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Indicates New Matter

INTRODUCED

May 12, 2009

**H. 4033**

Introduced by Reps. Clemmons, Harrell, Gunn, Anderson, Gullick, Limehouse, Hardwick, Merrill, Ott, Rutherford, Bales, V.S. Moss, Duncan, Owens, Bowen, Stavrinakis, Hutto, Allison, Barfield, Battle, Bingham, Branham, H.B. Brown, Cato, Cole, Cooper, Crawford, Delleney, Dillard, Gambrell, Harrison, Harvin, Hayes, Hearn, Herbkersman, Horne, Hosey, Howard, Jefferson, Jennings, Kennedy, King, Kirsh, Lowe, Lucas, Mack, McLeod, Miller, D.C. Moss, J.M. Neal, Neilson, M.A. Pitts, Rice, Sandifer, G.M. Smith, G.R. Smith, J.E. Smith, Sottile, Thompson, Weeks, White, Williams, Willis and A.D. Young

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Read the first time May 12, 2009.

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, TO ENACT THE “TRANSPORTATION INFRASTRUCTURE FUNDING FLEXIBILITY ACT” BY ADDING ARTICLE 3 TO CHAPTER 3, TITLE 57 SO AS TO PROVIDE THAT THE DEPARTMENT OF TRANSPORTATION MAY SOLICIT AND ENTER INTO CERTAIN PUBLIC‑PRIVATE INITIATIVES TO CONSTRUCT TRANSPORTATION FACILITIES AND TO PROVIDE THE PROCEDURE WHEREBY PUBLIC‑PRIVATE INITIATIVES ARE SOLICITED, APPROVED, AND IMPLEMENTED; BY ADDING ARTICLE 9 TO CHAPTER 3, TITLE 57 SO AS TO PROVIDE THE CIRCUMSTANCES WHEREBY TOLLS MAY BE IMPOSED AND COLLECTED ALONG THE STATE’S HIGHWAYS, TO PROVIDE FOR THE PROJECTS THAT MAY BE FINANCED BY TOLL REVENUES, TO PROVIDE PENALTIES FOR A PERSON WHO FAILS TO PAY A TOLL, AND TO PROVIDE THAT THE DEPARTMENT MAY IMPLEMENT AN ELECTRONIC TOLL SYSTEM; BY ADDING SECTION 11‑35‑3075 SO AS TO PROVIDE THAT THE PROVISIONS THAT ALLOW THE DEPARTMENT OF TRANSPORTATION TO ENTER INTO PUBLIC‑PRIVATE INITIATIVES TO CONSTRUCT TRANSPORTATION FACILITIES ARE SUBJECT TO CERTAIN PORTIONS OF THE CONSOLIDATED PROCUREMENT CODE AND TO CERTAIN EXPANDED DISCUSSIONS AND PROPOSAL REVISIONS; TO AMEND SECTION 11‑35‑710, AS AMENDED, RELATING TO THE PURCHASE OF CERTAIN ITEMS THAT ARE EXEMPT FROM THE PROVISIONS CONTAINED IN THE CONSOLIDATED PROCUREMENT CODE, SO AS TO PROVIDE THAT THE PURCHASE OF ITEMS ASSOCIATED WITH DEPARTMENT OF TRANSPORTATION’S PUBLIC‑PRIVATE INITIATIVES TO CONSTRUCT TRANSPORTATION FACILITIES ARE NOT EXEMPT FROM THE CONSOLIDATED PROCUREMENT CODE; TO AMEND SECTION 11‑35‑40, AS AMENDED, RELATING TO THE APPLICATION OF THE CONSOLIDATED PROCUREMENT CODE, SO AS TO PROVIDE AN ENTITY THAT UTILIZES A FEDERAL GRANT TO PROCURE AN ITEM MUST COMPLY WITH ALL APPLICABLE LAWS THAT ARE NOT CONTAINED IN THE CONSOLIDATED PROCUREMENT CODE; TO AMEND SECTION 57‑5‑1625, AS AMENDED, RELATING TO THE DEPARTMENT OF TRANSPORTATION’S AWARDING OF CONTRACTS THAT USE THE DESIGN‑BUILD PROCEDURE, SO AS TO REVISE THE DEFINITION OF THE TERM “DESIGN‑BUILD CONTRACT”; TO AMEND SECTION 57‑5‑1310, RELATING TO THE GENERAL ASSEMBLY’S INTENT WHEN IT PROVIDED THE DEPARTMENT OF TRANSPORTATION THE AUTHORITY TO CONSTRUCT TURNPIKE PROJECTS, SO AS TO PROVIDE THAT THE DEPARTMENT ALSO HAS THE AUTHORITY TO IMPROVE THESE FACILITIES PURSUANT TO THIS PROVISION; TO AMEND SECTION 57‑5‑1320, RELATING TO THE DEFINITION OF TERMS REGARDING TURNPIKE PROJECTS, SO AS TO REVISE THE DEFINITION OF THE TERM “TURNPIKE FACILITY”; TO AMEND SECTION 57‑5‑1330, RELATING TO THE DEPARTMENT OF TRANSPORTATION’S AUTHORITY TO DESIGNATE, ESTABLISH, PLAN, IMPROVE, CONSTRUCT, OPERATE, AND REGULATE TURNPIKE FACILITIES, SO AS TO PROVIDE THAT THE DEPARTMENT MAY DESIGNATE AS A TURNPIKE FACILITY ANY TRANSPORTATION FACILITY THAT IS FUNDED IN PART BY A LOCAL OPTION SALES AND USE TAX; TO AMEND SECTION 40‑11‑360, RELATING TO THE ENTITIES THAT ARE EXEMPT FROM THE PROVISIONS THAT REGULATE LICENSED CONTRACTORS, SO AS TO MAKE A TECHNICAL CHANGE; TO AMEND SECTION 57‑5‑1660, RELATING TO THE DEPARTMENT OF TRANSPORTATION’S REQUIREMENT THAT CERTAIN CONTRACTORS MUST FURNISH A BOND FOR CERTAIN CONSTRUCTION CONTRACTS, SO AS TO PROVIDE THAT THIS PROVISION DOES NOT APPLY TO CERTAIN PUBLIC‑PRIVATE INITIATIVES TO CONSTRUCT TRANSPORTATION FACILITIES AND PROVIDE THAT WHEN THE DEPARTMENT UTILIZES THE DESIGN‑BUILD DELIVERY METHOD FOR A HIGHWAY CONSTRUCTION PROJECT, THE AMOUNT OF THE PERFORMANCE AND INDEMNITY BOND AND PAYMENT BONDS REQUIRED BY THIS PROVISION RELATE ONLY TO THE PORTION OF THE CONTRACT CONCERNING CONSTRUCTION; AND TO REPEAL SECTIONS 12‑28‑2920, 57‑3‑200, 57‑3‑615, 57‑3‑618, 57‑5‑1490, AND 57‑5‑1495 RELATING TO THE CONSTRUCTION OF TOLL ROADS BY THE DEPARTMENT OF TRANSPORTATION, THE DEPARTMENT’S AUTHORITY TO ENTER INTO AGREEMENTS WITH VARIOUS ENTITIES TO CONSTRUCT, OPERATE, AND MAINTAIN HIGHWAY FACILITIES, THE PROJECTS THAT MAY BE CONSTRUCTED WITH TOLL REVENUES, THE IMPOSITION AND COLLECTION OF A TOLL ALONG INTERSTATE 73, THE PENALTY FOR FAILURE TO PAY A TOLL, AND THE COLLECTION OF TOLLS.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. This act may be referred to and cited as the “Transportation Infrastructure Funding Flexibility Act”.

SECTION 2. Chapter 3, Title 57 of the 1976 Code is amended by adding:

“Article 3

Public‑Private Initiatives

Section 57‑3‑300. As used in this article:

(1) ‘Affected jurisdiction’ means any county, city, town, municipal corporation, or other political subdivision within the State in which all or part of a transportation facility is located or any other public entity directly affected by the transportation facility.

(2) ‘Board’ means the State Budget and Control Board.

(3) ‘Department’ means the South Carolina Department of Transportation.

(4) ‘Existing transportation facility’ means a transportation facility not subject to a public‑private partnership agreement and open and operating as of January 1, 2009.

(5) ‘Independent financial consultant’ means a private entity that the department shall contract with to provide consulting services related to and a critical analysis of the anticipated financial structure of the partnership agreement. Prior to the execution of the partnership agreement, the consultant’s report must be provided to the Department of Transportation Commission and the State Budget and Control Board.

(6) ‘Objective index’ means a generally accepted official index sanctioned by the state or federal government intended to measure inflation or economic growth, including, but not limited to, the Consumer Price Index or indices tracking gross domestic product.

(7) ‘Operator’ means a private entity that is financing, managing, administering, maintaining, improving, equipping, or modifying a transportation facility pursuant to a partnership agreement.

(8) ‘Partnership agreement’ means the contract entered into pursuant to this article between a private entity and the department containing the terms and conditions under which a public‑private initiative will be carried out.

(9) ‘Private entity’ means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, non‑profit entity, or other business entity.

(10) ‘Public interest’ means a balancing of the following factors:

(a) whether the project under consideration contributes to the general welfare and convenience of the people of this State;

(b) whether the project delivery method under consideration is:

(i) the most advantageous to the State and the public as a whole;

(ii) likely to result in the most timely, economical, and successful completion of the project; and

(iii) likely to result in the economical and efficient management, maintenance, and operation of the transportation facility;

(c) the long and short term consideration of the impact the delivery method under consideration will have on all users; and

(d) local circumstances and conditions in the affected jurisdiction.

(11) ‘Public‑private initiative’ means an arrangement between the department and a private entity, the terms and conditions of which are stated in a partnership agreement.

(12) ‘Responder’ means a private entity that responds to a request for qualifications or a request for proposal, as appropriate.

(13) ‘Transportation facility’ means any existing or new highway, road, bridge, tunnel, toll road, overpass, ferry, mass transit facility, vehicle parking facility, rail facility, intermodal facility, or similar facility open to the public and used for the transportation of persons or goods, together with any buildings, structures, parking areas, appurtenances, or other property needed to operate the facility. A commercial or retail use or enterprise not essential to the transportation of persons or goods is not a ‘transportation facility.

(14) ‘User fees’ means the rate, toll, fee, or other charges imposed by the department and collected by a private entity pursuant to a partnership agreement for use of all or part of a transportation facility.

Section 57‑3‑310. The department may enter into public‑private initiatives for transportation facilities using the design‑build‑operate‑maintain or design‑build‑finance‑operate‑maintain project delivery methods, as defined in Section 11‑35‑2910, only if upon thorough analysis the department determines in writing that for this particular transportation facility, a public‑private initiative is in the public interest. The written determination must address, in general terms, the anticipated financial structure and the anticipated term of the public‑private initiative. The department must post its determination and supporting analysis in a conspicuous location on its Internet website.

Section 57‑3‑320. This article does not apply to contracts using the design‑build or the design‑bid‑build project delivery methods, as defined in Section 11‑35‑2910.

Section 57‑3‑330. (A) Subject to the provisions of this article, the department may solicit, receive, consider, evaluate, and accept proposals for a public‑private initiative.

(B) The department may not consider, evaluate, or accept unsolicited proposals for a public‑private initiative.

(C) An existing transportation facility may not be the subject of a public‑private initiative. However, if new capacity or lanes are added to an existing transportation facility, then the additional capacity or new lanes may be the subject of a public‑private initiative.

Section 57‑3‑340. The department may solicit proposals for public‑private initiatives only pursuant to a request for qualifications and a request for proposals that have been approved by the board.

Section 57‑3‑350. (A) After the department makes and posts the written determination required by Section 57‑3‑310, the department must first prepare a request for qualifications and submit the request for qualifications to the board for approval. This prequalification process must comply with Section 11‑35‑3023. Before the date set for submission, the department shall provide adequate public notice of the request for qualifications. The notice must be designed to successfully communicate with a broad spectrum of prospective responders. The date set for submissions from interested private entities must be no less than fifteen days after the department formally issues the request for qualifications.

(B) To approve a request for qualifications, the board must determine whether the request requires responders to submit information detailed enough and sufficient for the department to make an informed decision concerning the responder’s relative qualifications.

(C) The department may issue the request for qualifications upon approval by the board.

(D) The department may interview any or all of the responders in making its determination as to which responders are most qualified.

Section 57‑3‑360. (A) The board must approve the request for proposals before it may be formally issued. At least ten days prior to submitting a request for proposals and any accompanying documents to the board for consideration, the department must hold a public meeting concerning the request for proposals and the proposed public‑private initiative.

(B) A notice of the public meeting must be forwarded to a newspaper of general circulation in all affected jurisdictions with a request that it be published at least once a week for two consecutive weeks. A notice of the meeting must be furnished, on or before the date of the first newspaper publication, in writing to each member of the General Assembly representing a portion of an affected jurisdiction and to any person who has informed the department or the board that he desires to be notified of the public meeting. The notice must be posted in a conspicuous location on the department’s Internet website. The notice must contain a complete description of the project.

Section 57‑3‑370. (A) The request for proposal prepared by the department that is the subject of the public meeting required by Section 57‑3‑360 and submitted to the board for consideration, must be detailed and contain sufficient information for the board to determine whether the proposed public‑private initiative is in the public interest. In addition to any other legal requirements, the request for proposal must include:

(1) the expected, desired, or approved location or route of the transportation facility;

(2) the anticipated maximum term of the partnership agreement;

(3) the anticipated user fees, if any, when the facility opens for operation; and

(4) the text of any anticipated noncompete clause to be used in the partnership agreement, if any.

(B) The request for proposals must require each responder to identify an independent financial consultant whose competence and qualifications to provide the required consulting services must be an additional evaluation factor in the award of the contract. If the department elects not to negotiate a contract with the consultant proposed by the successful responder, the department may use any process otherwise authorized by law to select and contract with a different consultant. The request for proposals may require each responder to pay the department a fixed stipend, not to exceed the maximum amount stated in the request for proposals, which is sufficient, when combined with all stipends received, to pay for the cost of the department contracting with the consultant. The partnership agreement may require the successful responder to either reimburse the unsuccessful responders the amount of their respective stipends or to reimburse the department for the cost of contracting with the consultant.

Section 57‑3‑380. (A) To approve a request for proposal, the board must determine that:

(1) the proposed public‑private initiative is in the public interest;

(2) the anticipated financial structure of the public‑private initiative is sound;

(3) the anticipated term of the public‑private initiative is reasonable under the circumstances; and

(4) any anticipated noncompete clauses proposed to be included in a partnership agreement do not put the public at a disadvantage.

(B) A term longer than thirty years must be approved specifically by the board and the approval must be accompanied by a written justification for the approved length.

(C) The department must provide the board with any additional information that the board reasonably believes is necessary to make its determination.

(D) The board must transmit its determination to the department as soon as practicable. If the board makes a negative determination, the board may make recommendations to the department concerning changes to the request for proposal that would result in a favorable determination.

Section 57‑3‑390. After the department is notified of the board’s favorable determination, the department may formally issue the request for proposal.

Section 57‑3‑400. (A) The department may enter into a partnership agreement under the provisions of this article. The terms of the partnership agreement must:

(1) be in the public interest;

(2) provide that the private entity shall keep the transportation facility open for use by the members of the public after its initial opening upon payment of the applicable user fees, if any. However, the transportation facility may be temporarily closed because of emergencies or, with the consent of the department, to protect the safety of the public or for reasonable construction or maintenance procedures; and

(3) provide:

(a) for the planning, acquisition, financing, refinancing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing, or operation of a transportation facility, or any part or function of the transportation facility;

(b) the term of the partnership agreement;

(c) the grant, if any, to the private entity of a right to operate the transportation facility and the payment, if any, to be paid to the department;

(d) whether user fees will be collected on the transportation facility and the basis by which the user fees shall be determined and modified, provided that:

(i) the department shall establish the initial user fee, if any, to be charged to the traveling public for the use of the transportation facility. The department may delegate to the private entity the power to periodically revise the user fee to take into account inflation and economic conditions. Revisions may not exceed a cap contained in the partnership agreement. The cap must be expressed as the increase or decrease in an objective index identified and agreed to by the parties in the partnership agreement; and

(ii) any user fees and user fee adjustments provided in a partnership agreement may be computed under a congestion pricing method for the sole purpose of managing traffic flow;

(e) compensation to the private entity, which may include, but is not limited to, a reasonable development fee, a reasonable maximum rate of return on investment, and reimbursement of development expenses in the event of termination for convenience by the department;

(f) for the distribution of payments, if any;

(g) the guaranteed cost and completion guarantees, if any, related to the development or operation, or both, of the transportation facility and payment of damages for failure to meet the completion guarantee;

(h) a description of the actions the department may take to ensure proper maintenance of the transportation facility;

(i) remedies for default or nonperformance under the partnership agreement and grounds for termination of the partnership agreement by the department or private entity;

(j) procedures for amendment of the partnership agreement;

(k) the accounting and auditing standards to be used to evaluate progress on the project;

(l) which party will assume responsibility for specific project elements and the timing of the assumption of responsibility;

(m) that a user fee may not be imposed upon either a school bus, as defined in Section 56‑5‑190, that is owned, operated, or leased by either a public school or the South Carolina Department of Education, or on an authorized emergency vehicle, as defined in Section 56‑5‑170; and

(n) any other terms and provisions that the department deems reasonable, necessary, or appropriate, including provisions for revenue sources other than user fees.

(B) The partnership agreement may provide for an alternative dispute resolution process.

(C) In the partnership agreement the department may agree to make grants or loans for the development or operation, or both, of the transportation facility from time to time from amounts received from the federal government or any agency or instrumentality of the federal government.

(D) Any partnership agreement that the department intends to execute may not contain terms, conditions, or other provisions that materially deviate from the terms, conditions, and other provisions contained in the request for proposal approved by the board. Any material deviation must be referred to the board for approval in the same manner as provided in this article before the department enters into the partnership agreement. An executed partnership agreement is void ab initio if it contains any material deviations.

(E) The department may not enter into a partnership agreement unless it has complied with the requirements of Chapter 35, Title 11 and until the contractual terms of the partnership agreement have been approved by the Department of Transportation Commission.

(F) All partnership agreements must be transmitted to the General Assembly, the board, and the Governor and posted in a conspicuous place on the department’s Internet website.

Section 57‑3‑410. The department shall own fee simple title to the transportation facility. The transportation facility must be open for public use, enjoyment, safety, and welfare.

Section 57‑3‑420. (A) If the department terminates the partnership agreement for default, the department may, without limitation:

(1) elect to take over the transportation facility, including the succession of all rights, title, and interest in the transportation facility;

(2) exercise any other available rights and remedies; and

(3) conduct a procurement pursuant to this article to enter into a new partnership agreement with a different private entity.

(B) Any party asserting force majeure as an excuse to performance has the burden of proving proximate cause, that reasonable steps were taken to minimize the delay and damages caused by events when known, and that the other party was timely notified of the likelihood or actual occurrence which is claimed as grounds for a force majeure defense.

Section 57‑3‑430. (A) The department may accept from the United States or any of its agencies funds that are available to the State for carrying out this article, whether the funds are made available by grant, loan, or other means.

(B) The State assents to any federal requirements, conditions, or terms of any federal funding accepted by the department under this section.

(C) The department may enter into agreements or other arrangements with the United States or any of its agencies that may be necessary for carrying out the purposes of this article.

(D) The department may accept from any source any grant, donation, gift, or other form of conveyance of land, money, other real or personal property, or other item of value made to the State or the department for carrying out the purpose of this article.

(E) The department may combine federal, state, local, and private funds to finance a transportation facility under this article.

Section 57‑3‑440. Any financing of the project may be in any amounts and upon any terms and conditions as may be determined by the department and a private entity in the partnership agreement. The department and the private entity may use any and all revenues that may be available to it and may, to the fullest extent permitted by applicable law, issue debt, equity, or other securities or obligations. This article does not create any additional bonding authority for the department.

Section 57‑3‑450. The department may exercise the power of eminent domain to acquire property, rights of way, or other rights in property for transportation projects that are part of a public‑private initiative. Fee simple title to such property must be held by and in the name of the department. Any transportation facility operated by a private entity pursuant to a partnership agreement under the terms of this article must be open for public use and enjoyment.

Section 57‑3‑460. (A) All state law enforcement officers and law enforcement officers of an affected jurisdiction have the same powers and jurisdiction within the limits of a transportation facility that is the subject of a public‑private initiative as they have in their respective areas of jurisdiction and have access to the transportation facility that is the subject of a public‑private initiative at any time for the purpose of exercising those powers and jurisdiction.

(B) The traffic and motor vehicle laws of the State or, if applicable, any affected jurisdiction is the same on a transportation facility that is the subject of a public‑private initiative as those laws applied to conduct on similar transportation facilities in the State or affected area.

(C) Punishment for violations of traffic and motor vehicle laws of the State or, if applicable, any affected area on a transportation facility that is the subject of a public‑private initiative is as prescribed by law for conduct occurring on similar transportation facilities in the State or local jurisdiction.

(D) Collection of user fees by the private entity may be made pursuant to Article 9, Chapter 3, Title 57.

Section 57‑3‑470. (A) Partnership agreements may contain provisions that require private entities to obtain appropriate errors and omissions insurance to cover architectural and engineering services.

(B) The department may require one or more of the following forms of security to assure timely, faithful, and uninterrupted provisions of operations and maintenance services procured separately or as one element of a partnership agreement:

(1) operations period surety bonds that secure the performance of the private entity’s operations and maintenance obligations;

(2) letters of credit in an amount appropriate to cover the cost of the department preventing transportation infrastructure service interruptions for a period of up to twelve months; or

(3) appropriate written guarantees from the private entity, or depending upon the circumstances, from a parent corporation, to secure the recovery of reprocurement costs to the department if the private entity defaults in performance.

(C) The department shall require appropriate performance guarantees and security and appropriate payment bonds for the protection of persons supplying labor and materials to projects subject to a partnership agreement.

Section 57‑3‑480. An operator under this article and any utility whose facility is to be crossed or relocated shall cooperate fully in planning and arranging the manner of the crossing or relocation of the utility facility.

Section 57‑3‑490. The Circuit Court of Richland County has exclusive jurisdiction over actions between the department and a private entity for breach of a partnership agreement, whether the action is for monetary damages or declaratory, injunctive, or other equitable relief. A partnership agreement may contain a dispute resolution process, including, but not limited to, an obligation to participate in mandatory, nonbinding alternative dispute resolution.

Section 57‑3‑500. Partnership agreements may not be assigned, transferred, or sold without the prior written consent of the Department of Transportation Commission. The commission may not consent to a transfer, assignment, or sale unless it is in the public interest.

Section 57‑3‑510. The department may employ or contract with consultants and other specialists, as may be necessary, to carry out the duties and functions of this article. Any consultants or specialists, including the independent financial consultant, retained by the department are public employees for the purposes of the conflict of interest provisions contained Chapter 13, Title 8.

Section 57‑3‑520. The financial structure of a transportation facility subject to a partnership agreement authorized pursuant to Section 57‑3‑200 may be refinanced pursuant to the provisions contained in this article if the refinancing is in the best interest of the public and allows for the continued operation and maintenance of the facility.

Section 57‑3‑530. The department may adopt rules and regulations to carry out the provisions of this article as it deems necessary and appropriate.”

SECTION 3. Chapter 3, Title 57 of the 1976 Code is amended by adding:

“Article 9

Toll Roads, Use of Tolls, and Collection of Revenue

Section 57‑3‑900. As used in this article, the following terms have the following meanings:

(1) ‘Department’ means the South Carolina Department of Transportation.

(2) ‘Toll roads’ means:

(a) a turnpike project or facility, as defined in Article 9, Chapter 5, Title 57, constructed by the department pursuant to the provisions of this article;

(b) a transportation facility constructed by the department under a partnership agreement on which a toll is charged pursuant to Section 57‑3‑200; or

(c) a transportation facility constructed by a private entity pursuant to the provisions of Article 3, Chapter 3, Title 57 on which a user fee is charged.

(3) ‘Tolls’ means the tolls, charges, or user fees imposed for the use of a toll road.

Section 57‑3‑910. A toll may be imposed on passage of any vehicle on federal interstate highways in this State which were in existence as of January 1, 1997, unless the imposition is otherwise affirmatively approved by the General Assembly in separate legislation enacted solely for that purpose.

Section 57‑3‑920. Notwithstanding another provision of law, the department may impose and collect a toll on the proposed Interstate 73 corridor upon completion of this highway project. This toll must not be imposed upon a state‑owned or district‑owned school bus, or authorized emergency vehicles as defined in Section 56‑5‑170.

Section 57‑3‑930. (A) For the purposes of this section, ‘costs associated with the toll road’ means the costs of acquisition, construction, improving, financing, refinancing, operating, maintaining, and the satisfaction of the obligations of any partnership agreement authorized pursuant to Section 57‑3‑200, or partnership agreement under Article 3, Chapter 3, Title 57. Under no circumstances may a toll be collected for maintenance and operations on a road subject to a partnership agreement after the expiration of the partnership agreement, or after financial obligations related to the financing of that road have been satisfied.

(B) Tolls imposed and collected on a toll road only must be used to pay for the costs associated with that toll road. The tolls collected on a toll road must be:

(1) credited to the State Highway Fund to be used for payment of costs associated with the toll road;

(2) retained and applied by the entity or entities developing the toll road pursuant to a partnership agreement authorized pursuant to Section 57‑3‑200 or a partnership agreement authorized pursuant to Article 3, Chapter 3, Title 57; or

(3) used to service bonded indebtedness for the toll road pursuant to Paragraph 9, Section 13, Article X of the South Carolina Constitution, 1895.

(C) Upon repayment of the costs associated with the toll road, the toll charges shall cease.

Section 57‑3‑940. A person who uses a toll road and fails or refuses to pay the toll is guilty of a misdemeanor and, upon conviction, must be punished by a fine of not more than two hundred dollars or by imprisonment for not more than thirty days, and in addition the department shall have a lien upon the vehicle driven by the person for the amount of the toll and may take and retain possession of it.

Section 57‑3‑950. (A) For the purposes of this section only:

(1) ‘Agent’ means a public or private entity operating a toll road pursuant to an agreement with the department.

(2) ‘Department’ means the South Carolina Department of Transportation.

(3) ‘Electronic toll collection system’ means a system of collecting tolls or charges which is capable of charging an account holder the appropriate toll or charge by transmission of information from an electronic device, transponder, barcode, or other device on a motor vehicle to the toll lane, which information is used to charge the account the appropriate toll or charge.

(4) ‘Lessor’ means a person, corporation, firm, partnership, agency, association, or organization renting or leasing vehicles to a lessee under a rental agreement, lease, or otherwise where the lessee has the exclusive use of the vehicle for any period of time.

(5) ‘Lessee’ means a person, corporation, firm, partnership, agency, association, or organization that rents, leases, or contracts for the use of one or more vehicles and has exclusive use of the vehicles for any period of time.

(6) ‘Owner’ means a person or an entity who, at the time of a toll violation and with respect to the vehicle involved in the violation, is the registrant or co‑registrant of the vehicle with the South Carolina Department of Motor Vehicles or another state, territory, district, province, nation, or jurisdiction.

(7) ‘Photo‑monitoring system’ means a vehicle sensor installed to work in conjunction with a toll collection facility which automatically produces one or more photographs, one or more microphotographs, a videotape, or other recorded images of a vehicle at the time it is used or operated in violation of toll collection regulations.

(8) ‘Toll violation’ means the passage of a vehicle through a toll collection point without payment of the required toll.

(9) ‘Vehicle’ means a device in, upon, or by which a person or property is or may be transported or drawn upon a highway, except devices used exclusively upon stationary rails or tracks.

(B) Notwithstanding another provision of law, when a vehicle is driven through a toll road without payment of the required toll, the owner and operator of the vehicle are jointly and severally liable to the department to pay the required toll, administrative fees, and civil penalty as provided in this section. The department may enforce collection of the required toll as provided for in this section. In addition, the department or its agent shall have a lien upon the vehicle for the amount of the toll and may take and retain possession of the vehicle until the lien is satisfied.

(C) A certificate, sworn to or affirmed by the department or its agent, or a facsimile of it, that a toll violation has occurred, based upon inspection of photographs, microphotographs, videotape, or other recorded images produced by a photo‑monitoring system, is prima facie evidence of the violation and is admissible in a proceeding charging a toll violation pursuant to this section. A photograph, microphotograph, videotape, or other recorded image evidencing a violation must be available for inspection by the party charged and is admissible into evidence in a proceeding to adjudicate liability for a violation.

(D) The department or its agent may assess and collect administrative fees of:

(1) not more than ten dollars for the first toll violation within a period of one year; or

(2) not more than twenty‑five dollars for each subsequent toll violation within a period of one year.

(E) Upon failure to pay the required toll and administrative fees to the department or its agent within thirty days of the notice, the owner or operator may be cited for failure to pay a toll pursuant to this subsection and, upon an adjudication of liability, is subject to a civil penalty not to exceed fifty dollars for each violation as contained in subsection (F). Upon an adjudication of liability, a judgment must be entered against the owner or operator, and the court must mail a copy of the judgment to the owner or operator. Upon failure to satisfy the judgment within thirty days, the court shall notify the Department of Motor Vehicles and the agent, and the Department of Motor Vehicles shall suspend the registration of the vehicle that was operated when the toll was not paid or the vehicle to which that vehicle’s license plate has been transferred and deny the vehicle’s registration or re‑registration pursuant to Section 56‑3‑1335. The suspension shall remain in effect until the judgment is satisfied and evidence of its satisfaction has been presented to the Department of Motor Vehicles and the department’s agent. An owner or operator who has been convicted of a violation of Section 57‑3‑940 is not liable for the penalty imposed by this subsection.

(F) If a magistrate or municipal judge determines that the person or entity charged with liability under this section is liable, the magistrate or municipal judge shall collect the unpaid tolls and administrative fee and forward them to the department or its agent. The magistrate or municipal judge also may impose a civil penalty of up to fifty dollars for each violation, plus court costs. The civil penalty must be distributed in the same manner as other fines and penalties collected by the magistrate. Notwithstanding another provision of law:

(1) adjudication of liability pursuant to this section must be made by the magistrates court of the county in which the toll facility is located or the municipal court of the city in which the toll facility is located; and

(2) an imposition of liability pursuant to this section must be based upon a preponderance of evidence submitted and is not a conviction as an operator pursuant to Section 57‑3‑940.

(G) The department or its agent shall send:

(1) a ‘First Notice to Pay Toll’ to the owner or operator of a vehicle which, on one occasion in any twelve‑month period, is identified as having been involved in a toll violation. The first notice shall require payment to the department of the required toll, plus an administrative fee as provided for in subsection (D), within thirty days of the mailing of the notice;

(2) a ‘Second Notice to Pay Toll’ to the owner or operator of a vehicle which is identified as having been involved in a second toll violation in a twelve‑month period, or who has failed to respond to a ‘First Notice to Pay Toll’ within the required time period. The second notice shall require payment to the department of the required tolls, plus an administrative fee as provided for in subsection (D) for each violation within thirty days of the mailing of the notice;

(3) a ‘Failure to Pay Toll’ citation to the owner or operator of a vehicle which is identified as having been involved in a third toll violation in a twelve‑month period, or who has failed to respond to the second notice within the required time period. The citation requires payment to the department of the unpaid tolls, plus an administrative fee of not more than twenty‑five dollars for each violation, within thirty days, or the recipient’s appearance in magistrates court of the county in which the violation occurred or the municipal court of the city in which the violation has occurred to contest the citation. A ‘Failure to Pay Toll’ citation constitutes the summons and complaint for an action to recover the toll and all applicable fees allowed pursuant to this section;

(4) notwithstanding another provision of law, the notices and citation required by subsection (G) by first‑class mail to the owner or operator of the vehicle identified as being involved in the toll violation. If a vehicle is registered in two or more names, the notices or citation must be mailed to the first name listed on the registration records. Notwithstanding another provision of law, personal delivery of the notices and citation is not required. A manual or automatic record of the mailing of the notices or citation prepared in the ordinary course of business is prima facie evidence of the mailing of the notices or citation; and

(5) the notices and citation required by this subsection must contain the following information:

(a) the name and address of the person or entity alleged to be liable for a failure to pay a toll pursuant to this section;

(b) the registration number of the vehicle involved in the toll violation;

(c) the location where the toll violation took place;

(d) the date and time of the toll violation;

(e) the identification number of the photo‑monitoring system which recorded the violation or other document locator number;

(f) information advising of the manner and time in which liability may be contested;

(g) a warning advising that failure to contest liability in the manner and time provided in this section is an admission of liability; and

(h) information advising that failure to pay a toll may result in the suspension of vehicle registration and that a lien may be levied on the vehicle.

(H) If a vehicle owner receives a notice or citation pursuant to this section for a period during which the vehicle involved in the toll violation was:

(1) reported to a law enforcement division as having been stolen, a valid defense to an allegation of liability for a failure to pay a toll is that the vehicle had been reported to a law enforcement division as stolen before the time the violation occurred and had not been recovered by the time of the violation. If an owner receives a notice or citation pursuant to this section for a violation which occurred during a time period in which the vehicle was stolen, but which had not been reported to a law enforcement division as having been stolen, a valid defense to an allegation of liability for a toll violation pursuant to this section is that the vehicle was reported as stolen within two hours after the discovery of the theft by the owner. For purposes of asserting the defense provided by this subitem, a certified copy of the police report on the stolen vehicle, sent by first‑class mail to the department, its agent, or the magistrates court or the municipal court having jurisdiction of the citation within thirty days after receipt of the notices or citation, is sufficient; or

(2) leased to another person or entity, the lessor is not liable for the violation if the lessor sends to the department or to the court having jurisdiction over the citation a copy of the rental, lease, or another contract document covering the vehicle on the date of the violation, with the name and address of the lessee clearly legible, within thirty days after receiving the notices or citation. Failure to send the information within the thirty‑day period renders the lessor liable for the unpaid tolls and any administrative fees or penalties assessed pursuant to this section. If the lessor complies with the provisions of this subitem, the lessee of the vehicle on the date of the violation is subject to liability for the failure to pay the toll if the department or its agent mails a notice of liability to the lessee within thirty days after receipt of a copy of the rental, lease, or other contract document.

(I) If a person or entity receives a notice or citation pursuant to this section, it is a valid defense to liability that the person or entity that receives the notice was not the owner of the vehicle at the time of the toll violation.

(J) If an owner who pays the required tolls, fees, or penalties, or all of them pursuant to this section was not the operator of the vehicle at the time of the violation, the owner may maintain an action for indemnification against the operator.

(K) An owner of a vehicle is not liable for a penalty imposed pursuant to this section if the operator of the vehicle has been convicted of a violation of Section 57‑3‑940 for the same incident.

(L) Where electronic toll collection systems are utilized:

(1) a person who would like to make payment of tolls electronically must apply to the department or its agent to become an account holder. The department or its agent, in its discretion, may deny the application of a person. A person whose application is accepted must execute an account holder’s agreement. The terms of the account holder’s agreement must be established by the department;

(2) the department shall ensure that adequate and timely notice is given to all electronic toll collection system account holders to inform them when their accounts are delinquent. The owner of a vehicle who is an account holder under the electronic toll collection system is not liable for a failure to pay a toll pursuant to the provisions of this section unless the department or its agent has first sent a notice of delinquency to the account holder and the account holder was delinquent at the time of the violation;

(3) the department shall not sell, distribute, or make available the names and addresses of electronic toll collection system account holders, without the account holder’s consent, to any entity that uses the information for commercial purposes. However, this restriction does not preclude the exchange of this information between entities with jurisdiction over or operating a toll highway bridge or tunnel in any state or Canadian province;

(4) information or data collected by the department or its authorized agent for the purpose of establishing and monitoring electronic toll collection accounts is not subject to disclosure under the Freedom of Information Act;

(5) notwithstanding another provision of law, all information, data, photographs, microphotographs, videotape, or other recorded images prepared pursuant to this section must be for the exclusive use of the department or its authorized agent in the discharge of its duties under this section and must not be open to the public, subject to the disclosure under the Freedom of Information Act, nor used in a court in an action or a proceeding pending unless the action or proceeding relates to the imposition of or indemnification for liability pursuant to this section.

(M) Notwithstanding another provision of law, school buses transporting school children for a school event and authorized emergency vehicles as defined in Section 57‑5‑170 are exempt from the payment of any tolls.”

SECTION 4. Subarticle 3, Article 9, Chapter 35, Title 11 of the 1976 Code is amended by adding:

“Section 11‑35‑3075. (A) A procurement authorized pursuant to Article 3, Chapter 3, Title 57 is subject to this chapter except as otherwise provided in this section. The exclusions contained in subsection (B) and the expanded discussions and proposal revisions contained in subsection (C) only apply to procurements authorized pursuant to Article 3, Chapter 3, Title 57.

(B) A procurement authorized pursuant to Article 3, Chapter 3, Title 57 is exempt from the following sections, and the regulations implementing these sections: Section 11‑35‑1530(8) (Negotiations), Section 11‑35‑2030 (Multiterm Contracts), Section 11‑35‑3021 (Subcontractor Substitution), Section 11‑35‑3025 (Approval of architectural, engineering, or construction changes which do not alter scope or intent or exceed approved budget), Section 11‑35‑3030 (Bond and Security), Section 11‑35‑3035 (Error and Omissions Insurance), Section 11‑35‑3037 (Other Forms of Security), Section 11‑35‑3060 (Fiscal Responsibility), Section 11‑35‑3070 (Approval of architectural, engineering, or construction changes which do not alter scope or intent or exceed approved budget), Section 11‑35‑4230 (Authority to Resolve Contract and Breach of Contract Controversies), and Section 11‑35‑4320 (Contract Controversies).

(C) A procurement authorized pursuant to Article 3, Chapter 3, Title 57 may utilize expanded discussions and proposal revisions provided as follows:

(1) expanded discussions are exchanges between a governmental body and an offeror that are undertaken with the intent of allowing the offeror to revise its proposal. These discussions may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give‑and‑take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. Expanded discussions are tailored to each offeror’s proposal. If the governmental body elects to conduct expanded discussions, these discussions must be conducted with each offeror. The primary objective of expanded discussions is to maximize the governmental body’s ability to obtain best value, based on the requirements and the evaluation factors set forth in the solicitation. Expanded discussions may include changes to the request for proposals that do not exceed the general scope of the request for proposals or alter the scope of the initial competition. In conducting discussions, the procurement officer controls all exchanges;

(2) at a minimum, the procurement officer subject to item (3) of this subsection, must indicate to, or discuss with, each offeror being considered for award, deficiencies, significant weaknesses, and adverse past performance information. The procurement officer also is encouraged to discuss other aspects of the offeror’s proposal that, in the opinion of the procurement officer, could be altered or explained to enhance materially the proposal’s potential for award. However, the procurement officer is not required to discuss every area where the proposal could be improved. The scope and extent of discussions are a matter of procurement officer judgment;

(3) government personnel involved in the acquisition shall not engage in conduct that:

(a) favors one offeror over another;

(b) reveals an offeror’s technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror’s intellectual property to another offeror;

(c) reveals an offeror’s price without that offeror’s permission. However, the procurement officer may inform an offeror that its price is considered by the governmental body to be too high, or too low, and reveal the results of the analysis supporting that conclusion. It is also permissible, at the governmental body’s discretion, to indicate to all offerors the cost or price that the governmental body’s price analysis, market research, and other reviews have identified as reasonable;

(d) reveals the names of individuals providing reference information about an offeror’s past performance; or

(e) knowingly furnishes source selection information, as defined by regulation;

(4) the procurement officer may request or allow proposal revisions to clarify and document understandings reached during negotiations. At the conclusion of expanded discussions, each offeror must be given an opportunity to submit a final proposal revision, including any revisions necessary to address any changes made to the solicitation. The procurement officer is required to establish a common cut‑off date only for receipt of final proposal revisions. Requests for final proposal revisions shall advise offerors that the final proposal revisions must be in writing and that the government intends to make award without obtaining further revisions.”

SECTION 5. Section 11‑35‑710(1) of the 1976 Code, as last amended by Act 459 of 1996, is further amended to read:

“(1) except as provided in Section 11‑35‑3075, the construction, maintenance, and repair of bridges, highways, and roads; vehicle and road equipment maintenance and repair; and other emergency‑type parts or equipment utilized by the Department of Transportation or the Department of Public Safety;”

SECTION 6. Section 11‑35‑40(3) of the 1976 Code, as last amended by Act 153 of 1997, is further amended to read:

“(3) Compliance with Federal Requirements. Where a procurement involves the expenditure of federal assistance, grant, or contract funds, the governmental body ~~shall~~ also shall comply with ~~such~~ federal ~~law and~~ laws, including authorized regulations, as are mandatorily applicable and which are not presently reflected in ~~the~~ this code. Notwithstanding, where federal assistance, grant, or contract funds are used in a procurement by a governmental body as defined in Section 11‑35‑310(18), this code, including any requirements that are more restrictive than federal requirements ~~shall~~, must be followed, except to the extent such action would render the governmental body ineligible to receive federal funds whose receipt is conditioned on compliance with mandatorily applicable federal law. In those circumstances, the solicitation must identify and explain the impact of such federal laws on the procurement process, including any required deviation from this code.”

SECTION 7. Section 57‑5‑1625 of the 1976 Code, as added by Act 176 of 2005 is amended to read:

“Section 57‑5‑1625. (A) The department may award highway construction contracts using a design‑build procedure. A design‑build contract means an agreement that provides for both the design~~, right‑of‑way acquisition,~~ and construction of a project by a single entity. ~~The design‑build contract may also provide for the maintenance, operation, or financing of the project. The agreement may be in the form of a design‑build contract, a franchise agreement, or any other form of contract approved by the department.~~

(B) Selection criteria shall include the cost of the project and may include contractor qualifications, time of completion, innovation, design and construction quality, design innovation, or other technical or quality related criteria.”

SECTION 8. Section 57‑5‑1310 of the 1976 Code is amended to read:

“Section 57‑5‑1310. This article is intended to provide an additional and an alternative method for the provision of and financing of highways and appurtenant facilities to the end that such highways may be undertaken or improved in such manner as may best be calculated to expedite relief of hazardous and congested traffic conditions on the highways in the State and provide acceptable avenues for commerce and intercommunications by vehicular traffic among the several sections of the State. In effecting this enactment, the General Assembly intends that the indebtedness herein authorized fall within the category permitted by Paragraph 9 of Section 13 of Article X of the Constitution of South Carolina.”

SECTION 9. Section 57‑5‑1320(2) of the 1976 Code is amended to read:

“(2) ‘Turnpike facility’ means any express highway or limited access highway or portion of it, constructed under the provisions of this article by the department, whether or not financed with turnpike bonds, including any bridge, tunnel, overpass, underpass, interchange, additional lanes or capacity, entrance plaza, approach, toll house, service station and administration and storage and other buildings and facilities which the department considers necessary or desirable. A turnpike facility constitutes a portion or extension of any existing or proposed highway in the state highway system;”

SECTION 10. Section 57‑5‑1330(1) of the 1976 Code is amended to read:

“(1) The department may designate, establish, plan, improve, construct, maintain, operate, and regulate turnpike facilities as a part of the state highway system or any federal aid system whenever the department determines the traffic conditions, present or future, justify the facilities, except that the department may not designate as a turnpike facility any highway, road, bridge, or other transportation facility funded in whole ~~or in part~~ by a local option sales and use tax as provided in Chapter 37 ~~of~~, Title 4. The department may utilize funds available for the maintenance of the state highway system for the maintenance of any turnpike facility financed pursuant to this article.”

SECTION 11. Section 40‑11‑360(A)(4) of the 1976 Code is amended to read:

“(4) Contractors performing construction work for the South Carolina Department of Transportation pursuant to that department’s prequalification requirements, or a procurement authorized pursuant to Article 3, Chapter 3, Title 57 ~~with the exception of public/private partnerships performing work pursuant to Section 57‑3‑200~~;”

SECTION 12. Section 57‑5‑1660 of the 1976 Code is amended by adding at the end:

“(e) The provisions of this section do not apply to a procurement authorized pursuant to Article 3, Chapter 3, Title 57.

(f) When the department utilizes the design‑build delivery method authorized by Section 57‑5‑1625 for a highway construction project, the amount of the performance and indemnity bond and payment bonds required by this section shall relate only to the portion of the contract concerning construction.”

SECTION 13. It is the intent of the General Assembly that public‑private initiatives entered into pursuant to this act will be in all respects an essential governmental function dedicated for the public use that inures to the benefit of the people of this State through increased commerce and prosperity and the improvement of health and living conditions.

SECTION 14. Sections 12‑28‑2920, 57‑3‑200, 57‑3‑615, 57‑3‑618, 57‑5‑1490, and 57‑5‑1495 of the 1976 Code are repealed.

SECTION 15. If any section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 16. This act takes effect upon approval by the Governor.

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