WEST VIRGINIA LEGISLATURE
EIGHTY-FIRST LEGISLATURE
REGULAR SESSION, 2013

ENROLLED

Senate Bill No. 190

(BY SENATORS KESSLER (MR. PRESIDENT) AND M. HALL,
BY REQUEST OF THE EXECUTIVE)

[PASSED APRIL 13, 2013; TO TAKE EFFECT JULY 1, 2013.]
AN ACT to amend and reenact §17-27-5 and §17-27-9 of the Code of West Virginia, 1931, as amended, all relating to the funding of transportation public-private partnership projects and their corresponding comprehensive agreements; eliminating requirement that money from the State Road Fund only be used for public-private partnership projects where the money serves as a required match for federal funds specifically earmarked in a federal authorization or appropriation bill and does not exceed four percent of the immediate preceding three fiscal years’ average of the Division of Highways’s construction contracts awarded under the competitive bid process; allowing public-private partnership projects to use money from the State Road Fund when the projects are in excess of $20 million, constructed by the Division of Highways and contained in its six-year plan; providing that any earnings in excess of maximum rate of return that is negotiated in comprehensive agreements be deposited in the State Road Fund; providing a sunset provision prohibiting comprehensive agreements for public-private partnership projects after June 30, 2017; eliminating the requirement that a comprehensive agreement for public-private partnership projects be approved by concurrent resolution of the Legislature and be submitted to the Governor for his or her approval or disapproval before the Division of Highways enters into the comprehensive agreement; and mandating that the Division of Highways provide a copy of any
Be it enacted by the Legislature of West Virginia:

That §17-27-5 and §17-27-9 of the Code of West Virginia, 1931, as amended, be amended 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.

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

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

(2) A description of the proposed transportation facility;

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

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

(b) Following review by the division, the division shall submit to the Commissioner of Highways the conceptual proposals and priority ranking for review for final selection.
(c) The conceptual proposal shall be accompanied by the following material and information unless waived by the division with respect to the transportation facility or facilities that the private entity proposes to develop 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 the facility or facilities and all proposed interconnections with other transportation facilities;

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

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

   (A) The names and addresses, if known, of the current owners of the property needed for the transportation facility or facilities;
(B) The nature of the property interests to be acquired;

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

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

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

(6) A list of all permits and approvals required for acquisition or construction of or improvements to the transportation facility or facilities from local, state or federal agencies and a projected schedule for obtaining the permits and approvals: Provided, That the acquisition, construction, improvement or operation of a qualifying transportation facility that includes the extraction of mineable minerals is required to obtain all necessary permits or approvals from all applicable authorities in the same manner as if it were not a qualifying transportation facility under this article;

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

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

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

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

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

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

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

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

(2) The transportation facility and the proposed interconnections with existing transportation facilities and the developer's plans for development of the qualifying transportation facility are reasonable and compatible with the state transportation plan and with the local comprehensive plan or plans;
(3) The estimated cost of the transportation facility or facilities is reasonable in relation to similar facilities;

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

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

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

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

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

(2) With respect to transportation facilities, the requirement that public information dissemination with regard to any proposal under consideration comply with the division’s policy on the public involvement process, as revised:
(g) In connection with its approval of the development of the transportation facility as a qualifying transportation facility, the division shall establish a date for the acquisition of or the beginning of construction of or improvements to the qualifying transportation facility. The division may extend that date.

(h) Selection by the Commissioner of Highways:

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

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


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

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

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

(3) Inspection of the construction of or improvements to the qualifying transportation facility to ensure that they conform to the engineering standards acceptable to the division;
(4) Maintenance of a policy or policies of public liability insurance or self insurance, in a form and amount satisfactory to the division and reasonably sufficient to insure coverage of tort liability to the public and employees and to enable the continued operation of the qualifying transportation facility: Provided, That in no event may the insurance impose any pecuniary liability on the state, its agencies or any political subdivision of the state. Copies of the policies shall be filed with the division accompanied by proofs of coverage;

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

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

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

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

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

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

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

Provided, That the schedule and amount of the initial user fees to be imposed and any increase of the user fees must be approved by the Commissioner of the Division of Highways. A copy of any service contract shall be filed with the division. A schedule of the current user fees shall be made available by the developer to any member of the public upon request. In negotiating user fees under this section, the parties shall establish fees that are the same for persons using the facility under like conditions and that will not unreasonably discourage use of the qualifying transportation facility. The execution of the comprehensive agreement or any amendment to the comprehensive agreement constitutes conclusive evidence that the user fees provided in the comprehensive agreement comply with this article. User fees established in the comprehensive agreement as a source of revenues may be in addition to, or in lieu of, service payments.

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

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

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

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

(g) Notwithstanding any provision of this article to the
contrary, the division may not enter into any comprehensive

(h) Notwithstanding any provision of this article to the
contrary, at least thirty days prior to execution, the
commissioner shall provide a copy of a comprehensive
agreement to the Joint Committee on Government and
Finance.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Member, Chairman Senate Committee

[Signature]

Chairman House Committee

[Signature]

Originated in the Senate.

To take effect July 1, 2013.

[Signature]

Clerk of the Senate

[Signature]

Clerk of the House of Delegates

[Signature]

President of the Senate

[Signature]

Speaker of the House of Delegates

The within is approved this the 29th Day of April, 2013.

[Signature]

Governor
PRESENTED TO THE GOVERNOR

APR 26 2013

Time 11:00 am