

2015 -- H 6250

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STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2015

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A N A C T

RELATING TO PUBLIC PROPERTY AND WORKS - PUBLIC-PRIVATE PARTNERSHIPS -
PUBLIC PURPOSE FACILITY UPGRADE ACT

Introduced By: Representatives Casey, Shekarchi, Morin, Ackerman, and Keable

Date Introduced: May 27, 2015

Referred To: House Finance

It is enacted by the General Assembly as follows:

1 SECTION 1. Legislative findings and intent. The general assembly finds that there is a
2 public need for the construction, rehabilitation, and upgrade of facilities used for public purposes,
3 and that it is in the public interest to provide for such construction, rehabilitation, and upgrade of
4 such facilities.

5 (1) There is a public need for timely and cost-effective acquisition, design, construction,
6 improvement, renovation, expansion, equipping, maintenance, operation, implementation, or
7 installation of projects serving a public purpose, including educational facilities, transportation
8 facilities, water, or wastewater management facilities, and infrastructure, technology
9 infrastructure, roads, highways, bridges, and other public infrastructure and government facilities
10 within the state which serve a public need and purpose, and that such public need may not be
11 wholly satisfied by existing procurement methods.

12 (2) There are inadequate resources to develop new educational facilities, transportation
13 facilities, water or wastewater management facilities and infrastructure, technology infrastructure,
14 roads, highways, bridges, and other public infrastructure and government facilities for the benefit
15 of residents of this state, and that a public-private partnership has demonstrated that it can meet
16 the needs by improving the schedule for delivery, lowering the cost, and providing other benefits
17 to the public.

18 (3) A procurement under this section serves the public purpose of this section if such

1 procurement facilitates the timely development or operating of a qualifying project.

2 It is the intent of the general assembly to encourage investment in the state by private
3 entities; to facilitate various bond financing mechanisms, private capital, and other funding
4 sources for the development and operation of qualifying projects, including expansion and
5 acceleration of such financing to meet the public need; and to provide the greatest possible
6 flexibility to public and private entities contracting for the provision of public services.

7 SECTION 2. Title 37 of the General Laws entitled "PUBLIC PROPERTY AND
8 WORKS" is hereby amended by adding thereto the following chapter:

9 CHAPTER 25

10 PUBLIC-PRIVATE PARTNERSHIPS – PUBLIC PURPOSE FACILITY UPGRADE ACT

11 **37-25-1. Procurements through public-private partnerships.** – Notwithstanding any
12 provision of the general or public laws to the contrary, the general assembly hereby authorizes the
13 executive branch and all its departments, agencies, and offices of the state and all city and town
14 authorities to solicit and to accept all such procurements made pursuant to a public-private
15 partnership between such entities and qualifying private entities for qualifying projects.

16 **37-25-2. Implementation of rules and regulations.** – Consistent with the duties
17 described in § 37-2-9, the chief purchasing officer shall implement, consider, and decide matters
18 of policy, and have the power of review with respect to the implementation of such rules and
19 regulations and policy determinations regarding public-private partnerships under this chapter.
20 The chief purchasing officer may also promulgate further rules and regulations if necessary to
21 effectuate the intent of this chapter.

22 **37-25-3. Definitions – Public-private partnerships.** – As used in this section:

23 (1) "Affected local jurisdiction" means the state, city, town, or special district in which all
24 or a portion of a qualifying project is located;

25 (2) "Develop" means to plan, design, finance, lease, acquire, install, construct, or expand;

26 (3) "Fees" means charges imposed by the private entity of a qualifying project for use of
27 all or a portion of such qualifying project pursuant to a comprehensive agreement;

28 (4) "Lease payment" means any form of payment, including a land lease, by a public
29 entity to the private entity of a qualifying project for the use of the project;

30 (5) "Material default" means a nonperformance of its duties by the private entity of a
31 qualifying project which jeopardizes adequate service to the public from the project;

32 (6) "Operate" means to finance, maintain, improve, equip, modify, or repair;

33 (7) "Private entity" means any natural person, corporation, general partnership, limited
34 liability company, limited partnership, joint venture, business trust, public benefit corporation,

1 nonprofit entity, or other private business entity;

2 (8) "Proposal" means a plan for a qualifying project with detail beyond a conceptual level
3 for which terms such as fixing costs, payment schedules, financing, deliverables, and project
4 schedule are defined;

5 (9) "Qualifying project" means:

6 (i) A facility or project that serves a public purpose, including, but not limited to, any
7 ferry or mass transit facility, vehicle parking facility, airport or seaport facility, rail facility or
8 project, transportation facilities, technology infrastructure, roads, highways, bridges, fuel supply
9 facility, oil or gas pipeline, medical or nursing care facility, or educational facility or other
10 building or facility that is used or will be used by a public educational institution, or any other
11 public facility or infrastructure that is used or will be used by the public at large or in support of
12 an accepted public purpose or activity;

13 (ii) An improvement, including equipment, of a building that will be principally used by a
14 public entity or the public at large or that supports a service delivery system in the public sector;

15 (iii) A water, wastewater, or surface water management facility or other related
16 infrastructure; or

17 (iv) Notwithstanding any provision of this section, for projects that involve a facility
18 owned or operated by the governing board of a city or town, district, or hospital or health care
19 system, or projects that involve a facility owned or operated by an electric utility, only those
20 projects that the governing board designates as qualifying projects pursuant to this section.

21 (10) "Responsible public entity" means the state, a city, town, district, school board, or
22 any other political subdivision of the state; a public body corporate and politic; or a regional
23 entity that serves a public purpose and is authorized to develop or operate a qualifying project;

24 (11) "Revenues" means the income, earnings, user fees, lease payments, or other service
25 payments relating to the development or operation of a qualifying project, including, but not
26 limited to, money received as grants or otherwise from the federal government, a public entity, or
27 an agency or instrumentality thereof in aid of the qualifying project; and

28 (12) "Service contract" means a contract between a public entity and the private entity
29 which defines the terms of the services to be provided with respect to a qualifying project.

30 **37-25-4. Procurement procedures.** – (a) A responsible public entity may receive
31 unsolicited proposals or may solicit proposals for qualifying projects and may thereafter enter
32 into an agreement with a private entity, or a consortium of private entities, for the building,
33 upgrading, operating, ownership, or financing of facilities.

34 (b) The responsible public entity may establish a reasonable application fee for the

1 submission of an unsolicited proposal under this section. The fee must be sufficient to pay the
2 costs of evaluating the proposal. The responsible public entity may engage the services of a
3 private consultation to assist in the evaluation.

4 (c) The responsible public entity may request a proposal from private entities for public-
5 private project or, if the public entity receives an unsolicited proposal for a public-private project
6 and the public entity intends to enter into a comprehensive agreement for the project described in
7 such unsolicited proposal, the public entity shall publish notice in a newspaper of general
8 circulation at least once a week for two (2) weeks stating that the public entity has received a
9 proposal and will accept other proposals for the same project. The timeframe within which the
10 public entity may accept other proposals shall be determined by the public entity on a project-by-
11 project basis based upon the complexity of the project and the public benefit to be gained by
12 allowing a longer or shorter period of time within which other proposals may be received;
13 however, the timeframe for allowing other proposals must be at least twenty-one (21) days, but
14 no more than one hundred twenty (120) days after the initial date of publication. A copy of the
15 notice must be mailed to each local government in the affected area.

16 (d) A responsible public entity that is a school board may enter into a comprehensive
17 agreement only with the approval of the local governing body.

18 (e) Before approval, the responsible public entity must determine that the proposed
19 project:

20 (1) Is in the public's best interest;

21 (2) Is for a facility that is owned by the responsible public entity, or for a facility for
22 which ownership will be conveyed to the responsible public entity;

23 (3) Has adequate safeguards in place to ensure that additional costs or service disruptions
24 are not imposed on the public in the event of material default or cancellation of the agreement by
25 the responsible public entity;

26 (4) Has adequate safeguards in place to ensure that the responsible public entity or private
27 entity has the opportunity to add capacity to the proposed project or other facilities serving
28 similar predominantly public purposes; or

29 (5) Will be owned by the responsible public entity upon completion or termination of the
30 agreement, and upon payment of the amounts financed.

31 (f) Before signing a comprehensive agreement, the responsible public entity must
32 consider a reasonable finance plan that is consistent with § 37-25-10 including the project cost;
33 revenues by source; available financing; major assumptions; internal rate of return on private
34 investments, if governmental funds are assumed in order to deliver a cost-feasible project; and a

1 total cash-flow analysis beginning with the implementation of the project and extending for the
2 term of the agreement.

3 (g) In considering an unsolicited proposal, the responsible public entity may require from
4 the private entity a technical study prepared by a nationally recognized expert with experience in
5 preparing analysis for bond rating agencies as well as require disclosure of the private entity's
6 corporate governance documents, financial statements, certificates of insurance and any other
7 information necessary to determine the capability of such private entity to proceed and complete a
8 qualifying project under this chapter. In evaluating the technical study, the responsible public
9 entity may rely upon internal staff reports prepared by personnel familiar with the operation of
10 similar facilities or the advice of external advisors or consultants who have relevant experience.

11 **37-25-5. Project approval requirements.** -- (a) All solicited or unsolicited proposals
12 from a private entity for approval of a qualifying project must be accompanied by the following
13 material and information, unless waived by the responsible public entity:

14 (1) A description of the qualifying project, including the conceptual design of the
15 facilities or a conceptual plan for the provision of services, and a schedule for the initiation and
16 completion of the qualifying project.

17 (2) A description of the method by which the private entity proposes to secure the
18 necessary property interests that are required for the qualifying project.

19 (3) A description of the private entity's general plans for financing the qualifying project,
20 including the sources of the private entity's funds and the identity of any dedicated revenue source
21 or proposed debt or equity investment on behalf of the private entity.

22 (4) The name and address of a person who may be contacted for additional information
23 concerning the proposal.

24 (5) The proposed user fees, lease payments, or other service payments over the term of a
25 comprehensive agreement, and the methodology for and circumstances that would allow changes
26 to the user fees, lease payments, and other service payments over time.

27 (6) Additional material or information that the responsible public entity reasonably
28 requests.

29 **37-25-6. Project qualification and process.** -- (a) The private entity must meet the
30 minimum standards contained in the responsible public entity's guidelines for qualifying
31 professional services and contracts for traditional procurement projects.

32 (b) The responsible public entity must:

33 (1) Ensure that provision is made for the private entity's performance and payment of
34 subcontractors, including, but not limited to, surety bonds, letters of credit, parent company

1 guarantees, and lender and equity partner guarantees. For the components of the qualifying
2 project which involve construction performance and payment, bonds are required and are subject
3 to the recordation, notice, suit limitation, and other requirements;

4 (2) Ensure the most efficient pricing of the security package that provides for the
5 performance and payment of subcontractors;

6 (3) Ensure that provision is made for the transfer of the private entity's obligations if the
7 comprehensive agreement is terminated or a material default occurs;

8 (c) After the public notification period has expired in the case of an unsolicited proposal,
9 the responsible public entity shall rank the proposals received in order of preference. In ranking
10 the proposals, the responsible public entity may consider factors that include, but are not limited
11 to, professional qualifications, general business terms, innovative design techniques or cost-
12 reduction terms, and finance plans. The responsible public entity may then begin negotiations for
13 a comprehensive agreement with the highest-ranked firm. If the responsible public entity is not
14 satisfied with the results of the negotiations, the responsible public entity may terminate
15 negotiations with the proposer, and negotiate with the second-ranked or subsequent-ranked firms
16 in the order consistent with this procedure. If only one proposal is received, the responsible public
17 entity may negotiate in good faith, and if the public entity is not satisfied with the results of the
18 negotiations, the public entity may terminate negotiations with the proposer. Notwithstanding the
19 provisions of this subsection, the responsible public entity may reject all proposals at any point in
20 the process until contract with the proposer is executed.

21 (d) The responsible public entity shall perform an independent analysis of the proposed
22 public-private partnership which demonstrates the cost-effectiveness and overall public benefit
23 before the procurement process is initiated, or before the contract is awarded.

24 (e) The responsible public entity may approve the development or operation of an
25 education facility, a transportation facility, a water or wastewater management facility or related
26 infrastructure, a technology infrastructure or other public infrastructure, or a government facility
27 needed by the responsible public entity as a qualifying project, or the design or equipping of a
28 qualifying project that is developed or operated, if:

29 (1) There is a public need for or benefit derived from a project of the type that the private
30 entity proposes as the qualifying project.

31 (2) The estimated cost of the qualifying project is reasonable in relation to similar
32 facilities.

33 (3) The private entity's plans will result in the timely acquisition, design, construction,
34 improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying

1 project.

2 (f) The responsible public entity may charge a reasonable fee to cover the costs of
3 processing, reviewing, and evaluating the request, including, but not limited to, reasonable
4 attorney fees, and fees for financial and technical advisors or consultants and for other necessary
5 advisors or consultants.

6 (g) Upon approval of a qualifying project, the responsible public entity shall establish a
7 date for the commencement of activities related to the qualifying project. The responsible public
8 entity may extend the commencement date.

9 (h) Approval of a qualifying project by the responsible public entity is subject to entering
10 into a comprehensive agreement with the private entity.

11 **37-25-7. Interim agreement. --** (a) Before or in connection with the negotiation of a
12 comprehensive agreement, the public entity may enter into an interim agreement with the private
13 entity proposing the development or operation of the qualifying project. An interim agreement
14 does not obligate the responsible public entity to enter into a comprehensive agreement. The
15 interim agreement is discretionary with the parties, and is not required on a qualifying project for
16 which the parties may proceed directly to a comprehensive agreement without the need for an
17 interim agreement. An interim agreement must be limited to provisions that:

18 (1) Authorize the private entity to commence activities for which it may be compensated
19 related to the proposed qualifying project, including, but not limited to, project planning and
20 development, design, environmental analysis and mitigation, survey, other activities concerning
21 any part of the proposed qualifying project, and ascertaining the availability of financing for the
22 proposed facility or facilities.

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

24 (3) Contain such other provisions related to an aspect of the development or operation of
25 a qualifying project that the responsible public entity and the private entity deem appropriate.

26 **37-25-8. Comprehensive agreement. --** (a) Before developing or operating the
27 qualifying project, the private entity must enter into a comprehensive agreement with the
28 responsible public entity. The comprehensive agreement must provide for:

29 (1) Delivery of performance and payment bonds, letters of credit, or other security
30 acceptable to the responsible public entity in connection with the development or operation of the
31 qualifying project, in the form and amount satisfactory to the responsible public entity. For the
32 components of the qualifying project which involve construction, the form and amount of the
33 bonds must be consistent.

34 (2) Review of the design for the qualifying project by the responsible public entity and, if

1 the design conforms to standards acceptable to the responsible public entity, the approval of the
2 responsible public entity. This section does not require the private entity to complete the design of
3 the qualifying project before the execution of the comprehensive agreement.

4 (3) Inspection of the qualifying project by the responsible public entity to ensure that the
5 private entity's activities are acceptable to the public entity in accordance with the comprehensive
6 agreement.

7 (4) Maintenance of a policy of liability insurance, a copy of which must be filed with the
8 responsible public entity and accompanied by proofs of coverage, each in the form and amount
9 satisfactory to the responsible public entity and reasonably sufficient to ensure coverage of
10 liability to the public and employees which names the responsible public entity as an additional
11 insured under the policy terms and to enable the continued operation of the qualifying project.

12 (5) Monitoring by the responsible public entity of the maintenance practices to be
13 performed by the private entity to ensure that the qualifying project is properly maintained.

14 (6) Periodic filing by the private entity of the appropriate financial statements that pertain
15 to the qualifying project.

16 (7) Procedures that govern the rights and responsibilities of the responsible public entity
17 and the private entity in the course of the construction and operation of the qualifying project and
18 in the event of the termination of the comprehensive agreement or a material default by the
19 private entity. The procedures must include conditions that govern the assumption of the duties
20 and responsibilities of the private entity by an entity that funded, in whole or in part, the
21 qualifying project or by the responsible public entity, and must provide for the transfer or
22 purchase of property or other interests of the private entity by the responsibility public entity.

23 (8) Fees, lease payments, or service payments. In negotiating user fees, the fees must be
24 the same for persons using the facility under like conditions, and must not materially discourage
25 use of the qualifying project. The execution of the comprehensive agreement or a subsequent
26 amendment is conclusive evidence that the fees, lease payments, or service payments provided
27 for in the comprehensive agreement comply with this section. Fees or lease payments established
28 in the comprehensive agreement as a source of revenue may be in addition to, or in lieu of,
29 service payments.

30 (9) Duties of the private entity, including the terms and conditions that the responsible
31 public entity determines serve the public purpose of this section.

32 (b) The comprehensive agreement may include:

33 (1) An agreement by the responsible public entity to make grants or loans to the private
34 entity from amounts received from the federal, state, or local government, or an agency or

1 instrumentality thereof.

2 (2) A provision under which each entity agrees to provide notice of default and cure
3 rights for the benefit of the other entity, including, but not limited to, a provision regarding
4 unavoidable delays.

5 (3) A provision that terminates the authority and duties of the private entity under this
6 section, and dedicates the qualifying project to the responsible public entity or, if the qualifying
7 project was initially dedicated by an affected local jurisdiction, to the affected local jurisdiction
8 for public use.

9 **37-25-9. Fees. --** An agreement entered into pursuant to this chapter may authorize the
10 private entity to impose fees to members of the public for the use of the facility. The following
11 provisions apply to the agreement:

12 (1) The responsible public entity may develop new facilities or increase capacity in
13 existing facilities through agreements with public-private partnerships.

14 (2) The public-private partnership agreement must ensure that the facility is properly
15 operated, maintained, or improved in accordance with standards set forth in the comprehensive
16 agreement.

17 (3) The responsible public entity may lease existing fee-for-use facilities through a
18 public-private partnership agreement.

19 (4) Any revenues must be regulated by the responsible public entity pursuant to the
20 comprehensive agreement.

21 (5) A negotiated portion of revenues from fee-generating uses must be returned to the
22 public entity over the life of the agreement.

23 **37-25-10. Financing. --** (a) A private entity may enter into a private-source financing
24 agreement between financing sources and the private entity. A financing agreement and any liens
25 on the property or facility must be paid in full at the applicable closing that transfers ownership or
26 operation of the facility to the responsible public entity at the conclusion of the term of the
27 comprehensive agreement.

28 (b) The responsible public entity may lend funds to private entities that construct projects
29 containing facilities that are approved under this section.

30 (c) The responsible public entity may use innovative finance techniques associated with a
31 public-private partnership under this section, including, but not limited to, federal loans as may be
32 available in the Code of Federal Regulations, commercial bank loans, and hedges against
33 inflation from commercial banks or other private sources. In addition, the responsible public
34 entity may provide its own capital or operating budget to support a qualifying project. The budget

1 may be from any legally permissible funding sources of the responsible public entity, including
2 the proceeds of debt issuances. A responsible public entity may use the model financing
3 agreement provided in its financing of a facility owned by a responsible public entity. A financing
4 agreement may not require the responsible public entity to indemnify the financing source,
5 subject the responsible public entity's facility to liens in violation of secure financing by the
6 responsible public entity with a pledge of security interest, and any such provision is void.

7 (d) A responsible public entity shall appropriate on a priority basis as required by the
8 comprehensive agreement a contractual payment obligation, annual or otherwise, from the
9 enterprise or other government fund from which the qualifying projects will be funded. This
10 required payment obligation must be appropriated before other noncontractual obligations
11 payable from the same enterprise or other government fund.

12 **37-25-11. Powers and duties of the private entity.** -- (a) The private entity shall:

13 (1) Develop or operate the qualifying project in a manner that is acceptable to the
14 responsible public entity in accordance with the provisions of the comprehensive agreement.

15 (2) Maintain, or provide by contract for the maintenance or improvement of, the
16 qualifying project if required by the comprehensive agreement.

17 (3) Cooperate with the responsible public entity in making best efforts to establish
18 interconnection between the qualifying project and any other facility or infrastructure as
19 requested by the responsible public entity in accordance with the provisions of the comprehensive
20 agreement.

21 (4) Comply with the comprehensive agreement and any lease or service contract.

22 (b) Each private facility that is constructed pursuant to this section must comply with the
23 requirements of federal, state, and local laws; state, regional, and local comprehensive plans; the
24 responsible public entity's rules, procedures, and standards for facilities; and such other
25 conditions that the responsible public entity determines to be in the public's best interest and that
26 are included in the comprehensive agreement.

27 (c) The responsible public entity may provide services to the private entity. An agreement
28 for maintenance and other services entered into pursuant to this section must provide for full
29 reimbursement for services rendered for qualifying projects.

30 (d) A private entity of a qualifying project may provide additional services for the
31 qualifying project to the public or to other private entities if the provision of additional services
32 does not impair the private entity's ability to meet its commitments to the responsible public
33 entity pursuant to the comprehensive agreement.

34 **37-25-12. Expiration or termination of agreements.** -- Upon the expiration or

1 termination of a comprehensive agreement, the responsible public entity may use revenues from
2 the qualifying project to pay current operation and maintenance costs of the qualifying project. If
3 the private entity materially defaults under the comprehensive agreement, the compensation that
4 is otherwise due to the private entity is payable to satisfy all financial obligations to investors and
5 lenders on the qualifying project in the same way that is provided in the comprehensive
6 agreement or any other agreement involving the qualifying project, if the costs of operating and
7 maintaining the qualifying project are paid in the normal course. Revenues in excess of the costs
8 for operation and maintenance costs may be paid to the investors and lenders to satisfy payment
9 obligations under their respective agreements. A responsible public entity may terminate with
10 cause and without prejudice a comprehensive agreement, and may exercise any other rights or
11 remedies that may be available to it in accordance with the provisions of the comprehensive
12 agreement. The full faith and credit of the responsible public entity may not be pledged to secure
13 the financing of the private entity. The assumption of the development or operation of the
14 qualifying project does not obligate the responsible public entity to pay any obligation of the
15 private entity from sources other than revenues from the qualifying project unless stated
16 otherwise in the comprehensive agreement.

17 **37-25-13. Sovereign immunity.** -- This section does not waive the sovereign immunity
18 of a responsible public entity, an affected local jurisdiction, or an officer or employee thereof
19 with respect to participation in, or approval of, any part of a qualifying project or its operation,
20 including, but not limited to, interconnection of the qualifying project with any other
21 infrastructure or project. A city, town or district in which a qualifying project is located possesses
22 sovereign immunity with respect to the project, including, but not limited to, its design,
23 construction, and operation.

24 **37-25-14. Construction.** -- This chapter shall be liberally construed to effectuate the
25 purposes of this section. This section shall be construed as cumulative and supplemental to any
26 other authority or power vested in or exercised by the governing board of a city, town, district, or
27 hospital or health care system including those contained in acts of the general assembly
28 establishing such public hospital boards. This section does not affect any agreement or existing
29 relationship with a supporting organization involving such governing board or system in effect as
30 of January 1, 2016.

31 (1) This chapter does not limit a political subdivision of the state in the acquisition,
32 design, or construction of a public project pursuant to other statutory authority.

33 (2) Except as otherwise provided in this section, this chapter does not amend existing
34 laws by granting additional powers to, or further restricting, a local governmental entity from

1 [regulating and entering into cooperative arrangements with the private sector for the planning,](#)
2 [construction, or operation of a facility.](#)

3 **37-25-15 Severability.** -- [The provisions of this chapter are severable and if any of its](#)
4 [provisions are adjudged to be invalid or unconstitutional, this shall not affect or impair any of the](#)
5 [remaining provisions.](#)

6 SECTION 3. This act shall take effect on May 1, 2016.

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EXPLANATION
BY THE LEGISLATIVE COUNCIL
OF

A N A C T

RELATING TO PUBLIC PROPERTY AND WORKS - PUBLIC-PRIVATE PARTNERSHIPS -
PUBLIC PURPOSE FACILITY UPGRADE ACT

1 This act would create the public-private partnership – public purpose facility upgrade act
2 the purpose of which would be to promote the upgrade of facilities used for public purposes by
3 encouraging private investment in qualifying projects.

4 This act would take effect on May 1, 2016.

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