

FINAL Tracking Document of 8/15/07 Work Group Actions – PPEA Model Guideline Revisions

Offeror	Location- Public Comment Draft	Substance of Comment or Suggested Revision	Status & Location– Final Draft
#1 City of Roanoke (Roanoke)	Page 4, line 11 page 5, line 31; page 7, line 2; page 11, line 15; page 15, line 19	The acronym “RPE” is used to represent “responsible public entity.” However, “RPE” is not used consistently throughout the rest of the document	Accepted by consensus. Changes made throughout draft as needed
#2 Roanoke	Page 5, line 29 through page 7, line 2	“Guidelines adopted by state public entities <u>shall</u> and guidelines adopted by other public entities <u>may</u> include the following provisions”. The rest of page 5, page 6, and a portion of page 7 identify the twelve provisions. However, in the review of Senate bill 756, lines 201- 213, provisions 7 (page 6, lines 14-15) and 12 (page 6, lines 42-46 and page 7, lines 1-2) are required to be included in the guidelines for other public entities. Therefore, the guidelines should reflect this requirement.	Staff directed to re-write provisions to (i) be consistent with the statute and clarify mandatory vs. non-mandatory for localities. Page 5, line 38 through Page 7, line 3
#3 Roanoke	Page 5, line 29 through page 7, line 2	The twelve provisions listed are not listed in the same order as they appear in Senate Bill 756, lines 164-213. Should they be?	Same as Item #2
#4 Thomas R. Folk (Folk)	Page 5, line 38 through Page 6, line 46	This language appears confusing and inaccurate. Mixes mandatory and non mandatory provisions for state and local entities	Same as Item #2
#5 Folk	Page 7, lines 7-10	Should use terminology “public entity” rather than “public body.” Comment: Additionally, should clarify that each local public also has the flexibility not to include in its PPEA guidelines provisions in the model guidelines that are not required by the PPEA.	Accepted by consensus. See Item #1 Accepted by consensus. Revised language added. Page 7, line 10.
#6 Folk; Roanoke	Page 8, lines 39-40	<u>Folk</u> : Should eliminate sentence prohibiting a fee to process proposals. While the PPTA has an express prohibition on charging fees for solicited proposals, the PPEA does not. <u>Roanoke</u> : Is there a specific provision that prohibits the charging of a fee to process proposals or is this just the preference of the committee? The city has in its guidelines a provision that allows the option to charge a fee for solicited proposals, and we understand some other localities have similar provisions.	Work group decided by consensus to remove this provision from the guidelines Page 9, line 5

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#7 Roanoke	Page 9, lines 32-46	This provision outlines documents that are exempt from FOIA requests. However, FOIA cannot release a responsible public entity from its duty to respond to a court order or other applicable law, and this should be added to the guidelines. Suggest adding the following at the end of line 34 “... <i>except to the extent the documents are those as set forth below, unless otherwise required by law or a court.</i> ”	Staff directed to re-write submitted provision with assistance of FOIA Council Director. Concern: using “by law” i.e. other than FOIA, leaves the impression that there may be a specific provision that is not referenced. Page 10, lines 16-23
#8 Folk	Page 10, line 7 (footnote)	Should consider removing the term “earmarking.” Does not appear to add anything to the guidelines, while such specialized jargon makes the process appear less accessible and understandable.	Accepted by consensus; replace throughout with term “designate.” Page 10, line 29; Page 11, line 29
#9 Roanoke	Page 10, lines 9, 15, and 21	Change reference from Section D.1. to Section I.D.1	Accepted by consensus Page 10, lines 31& 38; Page 11, line 6
#10 Roanoke	Page 10, lines 23-26	Suggest rewriting the lines to read “Once a written determination has been made by the RPE, the documents afforded protection under this subdivision shall continue to be protected from disclosure when in the possession of the RPE or any affected jurisdiction to which such documents are provided.” We feel the following verbiage should be added to the end of that paragraph, “unless otherwise required by law or a court.”	Same as Item #7. Note: Language added to the portion of the FOIA section titled “general provisions.”
#11 Roanoke	Page 10, lines 23-26	Query: Can the RPE require the private entity to pay the RPE its costs for defending any request or action to compel disclosure of records?	Consensus not to include in guidelines, leave to RPE to decide. Note: It was noted that this provisions could be included as a contract provisions.
#12 Roanoke	Page 11, lines 20	Suggest rewriting sentence to read “RPE may not withhold from public access, unless otherwise required or authorized by law or a court.”	Same as Item #7; language added to clarify. Page 12, line 17
#13 Roanoke	Page 12, lines 9-12	Comment: Doesn’t the act also allow for Invitations for Bids (IFBs), and does the jurisdiction need to first decide if an RFP is needed, or does this only apply for the detailed phase in connection with entering into a comprehensive agreement?	Accepted by consensus Page 12, line 37

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#14 Folk	Page 13, lines 25-27	<p>Consider removing the provisions. Comment: The provision appears to call for individual meetings with prospective proposers after a procurement has been initiated. This appears to be inconsistent with what are generally accepted to be best practices in competitively negotiated public procurements and may lead to appearances of impropriety and favoritism.</p> <p><i>Note- Typically, before proposal submissions, all prospective proposers are invited to proposal conferences where all may attend and any guidance resulting is reduced to writing as an addendum provided to all proposers. Otherwise, meetings with proposers are typically negotiation sessions. Typically, other individual sessions of public procurement officials with proposers are generally prohibited precisely to avoid favoritism or appearances of favoritism and to ensure all competitors compete on a level playing field.</i></p>	<p>Consensus to revise language to clarify purpose.</p> <p>Note: The meeting is where the private entity must get information sufficient to provide a serious competing proposal.</p> <p align="center">Page 14, lines 11, 14 & 15</p>
#15 Roanoke	Page 13, lines 36-38	<p>Query: What is meant by “acceptance” in this situation? Does it mean the physical acceptance of the proposal when the public entity’s Purchasing Dept opens the proposal, or does it mean the RPE’s acceptance of a proposal for consideration?</p>	<p>Language revised to clarify the term.</p> <p align="center">Page 13, lines 32 & 38; Page 14, lines 3 & 6</p>
#17 Roanoke	Page 14, lines 1-7	<p>Query: Who is responsible for paying the costs of posting the information on websites or publications and newspapers- the RPE or the private entity submitting the proposal?</p>	<p>Consensus not to include, leave it to RPE. Note: This cost should be built into the proposal fee.</p>
#18 Roanoke	Page 14, line 21	<p>Change reference from “Section V (A)” to “Section IV (A)”</p>	<p>Accepted by consensus</p> <p align="center">Page 15, line 19</p>
#19 Folk	Page 14, lines 29-30	<p>Comment: The RPE should determine, before it issues the RFP, in the case of solicited proposals, or before it accepts an unsolicited proposal, in the case of unsolicited proposals, whether to proceed using competitively sealed bid procedures or competitive negotiation procedures. <i>Note- This is because in a procurement using competitive negotiation and “best value” methodology, typical for PPEA procurements, the evaluation criteria and the order of importance should be stated before proposals are received and should be tailored to the project. Disclosure of these tailored evaluation criteria and their order of importance should be done in the RFP in the case of solicited proposals. This is part of the communication process with proposers and allows proposers to better understand and respond to the RPE’s needs and priorities. Even with nonsolicited proposals, the better practice is to have evaluation criteria and their order of importance established before competing proposals are sought. If the RPE waits until after it has received conceptual-phase proposals, this is too late in the process.</i></p>	<p>Consensus not to include in guidelines.</p> <p>Note: RPE should have all available options open for consideration.</p>

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#20 Folk	Page 15, lines 1-3, 5	These provisions are potentially misleading and confusing to public entities in that they imply that it is acceptable or normal to proceed to the detailed phase of proposal review with just one proposal, without any consideration of the requirements of competitive negotiation and normally negotiations be held with at least two proposers. <i>Comment: The PPEA requires public entities using competitive negotiations to do in a manner consistent with the procurement of other than professional services through competitive negotiation as defined in Section 2.2-4301. The definition of competitive negotiation in 2.2-4301 says the process involves selection of “two or more offerors” and then negotiations “with each of the offerors so selected” unless certain specified written determinations are made. Thus, under the PPEA, the RPE is required to either negotiate with at least 2 proposers or to make a written justification for selection and negotiation with only one proposer.</i>	Consensus not to include in guidelines.
#21 Roanoke	Page 15, lines 34-35	Consider revising to read: “Suggestions for formatting information to be included in proposals at this stage include the items listed below, as well as any additional information or documents the RPE may request.”	Accepted by consensus Page 16, line 28
#22 Folk	Page 19, line 37 through Page 22, line 23	Comment: The long list of factors tend to discourage RPE’s from developing meaningful evaluation criteria that effectively communicate to proposers the RPE’s needs and priorities for a particular PPEA procurement. <i>Comment: PPEA procurements tend to be done through competitive negotiation using a best value methodology. Best practices for this kind of procurement call for a limited number of evaluation criteria (for example 5 to 10) listed in their relative order of importance that are developed for the specific procurement.</i>	Consensus to revise language to clarify that the factors are non mandatory; intended to provide guidance. Page 20, line 39
#23 Roanoke	Page 20, line 45	Consider revising line to read: “Financing and the impact on the debt or debt burden of the RPE and appropriating body.” <i>Comment: The RPE could be our Roanoke City School Board, but the School Board does not have debt or a debt burden. Technically, only the City has debt or a debt burden.</i>	Consensus to revise language “Financing and the impact on the debt burden of the RPE or appropriating body” Page 22, line 5
#24 Roanoke	Page 21, line 6	Query: What does “opportunity costs” mean?	Consensus to add definition. Page 30, line 9
#25 Roanoke	Page 22, line 25	Consider and additional section on the selection process be added that allows the RPE to try to reach a comprehensive agreement with the selected private entity, but if it’s not able to, the RPE can move on to negotiations with another proposer, thus keeping its options open until a comprehensive agreement acceptable to the RPE is reached? This would be a similar process to that used when negotiating proposals in “Other than Professional Services” solicitations.	Consensus not to include in guidelines. Note: RPE should have all available options open for consideration.

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#26 Roanoke	Page 22, lines 29-34	<p>Comment: Wish to confirm that this section only applies to state agencies and that localities <u>may</u> establish an advisory committee, but they are not required to do so?</p>	<p>Consensus to revise language to clarify that the advisory committee is permissive.</p> <p align="center">Page 23, line 36</p>
#27 Folk	Page 22, lines 41- Page 23, line 1	<p>Comment: Highlighted portion is unclear as written. There is an Attorney General’s Opinion that clarifies who the governing body is under Section 56-575.16.5 when the RPE is a school board.</p> <p>Consider: “When a school board is the RPE, review by the local governing body (e.g., the County Board of Supervisors, City Council, etc., as applicable, which provides appropriated funds for the school board) satisfies the requirement of this section.”</p>	<p>Consensus to revise language “When a school board is the RPE, review by the local governing body satisfies the requirement of this section.”</p> <p align="center">Page 24, line 9</p>
#28 Roanoke	Page 22, lines 38-41; Page 23, lines 1-3	<p>Comment: For proposals where school board is the RPE, the governing body shall serve as the appropriating body. The review of the governing body for such projects as required by Section 56-575.16 5 shall meet the requirements of this section.” In Roanoke, both the City and the City Schools are considered RPE’s and both have implemented PPEA guidelines. However, the City could be the public entity responsible for appropriating or authorizing funding to pay for a qualifying project for our Schools. Only our City Council, not our School Board, can obligate us to long term debt. As such, which public entity, or both, should include in its guidelines the mechanism for the City to review any proposed interim or comprehensive agreement prior to execution? In addition, for the proposals where the school board is the RPE, is the “governing body” that is referenced above the City Council or the governing body for the school board, or both? Therefore, should there be a reference to “local governing body”, and should it be defined in the definitions?</p> <p>Consider: “The review of the local governing body for such school board projects as required by Section 56-575.16 (6) shall meet the requirements of this section.”</p>	<p align="center">Same as Item #27</p>
#29 Roanoke	Page 25, line 23	<p>Consider changing reference from “Section V” to Section III (B).</p>	<p>Accepted by consensus</p> <p align="center">Page 26, line 36</p>

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#30 Roanoke	Page 26, lines 11-13	<p>Consider: “Once an interim agreement or a comprehensive agreement has been entered into, a RPE shall make procurement records available for public inspection, upon request, unless otherwise required or authorized by law or by a court.”</p> <p>Comment: Also, even though an interim agreement may have been entered into, if a comprehensive agreement is still under negotiation, we don’t feel the records should be disclosed in case the RPE may need to go to the next private entity to get an acceptable comprehensive agreement.</p>	<p>Accepted by consensus. Revised language added. Also See Item #2 Page 27, line 38.</p> <p>Work Group takes the position of the compromise reached in SB 1002, passed during the 2007 Session and sponsored by the FOIA Council, which provides a process for protecting certain documents from from disclosure in this situation.</p>
#31 Roanoke	Page 26, line 27	<p>Comment: Shouldn’t the word “provisions” be replaced with the word “guidelines”?</p>	<p>Accepted by consensus Page 27, line 43.</p>
#32 Auditor of Public Accounts/ Div. of Legislative Services	Page 27	<p>Suggest using a glossary of terms to provide additional guidance on terms used throughout the guidelines. Glossary is based on statutory definitions.</p>	<p>Consensus to: include all statutory definitions that are used in the guidelines and add the suggested definitions as revised.</p> <p>Page 29 through Page 31.</p>