

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

Model Guidelines

REVISED

September 2006-2007

Public-Private Education Facilities and Infrastructure Act of 2002
Model Guidelines

Table of Contents

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35

I. Introduction p. 1

Overview p.

Guidelines for the review and approval of proposals and projects p

Statement of Purpose p.

II. General Provisions p. 2

 A. Proposal Submission p. 2

 B. Affected ~~Local~~ Jurisdictions p. 3

 C. Proposal Review Fee p. 4

 D. Freedom of Information Act p. 4

 E. Use of Public funds p. 6

 F. Applicability of Other Laws p. 6

III. Solicited Proposals p. 7

IV. Unsolicited Proposals p. 7

 A. Decision to Accept and Consider Unsolicited Proposal; Notice p. 7

 B. Posting Requirements p. 8

 C. Initial Review by the Responsible Public Entity p. 9

V. Proposal Preparation and Submission p. 10

 A. Format for Submissions at the Conceptual Stage p. 10

 B. Format for Submissions at the Detailed Stage p. 13

VI. Proposal Evaluation and Selection Criteria p. 14

 A. Qualifications and Experience p. 14

 B. Project Characteristics p. 15

1 C. Project Financing p. ~~15~~

2 D. Public Benefit and Compatibility..... p. ~~16~~

3 E. Other Factors..... p. ~~16~~

4

5 **VI. Additional Review Procedures..... p.**

6 **A. Public Private Partnership Oversight Advisory Committee p.**

7 **B. Appropriating Body..... p.**

8

9 **VII. Interim and Comprehensive Agreements..... p. ~~17~~**

10 A. Interim Agreement Terms..... p. ~~17~~

11 B. Comprehensive Agreement Terms p. ~~17~~

12 C. Notice and Posting Requirements p. ~~19~~

13

14 **VIII Governing Provisions p. ~~20~~**

15

1
2 **I. Introduction**

3
4 **Overview**

5
6 The Public-Private Education Facilities and Infrastructure Act of 2002 (the
7 "PPEA") grants responsible public entities the authority to create public-private
8 partnerships for the development of a wide range of projects for public use if the public
9 entities determine there is a need for the project and that private involvement may
10 provide the project to the public in a timely or cost-effective fashion. The PPEA defines
11 "responsible public entity" (RPE) to include any public entity that "has the power to
12 develop or operate the applicable qualifying project." Individually negotiated interim or
13 comprehensive agreements between a private entity and ~~a responsible public entity~~ an
14 RPE will define the respective rights and obligations of the ~~responsible public entity~~ RPE
15 and the private entity.

16
17 In order for a project to come under the PPEA, it must meet the definition of a
18 "qualifying project." The PPEA contains a broad definition of qualifying project that
19 includes public buildings and facilities of all types; for example:

- 20
21 (i) An education facility, including but not limited to a school building
22 (including any stadium or other facility primarily used for school events),
23 any functionally related and subordinate facility and land to a school
24 building and any depreciable property provided for use in a school facility
25 that is operated as part of the public school system or as an institution of
26 higher education;
27
28 (ii) A building or facility that meets a public purpose and is developed or
29 operated by or for any public entity;
30
31 (iii) Improvements, together with equipment, necessary to enhance public
32 safety and security of buildings to be principally used by a public entity;
33
34 (iv) Utility and telecommunications and other communications infrastructure;
35
36 (v) A recreational facility;
37
38 (vi) Technology infrastructure and services¹, including but not limited to
39 telecommunications, automated data processing, word processing and
40 management information systems, and related information, equipment,
41 goods and services; ~~or~~
42
43 (vii) Technology, equipment, or infrastructure designed to deploy wireless
44 broadband services to schools, businesses, or residential areas,² or

¹ Senate Bill 756 (2007), p. 3, line 135.

² House Bill 2381 (2007), p. 1, line 45.

1 |
2 | ~~(vii)~~(ix) any improvements necessary or desirable to any unimproved locally- or
3 | state-owned real estate.
4 |

5 | The PPEA establishes requirements that the ~~responsible public entity~~RPE must
6 | adhere to when reviewing and approving proposals received pursuant to the PPEA. In
7 | addition, the PPEA specifies the criteria that must be used to select a proposal and the
8 | contents of the interim or comprehensive agreement detailing the relationship between
9 | the ~~responsible public entity~~RPE and the private entity.
10 |

11 | In passing the legislation, and following subsequent amendments to the Act in
12 | 2005 ~~and~~, 2006 ~~and~~ 2007, the General Assembly directed the Governor and the chairs of
13 | the House and Senate Committees on General Laws to facilitate the development of
14 | model guidelines to assist in the implementation of the PPEA. ~~The respective governing
15 | body of the public entity must first adopt guidelines that it will follow to receive and
16 | evaluate any proposal submitted to the public entity under the provisions of the PPEA.
17 | Such guidelines shall be made publicly available. The guidelines adopted by the public
18 | entity should designate an individual to serve as the point of contact to receive proposals
19 | submitted under the PPEA and to respond to inquiries regarding the PPEA or the
20 | guidelines. The guidelines may also contain provisions for an accelerated
21 | documentation, review, and selection process for proposals involving a qualifying project
22 | that the responsible public entity deems a priority.~~
23 |

24 | Because the PPEA is intended to encourage innovative partnerships between
25 | ~~responsible public entities~~RPE's and private entities, ~~public entities~~RPE's are encouraged
26 | to maintain an open dialogue with private entities to discuss the need for infrastructure
27 | improvements.
28 |

29 | **Guidelines for the review and approval of proposals and projects**
30 |

31 | Responsible public entities are required to adopt and make publicly available
32 | guidelines that are sufficient to enable the public entity to comply with the requirements
33 | of the PPEA. The adopted guidelines should be reasonable and structured to encourage
34 | competition. In addition, to facilitate communication, a public entity should designate an
35 | individual to serve as the point of contact for receiving proposals submitted under the
36 | PPEA and responding to inquiries regarding the PPEA or the guidelines.
37 |

38 | Guidelines adopted by state public entities shall and guidelines adopted by other
39 | public entities may include the following provisions:
40 |

- 41 | 1. Authorization for accelerated selection and review and documentation timelines for
42 | proposals involving a qualifying project that the RPE deems a priority;
43 |
44 | 2. Opportunities for competition through public notice and availability of representatives
45 | of the RPE to meet with private entities considering a proposal;
46 |

1 3. Reasonable criteria for choosing among competing proposals;

2
3 4. Suggested timelines for selecting proposals and negotiating an interim or
4 comprehensive agreement;

5
6 5. Financial review and analysis procedures that shall include, at a minimum, a cost-
7 benefit analysis, an assessment of opportunity cost, and consideration of the results of all
8 studies and analyses related to the proposed qualifying project. These procedures shall
9 also include requirements for the disclosure of such analysis to the appropriating body for
10 review prior to execution of an interim or comprehensive agreement;

11
12 6. Consideration of the nonfinancial benefits of a proposed qualifying project;

13
14 7. A mechanism for the appropriating body to review a proposed interim or
15 comprehensive agreement prior to execution;

16
17 8. Criteria for triggering the establishment of an advisory committee consisting of
18 representatives of the RPE and the appropriating body to review the terms of the
19 proposed interim or comprehensive agreement. Suggested criteria includes the scope,
20 costs, and duration of the qualifying project, as well as whether the project involves or
21 impacts multiple public entities;

22
23 9. Analysis of the adequacy of the information released when seeking competing
24 proposals and providing for the enhancement of that information, if deemed necessary, to
25 encourage competition;

26
27 10. Establishment of criteria, key decision points, and approvals required to ensure that
28 the RPE considers the extent of competition before selecting proposals and negotiating an
29 interim or comprehensive agreement;

30
31 11. The posting and publishing of public notice of a private entity's request for approval
32 of a qualifying project, including (i) specific information and documentation to be
33 released regarding the nature, timing, and scope of the qualifying project pursuant to
34 subsection A of § 56-575.4; (ii) a reasonable time period as determined by the RPE to
35 encourage competition and public-private partnerships in accordance with the goals of
36 this chapter, such reasonable period not to be less than 45 days, during which time the
37 RPE shall receive competing proposals pursuant to subsection A of § 56-575.4; and (iii) a
38 requirement for advertising the public notice in the Virginia Business Opportunities
39 publication and posting a notice on the Commonwealth's electronic procurement website
40 shall be included; and

41
42 12. A requirement that local public entities engage the services of qualified professionals,
43 which may include an architect, professional engineer, or certified public accountant, not
44 otherwise employed by the public entity, to provide independent analysis regarding the
45 specifics, advantages, disadvantages, and the long- and short-term costs of any request by
46 a private entity for approval of a qualifying project unless the governing body of the

1 public entity determines that such analysis of a request by a private entity for approval of
2 a qualifying project shall be performed by employees of the public entity.³
3

4 Statement of Purpose

5
6 The following model guidelines have been developed to assist public entities in
7 adopting guidelines to guide the implementation of the PPEA. The guidelines are
8 intended to serve as a general guide for the implementation of the PPEA. Each public
9 body has the flexibility to include provisions not contained in the model guidelines so
10 long as the provisions comply with the PPEA. The complete text of the PPEA has been
11 included in the Appendix to these model guidelines. Although guidance with regard to
12 the application of the PPEA is provided herein, it will be incumbent upon all entities,
13 both public and private, to comply with the provisions of the PPEA.
14

15 In the event that the PPEA is amended in a manner that either conflicts with
16 guidelines developed by a ~~responsible public entity~~RPE or concerns material matters not
17 addressed by such guidelines, the ~~responsible public entity~~RPE should appropriately
18 amend the guidelines. If the guidelines are not amended prior to the effective date of the
19 new law, the guidelines nonetheless shall be interpreted in a manner to conform to the
20 new law.

21 **H.I. General Provisions**

22 A. Proposal Submission

23
24
25 A proposal may be either solicited by a public entity or delivered by a private
26 entity on an unsolicited basis. Proposers may be required to follow a two-part proposal
27 submission process consisting of an initial conceptual phase and a detailed phase. The
28 initial phase of the proposal should contain specified information on proposer
29 qualifications and experience, project characteristics, project financing, anticipated public
30 support or opposition, or both, and project benefit and compatibility. The detailed
31 proposal should contain specified deliverables.
32

33 The PPEA allows private entities to include innovative financing methods,
34 including the imposition of user fees or service payments, in a proposal. Such financing
35 arrangements may include the issuance of debt instruments, equity or other securities or
36 obligations, including, if applicable, the portion of the tax-exempt private activity bond
37 limitation amount to be allocated annually to the Commonwealth of Virginia pursuant to
38 the Economic Growth and Tax Relief Reconciliation Act of 2001 for the development of
39 education facilities using public-private partnerships, and to provide for carryovers of any
40 unused limitation amount. The PPEA is a flexible development tool that allows the use of
41 innovative financing techniques. Depending on the public entity's authority and the
42 circumstances of each transaction, financing options might include the use of special
43 purpose entities, sale and lease back transactions, enhanced use leasing, property
44 exchanges, development agreements, conduit financing and other methods allowed by
45 law.

3 SB 756 (2007), p. 3, line 155 through p. 4, line 213.

1
2 Proposals should be prepared simply and economically, providing a concise
3 description of the proposer's capabilities to complete the proposed qualifying project and
4 the benefits to be derived from the project by the public entity. Project benefits to be
5 considered are those occurring during the construction, renovation, expansion or
6 improvement phase and during the life cycle of the project. Proposals also should
7 include a scope of work and a financial plan for the project, containing enough detail to
8 allow an analysis by the public entity of the financial feasibility of the proposed project.

9 ~~The public entity may establish criteria by which the proposer may provide clarification~~
10 ~~to the submission.~~ The cost analysis of a proposal should not be linked solely to the
11 financing plan, as the responsible public entity RPE may determine to finance the project
12 through other available means.

13
14 The public entity should establish clearly delineated criteria for (i) selecting
15 among competing proposals⁴ and (ii) the use of accelerated documentation, review, and
16 selection process for proposals involving a qualifying project that the RPE deems a
17 priority.⁵ In addition, to facilitate the flow of critical information, the public entity may
18 establish criteria by which the proposer may provide clarification to the submission.

19 20 **B. Affected Local Jurisdictions**

21
22 Any private entity requesting approval from or submitting a conceptual or
23 detailed proposal to a ~~responsible public entity RPE~~ must provide each affected ~~local~~
24 jurisdiction with a copy of the private entity's request or proposal by certified mail,
25 express delivery or hand delivery. Affected ~~local~~ jurisdictions that are not ~~responsible~~
26 ~~public entities RPE's~~ under the proposed qualifying project shall have 60 days from the
27 receipt of the request or proposal to submit written comments to the ~~responsible public~~
28 ~~entity RPE~~ and to indicate whether the proposed qualifying project is compatible with the
29 (i) local comprehensive plan, (ii) local infrastructure development plans, or (iii) capital
30 improvements budget or other government spending plan. Comments received within the
31 60-day period shall be given consideration by the ~~responsible public entity RPE~~, and no
32 negative inference shall be drawn from the absence of comment by an affected ~~local~~
33 jurisdiction.

34 35 **C. Proposal Review Fee**

36
37 A public entity shall receive an analysis of the proposal from appropriate internal
38 staff or outside advisors or consultants with relevant experience in determining whether
39 to enter into an agreement with the private entity. No fee may be charged by a public
40 entity to process, review or evaluate any solicited proposal submitted under the PPEA.
41 The public entity may charge a fee to the private entity to cover the costs of processing,
42 reviewing, and evaluating any unsolicited proposal or competing unsolicited proposal
43 submitted under the PPEA, including a fee to cover the costs of outside attorneys,
44 consultants, and financial advisors. Any fee charged for such review of a proposal should

4 SB 756, p. 3, line 166.

5 SB 756, p. 3, line 169.

1 be reasonable in comparison to the level of expertise required to review the proposal and
2 should not be greater than the direct costs associated with evaluating the proposed
3 qualifying project. “Direct costs” may include (i) the cost of staff time required to
4 process, evaluate, review and respond to the proposal and (ii) the out-of-pocket costs of
5 attorneys, consultants and financial advisors.

6
7 The proposal fee may cover all or part of the initial review process. For example,
8 a public entity may require a proposal fee in an amount sufficient to cover all anticipated
9 direct costs associated with evaluating the proposal, or a public entity may require a
10 smaller initial processing fee with an additional proposal fee to be charged should the
11 project proceed beyond the initial review.

12
13 The public entity may establish a fee schedule for the cost of the proposal review.
14 The public entity shall set forth in the procedures it has established for the
15 implementation of the PPEA the methodology used to calculate proposal fees. If the cost
16 of reviewing the proposal exceeds the initially established proposal fee, the public entity
17 may assess the proposer the additional costs deemed necessary to evaluate the proposal.

18
19 For rejected proposals, the public entity may establish a schedule for refunding
20 any portion of fees paid in excess of its direct costs associated with evaluating the
21 proposal. If the cost of reviewing the proposal is less than the initially established
22 proposal fee, the public entity may refund to the proposer the excess fee. As noted in
23 section IV.A. 1 below, fees should be refunded entirely if the public entity decides not to
24 proceed to publication and conceptual-phase review of an unsolicited proposal.

25
26 **D. Freedom of Information Act**

27
28 1. General applicability of disclosure provisions.

29
30 Proposal documents submitted by private entities are generally subject to the
31 Virginia Freedom of Information Act (“FOIA”) except that § 2.2-3705.6 (11) exempts
32 certain documents from public disclosure. FOIA exemptions, however, are discretionary,
33 and ~~a responsible public body~~ an RPE may elect to release some or all of documents
34 except to the extent the documents are:

35
36 a. Trade secrets of the private entity as defined in the Uniform Trade Secrets Act
37 (§ 59.1-336 et seq.);

38
39 b. Financial records of the private entity that are not generally available to the
40 public through regulatory disclosure or otherwise, including but not limited to, balance
41 sheets and financial statements; or

42
43 c. Other information submitted by a private entity, where if the record or
44 document were made public prior to the execution of an interim or comprehensive
45 agreement the financial interest or bargaining position of the public or private entity
46 would be adversely affected.

1
2 2. Protection from mandatory disclosure for certain documents submitted by a
3 private entity.

4
5 Before a document of a private entity may be withheld from disclosure, the
6 private entity must make a written request to the ~~responsible public entity RPE~~ at the time
7 the documents are submitted earmarking⁶ with specificity the documents for which the
8 protection is being sought and a clear statement of the reasons for invoking the protection
9 with reference to one or more of three classes of records listed in Section D.1.

10
11 Upon the receipt of a written request for protection of documents, the ~~responsible~~
12 ~~public entity RPE~~ shall determine whether the documents contain (i) trade secrets, (ii)
13 financial records, or (iii) other information that would adversely affect the financial
14 interest or bargaining position of the ~~responsible public entity RPE~~ or private entity in
15 accordance with Section D.1. The ~~responsible public entity RPE~~ shall make a written
16 determination of the nature and scope of the protection to be afforded by the ~~responsible~~
17 ~~public entity RPE~~ under this subdivision. If the written determination provides less
18 protection than requested by the private entity, the private entity should be accorded an
19 opportunity to withdraw its proposal. Nothing shall prohibit further negotiations of the
20 documents to be accorded protection from release although what may be protected must
21 be limited to the categories of records identified in Section D.1.

22
23 Once a written determination has been made by the ~~responsible public entity RPE~~,
24 the documents afforded protection under this subdivision shall continue to be protected
25 from disclosure when in the possession of the ~~responsible public entity RPE~~ or any
26 affected ~~local~~ jurisdiction to which such documents are provided.

27
28 ~~Cost estimates relating to a proposed procurement transaction prepared by or for a~~
29 ~~responsible public entity shall not be open to public inspection.~~

30
31 ~~3. Protection from mandatory disclosure for certain documents produced by the~~
32 ~~responsible public entity.~~

33
34 ~~Memoranda, staff evaluations, or other records prepared by or for the responsible~~
35 ~~public entity for the evaluation and negotiation of proposals may be withheld from~~
36 ~~disclosure if the disclosure of such records required by the PPEA would adversely affect~~
37 ~~the financial interest or bargaining position of the responsible public entity or private~~
38 ~~entity and the basis for the determination of adverse affect is documented in writing by~~
39 ~~the responsible public entity~~

40
41 ~~Cost estimates relating to a proposed procurement transaction prepared by or for a~~
42 ~~responsible public entity shall not be open to public inspection.~~

43

⁶ "Earmarking" denotes the process of identifying trade secrets and other proprietary records for which protection is sought.

1 | 4. If a private entity fails to earmark trade secrets, financial records, or other
2 | confidential or proprietary information, ~~records or documents~~ for protection from
3 | disclosure, such information, records or documents shall be subject to disclosure under
4 | FOIA.

5 |
6 | 3. Protection from mandatory disclosure for certain documents produced by the
7 | public entity.

8 |
9 | A public entity may withhold from disclosure memoranda, staff evaluations, or
10 | other records prepared by the public entity, its staff, outside advisors, or consultants
11 | exclusively for the evaluation and negotiation of proposals where (i) if such records were
12 | made public prior to or after the execution of an interim or a comprehensive agreement,
13 | the financial interest or bargaining position of the public entity would be adversely
14 | affected, and (ii) the basis for the determination required in clause (i) is documented in
15 | writing by the public entity.⁷

16 |
17 | Cost estimates relating to a proposed procurement transaction prepared by or for a
18 | public entity shall not be open to public inspection.

19 |
20 | 5.4. A responsible public entity RPE may not withhold from public access:

21 |
22 | (a) procurement records other than those subject to the written determination of
23 | the responsible public entity RPE;

24 |
25 | (b) information concerning the terms and conditions of any interim or
26 | comprehensive agreement, service contract, lease, partnership, or any agreement of any
27 | kind entered into by the responsible public entity RPE and the private entity;

28 |
29 | (c) information concerning the terms and conditions of any financing arrangement
30 | that involves the use of any public funds; or

31 |
32 | (d) information concerning the performance of any private entity developing or
33 | operating a qualifying transportation facility or a qualifying project.

34 |
35 | **E. Use of Public Funds**

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

7 [Senate Bill 1002, p. 1, line 56.](#)

1 **F. Applicability of Other Laws**

2
3 | Nothing in the PPEA shall affect the duty of a ~~responsible public entity~~RPE to
4 | comply with all other applicable law not in conflict with the PPEA. The applicability of
5 | the Virginia Public Procurement Act (the "VPPA") is as set forth in the PPEA.
6 |

7 | **III II. Solicited Proposals**

8
9 | A public entity may issue Requests for Proposals (RFPs), inviting proposals from
10 | private entities to develop or operate qualifying projects. A public entity may not issue a
11 | RFP until it has adopted guidelines to govern the PPEA documentation, review, and
12 | selection process. The public entity may use a two-part proposal process consisting of an
13 | initial conceptual phase and a detailed phase. An RFP may invite proposers to submit
14 | proposals on individual projects identified by the public entity. In such a case the
15 | ~~responsible public entity~~RPE should set forth in the RFP the format and supporting
16 | information that is required to be submitted, consistent with the provisions of the PPEA.
17 | The public entity may establish suggested timelines for selecting proposals for the review
18 | and selection of solicited proposals.⁸
19 |

20 | The RFP should specify, but not necessarily be limited to, information and
21 | documents that must accompany each proposal and the factors that will be used in
22 | evaluating the submitted proposals. The RFP should be posted in such public areas as are
23 | normally used for posting of the public entity's notices, including the public entity's
24 | website. Notices should also be published in a newspaper or other publications of
25 | general circulation and advertised in *Virginia Business Opportunities* and posted on the
26 | Commonwealth's electronic procurement site. In addition, solicited proposals should be
27 | posted pursuant to Section ~~IV-B III.B~~. The RFP should also contain or incorporate by
28 | reference other applicable terms and conditions, including any unique capabilities or
29 | qualifications that will be required of the private entities submitting proposals. Pre-
30 | proposal conferences may be held as deemed appropriate by the public entity.
31 |

32 | **IV III. Unsolicited Proposals**

33
34 | The PPEA permits public entities to receive, evaluate and select for negotiations
35 | unsolicited proposals from private entities to develop or operate a qualifying project.
36 |

37 | A ~~responsible public entity~~RPE may publicize its needs and may encourage
38 | interested parties to submit unsolicited proposals subject to the terms and conditions of
39 | the PPEA. When such proposals are received without issuance of an RFP, the proposal
40 | shall be treated as an unsolicited proposal. The public entity may establish suggested
41 | timelines for selecting proposals for the review and selection of unsolicited proposals.⁹

⁸ SB 756, p. 3, line 167.

⁹ SB 756, p. 3, line 167.

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

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

9
10 2. If the ~~responsible public entity~~RPE chooses to accept an unsolicited proposal
11 for conceptual-phase consideration, it shall post a notice in a public area regularly used
12 by the public entity for posting of public notices for a period of not less than 45 days. The
13 ~~responsible public entity~~RPE shall also publish the same notice for a period of not less
14 than 45 days in one or more newspapers or periodicals of general circulation in the
15 jurisdiction to notify any parties that may be interested in submitting competing
16 unsolicited proposals. In addition, the notice should be advertised in *Virginia Business*
17 *Opportunities* and on the Commonwealth's electronic procurement website. The notice
18 shall state that the public entity (i) has received and accepted an unsolicited proposal
19 under the PPEA, (ii) intends to evaluate the proposal, (iii) may negotiate an interim or
20 comprehensive agreement with the proposer based on the proposal, and (iv) will accept
21 for simultaneous consideration any competing proposals that comply with the procedures
22 adopted by the public entity and the PPEA. The notice also shall summarize the
23 proposed qualifying project or projects, and identify their proposed locations.

24
25 Representatives of the public entity familiar with the proposal and the guidelines
26 established by the public entity shall be made available to respond to inquiries and meet
27 with private entities considering a proposal.¹⁰ The public entity shall conduct an analysis
28 of the information pertaining to the proposal included in the notice to ensure that such
29 information sufficiently encourages competing proposals.¹¹ Further, the public entity
30 shall establish criteria, including key decision points and approvals to ensure proper
31 consideration of the extent of competition from available private entities prior to
32 selection.¹²

33
34 **B. Posting Requirements**

35
36 1. Conceptual proposals, whether solicited or unsolicited, shall be posted by the
37 ~~responsible public entity~~RPE within 10 working days after acceptance of such proposals
38 in the following manner:

39
40 a. For ~~responsible public entities~~RPE's that are state agencies, departments, and
41 institutions, posting shall be on the Department of General Service's web-based electronic
42 procurement program commonly known as "eVA;" and
43

¹⁰ SB 756, p. 3, line 164.

¹¹ SB 756, p. 4, line 186.

¹² SB 756, p. 4, line 189.

1 | b. For ~~responsible public entities~~RPE's that are local public bodies, posting shall
2 | be on the ~~responsible public entity~~RPE's website or by publication, in a newspaper of
3 | general circulation in the area in which the contract is to be performed, of a summary of
4 | the proposals and the location where copies of the proposals are available for public
5 | inspection. Posting may also be on the Department of General Service's web-based
6 | electronic procurement program commonly known as "eVA," in the discretion of the
7 | local ~~responsible public entity~~RPE.

8 |
9 | 2. Nothing shall be construed to prohibit the posting of the conceptual proposals
10 | by additional means deemed appropriate by the ~~responsible public entity~~RPE so as to
11 | provide maximum notice to the public of the opportunity to inspect the proposals.

12 |
13 | 3. In addition to the posting requirements, at least one copy of the proposals shall
14 | be made available for public inspection. Trade secrets, financial records, or other records
15 | of the private entity excluded from disclosure under the provisions of subdivision 11 of §
16 | 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the
17 | ~~responsible public entity~~RPE and the private entity. Any inspection of procurement
18 | transaction records shall be subject to reasonable restrictions to ensure the security and
19 | integrity of the records.

20 |
21 | **C. Initial Review by the Responsible Public Entity at the Conceptual Stage**

22 |
23 | 1. Only proposals complying with the requirements of the PPEA that contain
24 | sufficient information for a meaningful evaluation and that are provided in an appropriate
25 | format should be considered by the ~~responsible public entity~~RPE for further review at the
26 | conceptual stage. Formatting suggestions for proposals at the conceptual stage are found
27 | at Section V A.

28 |
29 | 2. The ~~responsible public entity~~RPE should determine at this initial stage of
30 | review whether it will proceed using:

31 |
32 | a. Standard procurement procedures consistent with the VPPA; or

33 |
34 | b. Guidelines developed by the ~~responsible public entity~~RPE that are
35 | consistent with procurement of other than professional services through
36 | "competitive negotiation" as the term is defined in § 2.2-4301 of the Code
37 | of Virginia. The ~~responsible public entity~~RPE may proceed using such
38 | guidelines only if it makes a written determination that doing so is likely
39 | to be advantageous to the ~~responsible public entity~~RPE and the public
40 | based upon either (i) the probable scope, complexity or priority of need;
41 | (ii) the risk sharing including guaranteed cost or completion guarantees,
42 | added value or debt or equity investments proposed by the private entity;
43 | or (iii) increase in funding, dedicated revenue or other economic benefit
44 | that would otherwise not be available.

45 |

1 3. After reviewing the original proposal and any competing proposals submitted
2 during the notice period, the ~~responsible public entity~~RPE may determine:

- 3
4 (i) not to proceed further with any proposal,
5
6 (ii) to proceed to the detailed phase of review with the original proposal,
7
8 (iii) to proceed to the detailed phase with a competing proposal, ~~or~~
9
10 (iv) to proceed to the detailed phase with multiple proposals; or
11
12 (v) to request modifications or amendments to any proposals¹³.
13

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

19 4. Discussions between ~~responsible~~ public bodies and private entities about the
20 need for infrastructure improvements shall not limit the ability of a public entity to later
21 determine to use standard procurement procedures to meet its infrastructure needs. The
22 public entity retains the right to reject any proposal at any time prior to the execution of
23 an interim or comprehensive agreement.
24

25 **IV. Proposal Preparation and Submission**

26
27 **A. Format for Submissions at Conceptual Stage**
28

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

37 **1. Qualification and Experience**

- 38
39 a. Identify the legal structure of the firm or consortium of firms making the
40 proposal. Identify the organizational structure for the project, the
41 management approach and how each partner and major subcontractor in
42 the structure fits into the overall team.
43
44 b. Describe the experience of the firm or consortium of firms making the
45 proposal and the key principals involved in the proposed project including

13 Suggested by Work Group, 5/30/07

1 experience with projects of comparable size and complexity. Describe the
2 length of time in business, business experience, public sector experience
3 and other engagements of the firm or consortium of firms. Include the
4 identity of any firms that will provide design, construction and completion
5 guarantees and warranties and a description of such guarantees and
6 warranties.

- 7
- 8 c. Provide the names, addresses, and telephone numbers of persons within
9 the firm or consortium of firms who may be contacted for further
10 information.
- 11
- 12 d. Provide a current or most recently audited financial statement of the firm
13 or firms and each partner with an equity interest of twenty percent or
14 greater.
- 15
- 16 e. Identify any persons known to the proposer who would be obligated to
17 disqualify themselves from participation in any transaction arising from or
18 in connection to the project pursuant to The Virginia State and Local
19 Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.) of
20 Title 2.2.

21

22 2. Project Characteristics

- 23
- 24 a. Provide a description of the project, including the conceptual design.
25 Describe the proposed project in sufficient detail so that type and intent of
26 the project, the location, and the communities that may be affected are
27 clearly identified.
- 28
- 29 b. Identify and fully describe any work to be performed by the public entity.
- 30
- 31 c. Include a list of all federal, state and local permits and approvals required
32 for the project and a schedule for obtaining such permits and approvals.
- 33
- 34 d. Identify any anticipated adverse social, economic and environmental
35 impacts of the project. Specify the strategies or actions to mitigate known
36 impacts of the project.
- 37
- 38 e. Identify the projected positive social, economic and environmental
39 impacts of the project.
- 40
- 41 f. Identify the proposed schedule for the work on the project, including the
42 estimated time for completion.
- 43
- 44 g. Propose allocation of risk and liability for work completed beyond the
45 agreement's completion date, and assurances for timely completion of the
46 project.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46

- h. State assumptions related to ownership, legal liability, law enforcement and operation of the project and the existence of any restrictions on the public entity's use of the project.
- i. Provide information relative to phased or partial openings of the proposed project prior to completion of the entire work.
- j. List any other assumptions relied on for the project to be successful.
- k. List any contingencies that must occur for the project to be successful.

3. Project Financing

- a. Provide a preliminary estimate and estimating methodology of the cost of the work by phase, segment, or both.
- b. Submit a plan for the development, financing and operation of the project showing the anticipated schedule on which funds will be required. Describe the anticipated costs of and proposed sources and uses for such funds including any anticipated debt service costs. The operational plan should include appropriate staffing levels and associated costs. Include supporting due diligence studies, analyses, or reports.
- c. Include a list and discussion of assumptions underlying all major elements of the plan. Assumptions should include all significant fees associated with financing given the recommended financing approach. In addition complete disclosure of interest rate assumptions should be included. Any ongoing operational fees, if applicable, should also be disclosed as well as any assumptions with regard to increases in such fees.
- d. Identify the proposed risk factors and methods for dealing with these factors.
- e. Identify any local, state or federal resources that the proposer contemplates requesting for the project. Describe the total commitment, if any, expected from governmental sources and the timing of any anticipated commitment. Such disclosure should include any direct or indirect guarantees or pledges of the public entity's credit or revenue.
- f. Identify the amounts and the terms and conditions for any revenue sources.
- g. Identify any aspect of the project that could disqualify the project from obtaining tax-exempt financing.

1 4. Project Benefit and Compatibility

- 2
- 3 a. Identify who will benefit from the project, how they will benefit and how
- 4 the project will benefit the overall community, region, or state.
- 5
- 6 b. Identify any anticipated public support or opposition, as well as any
- 7 anticipated government support or opposition, for the project.
- 8
- 9 c. Explain the strategy and plans that will be carried out to involve and
- 10 inform the general public, business community, and governmental
- 11 agencies in areas affected by the project.
- 12
- 13 d. Describe the anticipated significant benefits to the community, region or
- 14 state, including anticipated benefits to the economic condition of the
- 15 public entity and whether the project is critical to attracting or maintaining
- 16 competitive industries and businesses to the public entity or the
- 17 surrounding region.
- 18
- 19 e. Describe compatibility with the local comprehensive plan, local
- 20 infrastructure development plans, the capital improvements budget or
- 21 other government spending plan.
- 22
- 23 f. Provide a statement setting forth participation efforts that are intended to
- 24 be undertaken in connection with this project with regard to the following
- 25 types of businesses: (i) minority-owned businesses, (ii) woman-owned
- 26 businesses, and (iii) small businesses.
- 27

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

29

30 | If the ~~responsible public entity~~RPE decides to proceed to the detailed phase of

31 | review with one or more proposals, the following information should be provided by the

32 | private entity unless waived by the ~~responsible public entity~~RPE:

33

- 34 1. A topographical map (1:2,000 or other appropriate scale) depicting the
- 35 location of the proposed project;
- 36
- 37 2. A list of public utility facilities, if any, that will be crossed by the qualifying
- 38 project and a statement of the plans of the proposer to accommodate such
- 39 crossings;
- 40
- 41 3. A statement and strategy setting out the plans for securing all necessary
- 42 property;
- 43
- 44 4. A detailed listing of all firms that will provide specific design, construction
- 45 and completion guarantees and warranties, and a brief description of such
- 46 guarantees and warranties;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46

5. A total life-cycle cost specifying methodology and assumptions of the project or projects and the proposed project start date. Include anticipated commitment of all parties; equity, debt, and other financing mechanisms; and a schedule of project revenues and project costs. The life-cycle cost analysis should include, but not be limited to, a detailed analysis of the projected return, rate of return, or both, expected useful life of facility and estimated annual operating expenses.
6. A detailed discussion of assumptions about user fees or rates, and usage of the projects.
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 the executive management and the officers and directors of the firm or firms submitting the proposal. In addition, 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 V. 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~~RPE's review to determine whether the proposer possesses the requisite qualifications and experience include:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46

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
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**RPE;
2. Financing and the impact on the debt or debt burden of the **responsible public entity**RPE;

1
2 3. Financial plan, including the degree to which the proposer has conducted
3 due diligence investigation and analysis of the proposed financial plan and
4 the results of any such inquiries or studies;

5
6 4. Opportunity costs assessment;¹⁴

7
8 4.5. Estimated cost;

9
10 5.6. Life-cycle cost analysis;

11
12 6.7. The identity, credit history, past performance of any third party that will
13 provide financing for the project and the nature and timing of their
14 commitment, as applicable; and

15
16 8. Such other items as the public entity deems appropriate.

17
18 In the event that any project is financed through the issuance of obligations that
19 are deemed to be tax-supported debt of the public entity, or if financing such a project
20 may impact the public entity's debt rating or financial position, the public entity may
21 select its own finance team, source, and financing vehicle.

22
23 **D. Project Benefit and Compatibility**

24
25 Factors to be considered in determining the proposed project's compatibility with
26 the appropriate local or regional comprehensive or development plans include:

- 27
28 1. Community benefits;
29
30 2. Community support or opposition, or both;
31
32 3. Public involvement strategy;
33
34 4. Compatibility with existing and planned facilities; and
35
36 5. Compatibility with local, regional, and state economic development efforts.

37
38 **E. Other Factors**

39
40 Other factors that may be considered by a ~~responsible public entity~~RPE in the
41 evaluation and selection of PPEA proposals include:

- 42
43 1. The proposed cost of the qualifying project;
44

14 SB 756, p. 3, line 172.

- 1 2. The general reputation, industry experience, and financial capacity of the
2 private entity;
- 3
- 4 3. The proposed design of the qualifying project;
- 5
- 6 4. The eligibility of the project for accelerated documentation, review, and
7 selection;
- 8
- 9 5. Local citizen and government comments;
- 10
- 11 6. Benefits to the public, including financial and non financial;¹⁵
- 12
- 13 7. The private entity's compliance with a minority business enterprise
14 participation plan or good faith effort to comply with the goals of such
15 plan;
- 16
- 17 8. The private entity's plans to employ local contractors and residents; ~~and~~
- 18
- 19 9. The recommendation of a committee of representatives of members of the
20 public entity and the appropriating body which may be established to
21 provide advisory oversight for the project; and¹⁶
- 22
- 23 10. Other criteria that the ~~responsible public entity~~RPE deems appropriate.
- 24

VI. Additional Review Procedures.

A. Public Private Partnership Oversight Advisory Committee

The public entity should establish criteria to trigger establishment of an advisory committee consisting of representatives of the public entity and the appropriating body to review the terms of the proposed interim or comprehensive agreement. The criteria should include, but not be limited to, the scope, total cost and duration of the proposed project and whether the project involves or impacts multiple public entities.¹⁷ Timelines for the work of the committee should be developed and made available to proposers.¹⁸

B. Appropriating Body

If the public entity for appropriating or authorizing funding to pay for a qualifying project is different from the public entity reviewing or approving the project, then the public entity should establish a mechanism for that appropriating body to review any proposed interim or comprehensive agreement prior to execution.¹⁹ For proposals where

¹⁵ SB 756, p. 3, line 176.

¹⁶ SB 756, p. 4, line 180.

¹⁷ SB 756, p. 4, line 180.

¹⁸ Suggested by Work Group, 5/30/07

¹⁹ SB 756, p. 3, line 177.

1 | school board is the RPE, the governing body shall serve as the appropriating body. The
2 | review of the governing body for such projects as required by Section 56-575.16 5 shall
3 | meet the requirements of this section.²⁰
4 |

5 | **VII. Interim and Comprehensive Agreements**

6 |
7 | Prior to developing or operating the qualifying project, the selected private entity
8 | shall enter into a comprehensive agreement with the ~~responsible public entity~~RPE. Prior
9 | to entering a comprehensive agreement an interim agreement may be entered into that
10 | permits a private entity to perform compensable activities related to the project. The
11 | ~~responsible public entity~~RPE may designate a working group to be ~~responsible~~ for
12 | negotiating any interim or comprehensive agreement. Any interim or comprehensive
13 | agreement shall define the rights and obligations of the ~~responsible public entity~~RPE and
14 | the selected proposer with regard to the project.

15 | **A. Interim Agreement Terms**

16 |
17 | The scope of an interim agreement may include but is not limited to:

- 18 | 1. Project planning and development;
- 19 |
- 20 | 2. Design and engineering;
- 21 |
- 22 | 3. Environmental analysis and mitigation;
- 23 |
- 24 | 4. Survey;
- 25 |
- 26 | 5. Ascertaining the availability of financing for the proposed facility through
- 27 | financial and revenue analysis;
- 28 |
- 29 | 6. Establish a process and timing of the negotiation of the comprehensive
- 30 | agreement; and
- 31 |
- 32 | 7. Any other provisions related to any aspect of the development or operation of
- 33 | a qualifying project that the parties may deem appropriate prior to the
- 34 | execution of a comprehensive agreement.
- 35 |
- 36 |
- 37 |

38 | **B. Comprehensive Agreement Terms**

39 | The scope of the comprehensive agreement shall include but not be limited to:

- 40 | 1. The delivery of maintenance, performance and payment bonds or letters of
- 41 | credit in connection with any acquisition, design, construction, improvement,
- 42 | renovation, expansion, equipping, maintenance, or operation of the qualifying
- 43 | project;
- 44 |
- 45 |

20 | Suggested by Work Group, 5/30/07

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46

2. The review of plans and specifications for the qualifying project by the ~~responsible public entity~~RPE;
3. The rights of the ~~responsible public entity~~RPE to inspect the qualifying project to ensure compliance with the comprehensive agreement;
4. The maintenance of a policy or policies of liability insurance or self-insurance reasonably sufficient to insure coverage of the project and the tort liability to the public and employees and to enable the continued operation of the qualifying project;
5. The monitoring of the practices of the private entity by the ~~responsible public entity~~RPE to ensure proper maintenance;
6. The terms under which the private entity will reimburse the ~~responsible public entity~~RPE for services provided;
7. The policy and procedures that will govern the rights and responsibilities of the ~~responsible public entity~~RPE and the private entity in the event that the comprehensive agreement is terminated or there is a material default by the private entity including the conditions governing assumption of the duties and responsibilities of the private entity by the ~~responsible public entity~~RPE and the transfer or purchase of property or other interests of the private entity by the ~~responsible public entity~~RPE;
8. The terms under which the private entity will file appropriate financial statements on a periodic basis;
9. The mechanism by which user fees, lease payments, or service payments, if any, may be established from time to time upon agreement of the parties. Any payments or fees shall be set at a level that is the same for persons using the facility under like conditions and that will not materially discourage use for the qualifying project;
 - a. A copy of any service contract shall be filed with the ~~responsible public entity~~RPE.
 - b. A schedule of the current user fees or lease payments shall be made available by the private entity to any member of the public upon request.
 - c. Classifications according to reasonable categories for assessment of user fees may be made.
10. The terms and conditions under which the ~~responsible public entity~~RPE may contribute financial resources, if any, for the qualifying project;

11. The terms and conditions under which existing site conditions will be assessed and addressed, including identification of the ~~responsible~~ party for conducting the assessment and taking necessary remedial action;
12. The terms and conditions under which the public entity will be required to pay money to the private entity and the amount of any such payments for the project.
13. Other requirements of the PPEA or other applicable law; and
14. Such other terms and conditions as the public entity may deem appropriate.

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

The comprehensive agreement may provide for the development or operation of phases or segments of a qualifying project.

C. Notice and Posting requirements.

1. In addition to the posting requirements of Section V, 30 days prior to entering into an interim or comprehensive agreement, a ~~responsible public entity~~RPE shall provide an opportunity for public comment on the proposals. Such public comment period may include a public hearing in the sole discretion of the ~~responsible public entity~~RPE. After the end of the public comment period, no additional posting shall be required based on any public comment received.

2. Once the negotiation phase for the development of an interim or a comprehensive agreement is complete and a decision to award has been made by a ~~responsible public entity~~RPE, the ~~responsible public entity~~RPE shall post the proposed agreement in the following manner:

a. For ~~responsible public entities~~RPE's that are state agencies, departments, and institutions, posting shall be on the Department of General Service's web-based electronic procurement program commonly known as "eVA;" and

b. For ~~responsible public entities~~RPE's that are local public bodies, posting shall be on the ~~responsible public entity~~RPE's website or by publication, in a newspaper of general circulation in the area in which the contract is to be performed, of a summary of the proposals and the location where copies of the proposals are available for public inspection. Posting may also be on the Department of General Service's web-based electronic procurement program commonly known as "eVA," in the discretion of the local ~~responsible public entity~~RPE.

1 c. In addition to the posting requirements, at least one copy of the proposals shall
2 be made available for public inspection. Trade secrets, financial records, or other records
3 of the private entity excluded from disclosure under the provisions of subdivision 11 of §
4 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the
5 ~~responsible public entity~~RPE and the private entity.

6
7 d. Any studies and analyses considered by the public entity in its review of a
8 proposal shall be disclosed to the appropriating body at some point prior to the execution
9 of an interim or comprehensive agreement.²¹

10
11 3. Once an interim agreement or a comprehensive agreement has been entered
12 into, a ~~responsible public entity~~RPE shall make procurement records available for public
13 inspection, upon request.

14
15 a. Such procurement records shall include documents protected from disclosure
16 during the negotiation phase on the basis that the release of such documents would have
17 adversely affect the financial interest or bargaining position of the ~~responsible public~~
18 ~~entity~~RPE or private entity in accordance with Section II.D.2.

19
20 b. Such procurement records shall not include (i) trade secrets of the private
21 entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or (ii) financial
22 records, including balance sheets or financial statements of the private entity that are not
23 generally available to the public through regulatory disclosure or otherwise.

24
25 **VIII. Governing Provisions**

26
27 In the event of any conflict between these provisions and the PPEA, the terms of the
28 PPEA shall control.

²¹ SB 756, p. 3, line 172.