



State of Tennessee

PUBLIC CHAPTER NO. 975

SENATE BILL NO. 2093

By Ketron, Yarbro, Dickerson, Tracy

Substituted for: House Bill No. 2407

By Sargent, Sparks, Dawn White, Casada, McCormick, Johnson, Matlock, Dunn, Lundberg, Hazlewood, McManus, Clemmons, Powell, Stewart, Jernigan, Kevin Brooks, Hardaway

AN ACT to amend Tennessee Code Annotated, Title 4; Title 6; Title 9; Title 12; Title 54; Title 55; Title 65 and Title 67, relative to public-private partnerships for transportation purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 54, is amended by adding the following language as a new chapter:

54-23-101. This chapter shall be known and may be cited as the "Public-Private Transportation Act of 2016".

54-23-102. As used in this chapter:

(1) "Affected jurisdiction" means any county or municipality in which all or a portion of a qualifying transportation facility is located;

(2) "Availability payments" means payments by a public entity to an eligible private entity in connection with the development, redevelopment, or operation of a qualifying transportation facility pursuant to a service contract or comprehensive agreement;

(3) "Comprehensive agreement" means the comprehensive agreement between the eligible private entity and the responsible public entity required by § 54-23-110;

(4) "Consortium" means an organization, association, or other entity comprised of one (1) or more private entities and established for the purpose of entering into a public-private initiative under this chapter;

(5) "Department" means the department of transportation;

(6) "Develop" or "development":

(A) Means the entire process of bringing a transportation facility to completion or expanding an existing transportation facility for additional capacity; and

(B) Includes planning, research, feasibility analysis, environmental evaluation, preliminary engineering, designing, acquisition of rights-of-way, relocation of utilities, permitting, environmental mitigation, contracting, financing, and construction;

(7) "Eligible private entity":

(A) Means the private entity that is responsible for development, redevelopment, or operation, or a combination of such activities, of a qualifying transportation facility; and

(B) Includes a consortium;

(8) "Interim agreement" means an agreement, including a memorandum of understanding or binding preliminary agreement, between the private entity and the responsible public entity that provides for completion of studies and any other activities to advance the development, redevelopment, or operation, or any combination of these activities, of a qualifying transportation facility;

(9) "Operate" or "operation":

(A) Means any activity associated with the management, operation, and maintenance of a completed transportation facility; and

(B) Includes installing, repairing, or replacing equipment; maintenance, repair, or improvement of the transportation facility; the payment of debt service on bonds, loans, federal credit enhancements, private placements, amounts payable under hedging agreements and ancillary agreements and other costs related to the agreements; the payment of dividends; the payment of salaries, benefits, and other costs of employees or employment necessary to the development, redevelopment, or operation of transportation facilities; the collection of user fees and the payment of costs of operation and debt service; and contracting or administering contracts related to, and the financing of, any activity under this subdivision (9);

(10) "Private entity" means any natural person, corporation, limited liability company, partnership, joint venture, or other private business entity;

(11) "Proprietary" in regard to information, means commercial or financial information that is used either directly or indirectly in the business of any private entity submitting information to a responsible public entity under this chapter, and that gives the private entity an advantage or an opportunity to obtain an advantage over competitors who do not know or use such information, or information that, the release of which, would compromise the negotiating positions of the public or private entities, which information includes trade secrets;

(12) "Public entity":

(A) Means this state or any county or municipality; any agency or authority of this state or of a county or municipality; and any authority, board, district, instrumentality, or other entity created pursuant to the laws of this state or created by this state or by one (1) or more counties or municipalities; and

(B) Includes a local transit authority, metropolitan planning organization, or regional transportation authority;

(13) "Public-private initiative" means a contractual arrangement between the responsible public entity and one (1) or more private entities, the terms of which are stated in a public-private agreement, that provides for:

(A) Acceptance of a private equity contribution, including a money payment, for the right to develop, redevelop, or operate a project or to provide service for a qualified transportation facility;

(B) Sharing of resources and the means of providing a project or service for a transportation facility; or

(C) Cooperation in developing, redeveloping, and operating projects or services for a transportation facility;

(14) "Qualifying transportation facility" means one (1) or more transportation facilities developed, redeveloped, or operated by a private entity pursuant to this chapter;

(15) "Redevelop" or "redevelopment" means the process of replanning, reconstructing, or redesigning a transportation facility, including acquisition, clearance, development, or disposal, or any combination of these activities, of a transportation facility;

(16) "Responsible public entity" means a public entity that has the power to develop, redevelop, or operate the applicable transportation facility;

(17) "Revenues":

(A) Means all revenues derived from and on account of, or generated by, a qualifying transportation facility, directly or indirectly, and any revenues paid, contributed, or pledged to an eligible private entity by a public entity pursuant to law, agreement, or otherwise; and

(B) Includes user fees; availability payments; milestone payments; progress payments; capital contributions; income; earnings; lease payments; allocations; federal, state, regional, and local appropriations or the appropriations or other funds available to a public entity; bond proceeds; equity investments; and money received as grants or otherwise from the federal government or from any public entity in aid of the facility;

(18) "Service contract" means a contract entered into pursuant to § 54-23-111;

(19) "Transportation facility" means any mass transit system intended for shared passenger transport services to the general public, together with any building, structure, appurtenance, utility, transport support facility, transport vehicles, service vehicles, parking facility, or any other facility, structure, vehicle or property needed to operate the transportation facility or provide connectivity for the transportation facility to any other non-mass transit system transportation infrastructure including, but not limited to, interstates, highways, roads, streets, alleys, and sidewalks; and

(20) "User fees" means the rates, fees, or other charges imposed by the eligible private entity of a qualifying transportation facility for use of all or a portion of the qualifying transportation facility.

54-23-103.

(a) The general assembly finds that:

(1) There is a public need for timely development, redevelopment, and operation of transportation facilities within this state;

(2) Such public need may not be wholly satisfied by existing ways in which transportation facilities are developed, redeveloped, or operated; and

(3) Authorizing private entities to develop, redevelop, and operate one (1) or more transportation facilities may result in the development, redevelopment, and operation of transportation facilities in a more timely or less costly fashion, which serves the public safety and welfare.

(b) An action, other than the approval of the responsible public entity under § 54-23-105, shall serve the public purpose of this chapter if the action facilitates the timely development, redevelopment, or operation of a qualifying transportation facility or the continued development, redevelopment, or operation of a qualifying transportation facility.

(c) Investment in this state by private entities that facilitates the development, redevelopment, and operation of transportation facilities is encouraged. Transportation financing shall be expanded and accelerated to improve and add to the convenience of the public, in such a manner that public and private entities shall have the greatest possible flexibility in contracting with each other for the provision of the public services that are the subject of this chapter.

(d) This chapter shall be liberally construed in conformity with the purposes of this chapter.

54-23-104.

The requirements for purchasing of, and contracting for, goods and services by a public entity as provided in title 6 and title 12, chapter 3 shall not apply to this chapter; provided, that the responsible public entity shall objectively and competitively select a private entity with which to enter into a public-private initiative in accordance with the guidelines adopted by the responsible public entity and as provided in § 54-23-106 for solicited and unsolicited proposals.

54-23-105.

(a) No private entity may develop, redevelop, or operate a transportation facility under this chapter without first obtaining approval of, and entering into a comprehensive agreement with, the responsible public entity pursuant to this section and § 54-23-110. The private entity may initiate the approval process by requesting approval pursuant to subsection (b).

(b) To request approval from the responsible public entity, the private entity shall provide the following material and information with respect to the transportation facility that the private entity proposes to develop, redevelop, or operate as a qualifying transportation facility:

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

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

(3) The projected cost of the transportation facility and the proposed date for the beginning of development, redevelopment, and operation of the transportation facility;

(4) If applicable, a statement setting forth the method by which the private entity proposes to assist in securing all property interests required for the transportation facility, if any, including:

(A) The current owners and operators of the property needed for the transportation facility;

(B) The nature of the interest in the property to be acquired; and

(C) Any property that the responsible public entity is expected to be requested to condemn;

(5) Information relating to the current transportation plans, if any, of the state, region, and each affected jurisdiction, including information on how the proposed development, redevelopment, and operation of the transportation facility will address the needs of such plans by improving safety, reducing congestion, increasing capacity, enhancing economic efficiency, or any combination thereof;

(6) A list of all permits and approvals required for development, redevelopment, and operation of the transportation facility from local, state, or federal agencies and a projected schedule for obtaining the permits and approvals;

(7) A list of public utility facilities, if any, that will be crossed by the transportation facility and a statement of the plans of the private entity to accommodate such crossings;

(8) A statement setting forth the private entity's general plans for development, redevelopment, or operation of the transportation facility;

(9) A statement of the risks, liabilities, and responsibilities to be transferred or assigned to, or assumed by, the private entity for the development, redevelopment, or operation of the transportation facility, including revenue risk and any operation and maintenance; and

(10) Such additional material and information as the responsible public entity may reasonably request.

(c)(1) If the proposed development, redevelopment, or operation of the transportation facility will utilize, connect to, interconnect with, or cross over the private property on which an existing transportation facility is located, then the private entity shall notify the existing transportation facility of its request for approval within fifteen (15) days of the private entity submitting its request for approval by furnishing written notice to the registered agent of the existing

transportation facility on file with the secretary of state with the following information to the owner and operator of the existing transportation facility: a topographic map (1:2,000 or other appropriate scale) indicating the location of the proposed development, redevelopment, or operation; a description of the proposed development, redevelopment, or operation, including the conceptual design of the transportation facility and all proposed interconnections with, utilizations of, connections to, and crossings over the existing transportation facility; a statement of the plans of the private entity to accommodate the interconnections with, utilizations of, connections to, and crossings over the existing transportation facility; and a statement setting forth the private entity's general plans for the proposed development, redevelopment, or operation. No proprietary information, which is confidential pursuant to § 54-23-107, shall be furnished to the owner and operator of the existing transportation facility. The existing transportation facility may submit comments relating to the proposed development, redevelopment, or operation of the transportation facility to the responsible public entity within thirty (30) days after receiving a written notice from the private entity.

(2) The responsible public entity shall notify each affected jurisdiction that is not a responsible public entity of its receipt of a request for approval by furnishing a copy of the request to the governing body of the affected jurisdiction; except, that no proprietary information, which is confidential pursuant to § 54-23-107, shall be furnished to the affected jurisdiction. Each affected jurisdiction may submit comments relating to a proposed qualifying transportation facility to the responsible public entity within sixty (60) days after receiving a request for comments from the responsible public entity and indicate whether the facility will address the needs identified in the appropriate state, regional, or local transportation plan.

(d)(1) Any request for approval submitted to the department shall also be submitted to and reviewed by the fiscal review committee of the general assembly pursuant to subdivisions (d)(2)-(4) prior to the department receiving, considering, evaluating, and accepting proposals from a private entity pursuant to § 54-23-106.

(2) The fiscal review committee shall have twenty (20) business days from receipt of request for approval to comment on the request.

(3) After this twenty-day period, the private entity may proceed to submit a proposal to the department pursuant to § 54-23-106.

(4) The fiscal review committee shall be provided a copy of the private entity's request for approval, including a description of the transportation facility, the projected cost and financial structure of the transportation facility, any impact on the debt capacity of the state, the proposed date for the beginning of development, redevelopment, and operation of the transportation facility, information relating to the current transportation plans, if any, of the state, region, and each affected jurisdiction, and any other information as may be requested by the committee; provided, that no proprietary information, which is confidential pursuant to § 54-23-107, shall be provided to the fiscal review committee.

(e) The responsible public entity may grant approval if it determines that the proposed development, redevelopment, or operation of the transportation facility pursuant to this chapter serves the public interest. The responsible public entity may determine that the proposed development, redevelopment, or operation of the transportation facility serves the public interest for purposes of this subsection (e) 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) Proceeding with the development, redevelopment, or operation of the transportation facility pursuant to this chapter is more beneficial than proceeding through other means of procurement available to the responsible public entity under title 6 or title 12, chapter 3;

(3) The proposed development, redevelopment, or operation provides sufficient benefits to the public when compared to substantially similar

development, redevelopment, or operation of transportation facilities by the responsible public entity;

(4) Any revenue risk will be transferred to the private entity and any such transfer of revenue risk will be mitigated through provisions in the interim or comprehensive agreement;

(5) The qualified transportation facility contains a low or medium level of project delivery risk; provided, that if the facility contains a high level of project delivery risk, the facility serves the public interest for purposes of this subsection (e) if, in addition to meeting the other requirements of this subsection (e), the risks, liabilities, or responsibilities will be transferred or assigned to, or assumed by, the private entity in the event that issues arise with the development, redevelopment, or operation of the qualifying transportation facility;

(6) The risks, liabilities, and responsibilities transferred or assigned to, or assumed by, the private entity provide sufficient benefits to the public to not proceed with the development, redevelopment, or operation of the transportation facility through other means of procurement available to the responsible public entity under title 6 or title 12, chapter 3;

(7) The transportation facility and the proposed interconnections with existing transportation facilities are compatible with the existing transportation plan for the state, region, and affected jurisdictions;

(8) The estimated cost, choice of technology, developing, redeveloping, or operation plans, and proposed manner of financing the development, redevelopment, or operation are reasonable;

(9) The private entity's plans will result in the timely development, redevelopment, and operation of the transportation facility or their more efficient operation; and

(10) The private entity proposing the development, redevelopment, or operation is technically, managerially, and financially viable to carry out the proposal.

(f) For any project with an estimated cost of over fifty million dollars (\$50,000,000), the responsible public entity also shall require the private entity to pay the costs for an independent audit of any and all cost estimates associated with the private entity's proposed development, redevelopment, or operation, as well as a review of all public costs and potential liabilities to which taxpayers could be exposed, including improvements to other transportation facilities that may be needed as a result of the proposed development, redevelopment, or operation, failure by the private entity to reimburse the responsible public entity for services provided, and potential risk and liability in the event the private entity defaults on the comprehensive agreement or on bonds issued for the project. This independent audit shall be conducted by an independent consultant selected by the responsible public entity, and all such information from the review shall be subject to public disclosure pursuant to § 10-7-503 or any other law; except, that no proprietary information, which is confidential pursuant to § 54-23-107, shall be subject to public disclosure.

(g) In connection with granting the approval, the responsible public entity shall set forth any reports that the private entity needs to file if the information or materials filed with the request change. Except for these reports, the private entity shall not be required to update the information or materials filed with the request.

(h) The responsible public entity may charge a reasonable fee to cover the costs of processing and reviewing a request for approval and may charge a reasonable annual fee to cover the costs of the performance of its duties under this chapter.

54-23-106.

(a) A responsible public entity may solicit, receive, consider, evaluate, and accept a proposal for a qualifying transportation facility.

(b) In soliciting and selecting a private entity with which to enter into a public-private initiative, the responsible public entity may utilize one (1) or more of the following procurement approaches:

(1) Competitive sealed bidding;

(2) Competitive selection of proposals, based on qualifications, best value, or both; or

(3) Any other competitive selection process that the responsible public entity determines to be appropriate or reasonable and in the best interest of the public.

(c) The responsible public entity may select multiple private entities with which to enter a public-private initiative for a transportation facility if it serves the public purpose of this chapter.

(d)(1) The responsible public entity may receive, consider, evaluate, and accept an unsolicited proposal for a public-private initiative if the proposal:

(A) Is independently originated and developed by the proposer;

(B) Benefits the public; and

(C) Includes sufficient detail and information for the responsible public entity to evaluate the proposal in an objective and timely manner.

(2) Within sixty (60) days after receiving an unsolicited proposal, the responsible public entity shall undertake a preliminary evaluation of the unsolicited proposal to determine if the proposal complies with the requirements under subdivision (d)(1).

(3) If the unsolicited proposal does not comply with subdivision (d)(1), the responsible public entity shall return the proposal without further action and return any fees paid by the private entity.

(4) If the unsolicited proposal complies with subdivision (d)(1), the responsible public entity may continue to evaluate the proposal in accordance with this section; provided, that the responsible public entity shall advertise the unsolicited proposal pursuant to subdivision (d)(5) for the purpose of receiving competitive proposals for the same proposed transportation facility.

(5) The advertisement shall outline the general nature and scope of the unsolicited proposal, including the location of the transportation facility and the work to be performed on or in connection with the transportation facility and shall specify an address to which a competing proposal may be submitted. The advertisement shall specify a reasonable time period of not less than ninety (90) days by which competitors must submit a competing proposal to the responsible public entity.

(6) The responsible public entity shall:

(A) Determine if any competing proposal is comparable in nature and scope to the original unsolicited proposal;

(B) Evaluate the original unsolicited proposal and any comparable competing proposal; and

(C) Conduct any good faith discussions and, if necessary, any negotiations concerning each qualified proposal.

(7) After evaluating the unsolicited proposal and any competing proposals, the responsible public entity may:

(A) Accept the unsolicited proposal and reject any competing proposals;

(B) Reject the unsolicited proposal and accept a comparable competing proposal if the responsible public entity determines that the

comparable competing proposal is the most advantageous to this state or the affected jurisdiction;

(C) Accept both an unsolicited proposal and a competing proposal if accepting both proposals is advantageous to this state or the affected jurisdiction; or

(D) Reject the unsolicited proposal and any competing proposals and return any remaining fees paid by the private entities.

(e) The responsible public entity may charge a reasonable fee to cover its costs to process, review, and evaluate a solicited or unsolicited proposal and any competing proposals.

(f) In evaluating and selecting a solicited or unsolicited proposal and any comparable competing proposal to enter into a public-private initiative, the responsible public entity shall consider whether the transportation facility is compatible with the existing transportation plan for the state, region, and affected jurisdictions.

(g) In evaluating and selecting a solicited or unsolicited proposal and any comparable competing proposal to enter into a public-private initiative, the responsible public entity may consider the following factors:

(1) The ability of the transportation facility to improve safety, reduce congestion, increase capacity, and promote economic growth;

(2) The proposed cost of and financial plan for the transportation facility;

(3) The general reputation, qualifications, industry experience, and financial capacity of the private entity;

(4) The proposed design, operation, and feasibility of the transportation facility;

(5) Comments from citizens within affected jurisdictions;

(6) Benefits to the public;

(7) The safety record of the private entity;

(8) Novel methods, approaches, or concepts demonstrated by the proposal;

(9) Scientific, technical, or socioeconomic merits of the proposal;

(10) Potential contribution of the proposal to the responsible public entity's mission;

(11) Capabilities, related experience, facilities, or techniques of the private entity or unique combinations of these qualities that are integral factors for achieving the proposal objectives;

(12) Qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel, who are critical to achieving the proposal objectives;

(13) Comments of the owners and operators of existing transportation facilities; and

(14) Other criteria that the responsible public entity deems appropriate.

(h) The responsible public entity shall return any remaining fees paid by a private entity for any proposal that is rejected.

(i) Section 54-23-107 shall apply to any unsolicited proposal or competing proposal that is rejected.

54-23-107.

(a) All solicited and unsolicited proposals received by the responsible public entity pursuant to § 54-23-106, and any documents used by the responsible public entity to evaluate and accept or reject the proposals, shall remain confidential and not subject to disclosure to any proposer, affected jurisdiction, or to the public under § 10-7-503 or other law until after the responsible public entity selects a proposal to enter into a public-private initiative; except, that, at all times under this chapter, proprietary information and all solicited and unsolicited proposals that are withdrawn by a private entity shall remain confidential and not subject to disclosure to any proposer, affected jurisdiction, or to the public pursuant to this subsection (a), § 10-7-503, or any other law.

(b)(1) A private entity may request a review, prior to submission of a solicited or unsolicited proposal, by the responsible public entity of information that the private entity has identified as proprietary.

(2) A private entity may identify proprietary information submitted as part of a solicited or unsolicited proposal. A private entity shall have an opportunity to object to the release of any information it identifies as proprietary.

(3) The responsible public entity shall review any information identified as proprietary by a private entity as part of a solicited or unsolicited proposal and shall determine if such information is confidential under subsection (a).

(4) The responsible public entity shall inform the private entity that submitted the information of its determination of whether information identified by the private entity as proprietary is confidential under subsection (a).

(5) The private entity shall have the opportunity to object to the determination that the information is subject to disclosure or to amend or withdraw its proposal.

(6) Any information determined by the responsible public entity to be proprietary shall be exempt from disclosure under § 10-7-503.

54-23-108.

(a) After selecting an eligible private entity with which to enter a public-private initiative for a transportation facility pursuant to § 54-23-106, the responsible public entity may enter into the comprehensive agreement with the eligible private entity.

(b) In connection with entering into the comprehensive agreement, the responsible public entity shall establish a date for the beginning of development, redevelopment, or operation of the qualifying transportation facility. The responsible public entity may extend the date from time to time.

(c) If a comprehensive agreement is entered into pursuant to this section, the private entity shall furnish reasonably adequate service and facilities to, and may charge reasonable user fees to, any persons desiring to use the transportation facilities; provided, that the user fees shall be charged uniformly for the use of the transportation facilities by persons using the facilities under like conditions and shall comply with applicable federal law.

54-23-109.

(a) Prior to or in connection with the negotiation of the comprehensive agreement, the responsible public entity may enter into an interim agreement with the private entity proposing the development, redevelopment, or operation of the qualified transportation facility or facilities. The interim agreement may:

(1) Permit the private entity to commence activities for which it may be compensated relating to the proposed qualifying transportation facility, including project planning and development, advance right-of-way acquisition, design and engineering, environmental analysis and mitigation, survey, conducting transportation and revenue studies, and ascertaining the availability of financing for the proposed facility or facilities;

(2) Establish the process and timing of the negotiation of the comprehensive agreement; and

(3) Contain any other provisions related to any aspect of the development, redevelopment, or operation of a qualifying transportation facility that the parties may deem appropriate.

(b) Notwithstanding anything to the contrary in this chapter, a responsible public entity may enter into an interim agreement with multiple private entities if the responsible public entity determines in writing that it serves the public purpose of this chapter to do so.

54-23-110.

(a) Prior to developing, redeveloping, or operating the qualifying transportation facility, the eligible private entity shall enter into a comprehensive agreement with the responsible public entity. The comprehensive agreement shall provide for:

(1) Delivery of performance and payment bonds that comply with § 54-5-119(a) or letters of credit in connection with any development or redevelopment of the qualifying transportation facility, and bonds, letters of credit, or other forms of security for any operation of the qualifying transportation facility, in the forms and amounts satisfactory to the responsible public entity;

(2) Review of plans for the development, redevelopment, and operation of the qualifying transportation facility by the responsible public entity and approval by the responsible public entity if the plans conform to the standards of the responsible public entity;

(3) Inspection of development, redevelopment, or operation of the qualifying transportation facility by the responsible public entity to ensure that the development, redevelopment, or operation conforms to the engineering and other standards acceptable to the responsible public entity;

(4) Maintenance by the private entity of a policy or policies of public liability insurance of which copies shall be filed with the responsible public entity accompanied by proofs of coverage, or self-insurance, in such form and amount satisfactory to the responsible public entity 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;

(5) Monitoring of the maintenance practices of the private entity by the responsible public entity and the taking of such actions as the responsible public entity finds appropriate to ensure that the qualifying transportation facility is properly maintained;

(6) Filing of appropriate financial statements in a form acceptable to the responsible public entity on a periodic basis;

(7) The date of termination of the private entity's authority and duties under this chapter and dedication to the appropriate public entity;

(8) Any such user fees as may be established by agreement of the parties;

(9) Details on the payment mechanism and performance requirements; and

(10) The duties of the private entity under this chapter.

(b) The comprehensive agreement may contain:

(1) Other terms and conditions that the responsible public entity determines serve the public purpose of this chapter and to which the private entity and the responsible public entity mutually agree, including provisions regarding unavoidable delays or provisions providing for a loan of public funds for the development, redevelopment, or operation of one (1) or more qualifying transportation facilities;

(2) Provisions for the development, redevelopment, or operation of phases or segments of the qualifying transportation facility;

(3) Provisions under which the responsible public entity agrees to provide notice of default and cure rights for the benefit of the private entity and the persons specified in the agreement as providing financing for the qualifying transportation facility;

(4) Reimbursement to be paid to the responsible public entity for its cost to provide the services performed by the responsible public entity;

(5) Guaranteed cost and completion guarantees related to the development, redevelopment, and operation of the qualified transportation facility and payment of damages or election to forgo availability payments for failure to meet the completion guarantee; and

(6) The process for potential sharing or distributing of any earnings in excess of the maximum rate of return as negotiated in the comprehensive agreement.

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

(d) Notwithstanding this chapter to the contrary, a responsible public entity may enter into a comprehensive agreement with multiple private entities if the responsible public entity determines in writing that it serves the public purpose of this chapter to do so.

54-23-111.

In addition to any authority otherwise conferred by law, any public entity may contract with an eligible private entity for the development, redevelopment, or operation of a qualifying transportation facility in exchange for availability payments and other consideration as such public entity may deem appropriate.

54-23-112.

Any public entity may dedicate any property in which it has an interest for public use as a qualified transportation facility if it finds that the dedication would serve the public purpose of this chapter. In connection with the dedication, the public entity may convey any interest that it has in the property, subject to the conditions imposed by general law, to the private entity, subject to this chapter, for such consideration as such public entity may determine. Such consideration may include the agreement of the private entity to develop, redevelop, or operate the qualifying transportation facility.

54-23-113.

(a) The eligible private entity shall have all power allowed by law generally to a private entity having the same form of organization as the eligible private entity. The eligible private entity shall have the power to develop, redevelop, and operate the qualifying transportation facility, impose user fees, and enter into service contracts in connection with the development, redevelopment, or operation of the facility in exchange for availability payments and other consideration without further approval by the general assembly; provided, that any state funds used for the purposes of this chapter shall be specifically appropriated by reference in the general appropriations act to the project or services for the qualifying transportation facility; provided, further, that the development, redevelopment, or operation of any project or qualifying transportation facility for which the department is the responsible public entity and for which toll revenue as defined in § 54-3-103 is collected, shall be subject to the requirements of § 54-3-102(b) that the project or facility be included in the department's transportation improvement program submitted to the general assembly and be subject to approval of the general assembly pursuant to the express provisions of the general appropriations act. Notwithstanding any other law to the contrary, the authority to develop, redevelop, and operate transportation facilities and to impose user fees as provided in this chapter shall apply to any portion of a transportation facility, whether constructed prior to, or on or after, the effective date of this act.

(b) The eligible private entity may own, lease, or acquire any other right to use or develop and operate the qualifying transportation facility.

(c) Any financing of the qualifying transportation facility may be in such amounts and upon such terms and conditions as may be determined by the eligible private entity; provided, that the eligible private entity may issue debt, equity, or other securities or obligations, enter into sale and leaseback transactions, and secure any financing with a pledge of, security interest in, or lien on, any or all of its property.

(d) In developing, redeveloping, or operating the qualifying transportation facility, the eligible private entity may:

(1) Make classifications according to reasonable categories for assessment of user fees in accordance with § 54-23-108(c); and

(2) With the consent of the responsible public entity, make and enforce reasonable policies to the same extent that the responsible public entity could have made policies with respect to a similar transportation facility.

(e) The eligible private entity shall:

(1) Develop, redevelop, or operate the qualifying transportation facility in a manner that meets the engineering and other standards of the responsible public entity for transportation facilities operated and maintained by the responsible public entity, in accordance with the comprehensive agreement;

(2) Keep the qualifying transportation facility open for use by the members of the public at all times after its initial opening upon payment of the applicable user fees and availability payments; provided, that the qualifying transportation facility may have reasonable hours of operation based on demand, and may be temporarily closed because of emergencies or, with the consent of the responsible public entity, to protect the safety of the public or for reasonable construction or maintenance procedures;

(3) Maintain, or provide by contract for the maintenance of, the qualifying transportation facility;

(4) File with the responsible public entity:

(A) Reports describing material contracts with affiliates of the eligible private entity;

(B) An accurate schedule of applicable user fees and availability payments charged for use of the qualifying transportation facility; and

(C) Any other information required by the responsible public entity; and

(5) Cooperate with the responsible public entity in establishing any interconnection with the qualifying transportation facility requested by the responsible public entity.

54-23-114.

(a) The responsible public entity may take any action to obtain federal, state, or local assistance for a qualifying transportation facility that serves the public purpose of this chapter and may enter into any contracts required to receive such federal, state, or local assistance; provided, that any federal funds available to or received by the state and other state funds for the purposes of this chapter shall be subject to appropriation by the general assembly in accordance with § 54-23-113(a). The responsible public entity may determine that it serves the public purpose of this chapter for all or any portion of the costs of a qualifying transportation facility to be paid, directly or indirectly, from the proceeds of a grant or loan made by the federal, state, or local government.

(b) The responsible public entity may agree to make grants, milestone payments, or loans for the development, redeveloping, or operation of the qualifying transportation facility from amounts received from the federal government or other public entity. Prior to adoption by the responsible public entity of any action authorizing such grants, milestone payments, or loans, the public entity shall submit a plan of financing to the comptroller of the treasury or the comptroller's designee for

approval. The comptroller of the treasury or the comptroller's designee may request any additional information as may be required to properly review the proposed plan of financing. The comptroller of the treasury or the comptroller's designee shall evaluate each plan of financing based on the plan's particular circumstances and shall approve the plan only if a determination is made that the repayment structure is in the public's interest.

54-23-115.

(a) The responsible public entity may terminate a comprehensive agreement for a qualifying transportation facility:

(1) If a material default, as defined in the comprehensive agreement, in the performance of the eligible private entity's duties under the comprehensive agreement or under the service contract, if any, has occurred and is continuing;

(2) If development, redevelopment, or operation of the qualifying transportation facility has not begun by the date established by the responsible public entity as such date has been extended;

(3) For failure to provide reasonably adequate service and facilities at reasonable and uniform user fees as provided by this chapter; or

(4) For failure to comply with any order of a court of record.

(b) Prior to any termination of a comprehensive agreement, the responsible public entity shall give written notice to the eligible private entity and any person providing financing for the qualifying transportation facility, including any trustee or agent for any person providing financing. The eligible private entity and the persons providing financing for the qualifying transportation facility shall be entitled to a reasonable time period to cure the event that could lead to termination of the comprehensive agreement.

(c) Upon the termination of the comprehensive agreement, the responsible public entity may exercise any or all of the following remedies:

(1) The responsible public entity may elect to take over the transportation facility and in such case it shall succeed to all of the right, title, and interest in such transportation facility, subject to any liens on revenues previously granted by the eligible private entity to any person providing financing therefor and subject to subsection (d). Any liens on the real estate and tangible property comprising the transportation facility or facilities shall be deemed to be extinguished and shall be released on request if the responsible public entity takes over the qualifying transportation facility pursuant to this subsection (c);

(2) Any responsible public entity having the power of condemnation under applicable eminent domain law may exercise such power of condemnation to acquire the qualifying transportation facility. Nothing in this chapter shall be construed to limit the exercise of the power of condemnation by eminent domain by any responsible public entity against a qualifying transportation facility after termination of the comprehensive agreement. Any person that has provided financing for the qualifying transportation facility, and the eligible private entity, to the extent of the person's capital investment, may be entitled to certain compensation as set forth in the comprehensive agreement; or

(3) The responsible public entity may exercise all other rights and remedies which may be available to it at law or in equity.

(d) In the event the responsible public entity elects to take over a qualifying transportation facility pursuant to subdivision (c)(1), the responsible public entity may develop, redevelop, or operate the transportation facility, impose user fees for the use of the transportation facility, and comply with any service contracts as if it were the eligible private entity. Any revenues that are subject to a lien shall be collected for the benefit of, and paid to, secured parties, as their interests may appear, to the extent necessary to satisfy the eligible private entity's obligations to secured parties, including the maintenance of reserves, and such liens shall be correspondingly reduced and, when paid off, released. Before applying such payments to or for the

benefit of secured parties, the responsible public entity may use revenues to pay current development, redevelopment, and operation costs of the transportation facility, including compensation to the responsible public entity for its services in operating and maintaining the qualifying transportation facility. Remaining revenues, if any, after all such payments have been made shall be paid to the eligible private entity over the time period that the comprehensive agreement would have been in effect had it not been terminated. The right to receive such payment, if any, shall be considered just compensation for the transportation facility or facilities.

(e) The full faith and credit and unlimited taxing power of the responsible public entity shall not be pledged to secure any financing of the eligible private entity by the election to take over the qualifying transportation facility. Assumption of development, redevelopment, or operation of the qualifying transportation facility shall not obligate the responsible public entity to pay any obligation of the eligible private entity from sources other than revenues.

54-23-116.

(a) At the request of the eligible private entity, the responsible public entity may exercise any power of condemnation by eminent domain that it has under law for the purpose of acquiring any lands or estates or interests therein to the extent that the responsible public entity finds that such action serves the public purpose of this chapter. Any amounts to be paid in any such condemnation proceeding may be paid by the eligible private entity.

(b) Except as provided in subsection (a), until a comprehensive agreement has been terminated, the power of condemnation may not be exercised against a qualifying transportation facility.

(c) After the comprehensive agreement has been terminated, any responsible public entity having the power of condemnation under law may exercise such power of condemnation as provided by law.

54-23-117.

The eligible private entity and each public utility or other entity whose facilities are to be crossed or affected shall cooperate fully with the other in planning and arranging the manner of the crossing or relocation of the facilities. Any such entity possessing the power of condemnation is expressly granted such powers in connection with the moving or relocation of facilities to be crossed by the qualifying transportation facility or that must be relocated to the extent that such moving or relocation is made necessary or desirable by development, redevelopment, or operation of the qualifying transportation facility, which shall be construed to include development, redevelopment, or operation of temporary facilities for the purpose of providing service during the period of development, redevelopment, or operation. Should the eligible private entity and any such public utility or other entity not be able to agree upon a plan for the crossing or relocation, the responsible public entity may determine the manner in which the crossing or relocation is to be accomplished and any damages due arising out of the crossing or relocation. The responsible public entity may employ expert engineers who shall examine the location and plans for such crossing or relocation, hear any objections and consider modifications, and make a recommendation to the responsible public entity. In such a case, the cost of the experts is to be borne by the eligible private entity.

54-23-118.

All law enforcement officers of the state and of each affected jurisdiction, shall have the same powers and jurisdiction within the limits of the qualifying transportation facility as are authorized in such respective areas of jurisdiction and such law enforcement officers shall have access to the qualifying transportation facility at any time for the purpose of exercising such powers and jurisdiction. This authority does not extend to the private offices, buildings, garages, and other improvements of the eligible private entity to any greater degree than the police power extends to any other private buildings and improvements.

54-23-119.

The responsible public entity shall determine the date of termination of the original permanent financing and the comprehensive agreement. The responsible public entity may change or extend the termination dates to take into account any refinancing of the original permanent financing, including any refinancing for the purpose of expansion, or any early termination of the original permanent financing to the extent that such modification serves the public purpose of this chapter. Upon the termination of the comprehensive agreement, the

authority and duties of the eligible private entity under this chapter shall cease, and the qualifying transportation facility shall be dedicated to the responsible public entity or, if the qualifying transportation facility was initially dedicated by an affected jurisdiction, to such affected jurisdiction for public use. Upon termination of the financing or comprehensive agreement, the responsible public entity may select another private entity pursuant to this chapter to provide the financing or complete the development, redevelopment, or operation of the qualifying transportation facility.

54-23-120.

Nothing in this chapter constitutes a waiver of the sovereign immunity of the state or any other public entity with respect to the participation in, or approval of all or any part of the qualifying transportation facility or its operation, including interconnection of the qualifying transportation facility with any other transportation facility.

54-23-121.

(a) Nothing in this chapter amends or repeals in any manner the provisions of this title or other provisions of law relating to the development, redevelopment, or operation of transportation facilities, or the provisions of title 6 or title 12, chapter 3, or other provisions of law relating to procurement of goods and services by the state or other public entity.

(b) This chapter supplements title 6 and title 12, chapter 3, and this title, to provide additional authority to procure and undertake the development, redevelopment, or operation of transportation facilities.

(c) Except as provided in § 54-23-113(a), nothing in title 6 or title 12, chapter 3, or this title, shall apply to the development, redevelopment, or operation of qualifying transportation facilities undertaken pursuant to the authority of this chapter.

SECTION 2. The commissioner of transportation is authorized to promulgate rules to effectuate the purposes of this act. All such rules shall be promulgated in accordance with the provisions of the Uniform Administrative Procedures Act, compiled in Title 4, Chapter 5.

SECTION 3. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 4. For purpose of promulgating rules, this act shall take effect upon becoming a law, the public welfare requiring it. For all other purposes, this act shall take effect October 1, 2016, the public welfare requiring it.

SENATE BILL NO. 2093

PASSED: April 18, 2016



RON RAMSEY
SPEAKER OF THE SENATE



BETH HARWELL, SPEAKER
HOUSE OF REPRESENTATIVES

APPROVED this 27th day of April 2016



BILL HASLAM, GOVERNOR