

Senate Bill No. 190

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

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

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 transportation
31 facility or facilities and the proposed date for acquisition of

32 or the beginning of construction of, or improvements to, the
33 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 mineable
45 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
72 plans for financing and operating the transportation facility
73 or 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 of
79 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 of
101 the type the private entity proposes to operate as a qualifying
102 transportation facility;

103 (2) The transportation facility and the proposed
104 interconnections with existing transportation facilities and the
105 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 the thirtieth day of June,~~
100 ~~two thousand thirteen~~

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.

(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.)

FINANCE COMMITTEE AMENDMENTS

On page thirteen, section nine, line eighteen, after the word “contrary”, by inserting the following: “the division may not enter into any comprehensive agreements with a developer after June 30, 2017.

(h) Notwithstanding any provision of this article to the contrary,”.

And,

By striking out the title and substituting therefor a new title, to read as follows:

Eng. Senate Bill No. 190—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; 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 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.