# Bond Case Briefs

*Municipal Finance Law Since 1971*

---

## Virginia P3 Law Amendments: Good for the Public, Bad for Business?

Virginia, long at the forefront of public-private partnership (P3) legislation, has enacted new measures to protect the public from high-risk projects. On March 6, 2015, the Virginia General Assembly enacted House Bill 1886 (HB 1886), which requires a front-end assessment of project risk and a public interest finding for P3 projects.

The Virginia Public-Private Transportation Act of 1995 (PPTA) provides for the construction and operation of public transportation facilities via contracts with private entities. The purpose of the PPTA is "to encourage investment in the Commonwealth" with "the greatest possible flexibility in contracting with each other for the provision of [such] public services." A private entity that seeks authorization to develop or operate a transportation facility must obtain approval of the responsible public entity. The responsible public entity may approve such a project if it determines that the project serves the "public purpose" of the PPTA.

HB 1886 adds two key requirements to the PPTA. First, when submitting a request for approval to the public entity, the private entity must state "the risks, liabilities, and responsibilities to be transferred, assigned, or assumed by the private entity for the development and/or operation of the transportation facility, including revenue risk and operations and maintenance."

Second, before initiating any procurement, the chief executive officer of the responsible public entity must make a finding of public interest. HB 1886 establishes the Transportation Public-Private Partnership Advisory Committee, which is required to make the public interest finding for procurements initiated by the Department of Transportation or the Department of Rail and Public Transportation.

The public interest finding must include a statement of risks, liabilities, and responsibilities, including whether revenue risk will transfer to the private entity and how to mitigate such risks in the P3 agreement, and a description of the risks, liabilities, and responsibilities that the public entity will retain. In addition, the public interest finding must state (1) the expected benefits to the public entity; (2) whether the project delivery risk is low, medium, or high, and if high, how the public's interest will be protected by transferring the risks or responsibilities to the private entity; and (3) if the public entity proposes competitive negotiation, why this is more beneficial than competitive sealed bidding. And, before entering a P3 contract, the public entity must certify that the risks, liabilities, and responsibilities have not materially changed since the public interest finding.

In accordance with the forgoing requirements, the amended PPTA incorporates a statement of risk into the definition of "public purpose." Previously, a facility served the "public purpose" if, among other things, there is a public need and the plans are reasonable and efficient. Now, a project serves a public purpose if, in addition to the forgoing, "[t]he risks, liabilities, and responsibilities transferred, assigned, or assumed by the private entity provide sufficient benefits to the public to not proceed with the development and/or operation of the transportation facility through other means of procurement available to the responsible public entity."

As enacted, HB 1886 may place a heavy burden on contractors seeking work in the Commonwealth. The bill therefore has the potential to stifle private investment and make Virginia less competitive with the 33 other states that have now enacted P3 legislation. We will continue to monitor the impact of this legislation.

Last Updated: June 4 2015

Article by Amy Elizabeth Garber

Bradley Arant Boult Cummings LLP

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*