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# PPEA INTERIM and COMPREHENSIVE AGREEMENTS CHECKLIST<sup>1</sup>

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## INTRODUCTION

8 The Public-Private Education Facilities and Infrastructure Act of 2002 (the “PPEA”) grants  
9 responsible public entities the authority to create public-private partnerships for the  
10 development of a wide range of projects for public use if the public entities determine there is a  
11 need for the project and that private involvement may provide the project to the public in a  
12 timely or cost-effective fashion. The PPEA defines "responsible public entity" (RPE) to include  
13 any public entity that “has the power to develop or operate the applicable qualifying project.”  
14 Individually negotiated interim or comprehensive agreements between a private entity and an  
15 RPE define the respective rights and obligations of the RPE and the private entity. It is in the  
16 best interests of both the RPE and the private entity to have an interim or comprehensive  
17 agreement that sufficiently lays out the rights and obligations of the parties.  
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19 The PPEA provides a list of required provisions for comprehensive agreements (§ 56-575.9 of  
20 the Code of Virginia) and interim agreements (§ 56-575.9:1 of the Code of Virginia). In addition,  
21 the PPEA Model Guidelines Working Group has established Model PPEA Guidelines to facilitate  
22 the development of guidelines by RPEs and to assist in the implementation of the PPEA. The  
23 following is a suggested list of additional provisions and items that an RPE may wish to consider  
24 for inclusion in such agreements. This checklist is separated into three sections. Section I  
25 covers items that may be considered at the outset of drafting interim or comprehensive  
26 agreements. Section II consists of provisions that an RPE may want to consider for inclusion in  
27 an interim or comprehensive agreement. Section III includes additional items for consideration  
28 in an individual PPEA project, as needed.  
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### **Section I. The following are items an RPE may want to consider for Interim or Comprehensive Agreements.**

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- A. Check the correct legal name of the entity with which the RPE will be contracting. The Virginia State Corporation Commission (SCC) should be consulted, telephone number 1-866-722-2551, to be sure that the private entity is registered with the SCC and is authorized to do business in Virginia. If it is not registered with the SCC, it should be required to register as quickly as possible since Virginia law requires that entities doing business in Virginia are to be registered with the SCC. It is important

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<sup>1</sup> This PPEA checklist is based on a document titled "PPEA Interim and Comprehensive Agreements and Items to consider for Inclusion in Such Agreements" prepared by Gary E. Tegenkamp, Assistant City Attorney for the City of Roanoke. Assisting Mr. Tegenkamp in developing the document were R. B. Lawhorn and Sharon Gentry, also Roanoke City employees.

40 to know the legal entity that the RPE is dealing with because many times a parent  
41 entity will set up a separate corporation, LLC, or Limited Partnership for a particular  
42 project to limit the potential liability of the parent entity. The RPE needs to know  
43 this in order to understand what the risks are and to ensure that it gets appropriate  
44 bonds, and, in a particular case, perhaps even a guarantee from the parent entity.  
45

- 46 **B.** Check to be sure that the entity the RPE is contracting to perform the work under  
47 the interim or comprehensive agreement with has a Virginia Contractor's License, if  
48 one is required. If for some reason the entity that the RPE is contracting with is not  
49 required to have a Virginia Contractor's License, the RPE will want to be sure that  
50 the contractor doing the work under the resulting agreement does have a Virginia  
51 Contractor's License.  
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- 53 **C.** Require that the private entity ensures that the subcontractors have all required  
54 Virginia licenses and permits and are registered with the Virginia SCC if they are  
55 doing business in Virginia.  
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- 57 **D.** Verify that the private entity and its subcontractors have any required local business  
58 licenses.  
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- 60 **E.** Consider whether the RPE will require the private entity to provide that the RPE will  
61 be a third party beneficiary of the private entity's contracts with its subcontractors  
62 and will notify its subcontractors of that fact. If for some reason the private entity  
63 that the RPE contracts with goes out of business, terminates the contract, or is in  
64 default and is terminated, then the RPE may have an argument and the ability to  
65 take over the subcontracts with the subcontractors and proceed with the work or  
66 have some other remedy to allow the project to continue. In addition, if some  
67 warranty issues arise later, such a clause may allow the RPE to seek a remedy  
68 against both the private entity and the subcontractor directly, especially if the  
69 private entity no longer exists because it may have been created only for the project.  
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71 **Section II. The following are items that the RPE may want to consider for**  
72 **inclusion in an Interim Agreement or a Comprehensive Agreement.<sup>2</sup>**  
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74 **A.** **Recitals and Consideration Clause**

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77 **(1)** The recitals are the Whereas clauses that set forth the background of the  
78 PPEA process, how the Comprehensive Agreement was arrived at, how  
79 the RPE determined that the project is a qualifying project that serves the  
80 public purpose of the PPEA, and other terms that the RPE may want to  
81 include.  
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<sup>2</sup> The order of the items set forth below may be rearranged and additional items may be added or some of the items may be deleted. As to interim agreements, only some of these items may be applicable.

83 (2) Next, there should be a statement of consideration that basically states  
84 something similar to, “Therefore, for and in consideration of the  
85 promises and mutual covenants contained herein, and subject to the  
86 conditions set forth herein, the parties hereby covenant, agree, and bind  
87 themselves as follows:” or similar language to show consideration and  
88 agreement to be bound by the Agreement.  
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90 B. **Definitions** The first section after a consideration statement should be a  
91 definitions section. Since the Comprehensive Agreement usually involves many  
92 different items, including design as well as construction items, a “Definitions”  
93 section is important to define the various terms and how they will be used  
94 throughout the Comprehensive Agreement. This is especially the case if a term  
95 will have a meaning that is different from the term's general use. One important  
96 definition is the “Guaranteed Maximum Price” (or some other pricing  
97 methodology) for the project. However, there will usually be exceptions to that  
98 definition that will allow an increase in the Guaranteed Maximum Price under  
99 certain conditions because this involves a risk assessment and a risk acceptance  
100 by the private entity and/or the RPE since some issues cannot be anticipated in a  
101 qualifying project design and construction. Another important definition is that  
102 for “Contract Documents” which should include the various exhibits and  
103 attachments to the Agreement. If not elsewhere in the Agreement, an order of  
104 precedence can be included in the "Contracts Documents" section.  
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106 C. **General Description** This section can give a general description of the work and  
107 include the term of the Agreement and the private entity status as an  
108 independent contractor. Subsections can also provide for subcontractors and  
109 how the private entity will proceed to provide the services and work called for by  
110 the Comprehensive Agreement. Since the term of the Agreement may be  
111 difficult to predict because of changes and unanticipated delays, it may be wise  
112 to provide that the term begins on the effective date of the Agreement and  
113 continues until all obligations under the Agreement have been properly and fully  
114 performed by the private entity.  
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116 D. **The Work** This section should describe the work, the specifications, and the  
117 conditions affecting the work, as well as a subsection on the interpretation of  
118 the contract documents.  
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120 E. **Project Development** This section should describe the project development,  
121 including the design and construction of the project as well as dealing with the  
122 drawings and specifications and the different stages for submitting design  
123 development drawings. The RPE should note that this section may also contain a  
124 statement that the private entity may be allowed to start construction in  
125 accordance with the project schedule even though all of the construction  
126 documents and drawings have not been approved for the final design. Since a  
127 PPEA qualifying project may be a type of design and construction combination  
128 project, the final drawings may not be approved until after construction is

129 started in order to expedite the project. This is a decision for the RPE depending  
130 on how it wants to proceed on the particular project involved.

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132 F. **Prices** This section should deal with the pricing and how the price is to be  
133 determined, and what changes will be allowed to the price to either increase or  
134 decrease it depending on certain conditions or developments.

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136 G. **Samples** Since most PPEA projects will involve construction and construction  
137 usually requires samples to be submitted pursuant to various specifications and  
138 drawings, a provision should be made on how samples will be approved, labeled,  
139 marked, the use of samples, the failure of any samples to pass testing, testing of  
140 samples, the cost of testing, and how samples will be inventoried. Those can all  
141 be subsections of the Samples section.

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143 H. **Measurements, Drawings, Specifications** This section can provide for  
144 measurements, drawings and specifications and how those are handled. Items  
145 to consider include how the private entity will verify measurements and onsite  
146 documents, the requirements for the drawings and specifications and how that  
147 will be handled, how shop drawings, submittals, coordination drawings and  
148 schedules will be handled, how the Architect or Engineer (A/E) will review the  
149 documents, and what review process the RPE as the owner will have and what  
150 approval authority the locality will have for such drawings. The RPE may also  
151 want to include in this section the requirements for “as built” or record drawings  
152 as well as spare parts data and how that will be handled for equipment that is  
153 furnished as part of the project.

154  
155 I. **Warranty** This section should involve what types of warranties the RPE will get,  
156 who the warranties will be from, what type of repairs are involved during the  
157 warranty period, information about manufacturer’s warranties and how they will  
158 be assigned or transferred to the RPE. The RPE may want to have a provision  
159 that all warranties are subject to the reasonable approval of the owner since  
160 manufacturer’s warranties may have various exclusions and some  
161 manufacturer’s warranties even require indemnity requirements back from the  
162 owner, which many localities cannot give, and so the RPE may want to deal with  
163 that with the private entity up front. This section should also deal with repairs,  
164 transfer of warranties and a nonwaiver provision that by accepting warranties or  
165 guarantees under the Agreement, the RPE does not waive any other legal rights  
166 or remedies that the RPE may have for breach of the Agreement or breach of  
167 any of the warranties or guarantees.

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169 J. **Insurance, Bonds and Risk of Loss**

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171 (1) This section should provide for the different types of bonds that are  
172 required, particularly the performance bond and the labor and material  
173 payment bond that the private entity should be required to provide.  
174 Since this is usually a combined design and construction project, an issue

175 can arise as to whether the bond should be in the full price of the  
176 contract or the comprehensive agreement amount or just the  
177 construction value of the project. If such a project were done in the  
178 normal course, the bonds would be for the construction value only and  
179 not for the cost of the A/E services. It is recommended that the RPE  
180 provide sample bonds so that the bonds are in a form that the RPE will  
181 find acceptable and not have to be negotiated later.

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183 (2) The insurance provisions should also be set forth in this section or  
184 another section and the RPE should have its risk management office  
185 review the requirements of the insurance provisions, including the  
186 amounts and the types of coverages that should be required. It should  
187 be noted that many construction projects involve the use of a crane and  
188 other matters of that nature, thus builder's risk insurance and rigger's  
189 liability stating "on hook" coverages may be appropriate depending on  
190 the project involved. Some localities may wish to take advantage of  
191 recent changes in legislation that allows localities to provide builder's risk  
192 by the RPE. In order to make this determination, the RPE must look at  
193 the risks and the costs involved and whether it is more advantageous to  
194 have the RPE provide this type of insurance or for the private entity to  
195 provide it and the possible differences in coverages and costs.

196  
197 (3) An errors and omissions subsection should be included to provide that  
198 the private entity and/or the A/E of the private entity maintain  
199 professional liability insurance in an approved amount since the A/E is  
200 providing the design services of a professional. It should be noted that  
201 most A/E professional liability insurance policies are usually on a claims  
202 made basis and the RPE's risk management department should  
203 determine how long the errors and omissions insurance should continue.

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205 (4) This section should also contain an indemnification subsection that  
206 provides that the private entity indemnify and hold harmless the RPE,  
207 etc. on whatever terms the RPE wants for its indemnity clause.

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209 (5) This section can also deal with bankruptcy issues and what happens if the  
210 private entity files for bankruptcy or is threatened with bankruptcy from  
211 the private entity's creditors. In addition, if a surety that may be on one  
212 of the bonds files for bankruptcy, then the private entity should be  
213 required to replace the bond or insurance policy with an equivalent one  
214 that is acceptable to the RPE.

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216 **K. Notices to Proceed, Commencement and Completion** This section should deal  
217 with the notices to proceed, the commencement of the work, and completion of  
218 the work. Under this section the RPE can set forth how the notices to proceed  
219 will be given, any notices of delay that may be required from the private entity, a  
220 liquidated damages clause for delay and how that will be handled, suspensions  
221 and delays, and what are excusable delays. In addition, this section should

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address the construction schedule and progress charts should be addressed, as well as any exception to the completion schedule and liquidated damages, if any are required in the particular project involved.

- L. **Private Entity Responsibilities** This section can deal with items such as how the performance and superintendence of the work by the private entity are to be handled, materials and workmanship matters, the responsibility for the design of the project, and the use of the premises. Licenses, permits and responsibilities should also be addressed in this section as well as building codes, fees and charges for such items. This section should also include dealing with federal, state and local taxes as well as identification of contract deliverables. Other items that can be addressed in this section are patent and copyright indemnity, non-disclosure items, how heat will be provided to the project, any language requirements for an on-site superintendent, substitute materials or methods, advertising of awards, and any ground breaking ceremonies.

M. **Owner Rights and Responsibilities**

- (1) This section can include the owner’s representative and how such a representative is designated, site visits, the owner-directed staffing changes, examination of records by the owner, and ownership of the work product. The RPE may want to be sure that the work product becomes the property of the owner or RPE so that the private entity will be required to include in its contract with the A/E or any design professionals that they agree to such a requirement. Otherwise, the locality may run into copyright issues from A/Es or other design professionals and whether or not the locality could use the drawings and specifications prepared by the A/E professional if something happens the A/E is no longer working on the job. The A/E should be required to meet the standard of care in Virginia for the applicable design professional providing such design or services so there is no question about what standard of care applies.
- (2) This section can also deal with surveying of monuments and benchmarks, the owner’s partial occupancy of the project as well as the owned property and when the owner will take ownership of the property. Other items under this section can include other contracts that the RPE or owner may award for parts of the project that are not included in the Comprehensive Agreement and the requirements that the private entity shall cooperate and coordinate with such other contractors and with the owner’s employees or other representatives since the RPE may want to do some of the work on the project itself or through other contractors, such as providing furnishings for the project, etc. In certain cases, the RPE may wish to furnish some items for the project to the private entity and in such situations, the RPE may want to provide that such items are furnished “as is.”

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- N.** **Administrative Items** This section can provide some type of standard clause that all publications or other documents, such as manuals, handbooks, codes, standards, and specifications referred to in the Agreement for the purposes of establishing requirements applicable to equipment, materials, or workmanship are incorporated by reference into the Agreement, or similar type language.
- O.** **Subcontracting** This section can deal with subcontracts and how those are handled.
- P.** **Protection of Persons and Property** This section can deal with protection of persons and property. Under this section items such as accident prevention, health and safety standards, protection of the environment, existing vegetation, structures, utilities and improvements should be dealt with. In addition, under this section, access to the site, handling of asbestos and other hazardous materials, elevator work-qualifications, if appropriate, and other items of this nature should be addressed.
- Q.** **Payments** Under this section items such as invoices, payment, construction cost breakdown, allowable cost and payment, audit, final payment and other such matters should be dealt with. Items related to retainage should also be addressed in this section as well.
- R.** **Changes/Claims/Disputes**
- (1) These items can be broken into separate sections or handled as subsections under one section, but should include changes, whether the owner, without notice to any sureties, can require changes and that the contractor will proceed to provide the changes and how any disagreement as to additional compensation will be handled so that both parties understand how change procedures should be handled.
- (2) Under this section other items can be addressed, such as change order accounting, equitable adjustments, including cost for any A/E services, cost for development and construction, and differing site conditions. In addition, it is important to set out how resolutions of disputes, claims, and other matters should be handled and the procedures should be set out in detail.
- S.** **Terminations** This section should include termination for convenience of the RPE, termination for default, termination for owner default, and other matters of this nature.
- T.** **Inspection and Acceptance** Under this section, items such as inspection of professional services, inspection and acceptance of the work, technical supervision, approval of design, project closeout, asbestos-free and lead free paint certifications, and like matters should be dealt with.

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**U. Miscellaneous**

- (1) This section can address items that are not covered elsewhere. Under this section, items such as representations and warranties of authority, nondiscrimination, drug-free workplace, notices and where and how they should be sent with the addresses listed, successors and assigns, nonwaiver issues, severability, and counterparts signatures should be addressed. The RPE can also address the private entity’s payments to others, the owner’s right to audit, copy, and review the private entity’s records for the project, the faith-based statement required by § 2.2-4343.1 of the Code of Virginia, and the Ethics in Public Contracting provisions of Virginia Code.
- (2) Under this section or under a separate section, the RPE should have a governing law and forum selection provision that requires that all claims or litigation be litigated and presented in the jurisdiction of the RPE, either in a state or federal court within that RPE’s jurisdiction or just in a state court, depending on how the RPE wants to handle that matter. It should also provide that the law of Virginia applies so that no question can be raised as to what state’s law applies. It should be noted in this section “that the law of Virginia, without application of conflict of law provisions, should apply.” The RPE may want to add that all the parties voluntarily agree to submit to such jurisdiction and venue of such courts as well as the fact that the agreement shall not be construed in favor of or against either party, but construed according to the fair meaning as if both parties jointly prepared the Agreement, which will usually be the case in a PPEA matter.
- (3) Other items in a miscellaneous section or a separate section may include an annual appropriation and plan of finance or subject to annual appropriations clause. Financial statements can also be addressed in case an RPE wants the private entity to submit financial statements. Other items that can be set forth in a miscellaneous section or a separate section is the requirement that a copy of the Agreement needs to be sent to the Auditor of Public Accounts in accordance with the requirements of the PPEA, within 30 days after the effective date of the Agreement, or as the PPEA may otherwise require. Certification provisions can also be included in this section. Ethics in public contracting references, that headings are for convenience only, any minority and women-owned business enterprise and small business certification, and any consequential damage or limitation of liability issues can also be addressed in this section or in separate sections.

**V. Grant Funds** If federal, state, or other grant funds are or may be used for the project, the RPE should consider incorporating any grant documents and contracts into the Agreement and how those documents may affect the

362 Agreement and the project. These could be items such as Davis-Bacon Wage  
363 items, Buy America, and other federal and state requirements. In addition, the  
364 RPE should consider an order of procedures that addresses such federal and/or  
365 state items.

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367 **W. Entire Agreement** This section should provide that the entire Agreement and  
368 the attachments and exhibits are forming the entire Agreement along with the  
369 other provisions that the RPE wants to have in the entire agreement clause. In  
370 this type of clause, the RPE may want to include the fact that the private entity's  
371 conceptual phase and detailed phase proposals be attached and incorporated by  
372 reference for purposes of providing details concerning the overall intent of the  
373 parties, but that such exhibit is not intended to contradict the Agreement and  
374 that in the event of any inconsistencies, the Agreement would control, if that is  
375 what the RPE wants, or if the RPE wants some other order of precedence to  
376 control, the RPE can provide for that in this section.

377  
378 **X. Signature Page** This page should state that the parties are signing by their  
379 authorized representatives or there should be a separate section that the parties  
380 signing have the authority to sign. The RPE needs to be sure to have the proper  
381 legal name of the private entity as well as the RPE's name and any witnesses  
382 and/or certifications of funds that may be required by the RPE's procedures,  
383 including a notation about the ordinance number that may have authorized the  
384 Comprehensive Agreement. The RPE should also be sure that an authorized  
385 person of the private entity signs for the private entity.

387 **Section III. The following are additional items an RPE may want to consider**  
388 **for individual PPEA projects.**

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391 **A.** The RPE should consult with its engineering department or engineering  
392 consultant as well as other appropriate consultants within the RPE, or  
393 consultants that are retained separate from the private entity, as to how items  
394 may be addressed in the Comprehensive Agreement such as allowances or other  
395 matters in order to guarantee a maximum price that may not exceed the amount  
396 available for the project. There are various ways to handle this and each project  
397 will determine how the RPE and the private entity arrive at a fair price for both  
398 parties and what events will allow for either increases or decreases in that price.

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400 **B.** If possible, the RPE should consider having a project manager who understands  
401 the contract and who would be in contact with the private entity on a regular  
402 basis so that any issues that arise can be dealt with early and resolved in a timely  
403 manner and to try to reduce the number of surprises that arise as the project  
404 continues. This can be beneficial to both parties and help to have a successful  
405 project.

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407 C. The RPE, if the project is sufficiently large, may want to retain a separate entity  
408 to manage the project for the RPE and be sure that the private entity complies  
409 with the Comprehensive Agreement and the obligations under it. Although an  
410 additional expense to the RPE, the cost of retaining a project manager is usually  
411 money well spent since an RPE may not have sufficient manpower or experience  
412 to have someone present on the job site on a daily or almost daily basis to  
413 ensure that the RPE's interest is being served.

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## 416 CONCLUSION

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418 A PPEA project and the resulting agreements are not simple matters and many items need to  
419 be considered. Even then, unexpected items and matters will arise throughout the project and  
420 the best method of resolving those matters is good communications among the private entity,  
421 the RPE, and any project manager or management consultant the RPE may have retained to  
422 oversee the project for the RPE. Hopefully, the above checklist will help provide some insight  
423 and guidance for RPEs entering into PPEA projects.

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