

E N G R O S S E D

## **Senate Bill No. 190**

(By Senators Kessler (Mr. President) and M. Hall,  
By Request of the Executive)

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[Introduced February 15, 2013;  
referred to the Committee on Transportation and Infrastructure;  
and then to the Committee on Finance.]

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A BILL 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 Highway'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; eliminating a sunset provision prohibiting comprehensive agreements for public-private partnership projects after June 30, 2013; 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 comprehensive agreement to the Legislature's Joint Committee on Government and Finance at least thirty days prior to said agreement being executed by the Division of Highways for a public-private partnership project.

*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.**

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

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

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

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

10 (4) A statement setting forth the degree of public support  
11 for the proposed transportation facility, including a statement

12 of the benefits of the proposed transportation facility to the  
13 public and its compatibility with existing transportation  
14 facilities.

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

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

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

26 (2) A description of the transportation facility or  
27 facilities, including the conceptual design of the facility or  
28 facilities and all proposed interconnections with other  
29 transportation facilities;

30 (3) The projected total life-cycle cost of the  
31 transportation facility or facilities and the proposed date for  
32 acquisition of or the beginning of construction of, or  
33 improvements to, the transportation facility or facilities;

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

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

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

50 (C) Any property that the division may expect to

51 condemn; and

52 (D) The extent to which the property has been or will be

53 subjected to the extraction of mineable minerals.

54 (5) Information relating to the current transportation

55 plans, if any, of each affected local jurisdiction;

56 (6) A list of all permits and approvals required for

57 acquisition or construction of or improvements to the

58 transportation facility or facilities from local, state or federal

59 agencies and a projected schedule for obtaining the permits

60 and approvals: *Provided*, That the acquisition, construction,

61 improvement or operation of a qualifying transportation

62 facility that includes the extraction of mineable minerals is

63 required to obtain all necessary permits or approvals from all

64 applicable authorities in the same manner as if it were not a

65 qualifying transportation facility under this article;

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

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

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

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

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

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

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

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



103 (2) The transportation facility and the proposed  
104 interconnections with existing transportation facilities and  
105 the developer's plans for development of the qualifying  
106 transportation facility are reasonable and compatible with the  
107 state transportation plan and with the local comprehensive  
108 plan or plans;

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

111 (4) The acquisition, construction, improvement or the  
112 financing of the transportation facility or facilities does not  
113 involve any moneys from the State Road Fund: ~~unless those~~  
114 ~~moneys from the State Road Fund serve as a required match~~  
115 ~~for federal funds specifically earmarked in a federal~~  
116 ~~authorization or appropriation bill for a transportation facility~~  
117 ~~to be acquired, constructed or equipped pursuant to this~~  
118 ~~article: *Provided*, That the dedication of State Road Fund~~  
119 ~~moneys in any fiscal year as state required match for the~~  
120 ~~federal earmark does not exceed four percent of the~~

121 ~~immediate preceding three fiscal years' average of division's~~  
122 ~~construction contracts awarded under the competitive bid~~  
123 ~~process:~~ Provided, That moneys from the State Road Fund  
124 may be used if the project is constructed by the division, is in  
125 excess of \$20 million and is contained in the division's  
126 six-year plan: *Provided, however,* That the moneys from the  
127 General Revenue Fund may also be used if so designated and  
128 approved by the Legislature.

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

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

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

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

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

150 (g) In connection with its approval of the development of  
151 the transportation facility as a qualifying transportation  
152 facility, the division shall establish a date for the acquisition  
153 of or the beginning of construction of or improvements to the  
154 qualifying transportation facility. The division may extend  
155 that date.

156 (h) Selection by the Commissioner of Highways:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

48 investment specified in the comprehensive agreement:  
49 *Provided*, That the schedule and amount of the initial user  
50 fees to be imposed and any increase of the user fees must be  
51 approved by the Commissioner of the Division of Highways.  
52 A copy of any service contract shall be filed with the  
53 division. A schedule of the current user fees shall be made  
54 available by the developer to any member of the public ~~on~~  
55 upon request. In negotiating user fees under this section, the  
56 parties shall establish fees that are the same for persons using  
57 the facility under like conditions and that will not  
58 unreasonably discourage use of the qualifying transportation  
59 facility. The execution of the comprehensive agreement or  
60 any amendment to the comprehensive agreement constitutes  
61 conclusive evidence that the user fees provided in the  
62 comprehensive agreement comply with this article. User fees  
63 established in the comprehensive agreement as a source of  
64 revenues may be in addition to, or in lieu of, service  
65 payments.

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

71 (d) The comprehensive agreement shall incorporate the  
72 duties of the developer under this article and may contain any  
73 other terms and conditions that the division determines serve  
74 the public purpose of this chapter. Without limitation, the  
75 comprehensive agreement may contain provisions under  
76 which the division agrees to provide notice of default and  
77 cure rights for the benefit of the developer and the persons  
78 specified in the comprehensive agreement as providing  
79 financing for the qualifying transportation facility. The  
80 comprehensive agreement may contain any other lawful  
81 terms and conditions to which the developer and the division  
82 mutually agree, including, without limitation, provisions  
83 regarding unavoidable delays or provisions providing for a



84 loan of public funds to the developer to acquire, construct or  
85 improve one or more qualifying transportation facilities.

86 (e) The comprehensive agreement shall require the  
87 deposit of any earnings in excess of the maximum rate of  
88 return as negotiated in the comprehensive agreement in the  
89 ~~Economic Development Project Bridge Loan Fund State~~  
90 ~~Road Fund~~ established pursuant to ~~section eighteen-a, article~~  
91 ~~twenty-two, chapter twenty-nine~~ section one, article three,  
92 chapter seventeen of this code.

93 (f) Any changes in the terms of the comprehensive  
94 agreement, agreed upon by the parties ~~and subject to the~~  
95 ~~requirements of subsection (h) of this section,~~ shall be added  
96 to the comprehensive agreement by written amendment.

97 (g) Notwithstanding any provision of this article to the  
98 contrary, the division may not enter into any comprehensive  
99 agreements with a developer after June 30, ~~two thousand~~  
100 ~~thirteen~~ 2017.

101 (h) Notwithstanding any provision of this article to the  
102 contrary, ~~the division may not enter into any comprehensive~~  
103 ~~agreements with a developer after the thirtieth day of June,~~  
104 ~~two thousand thirteen.~~

105 (i) ~~Notwithstanding any provision of this article to the~~  
106 ~~contrary, the division may not enter into a comprehensive~~  
107 ~~agreement until the comprehensive agreement has been~~  
108 ~~approved by the Legislature by the adoption of a concurrent~~  
109 ~~resolution: *Provided*, That all voting on the floor of both~~  
110 ~~houses on the question of the adoption of any concurrent~~  
111 ~~resolution approving a comprehensive agreement shall be by~~  
112 ~~yeas and nays to be entered on the Journals. If the Legislature~~  
113 ~~approves the comprehensive agreement, the division shall~~  
114 ~~submit the comprehensive agreement to the Governor for his~~  
115 ~~or her approval or disapproval at least thirty days prior to~~  
116 ~~execution, the commissioner shall provide a copy of a~~  
117 ~~comprehensive agreement to the Joint Committee on~~  
118 ~~Government and Finance.~~