

The Evolution of Virginia's Public–Private Partnership Enabling Statutes

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* The research and writing of this paper was supported by the George Mason University Center for Transportation Public–Private Partnership Policy. The Center receives support from George Mason University, the Virginia Secretary of Transportation, and private donors. This Article represents the views of the authors, who are responsible for any errors or omissions.

I. INTRODUCTION

Public-private partnerships (P3s) have become an increasingly popular tool for infrastructure development in the United States. This interest arises out of concern about cost overruns, late project delivery, deferred maintenance, declining public funding, and increasing calls for infrastructure renewal and expansion. Used most frequently for transportation infrastructure, the term encompasses a variety of contract types that shift facility construction, financing, operation, and maintenance activities partially to private partners.¹ In contrast to traditional design-bid-build (DBB) procurement approaches, P3 arrangements increase private-sector participation in infrastructure delivery and financing² by bundling design, construction, financing, operation, and maintenance phases into a single private-sector delivery arrangement (e.g., design-build (DB), design-build-operate-maintain (DBOM), design-build-finance (DBF), design-build-finance-operate-maintain (DBFOM), and operation and maintenance (O&M)).³ While the public sector retains facility ownership, P3 agreements typically allow the private partners to recoup their investment through tolls, user-fees, or public payments. By increasing private-sector involvement in infrastructure development, such P3 arrangements can bring new funding to public projects, accelerate development, and support ongoing upgrades or maintenance.⁴ Since the United States lacks a generalized, federal P3 statutory framework, each state has developed its own approach to P3 law.⁵ While federal programs and legislation have enabled experimentation and alternative financing options,⁶ state legislatures have possessed primary responsibility for allowing or denying P3 approaches and for establishing program characteristics.⁷ State executive branches are then responsible for implementing appropriate P3 programs within the established statutory guidelines.

At the most fundamental level, effective P3 enabling statutes generate and support operating environments in which public entities can form successful facility or service delivery partnerships. However, given the funding, expertise, and public-interest protections required to evaluate and manage complex P3 arrangements, the enabling statutes must also specify allowable program activities, operating procedures, and lines of authority.⁸ The private sector's greater role in P3 delivery mechanisms, compared to traditional public-sector facility and service delivery, challenges P3 enabling statutes to

1. See Dominique Custos & John Reitz, *Public-Private Partnerships*, 58 AM. J. COMP. L. 555, 555 (2010) (giving an overview of public-private partnerships); see also U.S. GENERAL ACCOUNTING OFFICE, PUBLIC-PRIVATE PARTNERSHIPS: TERMS RELATED TO BUILDING AND FACILITY PARTNERSHIPS 13–14 (1999) (defining P3).

2. *Innovative Program Delivery: Public-Private Partnerships, P3 Defined*, U.S. DEPT' OF TRANSP., <http://www.fhwa.dot.gov/ipd/p3/defined/> (last visited Oct. 24, 2015).

3. JEFFERY N. BUxBAUM & IRIS N. ORTIZ, NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM, PUBLIC SECTOR DECISION MAKING FOR PUBLIC-PRIVATE PARTNERSHIPS: A SYNTHESIS OF HIGHWAY PRACTICE 8 (2009).

4. JAIME RALL ET AL., NATIONAL CONFERENCE OF STATE LEGISLATURES, PUBLIC-PRIVATE PARTNERSHIPS FOR TRANSPORTATION: A TOOLKIT FOR LEGISLATORS 3 (2010) [hereinafter NCSL].

5. Custos & Reitz, *supra* note 1, at 557.

6. For example, see the Federal Highway Administration's Special Experimental Programs SEP-14 and SEP-15, the Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA), and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). See BUxBAUM & ORTIZ, *supra* note 3, at 9 (explaining the evolution of P3 in the United States).

7. NCSL, *supra* note 4, at 15.

8. BUxBAUM & ORTIZ, *supra* note 3, at 13–14; NCSL, *supra* note 4, at 16, 19–20.

preserve a delicate balance between program flexibility and addressing public-interest concerns.⁹ Broader program flexibility enables innovative facility design, financing, and procurement solutions, potentially allowing the public sector to capture broader private-sector benefits. However, when delegating authority to executive and private entities, P3 enabling statutes must also adequately protect the public interest.

As of July 2015, 33 states, the District of Columbia, and Puerto Rico have enacted statutes enabling P3 approaches for transportation infrastructure delivery.¹⁰ As one of the first U.S. states to enable P3 procurement, Virginia's 25 year history with P3 enabling statutes provides a unique opportunity to study the balance between program flexibility and public interest concerns, and its evolution in practice.¹¹ The following discussion explores the evolution of Virginia's public–private partnership enabling statutes through both program flexibility and public interest frameworks. The discussion begins with a brief historical background of Virginia's enabling statutes, focusing on its four primary P3 enabling acts: the Virginia Highway Corporation Act of 1988 (HCA), the Qualifying Transportation Facilities Act of 1994 (QTFA), the Public–Private Transportation Act of 1995, and the Public–Private Education Facilities and Infrastructure Act of 2002.¹² The discussion then analyzes the four acts and their subsequent amendments to evaluate the authorized programs' flexibility, public concerns, and evolution. The Article concludes with a summary of major findings and areas for additional consideration.

II. BACKGROUND

Virginia's interest in alternative infrastructure procurement began in the mid-1980s when Governor Gerald L. Baliles made transportation development one of his administration's top priorities and established the Commission on Transportation in the 21st Century (COT-21) to evaluate the state's transportation needs and funding options.¹³ The Commission's report identified seven billion dollars in transportation investment needs, to be met with bond issues and tax increases. Concurrently, private actors submitted draft legislation to the Commission regarding privately-funded toll roads.¹⁴ The Commission recommended this approach to the state legislature, ultimately resulting in the state's first P3 enabling act, the HCA.¹⁵ In their statement of policy, the General Assembly highlighted the "compelling public need for rapid construction of safe and efficient highways" and deemed public–private partnerships in the public interest (with adequate default protections) when speeding up roadway construction and improving costs

9. Custos & Reitz, *supra* note 1, at 555–56.

10. *State P3 Legislation*, U.S. DEP'T OF TRANSP., http://www.fhwa.dot.gov/ipd/p3/state_legislation (last visited Oct. 24, 2015).

11. BUXBAUM & ORTIZ, *supra* note 3, at 9.

12. Virginia Highway Corporation Act of 1988, ch. 649, 1988 Va. Acts 834 (codified as VA. CODE ANN. §§ 56-535 to -552 (1988)); Qualifying Transportation Facilities Act of 1994, ch. 855, 1994 Va. Acts 1361; Public–Private Transportation Act of 1995, ch. 647, 1995 Va. Acts 1018 (codified as VA. CODE ANN. §§ 33.2-1800–1824 (2014)); Public–Private Education Facilities and Infrastructure Act of 2002, ch. 571, 2002 Va. Acts 764 (codified as VA. CODE ANN. § 56-575.1 to .18 (2002)).

13. Gerald L. Baliles, Governor of Va., State of the Commonwealth Address, Va. Gen. Assembly, S. DOC NO. 2B, at 15–25 (1986).

14. SIDNEY M. LEVY, BUILD, OPERATE, TRANSFER: PAVING THE WAY FOR TOMORROW'S INFRASTRUCTURE 51–52 (1996).

15. *Id.*

efficiencies.¹⁶

In keeping with this policy, HCA allowed private parties to submit proposals for constructing and operating toll-based roadway projects.¹⁷ The Commonwealth Transportation Board would first evaluate and approve proposals with regard to project cost, location, design, interconnection, and public need, with the Virginia Department of Transportation (VDOT) arranging comprehensive agreements for facility inspections.¹⁸ The State Corporation Commission (SCC) would then review the proposals and either accept or deny them for certificates of authority, allowing the private entities to construct and operate the facility for up to ten years following the original permanent financing term.¹⁹ The SCC would also authorize tolls and regulate the facilities.²⁰ Upon termination, the state would assume authority over the highway facilities.²¹

In February 1993, the General Assembly established the Joint Subcommittee Studying Privatization of Certain State Government Functions, which examined infrastructure projects and highway maintenance, among other government activities.²² As the subcommittee worked through 1994, the General Assembly passed the QTFA (effective July 1, 1995), greatly expanding the range of transportation facilities qualifying for P3 procurement.²³ The act also shifted primary proposal review authority to the “responsible public entity” possessing “the power to acquire, construct or improve the applicable transportation facility.”²⁴ However, the act still treated approved projects as public service commissions or utilities under the SCC’s regulatory authority, requiring its certification before projects could commence.²⁵

When the joint subcommittee issued its final report in May 1995, it proposed several changes to QTFA addressing concerns that the act “might unduly restrict privatization efforts.”²⁶ First, it recommended eliminating the SCC’s “unnecessarily burdensome” regulatory role.²⁷ Instead, responsible public entities would have sole responsibility for project approvals and the SCC would simply determine whether those entities could terminate comprehensive agreements with defaulting operators.²⁸ Second, the report recommended that public entities have authority to pursue P3 projects through requests for proposals (RFPs).²⁹ Third, the report recommended a clear provision exempting qualifying facilities from state public procurement laws.³⁰ Finally, the report recommended adding parking and inland port facilities to the list of qualifying transportation facilities, removing

16. *Id.*

17. Virginia Highway Corporation Act of 1988, VA. CODE ANN. § 56-539 (1988).

18. *Id.* § 56-544.

19. VA. CODE ANN. § 56-539 (2015).

20. Virginia Highway Corporation Act of 1988, VA. CODE ANN. § 56-542 (1988).

21. *Id.* § 56-551.

22. S.J. RES. 241, 1993 Gen. Assemb., Reg. Sess. (Va. 1993). The General Assembly extended the subcommittee’s work in January 1994. S.J. RES. 17, 1994 Gen. Assemb., Reg. Sess. (Va. 1994).

23. Qualifying Transportation Facilities Act of 1994, ch. 855, 1994 Va. Acts 1361, 1361–63.

24. *Id.* §§ 56-554, -555, -557.

25. *Id.* § 56-559.

26. COMMONWEALTH OF VA., FINAL REPORT OF THE JOINT SUBCOMMITTEE STUDYING PRIVATIZATION OF CERTAIN STATE GOVERNMENT FUNCTIONS, S. DOC. NO. 179-55, at 3 (1995).

27. *Id.* at 4.

28. *Id.*

29. *Id.* at 5.

30. *Id.*

redundant restrictions regarding tolling on interstate highways and existing facilities, and emphasizing compatibility with state and local transportation plans.³¹ The resulting Public-Private Transportation Act of 1995 (PPTA) amended and re-titled QTFA to address most of the joint subcommittee's recommendations. It adjusted the transportation facility definition, allowed public-agency P3 RFPs, removed the SCC from the approval and oversight process, and removed the ten-year concession limitation.³² Instead, responsible public entities had sole responsibility for project approvals and for negotiating comprehensive agreements including user-fee setting and termination dates.³³ The SCC's role was limited to declaring facilities officially in default prior to public takeovers.³⁴ Other changes included dedicating excess earnings to the state Transportation Trust Fund, adjusting procedures and authority for material defaults, exempting new P3s from the Virginia Public Procurement Act, and exempting PPTA projects from the Highway Corporation Act.³⁵ By 2002, the Virginia General Assembly recognized potential P3-related benefits for educational, governmental, and other public infrastructure development, passing the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA).³⁶ This act replicated PPTA's provisions for a range of non-transportation facilities, giving qualifying public entities responsibility for project approvals and implementing slightly stronger procurement protections (added to PPTA in a parallel amendment).

III. ANALYSIS

A. Program Flexibility

Innovative P3 infrastructure projects and procurement approaches offer a range of benefits for public entities if state statutory frameworks provide sufficient flexibility to support innovative facility design, financing, and procurement solutions. Key statutory elements include the qualifying proposal, facility, and partner definitions; delivery approaches; funding and financing approaches; and procurement processes. The following section reviews the evolution of these statutory elements across Virginia's four P3 enabling acts.

1. Qualifying Proposal, Facility, and Partner Definitions

At the most fundamental level, P3 enabling statutes must establish program scope. States with narrow policy objectives or concerns regarding public review may prefer a project-by-project approach, often with geographic limitations. In contrast, states anticipating multiple projects likely prefer standardized, programmatic approaches.³⁷

31. COMMONWEALTH OF VA., *supra* note 26, at 4–5.

32. Public-Private Transportation Act of 1995, ch. 647, §§ 56-557, -559, -560.B, 1995 Va. Acts 1018, 1020.

33. *Id.* §§ 56-566, -572.

34. *Id.* §§ 56-569, -570.

35. *Id.* §§ 56-560, -568, -573.1, -574.

36. Public-Private Education Facilities and Infrastructure Act of 2002, ch. 571, § 56-575.2, 2002 Va. Acts 764, 771.

37. BUXTBAUM & ORTIZ, *supra* note 3, at 13.

Given Virginia's consistent concern for timely infrastructure development,³⁸ its four P3 legislative acts all enabled statewide, programmatic approaches.

Qualifying proposal types, however, changed with time. Proponents claim that, in contrast to government-solicited proposals linked to transportation plans, unsolicited proposals from the private sector can drive innovation, address pressing needs, and provide much-needed funds for other projects when paired with careful evaluation and public-interest protections. Opponents, however, argue that such proposals benefit special private interests at the public's expense.³⁹ Given that an unsolicited highway proposal initiated Virginia's first P3 enabling statutes,⁴⁰ HCA and QTFA focus solely on unsolicited proposals submitted by private entities.⁴¹ The state later broadened the qualifying proposal definition to include proposal requests by public entities under PPTA,⁴² replicating this position with PPEA.⁴³

The qualifying facility types have also been expanded. Given its highway-focused foundations,⁴⁴ HCA applied solely to toll-based roadway facilities.⁴⁵ QTFA expanded the allowable transportation facilities greatly, excluding rail and pipeline facilities, but including "any road, bridge, tunnel, overpass, ferry, airport, seaport, mass transit facility or similar commercial facility used for the transportation of persons or goods, together with any other property that is needed to operate the same."⁴⁶ PPTA subsequently removed seaports but included railways and pipelines.⁴⁷ Successive amendments allowed interstate rail mass transit facilities⁴⁸ and added the "buildings, structures, parking areas, [and] appurtenances" necessary for facility operation,⁴⁹ not including commercial or retail uses.⁵⁰ Finally, PPEA and its subsequent amendments incorporated a variety of qualifying, non-transportation facilities:⁵¹ (i) educational; (ii) public; (iii) public safety; (iv) utility and communications; (v) recreational; (vi) technology infrastructure;⁵² (vii) productivity and

38. LEVY, *supra* note 14, at 52; Virginia Highway Corporation Act of 1988, VA. CODE ANN. §§ 56-535 to -552 (1988); Qualifying Transportation Facilities Act of 1994, ch. 855, § 56-555.A.1, 1994 Va. Acts 1361, 1362; Public-Private Transportation Act of 1995, VA. CODE ANN. § 33.2-1801 (2015); Public-Private Education Facilities and Infrastructure Act of 2002, VA. CODE ANN. § 56-575.2 (2009).

39. BUXBAUM & ORTIZ, *supra* note 3, at 14–15; NCSL, *supra* note 4, at 11.

40. LEVY, *supra* note 14, at 51–52.

41. Highway Corporation Act of 1988, VA. CODE ANN. § 56-539 (1988); Qualifying Transportation Facilities Act of 1994, ch. 855, § 56-557, 1994 Va. Acts 1361, 1363.

42. Public-Private Transportation Act of 1995, VA. CODE ANN. § 33.2-1802(A) (2014).

43. Public-Private Education Facilities and Infrastructure Act of 2002, VA. CODE ANN. § 56-575.3A (2009).

44. LEVY, *supra* note 14, at 52.

45. See Highway Corporation Act of 1988, VA. CODE ANN. § 56-539 (1988) (describing the application process).

46. Qualifying Transportation Facilities Act of 1994, ch. 855, § 56-554, 1994 Va. Acts 1361, 1362.

47. Public-Private Transportation Act of 1995, VA. CODE ANN. § 33.2-1800 (2014).

48. Act of Mar. 15, 2001, ch. 286, § 56-557, 2001 Va. Acts 245 (codified as amended at VA. CODE ANN. § 33.2-1800 (2014)).

49. Act of Mar. 22, 2005, ch. 504, § 56-557, 2005 Va. Acts 683, 683–84 (codified as amended at VA. CODE ANN. § 33.2-1800 (2014)).

50. Act of Apr. 19, 2006, ch. 922, § 56-557, 2006 Va. Acts 1623, 1624 (codified as amended at VA. CODE ANN. § 33.2-1800 (2014)).

51. Public-Private Education Facilities and Infrastructure Act of 2002, VA. CODE ANN. § 56-575.1 (2009).

52. Act of May 1, 2003, ch. 1034, § 56-575.1, 2003 Va. Acts 1698, 1698–99 (codified as VA. CODE ANN. § 56-575.1 (2009)).

efficiency services;⁵³ (viii) broadband;⁵⁴ (ix) publicly-owned real estate improvements;⁵⁵ and (x) waste-to-energy.⁵⁶

Qualifying partners, both public and private, changed less drastically. While some concerns circulate regarding foreign companies and access for local small businesses,⁵⁷ Virginia has maintained broad P3 partner definitions in its enabling statutes.⁵⁸ From the outset, HCA allowed an inclusive range of private entities to participate—"any natural person, corporation, partnership, joint venture, and any other business entity"—but given the act's highway focus, the Act restricted the public entity to VDOT.⁵⁹ Then, QTFA added limited liability companies and expanded the public entity definition to include the state agency, county, city, town, or other political subdivision that possessed "the power to acquire, construct or improve the applicable transportation facility."⁶⁰ PPTA preserved these definitions⁶¹ with a 2005 amendment explicitly including responsible local and regional authorities and adding five private-sector categories: general partnership, limited partnership, business trust, public benefit corporation, and non-profit entity.⁶² PPEA reproduced PPTA's broadest amended definitions.⁶³

When taken collectively, the four enabling acts and their subsequent amendments provide a broad set of program, proposal, and partner definitions. The statewide program does not limit proposal numbers or locations, accepts both solicited and unsolicited proposals, and accommodates a broad and growing list of qualifying facilities, private entities, and public entities. These characteristics testify to the state's developing needs and concerns, offering many paths to address them.

2. Delivery Approaches

In contrast to traditional public DBB delivery or full privatization (build-own-operate, asset sales), P3s enable a wide range of infrastructure delivery approaches. These include (in increasing order of private-sector involvement): DB; private service and maintenance contracts; DBOM; build-operate-transfer (BOT); build-transfer-operate (BTO); DBF; design-build-finance-operate (DBFO); DBFOM; and long-term lease agreements or concessions (brownfield).⁶⁴ These alternative approaches offer several potential benefits

53. Act of Mar. 4, 2008, ch. 273, § 56-575.1, 2008 Va. Acts 410, 410 (codified as VA. CODE ANN. § 56-575.1 (2009)).

54. Act of Mar. 20, 2007, ch. 649, § 56-575.1, 2007 Va. Acts 988, 988-99 (codified as VA. CODE ANN. § 56-575.1 (2009)).

55. Act of Mar. 23, 2005, ch. 618, § 56-575.1, 2005 Va. Acts 823, 823 (codified as VA. CODE ANN. § 56-575.1 (2009)).

56. Act of Mar. 30, 2009, ch. 754, § 56-575.1, 2009 Va. Acts 1603, 1603-04 (codified as VA. CODE ANN. § 56-575.1 (2009)).

57. NCSL, *supra* note 4, at 13; BUXBAUM & ORTIZ, *supra* note 3, at 27.

58. In 1998, Delegate Robert G. Marshall introduced House bill 456 seeking to limit private P3 entities to Virginia-registered businesses. The House referred the bill to the Committee on Transportation, where the members voted to take no action.

59. Virginia Highway Corporation Act of 1988, VA. CODE ANN. § 56-536 (1988).

60. Qualifying Transportation Facilities Act of 1994, ch. 855, § 56-554, 1994 Va. Acts 1361, 1361.

61. Public-Private Transportation Act of 1995, ch. 647, § 56-557, 1995 Va. Acts 1018, 1018.

62. Act of Mar. 22, 2005, ch. 562, § 56-557, 2005 Va. Acts 738, 738 (codified as amended at VA. CODE ANN. § 33.2-1800 (2014)).

63. Public-Private Education Facilities and Infrastructure Act of 2002, VA. CODE ANN. § 56-575.1 (2009).

64. BUXBAUM & ORTIZ, *supra* note 3, at 8.

compared to traditional delivery. First, they often incorporate private-sector incentives for on-time delivery, facility quality, and life-cycle efficiencies. Second, they can transfer cost, scheduling, and revenue risks from the public sector to the private sector. Third, they can permit innovative technologies and techniques more readily than traditional approaches. Together, these differences can generate time savings, cost savings, and quality improvements for the public sector.⁶⁵

Virginia, like a growing number of states,⁶⁶ has authorized the full range of P3 delivery approaches. From the outset, HCA defined authorized, private operation broadly, to include “acquisition, approval, construction, enlargement, maintenance, patrolling, toll collections, or connections [and] management and administrative functions.”⁶⁷ QTFA continued this definition, as applied to its broader list of qualifying transportation facilities.⁶⁸ PPTA also continued the broad operation definition, with PPEA including “[i] acquisition, [ii] design, [iii] construction, [iv] improvement, [v] renovation, [vi] expansion, [vii] equipping, [viii] maintenance or [ix] operation.”⁶⁹ In 2005, amendments to both PPTA and PPEA⁷⁰ updated the “operate” definition to mean “finance, maintain, improve, equip, modify, repair or operate,”⁷¹ with “develop” added to mean “plan, design, develop, finance, lease, acquire, install, construct, or expand.”⁷² In addition, a 2006 PPTA amendment defined allowable concession agreements as “any lease, license, franchise, easement, or other binding agreement . . . including, but not limited to, operations and maintenance, revenue collection, toll-collection enforcement, design, construction, and other activities that enhance throughput, reduce congestion, or otherwise manage the facility.”⁷³ Together, these terms represent a very broad authorization for flexible P3 infrastructure delivery.

3. Funding and Financing Approaches

In addition to the benefits offered by alternative delivery approaches, P3s can also provide new capital and financing sources, potentially accelerating projects lacking sufficient public funds.⁷⁴ Virginia authorized a broad range of P3 funding and financing

65. See NCSL, *supra* note 4, at 9–10 (detailing the savings generated by utilizing P3s).

66. See generally Kamran Ghavamifar & Ali Touran, *Alternative Project Delivery Systems: Applications and Legal Limits in Transportation Projects*, 134 J. PROF. ISSUES ENGINEERING EDUC. & PRAC. 106 (2008) (presenting a survey of all 50 states regarding the use of alternative project delivery systems).

67. Virginia Highway Corporation Act of 1988, VA. CODE ANN. § 56-536 (1998).

68. Qualifying Transportation Facilities Act of 1994, ch. 855, § 56-554, 1994 Va. Acts 1361, 1361–62.

69. Public–Private Education Facilities and Infrastructure Act of 2002, ch. 571, § 56-575.2, 2002 Va. Acts 764, 771; see also Public–Private Transportation Act of 1995, ch. 647, § 56-557, 1995 Va. Acts 1018, 1019 (including the same list without certain terms).

70. Act of Mar. 28, 2005, ch. 865, § 56-575.1, 2005 Va. Acts 1462, 1463; Public–Private Education Facilities and Infrastructure Act of 2002, VA. CODE ANN. § 56-575.1 (2009).

71. Act of Mar. 22, 2005, ch. 562, § 56-557, 2005 Va. Acts 738, 738 (codified as amended at VA. CODE ANN. § 33.2-1800 (2014)).

72. Act of Mar. 22, 2005, ch. 504, § 56-557, 2005 Va. Acts 683, 684 (codified as amended at VA. CODE ANN. § 33.2-1800 (2014)); see also VA. CODE § 33.2-1800 (2015) (using the same language but omitting the words “but not limited to”).

73. Act of Apr. 19, 2006, ch. 922, § 56-557, 2006 Va. Acts 1623, 1624 (codified as amended at VA. CODE ANN. § 33.2-1800 (2014); VA. CODE § 33.2-1800 (2015)).

74. See NCSL, *supra* note 4, at 9 (“Such partnerships combine a leveraged mix of public and private dollars to better bridge the gap between transportation needs and the financial resources available to meet those needs.”).

options from the start. Facility revenues under HCA depended on tolling, but the act allowed “any financing . . . in such amounts and upon such terms and conditions as may be deemed necessary or appropriate.”⁷⁵ With QTFA’s expanding scope, “revenues” included the facilities’ “user fees and/or service payments.”⁷⁶ In addition, the QTFA maintained the HCA’s financing flexibility, now with example options detailed: “debt, equity or other securities or obligations . . . sale and leaseback transactions and . . . any financing with a pledge of, security interest in, or lien on, any or all of its property.”⁷⁷ Finally, the QTFA allowed public partners to pursue and enter federal assistance contracts on behalf of qualifying facilities.⁷⁸

PPTA preserved the QTFA revenue definition,⁷⁹ but a 2005 amendment greatly expanded it⁸⁰ to include:

income; earnings; user fees; lease payments; allocations; federal, state, regional, and local appropriations or the appropriations or other funds available to any political subdivision, authority, or instrumentality thereof; bond proceeds; equity investments, service payments, or any combination . . . including money received as grants or otherwise from the United States of America, from any public entity, or from any agency or instrumentality of the foregoing in aid of such facility.⁸¹

The PPTA also allowed assistance from state and local sources.⁸² A second 2005 amendment added “leases, concessions, and grant and loan agreements . . . designated transportation trust funds; [and] grants from any state infrastructure bank” to the allowable funding and financing options.⁸³ The PPEA included very similar language regarding its broad range of allowable funding and financing approaches.⁸⁴

4. Procurement Processes

Given the innovative and non-traditional aspects of many P3 infrastructure-delivery approaches, traditional public procurement processes often struggle with P3 projects’ unique challenges and characteristics. As a result, P3 enabling statutes may allow for alternative procurement processes developed by responsible public entities.⁸⁵ Neither the HCA nor QTFA specified alternative procurement processes for qualifying P3 facilities. However, the PPTA included a provision exempting qualifying facilities from the Virginia Public Procurement Act. Instead, the Act required that responsible public entities develop

75. VA. CODE § 56-543.A (2015).

76. Qualifying Transportation Facilities Act of 1994, ch. 855, § 56-554, 1994 Va. Acts 1361, 1361–66.

77. *Id.* § 56-562.C.

78. *Id.* § 56-564.

79. Public-Private Transportation Act of 1995, ch. 647, § 56-557, 1995 Va. Acts 1018, 1018–26.

80. Act of Mar. 22, 2005, ch. 562, § 56-557, 2005 Va. Acts 738, 738 (codified as amended at VA. CODE ANN. § 33.2-1800 (2014)).

81. Public-Private Transportation Act of 1995, VA. CODE ANN. § 33.2-1800 (2014).

82. Public-Private Transportation Act of 1995, ch. 647, 1995 Va. Acts 1018, 1018–26 (codified as amended at VA. CODE ANN. § 33.2-1811 (2014)); VA. CODE ANN. § 33.2-1811 (2014).

83. Public-Private Transportation Act of 1995, ch. 504, § 56-567.1, 683, 683–91 (2005) (codified as amended at VA. CODE ANN. § 33.2-1811 (2014)); VA. CODE ANN. § 33.2-1812 (2014).

84. Public-Private Education Facilities and Infrastructure Act of 2002, VA. CODE ANN. §§ 56-575.8.C, 56-575.10.A (2009).

85. BUXBAUM & ORTIZ, *supra* note 3, at 13–14.

equivalent procedures preserving competitive negotiation without requiring lowest-bid selection.⁸⁶ The PPEA also included a Virginia Public Procurement Act exemption, but included additional language requiring that the alternative procedures be consistent with “competitive sealed bidding” and include “competitive negotiation.” In addition, the Act required that responsible public entities state their reasoning for pursuing alternative procurement procedures, namely “(i) the probable scope, complexity, or urgency of a project or (ii) risk sharing, added value, an increase in funding, or economic benefit from the project that would not otherwise be available.”⁸⁷ PPTA received the same requirements in separate 2002 amendments.⁸⁸

In 2005, an additional PPTA amendment required that responsible public entities develop guidelines for proposal review and acceptance, including scheduling, receipt and review procedures, information requirements, and priority procedures for highly developed applications.⁸⁹ In addition, the amendment added a list of decision factors deemed relevant under alternative procurement:

Other factors that may be considered include (i) the proposed cost of the qualifying transportation facility; (ii) the general reputation, qualifications, industry experience, and financial capacity of the private entity; (iii) the proposed design, operation, and feasibility of the qualifying transportation facility; (iv) the eligibility of the facility for priority selection, review, and documentation timelines under the responsible public entity’s guidelines; (v) local citizen and public entity comments; (vi) benefits to the public; (vii) the private entity’s compliance with a minority business enterprise participation plan or good faith effort to comply with the goals of such plan; (viii) the private entity’s plans to employ local contractors and residents; (ix) the safety record of the private entity; (x) the ability of the facility to address the needs identified in the appropriate state, regional or local transportation plan by improving safety, reducing congestion, increasing capacity, and enhancing economic efficiency; and (xi) other criteria that the responsible public entity deems appropriate.⁹⁰

PPEA received these guideline-development requirements and decision factors (excluding transportation plans) in a separate 2005 amendment.⁹¹ A subsequent 2007 amendment added more detailed guideline requirements.⁹² In accordance with these requirements, the state developed formal PPTA implementation guidelines in 2005, with

86. Public–Private Transportation Act of 1995, ch. 647, § 56-573.1, 1995 Va. Acts 1018, 1018–26 (codified as amended at VA. CODE ANN. § 33.2-1812 (2014)).

87. Public–Private Education Facilities and Infrastructure Act of 2002, ch. 571, § 56-575.16, 2002 Va. Acts 764, 775; VA. CODE ANN. § 56-575.16 (2015).

88. Act of Apr. 6, 2002, ch. 570, § 56-573.1 , 2002 Va. Acts 762, 764 (codified as amended at VA. CODE ANN. § 33.2-1812 (2014)); Act of Apr. 6, 2002, ch. 593, § 56-573.1, 2002 Va. Acts 824, 826 (codified as amended at VA. CODE ANN. § 33.2-1812 (2014)).

89. Act of Mar. 22, 2005, ch. 504, § 56-573.1, 2005 Va. Acts 682, 683 (codified as amended at VA. CODE ANN. § 33.2-1819 (2014)).

90. Act of Mar. 22, 2005, ch. 504, § 56-560.D, 2005 Va. Acts 683, 690 (codified as amended at VA. CODE ANN. § 33.2-1803 (2014)).

91. Act of Mar. 28, 2005, ch. 865, §§ 56-575.3:1, .16:2, 2005 Va. Acts 1482, 1488; Public–Private Education Facilities and Infrastructure Act of 2002, VA. CODE ANN. § 56-575.16.2 (2009).

92. Act of Mar. 23, 2007, ch. 764, § 56-575.3:1, 2007 Va. Acts 1167, 1171–72; Public–Private Education Facilities and Infrastructure Act of 2002, VA. CODE ANN. § 56-575.3:1 (2009).

updates in 2008, 2010, 2012, and 2014.⁹³ It developed PPEA implementation guidelines in 2002 with updates in 2006 and 2008.⁹⁴

B. Public Concerns

While P3 programs offer many potential benefits under flexible statutory frameworks, they also transfer traditionally public powers and discretion to private entities. Therefore, effective P3 enabling statutes should also address public concerns regarding public value preservation, risk management, accountability, and transparency.⁹⁵ The following Section explores each in turn.

1. Ensuring Public Value

Public-value assurance requires that public entities pursue P3 procurement only when appropriate for the project at hand, and not simply to generate private funds or accommodate unsolicited proposals. To evaluate a P3 approach's project-specific appropriateness, program administrators require clear criteria, strong project knowledge, and robust review procedures.⁹⁶ While many P3 valuation tools exist,⁹⁷ Virginia's enabling statutes generally do not specify preferred evaluation methods. Instead, they give responsible public entities primary authority for developing procurement processes and include four strategies to address public concerns. First, Virginia's P3 statutes condition project approvals on compatibility with existing public infrastructure development plans. HCA requires that proposals include “[t]he comprehensive plan or plans for all counties, cities, and towns through which the roadway will pass and an analysis which shows that the roadway conforms to these comprehensive plans.”⁹⁸ Similarly, QTFA requires that proposals include information regarding affected jurisdictions' transportation plans, with

93. COMMONWEALTH OF VA., PUBLIC-PRIVATE TRANSPORTATION ACT OF 1995, (AS AMENDED): IMPLEMENTATION GUIDELINES (2008), http://www.virginiadot.org/business/resources/PPTA_Guidelines_FINAL_Revised_081205.pdf; COMMONWEALTH OF VA., PUBLIC-PRIVATE TRANSPORTATION ACT OF 1995, (AS AMENDED): IMPLEMENTATION MANUAL AND GUIDELINES (2010), http://doav.virginia.gov/Downloads/Studies/PPTA/PPTA%20Implementation%20Manual_FINAL_December_08_2010.pdf; COMMONWEALTH OF VA., PUBLIC-PRIVATE TRANSPORTATION ACT OF 1995, (AS AMENDED): IMPLEMENTATION MANUAL AND GUIDELINES (2012), http://www.p3virginia.org/wp-content/uploads/2015/03/PPTA-Implementation_Manual_May_21_2012.pdf; VA. PUBLIC-PRIVATE PARTNERSHIPS, COMMONWEALTH OF VA., IMPLEMENTATION MANUAL AND GUIDELINES FOR THE PUBLIC-PRIVATE TRANSPORTATION ACT OF 1995 (AS AMENDED) (2014), http://www.virginiadot.org/office_of_transportation_public_private_partnerships/resources/UPDATED_PPTA_Implementation_Manual_11-07-14_FOR_POSTING_TO_WEBSITE_-changes_accepted.pdf.

94. COMMONWEALTH OF VA., PUBLIC-PRIVATE EDUCATION FACILITIES AND INFRASTRUCTURE ACT OF 2002: PROCEDURES (2002), <http://dgs.virginia.gov/LinkClick.aspx?fileticket=NxcfjXS5DsM%3d&tabid=62>; COMMONWEALTH OF VA., PUBLIC-PRIVATE EDUCATION FACILITIES AND INFRASTRUCTURE ACT OF 2002: PROCEDURES (2006), <http://dgs.virginia.gov/LinkClick.aspx?fileticket=Kj5xr%2bpx8OE%3d&tabid=62>; COMMONWEALTH OF VA., PUBLIC-PRIVATE EDUCATION FACILITIES AND INFRASTRUCTURE ACT OF 2002, AS AMENDED: GUIDELINES AND PROCEDURES (2006), <http://dgs.virginia.gov/LinkClick.aspx?fileticket=eh%2ffAacNtDM%3d&tabid=62>; COMMONWEALTH OF VA., PUBLIC-PRIVATE EDUCATION FACILITIES AND INFRASTRUCTURE ACT OF 2002, AS AMENDED: GUIDELINES AND PROCEDURES (2008), <https://dgs.virginia.gov/LinkClick.aspx?fileticket=H9WdcbwMscY%3D&tabid=62>.

95. Custos & Reitz, *supra* note 1, at 576–80; BUXBAUM & ORTIZ, *supra* note 3, at 11–38; NCSL, *supra* note 4, at 11–13 (noting various public concerns).

96. NCSL, *supra* note 4, at 11; BUXBAUM & ORTIZ, *supra* note 3, at 11–14.

97. NCSL, *supra* note 4, at 18–22 (discussing P3 valuation tools).

98. Virginia Highway Corporation Act of 1988, VA. CODE ANN. § 56-540 (1988).

approval depending on the projects' consistency with these plans.⁹⁹ PPTA's application and approval requirements also reference state and local transportation plans, particularly as amended in 2005, to consider safety, congestion, capacity, or efficiency goals.¹⁰⁰ PPEA includes equivalent provisions linking project approvals to relevant public infrastructure development and capital improvement plans.¹⁰¹

Second, the four enabling acts condition project approvals on public need or public interest findings. HCA required public interest determinations prior to SCC approvals and instructed the Commonwealth Transportation Board to "keep in mind the public interest" when reviewing proposals.¹⁰² Public interest and needs requirements continued in QTFA with a certificate of public convenience and necessity required from the SCC prior to project commencement, including an additional condition that P3 approaches provide superior predicted outcomes compared to public alternatives.¹⁰³ PPTA preserved these public-need requirements, with additional consideration added in 2005 for needs identified in public transportation plans.¹⁰⁴ PPEA proposal approvals also require public need determinations, and the statutes (as amended in 2007) specify required financial review and analysis procedures (e.g., cost-benefit analysis, opportunity cost assessments).¹⁰⁵

Most recently, a 2015 PPTA amendment requires that responsible public entities' chief executives develop and submit formal findings of public interest to the governor and general assembly prior to initiating P3 procurements.¹⁰⁶ The findings must include (1) a description of expected project benefits compared to public alternatives; (2) "a statement of the risks, liabilities, and responsibilities" transferred to the private entity or retained by the public entity; (3) a project delivery risk determination, and if deemed high, "a description of how the public's interest will be protected;" and (4) if pursuing alternative procurement processes, justification regarding their benefits compared to traditional procurement.¹⁰⁷ The amendment also established the Transportation Public–Private Partnership Advisory Committee, charged with determining whether proposed public requests for P3 proposals serve the public interest.¹⁰⁸

Third, several statutory provisions address lost-revenue concerns.¹⁰⁹ HCA, for instance, included toll collection for a special Commonwealth Transportation Board fund

99. Qualifying Transportation Facilities Act of 1994, ch. 855, §§ 56-557.A.5, -B.6, 1994 Va. Acts 1361, 1362.

100. Public–Private Transportation Act of 1995, VA. CODE §§ 33.2-1803.A.5, .A.10, .C.2, -1805.B (2014); Act of Mar. 22, 2005, ch. 504, §§ 56-560.A.10, -560.C.2, -563.B, 2005 Va. Acts 683, 685–86 (codified as amended at VA. CODE ANN. §§ 33.2-1803, -1805 (2014)).

101. Public–Private Education Facilities and Infrastructure Act of 2002, VA. CODE ANN. §§ 56-575.4.A.4, -575.6.B (2009).

102. Virginia Highway Corporation Act of 1988, VA. CODE ANN. §§ 56-539, -644.A.

103. Qualifying Transportation Facilities Act of 1994, ch. 855, §§ 56-557.B.2, -559.A, 1994 Va. Acts 1361, 1362–63.

104. Public–Private Transportation Act of 1995, VA. CODE ANN. § 33.2-1803.C.1 (2015); Act of Mar. 22, 2005, ch. 504, §§ 56-560.C.2, -573.1.2, 2005 Va. Acts 683, 685–86 (codified as amended at VA. CODE ANN. § 33.2-1803 (2015)).

105. VA. CODE ANN. §§ 56-575.3:1.5, -575.4.C.1 (2015); Act of Mar. 23, 2007, ch. 764, § 56-575.3:1.5, 2007 Va. Acts 1167, 1169–70.

106. Act of Mar. 26, 2015, ch. 612, §§ 33.2-1803.B.2, -1803.D, -1803.I.A, 2015 Va. Acts.

107. *Id.* § 33.2-1803.1.B.

108. *Id.* §§ 33.2-1803.B.1, -1803.2.

109. NCSL, *supra* note 4, at 12; BUXBAUM & ORTIZ, *supra* note 3, at 33.

dedicated to related transportation improvements.¹¹⁰ Alternatively, PPTA includes provisions distributing “any earnings in excess of the maximum rate of return as negotiated in the comprehensive agreement . . . to the Transportation Trust Fund, to the responsible public entity, or to the private entity for debt reduction or they may be shared with appropriate public entities.”¹¹¹ Following a 2006 PPTA amendment, the Transportation Trust Fund also receives PPTA concession payments.¹¹² Finally, Virginia’s P3 enabling statutes preserve public-sector involvement in toll and user-fee setting procedures, endeavoring to ensure appropriate private rates-of-return without harming users or discouraging facility use.¹¹³ HCA placed toll setting authority with the SCC, giving it “the duty and authority to approve or revise toll rates” as to “appear reasonable to the user in relation to the benefit obtained, not likely to materially discourage use of the roadway and provide the operator no more than a reasonable rate of return.”¹¹⁴ PPTA makes an exception for its projects, however, incorporating user fees into comprehensive agreements as negotiated and approved by the responsible public entity.¹¹⁵ In 2013, the Supreme Court of Virginia upheld the legality of this approach, arguing that tolls supporting particularized facility benefits represent user fees, that the SCC lacks constitutional authority over transportation projects, and that the General Assembly can delegate such user-fee-setting authority to responsible public entities with input from private partners.¹¹⁶ PPEA includes very similar provisions for fees, lease payments, and service payments negotiated under its projects’ comprehensive agreements.¹¹⁷

2. Managing Risk

The risk transfer possibilities offered by P3 approaches generate another balance of potential benefits and concerns. On the benefits side, P3s allow public and private entities to pair risks with the parties best suited to manage them, reducing overall risk. In particular, the private sector can often manage design, construction, financing, operations, and maintenance risks better than government actors can under traditional procurement. However, successful risk transfer requires a strong grasp of the highly complex projects, processes, and enforcement mechanisms involved. Poor risk allocation can generate long-term problems and unexpected costs for the public sector,¹¹⁸ so to avoid such problems, Virginia’s P3 enabling statutes emphasize careful proposal evaluation.

To support robust proposal evaluation, Virginia’s four enabling acts each required that proposals detail the facilities’ geographic locations, designs and interconnections, projected costs and schedules, methods for securing property interests; required permits,

110. Virginia Highway Corporation Act of 1988, VA. CODE ANN. § 56-552 (1998).

111. Public–Private Transportation Act of 1995, VA. CODE ANN. § 33.2-1808.E (2014).

112. Act of Apr. 19, 2006, ch. 922, § 56-566.E, 2006 Va. Acts 1623, 1623 (codified as amended at VA. CODE ANN. § 33.2-1808.E (2014)).

113. BUXBAUM & ORTIZ, *supra* note 3, at 29–30, 40.

114. Virginia Highway Corporation Act of 1988, VA. CODE ANN. § 56-542.D (1988).

115. Public–Private Transportation Act of 1995, VA. CODE ANN. §§ 33.2-1808.B, -1823 (2014).

116. See generally Elizabeth River Crossings OPCO, LLC v. Meeks, 749 S.E.2d 176 (Va. 2013) (holding that the tolls imposed pursuant to a P3 comprehensive agreement were user fees and not taxes).

117. Public–Private Education Facilities and Infrastructure Act of 2002, VA. CODE ANN. § 56-575.5.B (2009).

118. BUXBAUM & ORTIZ, *supra* note 3, at 15–17; NCSL, *supra* note 4, at 10. Virginia’s Pocahontas Parkway project offers an example regarding demand and revenue risks. BUXBAUM & ORTIZ, *supra* note 3, at 17–18.

approvals, and plans for obtaining them, financing plans; operational plans; and utility crossings. Proposal approvals then depended on the reasonableness of these costs and plans.¹¹⁹ For example, applications under QTFA required that the SCC certify that all plans were reasonable and that the private entity was “viable, technically, managerially and financially, to carry out the proposal.”¹²⁰

As the state’s P3 program matured however, the General Assembly amended PPTA and PPEA, introducing additional provisions to strengthen proposal reviews, particularly with regard to risk. For example, a 2007 PPEA amendment required that the appropriating body review any proposed comprehensive agreement that: “(i) creates state tax-supported debt, (ii) requires a level of appropriation significantly beyond the appropriation received by the responsible public entity in the most recent appropriation act, or (iii) significantly alters the Commonwealth’s discretion to change the level of services or the funding for such services over time . . .”¹²¹

The next year, a 2008 PPTA amendment required that projects with estimated construction costs exceeding \$50 million undergo independent audits evaluating all traffic estimates, cost estimates, and potential taxpayer-borne public costs and liabilities.¹²² More recently, the 2015 PPTA amendment requiring formal findings of public interest greatly strengthened the risk review process. The amendment required detailed risk disclosure in proposal applications and specified that project benefits must outweigh these risks in order to proceed under P3 procurement.¹²³ In addition, the findings of public interest required of executive agencies must disclose and address these risks.¹²⁴

Even with careful proposal evaluation however, the scale and complexity of many P3 projects present long-term uncertainties and public–protection concerns. In response, some governments, particularly in the European Union, limit P3 contract and concession lengths to match the terms associated with low-to-moderate-risk financing (e.g., government bonds or commercial mortgages). Opponents of this approach argue that such limits undermine many projects’ financial viability.¹²⁵ Both HCA and QTFA limited P3 agreements to ten years following the original permanent financing’s term (subject to revision), with the responsible public entity receiving the facility upon termination.¹²⁶ PPTA and PPEA removed this limitation however, incorporating termination dates and facility dedications into the comprehensive agreements negotiated by responsible public entities.¹²⁷ Without contract term limits, Virginia’s statutes depend on termination and buy-back provisions, particularly in the case of operator bankruptcy.¹²⁸ The HCA, for example, allowed the SCC

119. Qualifying Transportation Facilities Act of 1994, ch. 855, § 56-557.A, .B, 1994 Va. Acts 1361, 1362; Public–Private Transportation Act of 1995, VA. CODE ANN. § 33.2-1803.A, .C (2015); Public–Private Education Facilities and Infrastructure Act of 2002, VA. CODE ANN. § 56-575.4.A, .C (2009).

120. Qualifying Transportation Facilities Act of 1994, ch. 855, § 56-559.A, 1994 Va. Acts 1361, 1363.

121. Act of Mar. 23, 2007, ch. 764, § 56-575.4.J, 2007 Va. Acts 1167, 1171.

122. Act of Mar. 4, 2008, ch. 296, § 56-560.E, 2008 Va. Acts 441, 442 (codified as amended at VA. CODE ANN. § 33.2-1803.E (2015)).

123. Act of Mar. 26, 2015, ch. 612, § 33.2-1803.A.11, -C.5, 2015 Va. Acts.

124. *Id.* §§ 33.2-1803.B, .D, -1803.1.A.

125. BUXBAUM & ORTIZ, *supra* note 3, at 37; NCSL, *supra* note 4, at 11.

126. Virginia Highway Corporation Act of 1988, VA. CODE ANN. § 56-551 (1988); Qualifying Transportation Facilities Act of 1994, ch. 855, § 56-569, 1994 Va. Acts 1361, 1366.

127. Public–Private Transportation Act of 1995, VA. CODE ANN. §§ 33.2-1808.A.9, -1817 (2014); Public–Private Education Facilities and Infrastructure Act of 2002, VA. CODE ANN. § 56-575.9.A.8 (2009).

128. BUXBAUM & ORTIZ, *supra* note 3, at 37–38, 40; NCSL, *supra* note 4, at 11–12.

to revoke a certificate of authority if an operator experienced a material and continuing default, failed to comply with the terms of its agreement, or failed to begin the project in a timely manner. Once the SCC declared a project in default, VDOT could take over the project's construction and operation and proceed according to the public interest, providing fair compensation to the private operator.¹²⁹ QTFA and PPTA extended these takeover provisions to all responsible public entities, maintaining the SCC's authority to declare facilities in default.¹³⁰ PPEA, in contrast, incorporated termination and default procedures into the comprehensive agreements, although it also allows responsible public entities to take over for defaulting operators.¹³¹

3. Accountability and Transparency

Finally, public accountability and transparency gain new importance in P3 applications, given the highly complex projects, non-traditional procurement procedures, and unelected private participants involved. To preserve public accountability and protect the public interest, some states require legislative approval for each P3 project undertaken. Opponents argue that such approvals introduce political uncertainties and last-minute changes that discourage private participation and investment. Instead, they recommend strong enabling statutes.¹³²

Virginia does not require legislative approval for its P3 projects,¹³³ relying instead on responsible public entities to review, approve, and manage P3 projects.¹³⁴ Without legislative approval, timely and comprehensive public disclosure becomes critical, along with appropriate protections for proprietary information and negotiation positions.¹³⁵ HCA has always required that operators report their business relationships and financial statements to the SCC annually.¹³⁶ QTFA, PPTA, and PPEA reduced the SCC's role, but maintained HCA's 60 day comment period for affected jurisdictions.¹³⁷

A series of amendments in the mid-2000s strengthened PPTA's and PPEA's disclosure requirements and updated protections for confidential and proprietary

129. Virginia Highway Corporation Act of 1988, VA. CODE ANN. § 56-549 (1988).

130. Qualifying Transportation Facilities Act of 1994, ch. 855, § 56-566, 1994 Va. Acts 1361, 1366; Public-Private Transportation Act of 1995, VA. CODE §§ 33.2-1808.F.-1813, -1814 (2014).

131. Qualifying Transportation Facilities Act of 1994 §§ 56-575.9, -565.11. Under all four enabling statutes, the state does not "oblige its full faith and credit on any financing of the operator" to pay the operator's obligations, if or when it assumes operation upon the private operator's default, beyond facility revenues. *Id.* § 56-543.A (2015); Qualifying Transportation Facilities Act of 1994, ch. 855, § 56-565.D, 1994 Va. Acts 1361, 1365; Public-Private Transportation Act of 1995, VA. CODE ANN. § 33.2-1813 (2015); Public-Private Education Facilities and Infrastructure Act of 2002, § 56-575.11.E (2009).

132. NCSL, *supra* note 4, at 16, 18–19; BUXBAUM & ORTIZ, *supra* note 3, at 13–14.

133. Several unsuccessful bills have proposed provisions for legislative approval. S.B. 1319, 2005 Gen. Assemb., Reg. Sess. (Va. 2005); H.B. 969, 2010 Gen. Assemb., Reg. Sess. (Va. 2010).

134. Virginia Highway Corporation Act of 1988, VA. CODE ANN. § 56-539 (2015); Qualifying Transportation Facilities Act of 1994, ch. 855, §§ 56-556, -557, 1994 Va. Acts 1361, 1362; Public-Private Transportation Act of 1995, VA. CODE ANN. § 33.2-1803 (2014); Public-Private Education Facilities and Infrastructure Act of 2002, VA. CODE ANN. § 56-575.3 (2009).

135. NCSL, *supra* note 4, at 10, 12; BUXBAUM & ORTIZ, *supra* note 3, at 24–27.

136. Virginia Highway Corporation Act of 1988, VA. CODE ANN. §§ 56-542.C, -542.F, -546 (1988).

137. Qualifying Transportation Facilities Act of 1994, ch. 855, 1994 Va. Acts 1361, 1362; Public-Private Transportation Act of 1995, ch. 647, §§ 56-563.B, -566.7, 1995 Va. Acts 1018, 1021 (codified as amended at VA. CODE ANN. § 33.2-1805, -1808 (2014)); Public-Private Education Facilities and Infrastructure Act of 2002, ch. 571, § 56-575.6.B, 2002 Va. Acts 764, 772.

information. For example, 2006 amendments required public proposal disclosure within ten days of receipt, with interim and comprehensive agreements made available for thirty-day public review and comment periods prior to finalization. Once finalized, procurement records would be available upon request, although a subsequent amendment protected internal proposal evaluation documents from disclosure if they would adversely affect the public entity.¹³⁸ Amendments also strengthened public review provisions. In 2007, the General Assembly established the Public–Private Partnership Advisory Commission within the legislative branch to review PPEA proposals in advance of procurement. In particular, the group would accept or decline proposals for review within ten days, and if accepted, provide recommendations regarding any state tax-supported debt, project financial impacts, policy aspects, and business terms within 45 days. The act also required disclosure and appropriating-body-reviews of agreements involving tax-supported debt, unusual appropriations, or changes in state control.¹³⁹ A similar 2015 PPTA amendment established the Transportation Public–Private Partnership Advisory Committee, with members from both the legislative and executive branches, to determine in public meetings whether proposed RFPs served the public interest.¹⁴⁰

IV. CONCLUSION

Across its more than 25 year history, Virginia’s statutory frameworks have evolved substantially in their balance between program flexibility and addressing public-interest concerns. Virginia’s program likely benefited from its origins with the HCA’s narrow focus on unsolicited, toll-based roadway projects. This beginning enabled the state to experiment with P3 procurement before expanding the program to address new needs through solicited proposals and broader transportation, education, and infrastructure facility development. As the State’s P3 statutes transitioned from the HCA through the PPEA, its P3 program flexibility expanded to accept nearly all project, proposal, partner, project delivery, funding, financing, and procurement types. Virginia’s resulting P3 project history exemplifies the advantages of such program flexibility.¹⁴¹

Provisions addressing public concerns, however, have generally lagged behind program flexibility. Each enabling act included basic provisions for public interest protections, risk management, and transparency; however, the program experienced several significant statutory amendments strengthening findings of public interest, proposal

138. Act of May 18, 2006, ch. 936, §§ 56-573.1:1, -575.17, 2006 Va. Acts 1788, 1789; Act of Mar. 15, 2007, ch. 374 § 2.2-3705.6.11, 2007 Va. Acts 518, 519.

139. Act of Mar. 23, 2007, ch. 764, §§ 30-280.C, -56-575.4.I to J, 2007 Va. Acts 1169, 1171.

140. Act of Mar. 26, 2015, ch. 612, §§ 33.2-1803.2, -1803.B.1 to 2, 2015 Va. Acts.

141. Completed PPTA projects include: the I-495 Capital Beltway Express Lanes; Route 895 (Pocahontas Parkway); Route 199; Route 58; statewide Regional Traffic Operations centers; Route 288; and the I-95 Express Lanes. Additional projects under construction include the Midtown Tunnel/Downtown Tunnel/MLK Extension; Route 58 Tri-County & Laurel Forks; Coalfields Expressway; Route 28; and Dulles Rail. Still more are under development: I-495 Express Lanes Extension; I-66 Corridor Park-and-Ride System Enhancements; Statewide Rest Area & Parking Asset Enhancements; Hampton Roads Crossings; Route 460/58 Connector (Hampton Roads); Patriots Crossing (Hampton Roads); and I-64 to HOT (Hampton Roads). Virginia Office of Public–Private Partnerships, *Public–Private Transportation Act Projects*, VIRGINIA.GOV, http://www.p3virginia.org/wp-content/uploads/2014/12/2013_PPTA_Portfolio_Map_final1.pdf (last visited Oct. 24, 2015); *Virginia Public–Private Partnerships, Projects*, VIRGINIA.GOV, <http://www.p3virginia.org/p3-projects/> (last visited Oct. 24, 2015).

audits, document disclosure, public comment provisions, and advisory bodies. For instance, while the four enabling acts allowed most partners, financing methods, and delivery approaches from the outset, the public sector ultimately found the accompanying risk management and review provisions insufficient. Similarly, loosened procurement procedures and regulatory oversight improved program flexibility, but ultimately spawned provisions strengthening review and disclosure requirements. It remains unclear whether these changes will prove sufficient in the long run. As of this writing, toll-setting remains controversial; Virginia's P3 enabling statutes do not address controversial compensation clauses, nor do they include specific provisions for performance standards, environmental protections, or labor protections.¹⁴² The PPTA's proponents and critics still debate whether shifting P3s from the SCC's regulated utility model to a long-term concession model represents a positive development.¹⁴³ Ultimately, this history demonstrates the difficulties inherent in formulating P3 statutory frameworks that balance program flexibility with public concerns. Virginia's experience may help inform other states' P3 program development as its program continues to grow and evolve.

142. See NCSL, *supra* note 4, at 11–13 (providing an overview of P3 concerns); BUXBAUM & ORTIZ, *supra* note 3, at 31, 34–36 (outlining the concerns of P3 implementation).

143. See Robert Poole, *What We've Learned from 25 Years of Highway Public–Private Partnerships*. REASON FOUND. (July 7, 2014), <http://reason.org/news/show/25-years-of-public-private-highways> (promoting the shift to a long-term concession model); but see JAMES J. REGIMBAL JR., S. ENVTL. L. CTR., AN EXAMINATION OF THE VIRGINIA PUBLIC–PRIVATE TRANSPORTATION ACT OF 1995 2 (2012), https://www.southernenvironment.org/uploads/publications/va_public_private_transpo_act.pdf (arguing that Virginia should consider treating some PPTA projects under a regulated utility model).