

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

61 (e) The division may solicit any proposal for the acquisition, construction or improvement
62 of the transportation facility or facilities as a qualifying transportation facility if it is determined that
63 it serves the public purpose of this article. The division may determine that the acquisition,
64 construction or improvement of the transportation facility or facilities as a qualifying transportation
65 facility serves a public purpose if:

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

68 (2) The transportation facility and the proposed interconnections with existing
69 transportation facilities and the developer's plans for development of the qualifying transportation
70 facility are reasonable and compatible with the state transportation plan and with the local
71 comprehensive plan or plans;

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

74 (4) The acquisition, construction, improvement or the financing of the transportation facility
75 or facilities does not involve any moneys from the State Road Fund: *Provided*, That moneys from
76 the State Road Fund may be used if the project is constructed by the division: is in excess of
77 ~~\$20~~ \$10 million and is contained in the division's six-year plan *Provided, however*, That the
78 moneys from the General Revenue Fund may also be used if so designated and approved by the
79 Legislature.

80 (5) The use of federal funds in connection with the financing of a qualifying transportation
81 facility has been determined by the division to be compatible with the state transportation plan
82 and with the local comprehensive plan or plans; and

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

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

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

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

93 (g) In connection with its approval of the development of the transportation facility as a
94 qualifying transportation facility, the division shall establish a date for the acquisition of or the
95 beginning of construction of or improvements to the qualifying transportation facility. The division
96 may extend that date.

97 (h) Selection by the Commissioner of Highways:

98 (1) Upon presentations of proposals received by the division, the commissioner shall make
99 his or her decision for the project.

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

§17-27-9. Comprehensive agreement.

1 (a) Prior to acquiring, constructing or improving the qualifying transportation facility, the
2 developer shall enter into a comprehensive agreement with the division. The comprehensive
3 agreement shall provide for:

4 (1) Delivery of performance or payment bonds in connection with the construction of or
5 improvements to the qualifying transportation facility, in the forms and amounts satisfactory to the
6 division;

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

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

11 (4) Maintenance of a policy or policies of public liability insurance or self insurance, in a
12 form and amount satisfactory to the division and reasonably sufficient to insure coverage of tort
13 liability to the public and employees and to enable the continued operation of the qualifying

14 transportation facility: *Provided*, That in no event may the insurance impose any pecuniary liability
15 on the state, its agencies or any political subdivision of the state. Copies of the policies shall be
16 filed with the division accompanied by proofs of coverage;

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

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

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

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

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

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

29 (b) The comprehensive agreement may require user fees established by agreement of the
30 parties. Any user fees shall be set at a level that, taking into account any service payments, allows
31 the developer the rate of return on its investment specified in the comprehensive agreement:

32 *Provided*, That the schedule and amount of the initial user fees to be imposed and any increase
33 of the user fees must be approved by the Commissioner of the Division of Highways. A copy of
34 any service contract shall be filed with the division. A schedule of the current user fees shall be
35 made available by the developer to any member of the public upon request. In negotiating user
36 fees under this section, the parties shall establish fees that are the same for persons using the
37 facility under like conditions and that will not unreasonably discourage use of the qualifying
38 transportation facility. The execution of the comprehensive agreement or any amendment to the
39 comprehensive agreement constitutes conclusive evidence that the user fees provided in the

40 comprehensive agreement comply with this article. User fees established in the comprehensive
41 agreement as a source of revenues may be in addition to, or in lieu of, service payments.

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

45 (d) The comprehensive agreement shall incorporate the duties of the developer under this
46 article and may contain any other terms and conditions that the division determines serve the
47 public purpose of this chapter. Without limitation, the comprehensive agreement may contain
48 provisions under which the division agrees to provide notice of default and cure rights for the
49 benefit of the developer and the persons specified in the comprehensive agreement as providing
50 financing for the qualifying transportation facility. The comprehensive agreement may contain any
51 other lawful terms and conditions to which the developer and the division mutually agree,
52 including, without limitation, provisions regarding unavoidable delays or provisions providing for
53 a loan of public funds to the developer to acquire, construct or improve one or more qualifying
54 transportation facilities.

55 (e) The comprehensive agreement shall require the deposit of any earnings in excess of
56 the maximum rate of return as negotiated in the comprehensive agreement in the State Road
57 Fund established pursuant to section one, article three, chapter seventeen of this code.

58 (f) Any changes in the terms of the comprehensive agreement, agreed upon by the parties,
59 shall be added to the comprehensive agreement by written amendment.

60 (g) Notwithstanding any provision of this article to the contrary, the division may not enter
61 any comprehensive agreements with a developer after June 30, ~~2017~~ 2023.

62 (h) Notwithstanding any provision of this article to the contrary, at least thirty days prior to
63 execution, the commissioner shall provide a copy of a comprehensive agreement to the Joint
64 Committee on Government and Finance.

65 (i) On or before January 15, 2018, and annually thereafter, the Commissioner of Highways
66 shall prepare and submit to the Joint Committee on Government and Finance a written report
67 evaluating the experience of the Division of Highways with each project subject to this article that
68 is being planned, in progress or completed, including the following information as to each project:

69 (1) Description and location of the project;

70 (2) The status of the project, including the timeline from planning to completion;

71 (3) Scope of work;

72 (4) Classification of the project as a preservation project, modernization project or
73 expansion project;

74 (5) Method of financing the project;

75 (6) Estimated and final cost of the project;

76 (7) Financial information, including whether the division realized any cost or time savings,
77 the number and cost of change orders and the number of bids received;

78 (8) The quality of work performed; and

79 (9) Any other issues the commissioner considers appropriate.