

# **Public-Private Education Facilities and Infrastructure Act of 2002**

**Model Procedures Guidelines**

**AMENDED**

**September 30, 2002 July 2005**

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## I. Introduction

The Public-Private Education Facilities and Infrastructure Act of 2002 (the "PPEA") grants responsible public entities the authority to create public-private partnerships for the development of a wide range of projects for public use if the public entities determine there is a need for the project and that private involvement may provide the project to the public in a timely or cost-effective fashion. The PPEA defines "responsible public entity" to include any public entity that "has the power to ~~acquire, design, construct, improve, renovate, expand, equip, maintain, develop~~ or operate the applicable qualifying project." Individually negotiated interim<sup>1</sup> or comprehensive agreements between ~~an operator~~ a private entity and a responsible public entity will define the respective rights and obligations of the responsible public entity and the ~~private operator~~ entity.<sup>2</sup>

In order for a project to come under the PPEA, it must meet the definition of a "qualifying project." The PPEA contains a broad definition of qualifying project that includes public buildings and facilities of all types; for example:

- (i) An education facility, including, but not limited to, a school building (including any stadium or other facility primarily used for school events), any functionally-related and subordinate facility and land to a school building and any depreciable property provided for use in a school facility that is operated as part of the public school system or as an institution of higher education;
- (ii) A building or facility ~~for principal use by any public entity that meets a public purpose and is developed or operated by or for any public entity;~~<sup>3</sup>
- (iii) Improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity;
- (iv) Utility and telecommunications and other communications infrastructure;  
~~or~~
- (v) A recreational facility;
- (vi) Technology infrastructure, including, but not limited to, telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services.<sup>4</sup>
- (vii) any improvements necessary or desirable to any unimproved locally- or state-owned real estate.<sup>5</sup>

1 The PPEA establishes requirements that the responsible public entity must adhere  
2 to when reviewing and approving proposals received pursuant to the PPEA. In addition,  
3 the PPEA specifies the criteria that must be used to select a proposal and the contents of  
4 the interim or comprehensive agreement detailing the relationship between the  
5 responsible public entity and the private entity.

6  
7 In passing the legislation, and following subsequent amendments to the Act in  
8 2005, the General Assembly directed the Governor and the chairs of the House and  
9 Senate Committees on General Laws to facilitate the development of model  
10 guidelinesprocedures to assist in the implementation of the PPEA. The respective  
11 governing body of the public entity must first adopt guidelinesprocedures<sup>6</sup>-that it will  
12 follow to receive and evaluate any proposal submitted to the public entity under the  
13 provisions of the PPEA. Such guidelines shall be made publicly available.<sup>7</sup> The  
14 guidelinesprocedures adopted by the public entity should designate an individual to serve  
15 as the point of contact to receive proposals submitted under the PPEA and to respond to  
16 inquiries regarding the PPEA or the guidelinesprocedures. The guidelines may also  
17 contain provisions for an accelerated documentation, review, and selection process for  
18 proposals involving a qualifying project that the responsible public entity deems a  
19 priority.<sup>8</sup>

20  
21 Because the PPEA is intended to encourage innovative partnerships between  
22 responsible public entities and private entities, public entities are encouraged to maintain  
23 an open dialogue with private entities to discuss the need for infrastructure  
24 improvements.<sup>9</sup>

25  
26 The following model guidelinesprocedures have been developed to assist public  
27 entities in adopting guidelinesprocedures to guide the implementation of the PPEA. The  
28 complete text of the PPEA has been included in the Appendix to these model  
29 guidelinesprocedures. Although guidance with regard to the application of the PPEA is  
30 provided herein, it will be incumbent upon all entities, both public and private, to comply  
31 with the provisions of the PPEA.

32  
33 In the event that the PPEA is amended in a manner that either conflict with  
34 guidelines developed by a responsible public entity or concern material matters not  
35 addressed by such guidelines, the responsible public entity should appropriately amend  
36 the guidelines. If the guidelines are not amended prior to the effective date of the new  
37 law, the guidelines nonetheless shall be interpreted in a manner to conform to the new  
38 law.<sup>10</sup>

## 39 40 **II. General Provisions**

### 41 42 **A. Proposal Submission**

43  
44 A proposal may be either solicited by a public entity or delivered by a private  
45 entity on an unsolicited basis. Proposers may be required to follow a two-part proposal  
46 submission process consisting of an initial conceptual phase and a detailed phase. The

1 initial phase of the proposal should contain specified information on proposer  
2 qualifications and experience, project characteristics, project financing, anticipated public  
3 support or opposition, or both, and project benefit and compatibility. The detailed  
4 proposal should contain specified deliverables.

5  
6 The PPEA allows private entities to include innovative financing methods,  
7 including the imposition of user fees or service payments, in a proposal. Such financing  
8 arrangements may include the issuance of debt instruments, equity or other securities or  
9 obligations, including, if applicable, the portion of the tax-exempt private activity bond  
10 limitation amount to be allocated annually to the Commonwealth of Virginia pursuant to  
11 the Economic Growth and Tax Relief Reconciliation Act of 2001<sup>10</sup> for the development of  
12 education facilities using public-private partnerships, and to provide for carryovers of any  
13 unused limitation amount. The PPEA is a flexible development tool that allows the use of  
14 innovative financing techniques. Depending on the public entity's authority and the  
15 circumstances of each transaction, financing options might include the use of special  
16 purpose entities, sale and lease back transactions, enhanced use leasing, property  
17 exchanges, development agreements, conduit financing and other methods allowed by  
18 law.<sup>11</sup>

19  
20 Proposals should be prepared simply and economically, providing a concise  
21 description of the proposer's capabilities to complete the proposed qualifying project and  
22 the benefits to be derived from the project by the public entity. Project benefits to be  
23 considered are those occurring during the construction, renovation, expansion or  
24 improvement phase and during the life cycle of the project. Proposals also should  
25 include a ~~comprehensive~~ scope of work and a financial plan for the project, containing  
26 enough detail to allow an analysis by the public entity of the financial feasibility of the  
27 proposed project. The public entity may establish criteria by which the proposer may  
28 provide clarification to the submission. The cost analysis of a proposal should not be  
29 linked solely to the financing plan as the responsible public entity may determine to  
30 finance the project through other available means.<sup>12</sup>

31  
32 **B. Affected Local Jurisdictions**

33  
34 Any private entity requesting approval from or submitting a conceptual or  
35 detailed proposal to a responsible public entity must provide each affected local  
36 jurisdiction with a copy of the private entity's request or proposal by certified mail,  
37 express delivery or hand delivery. Affected local jurisdictions that are not responsible  
38 public entities under the proposed qualifying project shall have 60 days from the receipt  
39 of the request or proposal to submit written comments to the responsible public entity and  
40 to indicate whether the proposed qualifying project is compatible with the (i) local  
41 comprehensive plan, (ii) local infrastructure development plans, or (iii) capital  
42 improvements budget or other government spending plan. Comments received within the  
43 60-day period shall be given consideration by the responsible public entity, and no  
44 negative inference shall be drawn from the absence of comment by an affected local  
45 jurisdiction.

### C. Proposal Review Fee

A public entity ~~may seek the advice of~~ shall receive an analysis of the proposal from appropriate<sup>13</sup> internal staff or outside advisors or consultants with relevant experience in determining whether to enter into an agreement with the private entity. No fee may be charged by a public entity to process, review or evaluate any solicited proposal submitted under the PPEA. The public entity may charge a fee to the private entity to cover the costs of processing, reviewing, and evaluating any unsolicited proposal or competing unsolicited proposal submitted under the PPEA, including a fee to cover the costs of outside attorneys, consultants, and financial advisors. Any fee charged for such review of a proposal should be reasonable in comparison to the level of expertise required to review the proposal and should not be greater than the direct costs associated with evaluating the proposed qualifying project. "Direct costs" may include (i) the cost of staff time required to process, evaluate, review and respond to the proposal and (ii) the out-of-pocket costs of attorneys, consultants and financial advisors.

The proposal fee may cover all or part of the initial review process. For example, a public entity may require a proposal fee in an amount sufficient to cover all anticipated direct costs associated with evaluating the proposal, or a public entity may require a smaller initial processing fee with an additional proposal fee to be charged should the project proceed beyond the initial review.

The public entity may establish a fee schedule for the cost of the proposal review. The public entity shall set forth in the procedures it has established for the implementation of the PPEA the methodology used to calculate proposal fees. If the cost of reviewing the proposal exceeds the initially established proposal fee, the public entity may assess the proposer the additional costs deemed necessary to evaluate the proposal.

For rejected proposals, the public entity may establish a schedule for refunding any portion of fees paid in excess of its direct costs associated with evaluating the proposal. If the cost of reviewing the proposal is less than the initially established proposal fee, the public entity may refund to the proposer the excess fee. As noted in section IV.A. 1 below, fees should be refunded entirely if the public entity decides not to proceed to publication and conceptual-phase review of an unsolicited proposal.

### D. Freedom of Information Act

Generally, proposal documents submitted by private entities are subject to the Virginia Freedom of Information Act ("FOIA"). In accordance with § 2.2-3705 A 56 of FOIA, such documents are releasable if requested, except to the extent that they relate to (i) confidential proprietary information submitted to the responsible public entity under a promise of confidentiality or (ii) memoranda, working papers or other records related to proposals if making public such records would adversely affect the financial interest of the public or private entity or the bargaining position of either party.

1 Subsection 56-575.4 G of the PPEA imposes an obligation on a public entity and  
2 any affected local jurisdiction to protect confidential proprietary information submitted  
3 by a private entity or operator. When the private entity requests that the public entity not  
4 disclose information, the private entity must (i) invoke the exclusion when the data or  
5 materials are submitted to the public entity or before such submission, (ii) identify the  
6 data and materials for which protection from disclosure is sought, and (iii) state why the  
7 exclusion from disclosure is necessary. A private entity may request and receive a  
8 determination from the public entity as to the anticipated scope of protection prior to  
9 submitting the proposal. The public entity is authorized and obligated to protect only  
10 confidential proprietary information, and thus will not protect any portion of a proposal  
11 from disclosure if the entire proposal has been designated confidential by the proposer  
12 without reasonably differentiating between the proprietary and non-proprietary  
13 information contained therein.

14  
15 Upon receipt of a request that designated portions of a proposal be protected from  
16 disclosure as confidential and proprietary, the public entity shall determine whether such  
17 protection is appropriate under applicable law and, if appropriate, the scope of such  
18 appropriate protection, and shall communicate its determination to the proposer. If the  
19 determination regarding protection or the scope thereof differs from the proposer's  
20 request, then the public entity should accord the proposer a reasonably reasonable  
21 opportunity to clarify and justify its request. Upon a final determination by the public  
22 entity to accord less protection than requested by the proposer, the proposer should be  
23 accorded an opportunity to withdraw its proposal. A proposal so withdrawn should be  
24 treated in the same manner as a proposal not accepted for publication and conceptual-  
25 phase consideration as provided in section IV.A.1 below.

26  
27 Once a comprehensive agreement has been entered into, and the process of  
28 bargaining of all phases or aspects of the comprehensive agreement is complete, a  
29 responsible public entity shall make available, upon request, procurement records in  
30 accordance with Section 2.2-4342.<sup>14</sup>

31  
32 **E. Use of Public Funds**

33  
34 Virginia constitutional and statutory requirements as they apply to appropriation  
35 and expenditure of public funds apply to any interim or comprehensive agreement  
36 entered into under the PPEA. Accordingly, the processes and procedural requirements  
37 associated with the expenditure or obligation of public funds shall be incorporated into  
38 planning for any PPEA project or projects.

## F. Applicability of Other Laws

Nothing in the PPEA shall affect the duty of a responsible public entity to comply with all other applicable law not in conflict with the PPEA. The applicability of the Virginia Public Procurement Act (the "VPPA") is as set forth in the PPEA.

## **III. Solicited Proposals**

A public entity may issue Requests for Proposals (RFPs), inviting proposals from private entities to ~~develop or acquire, construct, improve, renovate, expand, maintain or operate~~ qualifying projects ~~or to design or equip projects so constructed, improved, renovated, expanded, maintained or operated~~. A public entity may not issue a RFP until it has adopted guidelines to govern the PPEA documentation, review, and selection process.<sup>15</sup> The public entity may use a two-part proposal process consisting of an initial conceptual phase and a detailed phase. An RFP may invite proposers to submit proposals on individual projects identified by the public entity. In such a case the responsible public entity should set forth in the RFP the format and supporting information that is required to be submitted, consistent with the provisions of the PPEA.

The RFP should specify, but not necessarily be limited to, information and documents that must accompany each proposal and the factors that will be used in evaluating the submitted proposals. The RFP should be posted in such public areas as are normally used for posting of the public entity's notices, including the public entity's website. Notices should also be published in a newspaper or other publications of general circulation and advertised in *Virginia Business Opportunities* and posted on the Commonwealth's electronic procurement site.<sup>16</sup> The RFP should also contain or incorporate by reference other applicable terms and conditions, including any unique capabilities or qualifications that will be required of the private entities submitting proposals. Pre-proposal conferences may be held as deemed appropriate by the public entity.

## **IV. Unsolicited Proposals**

The PPEA permits public entities to receive, evaluate and select for negotiations unsolicited proposals from private entities to ~~develop, acquire, construct, improve, renovate, expand, maintain,~~ or operate a qualifying project ~~it or to design or equip projects so constructed, improved, renovated, expanded, maintained or operated~~.

A responsible public entity may publicize its needs and may encourage interested parties to submit unsolicited proposals subject to the terms and conditions of the PPEA. When such proposals are received without issuance of an RFP, the proposal shall be treated as an unsolicited proposal.



### **A. Decision to Accept and Consider Unsolicited Proposal; Notice**

1  
2  
3  
4 1. Upon receipt of any unsolicited proposal or group of proposals and payment of  
5 any required fee by the proposer or proposers, the responsible public entity should  
6 determine whether to accept the unsolicited proposal for publication and conceptual-  
7 phase consideration. If the public entity determines not to accept the proposal and  
8 proceed to publication and conceptual-phase consideration, it should return the proposal,  
9 together with all fees and accompanying documentation, to the proposer.

10  
11 2. If the responsible public entity chooses to accept an unsolicited proposal for  
12 conceptual-phase consideration, it shall post a notice in a public area regularly used by  
13 the public entity for posting of public notices for a period of not less than 45 days. The  
14 responsible public entity shall also publish the same notice for a period of not less than 45  
15 days in one or more newspapers or periodicals of general circulation in the jurisdiction to  
16 notify any parties that may be interested in submitting competing unsolicited proposals.  
17 In addition, the notice should also be advertised in *Virginia Business Opportunities* and  
18 on the Commonwealth's electronic procurement website.<sup>17</sup> The notice shall state that the  
19 public entity (i) has received and accepted an unsolicited proposal under the PPEA, (ii)  
20 intends to evaluate the proposal, (iii) may negotiate a an interim or comprehensive  
21 agreement with the proposer based on the proposal, and (iv) will accept for simultaneous  
22 consideration any competing proposals that comply with the procedures adopted by the  
23 public entity and the PPEA. The notice also shall summarize the proposed qualifying  
24 project or projects, and identify their proposed locations. Copies of unsolicited proposals  
25 shall be available upon request, subject to the provisions of FOIA and § 56-575.4 G of  
26 the PPEA. Representatives of the public entity are encouraged to answer questions from  
27 private entities that are contemplating submission of a competing unsolicited proposal.<sup>18</sup>

### **B. Initial Review by the Responsible Public Entity at the Conceptual Stage**

28  
29  
30  
31 1. Only proposals complying with the requirements of the PPEA that contain  
32 sufficient information for a meaningful evaluation and that are provided in an appropriate  
33 format should be considered by the responsible public entity for further review at the  
34 conceptual stage. Formatting suggestions for proposals at the conceptual stage are found  
35 at Section V A.

36 2. The responsible public entity should determine at this initial stage of review  
37 whether it will proceed using:

- 38  
39 a. Standard procurement procedures consistent with the VPPA; or  
40  
41 b. GuidelinesProcedures developed by the responsible public entity that are  
42 consistent with procurement of other than professional services through  
43 "competitive negotiation" as the term is defined in § 2.2-4301 of the Code  
44 of Virginia. The responsible public entity may proceed using such  
45 guidelinesprocedures only if it makes a written determination that doing so  
46 is likely to be advantageous to the responsible public entity and the public

1 based upon either (i) the probable scope, complexity or ~~urgency-priority~~  
2 <sup>19</sup>of need, ~~or~~; (ii) the risk sharing including guaranteed cost or completion  
3 guarantees<sup>20</sup>, added value, ~~or debt or equity investments proposed by the~~  
4 private entity<sup>21</sup>; or (iii) increase in funding, dedicated revenue<sup>22</sup> or other  
5 economic benefit ~~from the project that~~ would otherwise not be available.  
6

7 3. After reviewing the original proposal and any competing proposals submitted  
8 during the notice period, the responsible public entity may determine:

- 9
- 10 (i) not to proceed further with any proposal,
  - 11
  - 12 (ii) to proceed to the detailed phase of review with the original proposal,
  - 13
  - 14 (iii) to proceed to the detailed phase with a competing proposal, or
  - 15
  - 16 (iv) to proceed to the detailed phase with multiple proposals.
  - 17

18 In the event that more than one proposal will be considered in the detailed phase  
19 of review, the public entity should consider whether the unsuccessful proposer should be  
20 reimbursed for costs incurred in the detailed phase of review, and such reasonable costs  
21 may be assessed to the successful proposer in the comprehensive agreement.  
22

23 4. Discussions between responsible public bodies and private entities about the  
24 need for infrastructure improvements shall not limit the ability of a public entity to later  
25 determine to use standard procurement procedures to meet its infrastructure needs.<sup>23</sup> The  
26 public entity retains the right to reject any proposal at any time prior to the execution of  
27 an interim or comprehensive agreement.<sup>24</sup>  
28

## 29 **V. Proposal Preparation and Submission**

### 30 **A. Format for Submissions at Conceptual Stage**

31

32

33 A responsible public entity may require that proposals at the conceptual stage  
34 contain information in the following areas: (i) qualifications and experience, (ii) project  
35 characteristics, (iii) project financing, (iv) anticipated public support or opposition, or  
36 both, (v) project benefit and compatibility and (vi) any additional information as the  
37 responsible public entity may reasonably request to comply with the requirements of the  
38 PPEA. Suggestions for formatting information to be included in proposals at this stage  
39 include:

#### 40 1. Qualification and Experience

- 41
- 42
  - 43 a. Identify the legal structure of the firm or consortium of firms making the  
44 proposal. Identify the organizational structure for the project, the  
45 management approach and how each partner and major subcontractor in  
46 the structure fits into the overall team.

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- b. Describe the experience of the firm or consortium of firms making the proposal and the key principals involved in the proposed project including experience with projects of comparable size and complexity. Describe the length of time in business, business experience, public sector experience and other engagements of the firm or consortium of firms. Include the identity of any firms that will provide design, construction and completion guarantees and warranties and a description of such guarantees and warranties.
- c. Provide the names, addresses, and telephone numbers of persons within the firm or consortium of firms who may be contacted for further information.
- d. Provide a current or most recently audited financial statement of the firm or firms and each partner with an equity interest of twenty percent or greater.
- e. Identify any persons known to the proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2.

2. Project Characteristics

- a. Provide a description of the project, including the conceptual design. Describe the proposed project in sufficient detail so that type and intent of the project, the location, and the communities that may be affected are clearly identified.
- b. Identify and fully describe any work to be performed by the public entity.
- c. Include a list of all federal, state and local permits and approvals required for the project and a schedule for obtaining such permits and approvals.
- d. Identify any anticipated adverse social, economic and environmental impacts of the project. Specify the strategies or actions to mitigate known impacts of the project.
- e. Identify the projected positive social, economic and environmental impacts of the project.
- f. Identify the proposed schedule for the work on the project, including the estimated time for completion.

- 1 g. Propose allocation of risk and liability for work completed beyond the  
2 agreement's completion date, and assurances for timely completion of the  
3 project.  
4
- 5 h. State assumptions related to ownership, legal liability, law enforcement  
6 and operation of the project and the existence of any restrictions on the  
7 public entity's use of the project.  
8
- 9 i. Provide information relative to phased or partial openings of the proposed  
10 project prior to completion of the entire work.  
11

### 12 3. Project Financing

- 13
- 14 a. Provide a preliminary estimate and estimating methodology of the cost of  
15 the work by phase, segment, or both.  
16
- 17 b. Submit a plan for the development, financing and operation of the project  
18 showing the anticipated schedule on which funds will be required.  
19 Describe the anticipated costs of and proposed sources and uses for such  
20 funds.  
21
- 22 c. Include a list and discussion of assumptions underlying all major elements  
23 of the plan.  
24
- 25 d. Identify the proposed risk factors and methods for dealing with these  
26 factors.  
27
- 28 e. Identify any local, state or federal resources that the proposer  
29 contemplates requesting for the project. Describe the total commitment, if  
30 any, expected from governmental sources and the timing of any  
31 anticipated commitment.  
32
- 33 f. Identify the amounts and the terms and conditions for any revenue  
34 sources.<sup>25</sup>  
35
- 36 g. Identify any aspect of the project that could disqualify the project from  
37 obtaining tax-exempt financing.<sup>26</sup>  
38

### 39 4. Project Benefit and Compatibility

- 40
- 41 a. Identify who will benefit from the project, how they will benefit and how  
42 the project will benefit the overall community, region, or state.  
43
- 44 b. Identify any anticipated public support or opposition, as well as any  
45 anticipated government support or opposition, for the project.  
46

- 1           c. Explain the strategy and plans that will be carried out to involve and  
2           inform the general public, business community, and governmental  
3           agencies in areas affected by the project.  
4
- 5           d. Describe the anticipated significant benefits to the community, region or  
6           state including anticipated benefits to the economic condition of the public  
7           entity and whether the project is critical to attracting or maintaining  
8           competitive industries and businesses to the public entity or the  
9           surrounding region  
10
- 11          e. Compatibility with the local comprehensive plan, local infrastructure  
12          development plans, the capital improvements budget or other government  
13          spending plan.  
14

**B. Format for Submissions at Detailed Stage**

17           If the responsible public entity decides to proceed to the detailed phase of review  
18           with one or more proposals, the following information should be provided by the private  
19           entity unless waived by the responsible public entity:

- 20
- 21          1. A topographical map (1:2,000 or other appropriate scale) depicting the  
22          location of the proposed project;  
23
- 24          2. A list of public utility facilities, if any, that will be crossed by the qualifying  
25          project and a statement of the plans of the proposer to accommodate such  
26          crossings;  
27
- 28          3. A statement and strategy setting out the plans for securing all necessary  
29          property. ~~The statement must include the names and addresses, if known, of~~  
30          ~~the current owners of the subject property as well as a list of any property the~~  
31          ~~proposer intends to request the public entity to condemn<sup>27</sup>;~~  
32
- 33          4. A detailed listing of all firms that will provide specific design, construction  
34          and completion guarantees and warranties, and a brief description of such  
35          guarantees and warranties;  
36
- 37          5. A total life-cycle cost specifying methodology and assumptions of the project  
38          or projects and the proposed project start date. Include anticipated  
39          commitment of all parties; equity, debt, and other financing mechanisms; and  
40          a schedule of project revenues and project costs. The life-cycle cost analysis  
41          should include, but not be limited to, a detailed analysis of the projected  
42          return, rate of return, or both, expected useful life of facility and estimated  
43          annual operating expenses.  
44
- 45          6. A detailed discussion of assumptions about user fees or rates, and usage of the  
46          projects.

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- 7. Identification of any known government support or opposition, or general public support or opposition for the project. Government or public support should be demonstrated through resolution of official bodies, minutes of meetings, letters, or other official communications.
- 8. Demonstration of consistency with appropriate local comprehensive or infrastructure development plans or indication of the steps required for acceptance into such plans.
- 9. Explanation of how the proposed project would impact local development plans of each affected local jurisdiction.
- 10. Identification of any known conflicts of interest or other disabilities that may impact the public entity's consideration of the proposal, including the identification of any persons known to the proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2.
- 11. Additional material and information as the public entity may reasonably request.

**VI. Proposal Evaluation and Selection Criteria**

The following items shall be considered in the evaluation and selection of PPEA proposals.

**A. Qualifications and Experience**

Factors to be considered in either phase of the responsible public entity's review to determine whether the proposer possesses the requisite qualifications and experience include:

- 1. Experience with similar projects;
- 2. Demonstration of ability to perform work;
- 3. Leadership structure;
- 4. Project manager's experience;
- 5. Management approach;
- 6. Financial condition; and

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7. Project ownership.

### **B. Project Characteristics**

Factors to be considered in determining the project characteristics include:

1. Project definition;
2. Proposed project schedule;
3. Operation of the project;
4. Technology; technical feasibility;
5. Conformity to laws, regulations, and standards;
6. Environmental impacts;
7. Condemnation impacts;
8. State and local permits; and
9. Maintenance of the project.

### **C. Project Financing**

Factors to be considered in determining whether the proposed project financing allows adequate access to the necessary capital to finance the project include:

1. Cost and cost benefit to the responsible public entity;
2. Financing and the impact on the debt or debt burden of the responsible public entity;
3. Financial plan;
4. Estimated cost; and
5. Life-cycle cost analysis.

### **D. Project Benefit and Compatibility**

Factors to be considered in determining the proposed project's compatibility with the appropriate local or regional comprehensive or development plans include:

1. Community benefits;
2. Community support or opposition, or both;
3. Public involvement strategy;
4. Compatibility with existing and planned facilities; and
5. Compatibility with local, regional, and state economic development efforts.

#### **E. Other Factors.**

Other factors that may be considered by a responsible public entity in the evaluation and selection of PPEA proposals include:

1. The proposed cost of the qualifying project;
2. The general reputation, industry experience, and financial capacity of the private entity;
3. The proposed design of the qualifying project;
4. The eligibility of the project for accelerated documentation, review, and selection;
5. Local citizen and government comments;
6. Benefits to the public;
7. The private entity's compliance with a minority business enterprise participation plan or good faith effort to comply with the goals of such plan;
8. The private entity's plans to employ local contractors and residents; and
9. Other criteria that the responsible public entity deems appropriate.<sup>28</sup>

#### **VII. Interim and Comprehensive Agreements**

Prior to ~~developing, acquiring, designing, constructing, improving, renovating, expanding, equipping, maintaining,~~ or operating the qualifying project, the selected ~~proposer~~ private entity shall enter into a comprehensive agreement with the responsible public entity. ~~Prior to entering a comprehensive agreement an interim agreement may be entered into that permits a private entity to perform compensable activities related to the project.~~<sup>29</sup> The responsible public entity may designate a working group to be responsible for negotiating ~~the any interim or~~ comprehensive agreement. ~~Each~~Any interim or



1 comprehensive agreement shall define the rights and obligations of the responsible public  
2 entity and the selected proposer with regard to the project.

3  
4 **A. Interim Agreement Terms**

5  
6 The scope of an interim agreement may include but not limited to:

- 7  
8 1. Project planning and development  
9  
10 2. Design and engineering  
11  
12 3. Environmental analysis and mitigation  
13  
14 4. Survey  
15  
16 5. Ascertaining the availability of financing for the proposed facility through  
17 financial and revenue analysis  
18  
19 6. Establish a process and timing of the negotiation of the comprehensive  
20 agreement; and  
21  
22 7. Any other provisions related to any aspect of the development or operation of  
23 a qualifying project that the parties may deem appropriate prior to the  
24 execution of a comprehensive agreement.<sup>30</sup>

25  
26 **B. Comprehensive Agreement Terms**

27  
28 The ~~terms~~ scope of the comprehensive agreement shall include but not be limited  
29 to:

- 30  
31 1. The delivery of maintenance, performance and payment bonds or letters of  
32 credit in connection with any acquisition, design, construction, improvement,  
33 renovation, expansion, equipping, maintenance, or operation of the qualifying  
34 project;  
35  
36 2. The review of plans and specifications for the qualifying project by the  
37 responsible public entity;  
38  
39 3. The rights of the responsible public entity to inspect the qualifying project to  
40 ensure compliance with the comprehensive agreement;  
41  
42 4. The maintenance of a policy or policies of liability insurance or self-insurance  
43 reasonably sufficient to insure coverage of the project and the tort liability to  
44 the public and employees and to enable the continued operation of the  
45 qualifying project;  
46

- 1 | 5. The monitoring of the practices of the operator private entity by the  
2 | responsible public entity to ensure proper maintenance;  
3 |
- 4 | 6. The terms under which the operator private entity will reimburse the  
5 | responsible public entity for services provided;  
6 |
- 7 | 7. The policy and procedures that will govern the rights and responsibilities of  
8 | the responsible public entity and the operator private entity in the event that  
9 | the comprehensive agreement is terminated or there is a material default by  
10 | the operator private entity including the conditions governing assumption of  
11 | the duties and responsibilities of the operator private entity by the responsible  
12 | public entity and the transfer or purchase of property or other interests of the  
13 | operator private entity by the responsible public entity;  
14 |
- 15 | 8. The terms under which the operator private entity will file appropriate  
16 | financial statements on a periodic basis.  
17 |
- 18 | 9. The mechanism by which user fees, lease payments, or service payments, if  
19 | any, may be established from time to time upon agreement of the parties. Any  
20 | payments or fees shall be set at a level that are the same for persons using the  
21 | facility under like conditions and that will not materially discourage use for  
22 | the qualifying project;  
23 |
- 24 | a. A copy of any service contract shall be filed with the responsible public  
25 | entity.  
26 |
- 27 | b. A schedule of the current user fees or lease payments shall be made  
28 | available by the operator private entity to any member of the public upon  
29 | request.  
30 |
- 31 | c. Classifications according to reasonable categories for assessment of user  
32 | fees may be made.  
33 |
- 34 | 10. The terms and conditions under which the responsible public entity may  
35 | contribute financial resources, if any, for the qualifying project; ~~and~~  
36 |
- 37 | 11. The terms and conditions under which existing site conditions will be assessed  
38 | and addressed, including identification of the responsible party for conducting  
39 | the assessment and taking necessary remedial action; and<sup>31</sup>  
40 |
- 41 | 11.12. Other requirements of the PPEA.  
42 |

43 | Any changes in the terms of the interim or comprehensive agreement as may be  
44 | agreed upon by the parties from time to time shall be added to the interim or  
45 | comprehensive agreement by written amendment.  
46 |

1        The comprehensive agreement may provide for the development or operation of  
2 phases or segments of a qualifying project.<sup>32</sup>  
3

<sup>1</sup> [SB 1107 \(2004\) Page 6, Lines 314 through 323 \(reference to "interim agreements" made throughout draft\).](#)

<sup>2</sup> [SB 1107\(2005\) Page 1, line 19; line 31 \(Chapter 865 of 2005 Acts of Assembly\)](#)

<sup>3</sup> [SB 1107\(2005\) Page 1, line 46](#)

<sup>4</sup> [HB 1925\(2003\), Page 1, line 37 \(Chapter 1034 of 2003 Acts of Assembly\)](#)

<sup>5</sup> [HB 1945 \(2005, Page 1, line 38 \(Chapter 618 of the 2005 Acts of Assembly\)](#)

<sup>6</sup> [SB 1107\(2005\) Page 2, line 118 \(Change from "procedures" to "guidelines" made throughout draft\).](#)

<sup>7</sup> [SB 1107\(2005\) Page 3, line 119.](#)

<sup>8</sup> [SB 1107\(2005\) Page 2, line 124.](#)

<sup>9</sup> [Language adopted by the Work Group.](#)

<sup>10</sup> [Language adopted by the Work Group.](#)

<sup>11</sup> [Language adopted by the Work Group.](#)

<sup>12</sup> [Language adopted by Work Group.](#)

<sup>13</sup> [HB 148 \(2004\) Page 2, lines 103 through 110 \(Chapter 986 of 2004 Acts of Assembly.](#)

<sup>14</sup> [SB 352 \(2004\) Page7, line 405 through Page 8, line \(Chapter 690 of the 2004 Acts of Assembly\)](#)

<sup>15</sup> [SB 1107\(2005\) Page 2, line 117 \(Chapter 986 of the 2005 Acts of Assembly\)](#)

<sup>16</sup> [SB 1330\(2003\) Page 2, line 64 \(Chapter 292 of the 2003 Acts of Assembly\).](#)

<sup>17</sup> [SB 1330\(2003\) Page 2, line 64.](#)

<sup>18</sup> [Language adopted by the Work Group.](#)

<sup>19</sup> [SB 1107 \(2005\) Page 8, line 426.](#)

<sup>20</sup> [SB 1107 \(2005\) Page 8, line 427.](#)

<sup>21</sup> [SB 1107 \(2005\) Page 8, line 427.](#)

<sup>22</sup> [SB 1107 \(2005\) Page 8, lines 428 through 429.](#)

<sup>23</sup> [Language adopted by the Work Group.](#)

<sup>24</sup> [SB 1330 \(2003\) Page 1, line 24.](#)

<sup>25</sup> [SB 1107 \(2005\) Page 3, line 149.](#)

<sup>26</sup> [Language adopted by the Work Group.](#)

<sup>27</sup> [SB 1107 \(2005\) Page 3, lines 137 through 140.](#)

<sup>28</sup> [SB 1107 \(2005\) Page 7, lines 416 through 422.](#)

<sup>29</sup> [Language adopted by the Work Group.](#)

<sup>30</sup> [SB 1107 \(2005\) Page 6, lines 317 through 323.](#)

<sup>31</sup> [Language adopted by the Work Group.](#)

<sup>32</sup> [SB 1107 \(2005\) Page 6, line 312.](#)