

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

Changes from 8/15 meeting shown in grey

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

16 **Terms and Definitions ..... p.**

17

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 services<sup>1</sup>, 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,<sup>2</sup> or

<sup>1</sup> Senate Bill 756 (2007), p. 3, line 135.

<sup>2</sup> 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 guidelines should be reasonable and structured to encourage  
34 | competition. In addition, to facilitate communication, an RPE 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 all RPE's are required to include provisions that require  
39 | the posting and publishing of public notice of a private entity's request for approval a  
40 | qualifying project, including (i) specific information and documentation to be released  
41 | regarding the nature, timing, and scope of the qualifying project pursuant to subsection A  
42 | of § 56-575.4; (ii) a reasonable time period of at least 45 days during which the RPE shall  
43 | receive competing proposals pursuant to Section 56-575.4 A. Such time period shall also  
44 | be as determined by the RPE to encourage competition and public-private partnerships in  
45 | accordance with the goals of the PPEA; and (iii) a requirement for advertising the public

1 notice in the Virginia Business Opportunities publication and posting a notice on the  
2 Commonwealth's electronic procurement website

3  
4 RPE's that are agencies or institutions of the Commonwealth are required to  
5 include the following provisions in their guidelines:

6  
7 1. Opportunities for competition through public notice and availability of representatives  
8 of the RPE to meet with private entities considering a proposal;

9  
10 2. Reasonable criteria for choosing among competing proposals;

11  
12 3. Suggested timelines for selecting proposals and negotiating an interim or  
13 comprehensive agreement;

14  
15 4. Authorization for accelerated selection and review and documentation timelines for  
16 proposals involving a qualifying project that the RPE deems a priority;

17  
18 5. Financial review and analysis procedures that shall include, at a minimum, a cost-  
19 benefit analysis, an assessment of opportunity cost, and consideration of the results of all  
20 studies and analyses related to the proposed qualifying project. These procedures shall  
21 also include requirements for the disclosure of such analysis to the appropriating body for  
22 review prior to execution of an interim or comprehensive agreement;

23  
24 6. Consideration of the nonfinancial benefits of a proposed qualifying project;

25  
26 7. A mechanism for the appropriating body to review a proposed interim or  
27 comprehensive agreement prior to execution;

28  
29 8. Criteria for triggering the establishment of an advisory committee consisting of  
30 representatives of the RPE and the appropriating body to review the terms of the  
31 proposed interim or comprehensive agreement. Suggested criteria includes the scope,  
32 costs, and duration of the qualifying project, as well as whether the project involves or  
33 impacts multiple RPE's;

34  
35 9. Analysis of the adequacy of the information released when seeking competing  
36 proposals and providing for the enhancement of that information, if deemed necessary, to  
37 encourage competition; and

38  
39 10. Establishment of criteria, key decision points, and approvals required to ensure that  
40 the RPE considers the extent of competition before selecting proposals and negotiating an  
41 interim or comprehensive agreement.

42  
43 Guidelines of local RPE's must include a requirement that such RPE's engage the  
44 services of qualified professionals, which may include an architect, professional engineer,  
45 or certified public accountant, not otherwise employed by the public entity, to provide  
46 independent analysis regarding the specifics, advantages, disadvantages, and the long-

1 | and short-term costs of any request by a private entity for approval of a qualifying project  
2 | unless the governing body of the RPE determines that such analysis of a request by a  
3 | private entity for approval of a qualifying project shall be performed by employees of the  
4 | RPE.<sup>3</sup>

## 6 | Statement of Purpose

8 | The following model guidelines have been developed to assist ~~public entities~~  
9 | RPE's<sup>4</sup> in adopting guidelines to guide the implementation of the PPEA. The guidelines  
10 | are intended to serve as a general guide for the implementation of the PPEA. ~~Each public~~  
11 | ~~body~~ An RPE is not required to adopt the entire text of the model guidelines. Each RPE  
12 | has the flexibility to add or delete provisions included in the model guidelines and to  
13 | include provisions not contained in the model guidelines so long as the provisions  
14 | resulting guidelines comply with the PPEA.<sup>5</sup> The complete text of the PPEA has been  
15 | included in the Appendix to these model guidelines. Although guidance with regard to  
16 | the application of the PPEA is provided herein, it will be incumbent upon all entities,  
17 | both public and private, to comply with the provisions of the PPEA.

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

## 25 | H.I. General Provisions

### 27 | A. Proposal Submission

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

37 | The PPEA allows private entities to include innovative financing methods,  
38 | including the imposition of user fees or service payments, in a proposal. Such financing  
39 | arrangements may include the issuance of debt instruments, equity or other securities or  
40 | obligations, including, if applicable, the portion of the tax-exempt private activity bond  
41 | limitation amount to be allocated annually to the Commonwealth of Virginia pursuant to

<sup>3</sup> SB 756 (2007), p. 3, line 155 through p. 4, line 213; Work Group revised listing of provisions to track statute, 8/15/07; City of Roanoke (Roanoke) and Thomas R. Folk (Folk).

<sup>4</sup> Use term “responsible public entity” or “RPE” will be used consistently throughout guidelines; Work Group, 8/15/07; Roanoke.

<sup>5</sup> Work Group, 8/15/07, to clarify that RPE's have flexibility not to include provisions of the model guidelines that are not specifically based on requirements found in the PPEA

1 the Economic Growth and Tax Relief Reconciliation Act of 2001 for the development of  
2 education facilities using public-private partnerships, and to provide for carryovers of any  
3 unused limitation amount. The PPEA is a flexible development tool that allows the use of  
4 innovative financing techniques. Depending on the ~~public entity's RPE's~~ authority and  
5 the circumstances of each transaction, financing options might include the use of special  
6 purpose entities, sale and lease back transactions, enhanced use leasing, property  
7 exchanges, development agreements, conduit financing and other methods allowed by  
8 law.

9  
10 Proposals should be prepared simply and economically, providing a concise  
11 description of the proposer's capabilities to complete the proposed qualifying project and  
12 the benefits to be derived from the project by the ~~public entity RPE~~. Project benefits to  
13 be considered are those occurring during the construction, renovation, expansion or  
14 improvement phase and during the life cycle of the project. Proposals also should  
15 include a scope of work and a financial plan for the project, containing enough detail to  
16 allow an analysis by the ~~public entity RPE~~ of the financial feasibility of the proposed  
17 project. ~~The public entity may establish criteria by which the proposer may provide~~  
18 ~~clarification to the submission.~~ The cost analysis of a proposal should not be linked solely  
19 to the financing plan, as the ~~responsible public entity RPE~~ may determine to finance the  
20 project through other available means.

21  
22 The RPE should establish clearly delineated criteria for (i) selecting among  
23 competing proposals<sup>6</sup> and (ii) the use of accelerated documentation, review, and selection  
24 process for proposals involving a qualifying project that the RPE deems a priority.<sup>7</sup> In  
25 addition, to facilitate the flow of critical information, the RPE may establish criteria by  
26 which the proposer may provide clarification to a submitted proposal.

### 27 28 **B. Affected ~~Local~~ Jurisdictions**

29  
30 Any private entity requesting approval from or submitting a conceptual or  
31 detailed proposal to a ~~responsible public entity RPE~~ must provide each affected ~~local~~  
32 jurisdiction with a copy of the private entity's request or proposal by certified mail,  
33 express delivery or hand delivery. Affected ~~local~~ jurisdictions that are not ~~responsible~~  
34 ~~public entities RPE's~~ under the proposed qualifying project shall have 60 days from the  
35 receipt of the request or proposal to submit written comments to the ~~responsible public~~  
36 ~~entity RPE~~ and to indicate whether the proposed qualifying project is compatible with the  
37 (i) local comprehensive plan, (ii) local infrastructure development plans, or (iii) capital  
38 improvements budget or other government spending plan. Comments received within the  
39 60-day period shall be given consideration by the ~~responsible public entity RPE~~, and no  
40 negative inference shall be drawn from the absence of comment by an affected ~~local~~  
41 jurisdiction.

---

<sup>6</sup> SB 756, p. 3, line 166.

<sup>7</sup> SB 756, p. 3, line 169.



1           **C. Proposal Review Fee**

2  
3           A ~~public entity RPE~~ shall receive an analysis of the proposal from appropriate  
4 internal staff or outside advisors or consultants with relevant experience in determining  
5 whether to enter into an agreement with the private entity. ~~No fee may be charged by a~~  
6 ~~public entity to process, review or evaluate any solicited proposal submitted under the~~  
7 ~~PPEA.~~<sup>8</sup> The ~~public entity RPE~~ may charge a fee to the private entity to cover the costs of  
8 processing, reviewing, and evaluating any unsolicited proposal or competing unsolicited  
9 proposal submitted under the PPEA, including a fee to cover the costs of outside  
10 attorneys, consultants, and financial advisors. Any fee charged for such review of a  
11 proposal should be reasonable in comparison to the level of expertise required to review  
12 the proposal and should not be greater than the direct costs associated with evaluating the  
13 proposed qualifying project. “Direct costs” may include (i) the cost of staff time required  
14 to process, evaluate, review and respond to the proposal and (ii) the out-of-pocket costs  
15 of attorneys, consultants and financial advisors.

16  
17           The proposal fee may cover all or part of the initial review process. For example,  
18 a ~~public entity RPE~~ may require a proposal fee in an amount sufficient to cover all  
19 anticipated direct costs associated with evaluating the proposal, or a ~~public entity RPE~~  
20 may require a smaller initial processing fee with an additional proposal fee to be charged  
21 should the project proceed beyond the initial review.

22  
23           The ~~public entity RPE~~ may establish a fee schedule for the cost of the proposal  
24 review. The ~~public entity RPE~~ shall set forth in the procedures it has established for the  
25 implementation of the PPEA the methodology used to calculate proposal fees. If the cost  
26 of reviewing the proposal exceeds the initially established proposal fee, the ~~public entity~~  
27 ~~RPE~~ may assess the proposer the additional costs deemed necessary to evaluate the  
28 proposal.

29  
30           For rejected proposals, the ~~public entity RPE~~ may establish a schedule for  
31 refunding any portion of fees paid in excess of its direct costs associated with evaluating  
32 the proposal. If the cost of reviewing the proposal is less than the initially established  
33 proposal fee, the ~~public entity RPE~~ may refund to the proposer the excess fee. As noted  
34 in section IV.A. 1 below, fees should be refunded entirely if the ~~public entity RPE~~  
35 decides not to proceed to publication and conceptual-phase review of an unsolicited  
36 proposal.

37  
38           **D. Freedom of Information Act**

39  
40           1. General applicability of disclosure provisions.

41  
42           Proposal documents submitted by private entities are generally subject to the  
43 Virginia Freedom of Information Act (“FOIA”) except that § 2.2-3705.6 (11) exempts  
44 certain documents from public disclosure. FOIA exemptions, however, are discretionary,

<sup>8</sup> ~~Removed by Work Group, 8/15/07, as not being authorized by law; Folk.~~

1 | and ~~a responsible public body~~ an RPE may elect to release some or all of documents  
2 | except to the extent the documents are:

3 |  
4 | a. Trade secrets of the private entity as defined in the Uniform Trade Secrets Act  
5 | (§ 59.1-336 et seq.);

6 |  
7 | b. Financial records of the private entity that are not generally available to the  
8 | public through regulatory disclosure or otherwise, including but not limited to, balance  
9 | sheets and financial statements; or

10 |  
11 | c. Other information submitted by a private entity, where if the record or  
12 | document were made public prior to the execution of an interim or comprehensive  
13 | agreement the financial interest or bargaining position of the public or private entity  
14 | would be adversely affected.

15 |  
16 | Additionally, to the extent access to proposal documents submitted by private  
17 | entities are compelled or protected from disclosure by a court order, the RPE must  
18 | comply with the provisions of such order.

19 |  
20 | An RPE may contact the Freedom of Information Act Council (FOIAC) regarding  
21 | the applicability of the access provisions of FOIA:<sup>9</sup>

22 |  
General Assembly Building, 2<sup>nd</sup> Floor  
910 Capitol Street Richmond, VA 23219  
E-mail: foiacouncil@leg.state.va.us

Telephone: 804/225-3056  
Toll-Free: 1-866-448-4100  
Fax: 804/371-8705

23 |  
24 | 2. Protection from mandatory disclosure for certain documents submitted by a  
25 | private entity.

26 |  
27 | Before a document of a private entity may be withheld from disclosure, the  
28 | private entity must make a written request to the ~~responsible public entity~~ RPE at the time  
29 | the documents are submitted ~~earmarking~~<sup>10</sup> -designating with specificity the documents for  
30 | which the protection is being sought and a clear statement of the reasons for invoking the  
31 | protection with reference to one or more of three classes of records listed in Section I.D.1  
32 | D.1<sup>11</sup>.

33 |  
34 | Upon the receipt of a written request for protection of documents, the ~~responsible~~  
35 | ~~public entity~~ RPE shall determine whether the documents contain (i) trade secrets, (ii)  
36 | financial records, or (iii) other information that would adversely affect the financial  
37 | interest or bargaining position of the ~~responsible public entity~~ RPE or private entity in  
38 | accordance with Section I.D.1 D.1. The ~~responsible public entity~~ RPE shall make a

<sup>9</sup> Rewritten at request of Work Group, 8/15/07; Roanoke.

<sup>10</sup> "Earmarking" denotes the process of identifying trade secrets and other proprietary records for which protection is sought. Term removed and replaced with "designate" by Work Group, 8/15/07; Folk.

<sup>11</sup> Citation corrected by Work Group, 8/15/07; Roanoke

1 written determination of the nature and scope of the protection to be afforded by the  
2 ~~responsible public entity~~RPE under this subdivision. If the written determination provides  
3 less protection than requested by the private entity, the private entity should be accorded  
4 an opportunity to withdraw its proposal. Nothing shall prohibit further negotiations of  
5 the documents to be accorded protection from release although what may be protected  
6 must be limited to the categories of records identified in Section I.D.1 D.1.

7  
8 Once a written determination has been made by the ~~responsible public entity~~RPE,  
9 the documents afforded protection under this subdivision shall continue to be protected  
10 from disclosure when in the possession of the ~~responsible public entity~~RPE or any  
11 affected ~~local~~ jurisdiction to which such documents are provided.

12  
13 ~~Cost estimates relating to a proposed procurement transaction prepared by or for a~~  
14 ~~responsible public entity shall not be open to public inspection.~~

15  
16 ~~3. Protection from mandatory disclosure for certain documents produced by the~~  
17 ~~responsible public entity.~~

18  
19 ~~Memoranda, staff evaluations, or other records prepared by or for the responsible~~  
20 ~~public entity for the evaluation and negotiation of proposals may be withheld from~~  
21 ~~disclosure if the disclosure of such records required by the PPEA would adversely affect~~  
22 ~~the financial interest or bargaining position of the responsible public entity or private~~  
23 ~~entity and the basis for the determination of adverse affect is documented in writing by~~  
24 ~~the responsible public entity~~

25  
26 ~~Cost estimates relating to a proposed procurement transaction prepared by or for a~~  
27 ~~responsible public entity shall not be open to public inspection.~~

28  
29 ~~4. If a private entity fails to  earmark- designate  trade secrets, financial records, or~~  
30 ~~other~~ confidential or proprietary information, ~~records or documents~~ for protection from  
31 disclosure, such information, records or documents shall be subject to disclosure under  
32 FOIA.

33  
34 3. Protection from mandatory disclosure for certain documents produced by the  
35 RPE.

36  
37 A RPE may withhold from disclosure memoranda, staff evaluations, or other  
38 records prepared by the RPE, its staff, outside advisors, or consultants exclusively for the  
39 evaluation and negotiation of proposals where (i) if such records were made public prior  
40 to or after the execution of an interim or a comprehensive agreement, the financial  
41 interest or bargaining position of the RPE would be adversely affected, and (ii) the basis  
42 for the determination required in clause (i) is documented in writing by the RPE.<sup>12</sup>

43  
44 Cost estimates relating to a proposed procurement transaction prepared by or for a  
45 public entity-RPE shall not be open to public inspection.

<sup>12</sup> Senate Bill 1002, p. 1, line 56.

1  
2 | ~~5.4.~~ A ~~responsible public entity~~RPE may not withhold from public access:

3  
4 (a) procurement records other than those subject to the written determination of  
5 | the ~~responsible public entity~~RPE;

6  
7 (b) information concerning the terms and conditions of any interim or  
8 comprehensive agreement, service contract, lease, partnership, or any agreement of any  
9 | kind entered into by the ~~responsible public entity~~RPE and the private entity;

10  
11 (c) information concerning the terms and conditions of any financing arrangement  
12 that involves the use of any public funds; or

13  
14 (d) information concerning the performance of any private entity developing or  
15 operating a qualifying transportation facility or a qualifying project.

16  
17 However, to the extent that access to any procurement record or other document  
18 or information is compelled or protected by a court order, then the RPE must comply  
19 with such order.<sup>13</sup>

20  
21 **E. Use of Public Funds**

22  
23 Virginia constitutional and statutory requirements as they apply to appropriation  
24 and expenditure of public funds apply to any interim or comprehensive agreement  
25 entered into under the PPEA. Accordingly, the processes and procedural requirements  
26 associated with the expenditure or obligation of public funds shall be incorporated into  
27 planning for any PPEA project or projects.

28  
29 **F. Applicability of Other Laws**

30  
31 | Nothing in the PPEA shall affect the duty of a ~~responsible public entity~~RPE to  
32 comply with all other applicable law not in conflict with the PPEA. The applicability of  
33 the Virginia Public Procurement Act (the "VPPA") is as set forth in the PPEA.

34  
35 | **III II. Solicited Proposals**

36  
37 | A ~~public entity~~ RPE may issue Requests for Proposals (RFPs) or Invitations for  
38 Bids (IFBs)<sup>14</sup>, inviting proposals from private entities to develop or operate qualifying  
39 projects. ~~A public entity~~ An RPE may not issue a RFP until it has adopted guidelines to  
40 govern the PPEA documentation, review, and selection process. The ~~public entity~~ RPE  
41 may use a two-part proposal process consisting of an initial conceptual phase and a  
42 detailed phase. An RFP may invite proposers to submit proposals on individual projects  
43 | identified by the ~~public entity~~RPE. In such a case the ~~responsible public entity~~RPE  
44 should set forth in the RFP the format and supporting information that is required to be

<sup>13</sup> Added by Work Group, 8/15/07, to clarify effect of court orders; Roanoke.

<sup>14</sup> Added by Work Group, 8/15/07; Roanoke.

1 submitted, consistent with the provisions of the PPEA. The RPE may establish suggested  
2 timelines for selecting proposals for the review and selection of solicited proposals.<sup>15</sup>

3  
4 The RFP should specify, but not necessarily be limited to, information and  
5 documents that must accompany each proposal and the factors that will be used in  
6 evaluating the submitted proposals. The RFP should be posted in such public areas as are  
7 normally used for posting of the ~~public entity~~RPE's notices, including the ~~public~~  
8 ~~entity~~RPE's website. Notices should also be published in a newspaper or other  
9 publications of general circulation and advertised in *Virginia Business Opportunities* and  
10 posted on the Commonwealth's electronic procurement site. In addition, solicited  
11 proposals should be posted pursuant to Section ~~IV.B III.B.~~<sup>16</sup> The RFP should also  
12 contain or incorporate by reference other applicable terms and conditions, including any  
13 unique capabilities or qualifications that will be required of the private entities submitting  
14 proposals. Pre-proposal conferences may be held as deemed appropriate by the ~~public~~  
15 ~~entity~~RPE.

### 16 17 **IV III. Unsolicited Proposals**

18  
19 The PPEA permits public entities to receive, evaluate and select for negotiations  
20 unsolicited proposals from private entities to develop or operate a qualifying project.

21  
22 A ~~responsible public entity~~RPE may publicize its needs and may encourage  
23 interested parties to submit unsolicited proposals subject to the terms and conditions of  
24 the PPEA. When such proposals are received without issuance of an RFP, the proposal  
25 shall be treated as an unsolicited proposal. The RPE may establish suggested timelines  
26 for selecting proposals for the review and selection of unsolicited proposals.<sup>17</sup>

#### 27 28 **A. Decision to Accept and Consider Unsolicited Proposal; Notice**

29  
30 1. Upon receipt of any unsolicited proposal or group of proposals and payment of  
31 any required fee by the proposer or proposers, the ~~responsible public entity~~RPE should  
32 determine whether to accept the unsolicited proposal for the purpose of<sup>18</sup> publication and  
33 conceptual-phase consideration. If the ~~public entity~~RPE determines not to accept the  
34 proposal and proceed to publication and conceptual-phase consideration, it should return  
35 the proposal, together with all fees and accompanying documentation, to the proposer.

36  
37 2. If the ~~responsible public entity~~RPE chooses to accept an unsolicited proposal  
38 for publication and conceptual-phase consideration, it shall post a notice in a public area  
39 regularly used by the ~~public entity~~RPE for posting of public notices for a period of not  
40 less than 45 days. The ~~responsible public entity~~RPE shall also publish the same notice for  
41 a period of not less than 45 days in one or more newspapers or periodicals of general  
42 circulation in the jurisdiction to notify any parties that may be interested in submitting

<sup>15</sup> SB 756, p. 3, line 167.

<sup>16</sup> Citation corrected by Work Group, 8/15/07.

<sup>17</sup> SB 756, p. 3, line 167.

<sup>18</sup> Added by Work Group, 8/15/07, to clarify what acceptance at this stage means: Roanoke.

1 competing unsolicited proposals. In addition, the notice should be advertised in *Virginia*  
2 *Business Opportunities* and on the Commonwealth's electronic procurement website.  
3 The notice shall state that the ~~public entity~~RPE (i) has received ~~and accepted~~ an  
4 unsolicited proposal under the PPEA, (ii) intends to evaluate the proposal, (iii) may  
5 negotiate an interim or comprehensive agreement with the proposer based on the  
6 proposal, and (iv) will ~~accept~~ receive for simultaneous consideration any competing  
7 proposals that comply with the procedures adopted by the ~~public entity~~RPE and the  
8 PPEA. The notice also shall summarize the proposed qualifying project or projects, and  
9 identify their proposed locations.

10  
11 To ensure that sufficient information is available upon which to base the  
12 development of a serious competing proposal,<sup>19</sup> representatives of the RPE familiar with  
13 the unsolicited proposal and the guidelines established by the RPE shall be made  
14 available to respond to inquiries and meet with private entities that are considering the  
15 submission of a competing proposal.<sup>20</sup> The RPE shall conduct an analysis of the  
16 information pertaining to the proposal included in the notice to ensure that such  
17 information sufficiently encourages competing proposals.<sup>21</sup> Further, the RPE shall  
18 establish criteria, including key decision points and approvals to ensure proper  
19 consideration of the extent of competition from available private entities prior to  
20 selection.<sup>22</sup>

## 21 22 **B. Posting Requirements**

23  
24 1. Conceptual proposals, whether solicited or unsolicited, shall be posted by the  
25 ~~responsible public entity~~RPE within 10 working days after acceptance of such proposals  
26 in the following manner:

27  
28 a. For ~~responsible public entities~~RPE's that are state agencies, departments, and  
29 institutions, posting shall be on the Department of General Service's web-based electronic  
30 procurement program commonly known as "eVA;" and

31  
32 b. For ~~responsible public entities~~RPE's that are local public bodies, posting shall  
33 be on the ~~responsible public entity~~RPE's website or by publication, in a newspaper of  
34 general circulation in the area in which the contract is to be performed, of a summary of  
35 the proposals and the location where copies of the proposals are available for public  
36 inspection. Posting may also be on the Department of General Service's web-based  
37 electronic procurement program commonly known as "eVA," in the discretion of the  
38 local ~~responsible public entity~~RPE.

39  

---

<sup>19</sup> Series of revisions made by Work Group, 8/15/07, to clarify the purpose of meeting with private entities  
at this stage; Folk.

<sup>20</sup> SB 756, p. 3, line 164.

<sup>21</sup> SB 756, p. 4, line 186.

<sup>22</sup> SB 756, p. 4, line 189.

1 2. Nothing shall be construed to prohibit the posting of the conceptual proposals  
2 | by additional means deemed appropriate by the ~~responsible public entity~~RPE so as to  
3 provide maximum notice to the public of the opportunity to inspect the proposals.  
4

5 3. In addition to the posting requirements, at least one copy of the proposals shall  
6 be made available for public inspection. Trade secrets, financial records, or other records  
7 of the private entity excluded from disclosure under the provisions of subdivision 11 of §  
8 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the  
9 | ~~responsible public entity~~RPE and the private entity. Any inspection of procurement  
10 transaction records shall be subject to reasonable restrictions to ensure the security and  
11 integrity of the records.  
12

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

14  
15 1. Only proposals complying with the requirements of the PPEA that contain  
16 sufficient information for a meaningful evaluation and that are provided in an appropriate  
17 | format should be considered by the ~~responsible public entity~~RPE for further review at the  
18 conceptual stage. Formatting suggestions for proposals at the conceptual stage are found  
19 | at Section ~~V A I. V. A.~~<sup>23</sup>  
20

21 | 2. The ~~responsible public entity~~RPE should determine at this initial stage of  
22 review whether it will proceed using:  
23

- 24 a. Standard procurement procedures consistent with the VPPA; or  
25  
26 | b. Guidelines developed by the ~~responsible public entity~~RPE that are  
27 consistent with procurement of other than professional services through  
28 "competitive negotiation" as the term is defined in § 2.2-4301 of the Code  
29 | of Virginia. The ~~responsible public entity~~RPE may proceed using such  
30 guidelines only if it makes a written determination that doing so is likely  
31 | to be advantageous to the ~~responsible public entity~~RPE and the public  
32 based upon either (i) the probable scope, complexity or priority of need;  
33 (ii) the risk sharing including guaranteed cost or completion guarantees,  
34 added value or debt or equity investments proposed by the private entity;  
35 or (iii) increase in funding, dedicated revenue or other economic benefit  
36 that would otherwise not be available.  
37

38 3. After reviewing the original proposal and any competing proposals submitted  
39 | during the notice period, the ~~responsible public entity~~RPE may determine:  
40

- 41 (i) not to proceed further with any proposal,  
42  
43 (ii) to proceed to the detailed phase of review with the original proposal,  
44  
45 | (iii) to proceed to the detailed phase with a competing proposal, ~~or~~

---

23 Citation corrected by Work Group, 8/15/07; Roanoke

- 1  
2 (iv) to proceed to the detailed phase with multiple proposals; or  
3  
4 (v) to request modifications or amendments to any proposals<sup>24</sup>.

5  
6 In the event that more than one proposal will be considered in the detailed phase  
7 of review, the public entity RPE should consider whether the unsuccessful proposer  
8 should be reimbursed for costs incurred in the detailed phase of review, and such  
9 reasonable costs may be assessed to the successful proposer in the comprehensive  
10 agreement.

11  
12 4. Discussions between responsible public bodies RPE's and private entities about  
13 the need for infrastructure improvements shall not limit the ability of a public entity RPE  
14 to later determine to use standard procurement procedures to meet its infrastructure  
15 needs. The public entity RPE retains the right to reject any proposal at any time prior to  
16 the execution of an interim or comprehensive agreement.

17  
18 **IV. Proposal Preparation and Submission**

19  
20 **A. Format for Submissions at Conceptual Stage**

21  
22 A responsible public entity RPE may require that proposals at the conceptual stage  
23 contain information in the following areas: (i) qualifications and experience, (ii) project  
24 characteristics, (iii) project financing, (iv) anticipated public support or opposition, or  
25 both, (v) project benefit and compatibility and (vi) any additional information as the  
26 responsible public entity RPE may reasonably request to comply with the requirements of  
27 the PPEA. Suggestions for formatting information to be included in proposals at this  
28 stage include the items listed below, as well as any additional information or documents  
29 that RPE may request:<sup>25</sup>

30  
31 **1. Qualification and Experience**

- 32  
33 a. Identify the legal structure of the firm or consortium of firms making the  
34 proposal. Identify the organizational structure for the project, the  
35 management approach and how each partner and major subcontractor in  
36 the structure fits into the overall team.  
37  
38 b. Describe the experience of the firm or consortium of firms making the  
39 proposal and the key principals involved in the proposed project including  
40 experience with projects of comparable size and complexity. Describe the  
41 length of time in business, business experience, public sector experience  
42 and other engagements of the firm or consortium of firms. Include the  
43 identity of any firms that will provide design, construction and completion

<sup>24</sup> Work Group, 5/30/07

<sup>25</sup> Work Group, 8/15/07; Roanoke.



1 guarantees and warranties and a description of such guarantees and  
2 warranties.

- 3
- 4 c. Provide the names, addresses, and telephone numbers of persons within  
5 the firm or consortium of firms who may be contacted for further  
6 information.
- 7
- 8 d. Provide a current or most recently audited financial statement of the firm  
9 or firms and each partner with an equity interest of twenty percent or  
10 greater.
- 11
- 12 e. Identify any persons known to the proposer who would be obligated to  
13 disqualify themselves from participation in any transaction arising from or  
14 in connection to the project pursuant to The Virginia State and Local  
15 Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.) of  
16 Title 2.2.

17

18 2. Project Characteristics

- 19
- 20 a. Provide a description of the project, including the conceptual design.  
21 Describe the proposed project in sufficient detail so that type and intent of  
22 the project, the location, and the communities that may be affected are  
23 clearly identified.
- 24
- 25 b. Identify and fully describe any work to be performed by the public  
26 entityRPE.
- 27
- 28 c. Include a list of all federal, state and local permits and approvals required  
29 for the project and a schedule for obtaining such permits and approvals.
- 30
- 31 d. Identify any anticipated adverse social, economic and environmental  
32 impacts of the project. Specify the strategies or actions to mitigate known  
33 impacts of the project.
- 34
- 35 e. Identify the projected positive social, economic and environmental  
36 impacts of the project.
- 37
- 38 f. Identify the proposed schedule for the work on the project, including the  
39 estimated time for completion.
- 40
- 41 g. Propose allocation of risk and liability for work completed beyond the  
42 agreement's completion date, and assurances for timely completion of the  
43 project.
- 44

- 1 h. State assumptions related to ownership, legal liability, law enforcement  
2 and operation of the project and the existence of any restrictions on the  
3 public entityRPE's use of the project.
- 4
- 5 i. Provide information relative to phased or partial openings of the proposed  
6 project prior to completion of the entire work.
- 7
- 8 j. List any other assumptions relied on for the project to be successful.
- 9
- 10 k. List any contingencies that must occur for the project to be successful.
- 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 including any anticipated debt service costs. The operational plan  
21 should include appropriate staffing levels and associated costs. Include  
22 supporting due diligence studies, analyses, or reports.
- 23
- 24 c. Include a list and discussion of assumptions underlying all major elements  
25 of the plan. Assumptions should include all significant fees associated  
26 with financing given the recommended financing approach. In addition  
27 complete disclosure of interest rate assumptions should be included. Any  
28 ongoing operational fees, if applicable, should also be disclosed as well as  
29 any assumptions with regard to increases in such fees.
- 30
- 31 d. Identify the proposed risk factors and methods for dealing with these  
32 factors.
- 33
- 34 e. Identify any local, state or federal resources that the proposer  
35 contemplates requesting for the project. Describe the total commitment, if  
36 any, expected from governmental sources and the timing of any  
37 anticipated commitment. Such disclosure should include any direct or  
38 indirect guarantees or pledges of the public entityRPE's credit or revenue.
- 39
- 40 f. Identify the amounts and the terms and conditions for any revenue  
41 sources.
- 42
- 43 g. Identify any aspect of the project that could disqualify the project from  
44 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~~RPE and whether the project is critical to attracting or
- 16                  maintaining competitive industries and businesses to the ~~public entity~~RPE
- 17                  or the 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
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 entityRPE'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 entityRPE may reasonably request.

**VI V. Proposal Evaluation and Selection Criteria**

There are several factors that an RPE may wish to consider when evaluating and selecting a proposal under the PPEA.<sup>26</sup> The following ~~are items shall factors that may~~ be considered by a RPE in the evaluation and selection of PPEA proposals.

<sup>26</sup> Work Group, 8/15/07, to clarify that the factors listed are not mandatory; Folk.

1           **A. Qualifications and Experience**

2  
3           Factors to be considered in either phase of the ~~responsible public entity~~RPE's  
4 review to determine whether the proposer possesses the requisite qualifications and  
5 experience include:

- 6  
7           1.       Experience with similar projects;  
8  
9           2.       Demonstration of ability to perform work;  
10  
11          3.       Leadership structure;  
12  
13          4.       Project manager's experience;  
14  
15          5.       Management approach;  
16  
17          6.       Financial condition; and  
18  
19          7.       Project ownership.

20  
21           **B. Project Characteristics**

22  
23           Factors to be considered in determining the project characteristics include:

- 24  
25          1.       Project definition;  
26  
27          2.       Proposed project schedule;  
28  
29          3.       Operation of the project;  
30  
31          4.       Technology; technical feasibility;  
32  
33          5.       Conformity to laws, regulations, and standards;  
34  
35          6.       Environmental impacts;  
36  
37          7.       Condemnation impacts;  
38  
39          8.       State and local permits; and  
40  
41          9.       Maintenance of the project.

42  
43           **C. Project Financing**

44  
45           Factors to be considered in determining whether the proposed project financing  
46 allows adequate access to the necessary capital to finance the project include:

- 1
- 2 | 1. Cost and cost benefit to the ~~responsible public entity~~RPE;
- 3
- 4 | 2. Financing and the impact on the ~~debt or~~ debt burden of the ~~responsible~~  
5 | ~~public entity~~RPE or appropriating body;<sup>27</sup>
- 6
- 7 3. Financial plan, including the degree to which the proposer has conducted  
8 due diligence investigation and analysis of the proposed financial plan and  
9 the results of any such inquiries or studies;
- 10
- 11 | 4. Opportunity costs assessment;<sup>28</sup>
- 12
- 13 | 4.5. Estimated cost;
- 14
- 15 | 5.6. Life-cycle cost analysis;
- 16
- 17 | 6.7. The identity, credit history, past performance of any third party that will  
18 provide financing for the project and the nature and timing of their  
19 commitment, as applicable; and
- 20
- 21 | 8. Such other items as the ~~public entity~~RPE deems appropriate.
- 22

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

#### 27

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

29

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

- 32
- 33 1. Community benefits;
- 34
- 35 2. Community support or opposition, or both;
- 36
- 37 3. Public involvement strategy;
- 38
- 39 4. Compatibility with existing and planned facilities; and
- 40
- 41 5. Compatibility with local, regional, and state economic development efforts.

---

<sup>27</sup> Work Group, 8/15/07; Roanoke.

<sup>28</sup> SB 756, p. 3, line 172.

1 **E. Other Factors**

2  
3 Other factors that may be considered by a ~~responsible public entity~~RPE in the  
4 evaluation and selection of PPEA proposals include:

- 5  
6 1. The proposed cost of the qualifying project;  
7  
8 2. The general reputation, industry experience, and financial capacity of the  
9 private entity;  
10  
11 3. The proposed design of the qualifying project;  
12  
13 4. The eligibility of the project for accelerated documentation, review, and  
14 selection;  
15  
16 5. Local citizen and government comments;  
17  
18 6. Benefits to the public, including financial and non financial;<sup>29</sup>  
19  
20 7. The private entity’s compliance with a minority business enterprise  
21 participation plan or good faith effort to comply with the goals of such  
22 plan;  
23  
24 8. The private entity’s plans to employ local contractors and residents; ~~and~~  
25  
26 9. The recommendation of a committee of representatives of members of the  
27 RPE and the appropriating body which may be established to provide  
28 advisory oversight for the project; and<sup>30</sup>  
29  
30 10. Other criteria that the ~~responsible public entity~~RPE deems appropriate.

31  
32 **VI. Additional Review Procedures.**

33  
34 **A. Public Private Partnership Oversight Advisory Committee**

35  
36 An RPE that is an agency or institution of the Commonwealth shall and all other  
37 RPE’s may<sup>31</sup> establish criteria to trigger establishment of an advisory committee consisting  
38 of representatives of the RPE and the appropriating body to review the terms of the  
39 proposed interim or comprehensive agreement. The criteria should include, but not be  
40 limited to, the scope, total cost and duration of the proposed project and whether the project

<sup>29</sup> SB 756, p. 3, line 176.

<sup>30</sup> SB 756, p. 4, line 180.

<sup>31</sup> Work Group, 8/15/07, to clarify that establishment of advisory committee is not mandatory for non state RPE’s; Roanoke.

1 involves or impacts multiple public entities.<sup>32</sup> Timelines for the work of the committee  
2 should be developed and made available to proposers.<sup>33</sup>

### 4 B. Appropriating Body

6 If the ~~public entity~~RPE for appropriating or authorizing funding to pay for a  
7 qualifying project is different from the RPE reviewing or approving the project, then the  
8 ~~public entity~~RPE should establish a mechanism for that appropriating body to review any  
9 proposed interim or comprehensive agreement prior to execution.<sup>34</sup> When a school board is  
10 the RPE, review by the local governing body shall satisfy the requirement for this  
11 requirement.<sup>35</sup>

## 13 VII. Interim and Comprehensive Agreements

15 Prior to developing or operating the qualifying project, the selected private entity  
16 shall enter into a comprehensive agreement with the ~~responsible public entity~~RPE. Prior  
17 to entering a comprehensive agreement an interim agreement may be entered into that  
18 permits a private entity to perform compensable activities related to the project. The  
19 ~~responsible public entity~~RPE may designate a working group to be responsible for  
20 negotiating any interim or comprehensive agreement. Any interim or comprehensive  
21 agreement shall define the rights and obligations of the ~~responsible public entity~~RPE and  
22 the selected proposer with regard to the project.

### 24 A. Interim Agreement Terms

26 The scope of an interim agreement may include but is not limited to:

- 28 1. Project planning and development;
- 29 2. Design and engineering;
- 30 3. Environmental analysis and mitigation;
- 31 4. Survey;
- 32 5. Ascertaining the availability of financing for the proposed facility through  
33 financial and revenue analysis;
- 34 6. Establish a process and timing of the negotiation of the comprehensive  
35 agreement; and

32 SB 756, p. 4, line 180.

33 Work Group, 5/30/07.

34 SB 756, p. 3, line 177.

35 Work Group, 5/30/07; revised 8/15/07; Folk, Roanoke.



- 1 7. Any other provisions related to any aspect of the development or operation of  
2 a qualifying project that the parties may deem appropriate prior to the  
3 execution of a comprehensive agreement.  
4

5 **B. Comprehensive Agreement Terms**  
6

7 The scope of the comprehensive agreement shall include but not be limited to:  
8

- 9 1. The delivery of maintenance, performance and payment bonds or letters of  
10 credit in connection with any acquisition, design, construction, improvement,  
11 renovation, expansion, equipping, maintenance, or operation of the qualifying  
12 project;  
13  
14 2. The review of plans and specifications for the qualifying project by the  
15 ~~responsible public entity~~RPE;  
16  
17 3. The rights of the ~~responsible public entity~~RPE to inspect the qualifying  
18 project to ensure compliance with the comprehensive agreement;  
19  
20 4. The maintenance of a policy or policies of liability insurance or self-insurance  
21 reasonably sufficient to insure coverage of the project and the tort liability to  
22 the public and employees and to enable the continued operation of the  
23 qualifying project;  
24  
25 5. The monitoring of the practices of the private entity by the ~~responsible public~~  
26 ~~entity~~RPE to ensure proper maintenance;  
27  
28 6. The terms under which the private entity will reimburse the ~~responsible public~~  
29 ~~entity~~RPE for services provided;  
30  
31 7. The policy and procedures that will govern the rights and responsibilities of  
32 the ~~responsible public entity~~RPE and the private entity in the event that the  
33 comprehensive agreement is terminated or there is a material default by the  
34 private entity including the conditions governing assumption of the duties and  
35 responsibilities of the private entity by the ~~responsible public entity~~RPE and  
36 the transfer or purchase of property or other interests of the private entity by  
37 the ~~responsible public entity~~RPE;  
38  
39 8. The terms under which the private entity will file appropriate financial  
40 statements on a periodic basis;  
41  
42 9. The mechanism by which user fees, lease payments, or service payments, if  
43 any, may be established from time to time upon agreement of the parties. Any  
44 payments or fees shall be set at a level that is the same for persons using the  
45 facility under like conditions and that will not materially discourage use for  
46 the qualifying 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

- 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~~RPE 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~~RPE 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 III. B~~, 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:

1  
2 | a. For ~~responsible public entities~~RPE's that are state agencies, departments, and  
3 institutions, posting shall be on the Department of General Service's web-based electronic  
4 procurement program commonly known as "eVA;" and

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

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

19  
20 d. Any studies and analyses considered by the RPE in its review of a proposal  
21 shall be disclosed to the appropriating body at some point prior to the execution of an  
22 interim or comprehensive agreement;<sup>36</sup>

23  
24 3. Once an interim agreement or a comprehensive agreement has been entered  
25 into, a ~~responsible public entity~~RPE shall make procurement records available for public  
26 inspection, upon request.

27  
28 a. Such procurement records shall include documents protected from disclosure  
29 during the negotiation phase on the basis that the release of such documents would have  
30 adversely affect the financial interest or bargaining position of the ~~responsible public~~  
31 ~~entity~~RPE or private entity in accordance with Section II.D.2.

32  
33 b. Such procurement records shall not include (i) trade secrets of the private  
34 entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or (ii) financial  
35 records, including balance sheets or financial statements of the private entity that are not  
36 generally available to the public through regulatory disclosure or otherwise.

37  
38 c. To the extent access to procurement records are compelled or protected by a  
39 court order, then the RPE must comply with such order.<sup>37</sup>

## 40 41 **VIII. Governing Provisions**

42  
43 | In the event of any conflict between these ~~provisions~~guidelines and the PPEA, the  
44 terms of the PPEA shall control.

<sup>36</sup> SB 756, p. 3, line 172.

<sup>37</sup> Work Group, 8/15/07, to clarify the affect of court order or access to documents.

## Terms and Definitions

1  
2  
3 "Affected jurisdiction" means any county, city or town in which all or a portion of a  
4 qualifying project is located.

5  
6 "Appropriating body" means the body responsible for appropriating or authorizing  
7 funding to pay for a qualifying project.

8  
9 "Conceptual stage" means the initial phase of project evaluation where the public entity  
10 makes a determination whether the proposed project serves a public purpose, meets the  
11 criteria for a qualifying project, assesses the qualifications and experience of a private  
12 entity proposer, reviews the project for financial feasibility, and warrants further pursuit.

13  
14 "Comprehensive agreement" means the comprehensive agreement between the private  
15 entity and the responsible public entity that is required prior to the development or  
16 operation of a qualifying project.

17  
18 "Cost-benefit analysis" means an analysis that weighs expected costs against expected  
19 benefits in order to choose the best option. For example, a city manager may compare  
20 the costs and benefits of constructing a new office building to those of renovating and  
21 maintaining an existing structure in order to select the most financially advantageous  
22 option.

23  
24 "Detailed stage" means the second phase of project evaluation where the public entity  
25 has completed the conceptual stage and accepted the proposal and may requests  
26 additional information regarding a proposed project prior to entering into competitive  
27 negotiations with one or more private entities to develop an interim or comprehensive  
28 agreement.

29  
30 "Develop" or "development" means to plan, design, develop, finance, lease, acquire,  
31 install, construct, or expand.

32  
33 "Interim agreement" means an agreement between a private entity and a responsible  
34 public entity that provides for phasing of the development or operation, or both, of a  
35 qualifying project. Such phases may include, but are not limited to, design, planning,  
36 engineering, environmental analysis and mitigation, financial and revenue analysis, or  
37 any other phase of the project that constitutes activity on any part of the qualifying  
38 project.

39  
40 "Lease payment" means any form of payment, including a land lease, by a public entity  
41 to the private entity for the use of a qualifying project.

42  
43 "Lifecycle cost analysis" means an analysis that calculates cost of an asset over its entire  
44 life span and includes the cost of planning, constructing, operating, maintaining,  
45 replacing, and when applicable, salvaging the asset. Although one proposal may have a

1 lower initial construction cost, it may not have the lowest lifecycle cost once  
2 maintenance, replacement, and salvage value is considered

3  
4 "Material default" means any default by the private entity in the performance of its  
5 duties that jeopardizes adequate service to the public from a qualifying project.

6  
7 "Operate" means to finance, maintain, improve, equip, modify, repair, or operate.

8  
9 "Opportunity cost" means the cost of passing up another choice when making a  
10 decision or the increase in costs due to delays in making a decision.

11  
12 "Private entity" means any natural person, corporation, general partnership, limited  
13 liability company, limited partnership, joint venture, business trust, public benefit  
14 corporation, non-profit entity, or other business entity.

15  
16 "Public entity" means the Commonwealth and any agency or authority thereof, any  
17 county, city or town and any other political subdivision of the Commonwealth, any  
18 public body politic and corporate, or any regional entity that serves a public purpose.

19  
20 "Qualifying project" means (i) any education facility, including, but not limited to a  
21 school building, any functionally related and subordinate facility and land to a school  
22 building (including any stadium or other facility primarily used for school events), and  
23 any depreciable property provided for use in a school facility that is operated as part of  
24 the public school system or as an institution of higher education; (ii) any building or  
25 facility that meets a public purpose and is developed or operated by or for any public  
26 entity; (iii) any improvements, together with equipment, necessary to enhance public  
27 safety and security of buildings to be principally used by a public entity; (iv) utility and  
28 telecommunications and other communications infrastructure; (v) a recreational facility;  
29 (vi) technology infrastructure and services, including, but not limited to,  
30 telecommunications, automated data processing, word processing and management  
31 information systems, and related information, equipment, goods and services; (vii) any  
32 technology, equipment, or infrastructure designed to deploy wireless broadband services  
33 to schools, businesses, or residential areas; or (viii) any improvements necessary or  
34 desirable to any unimproved locally- or state-owned real estate.

35  
36 "Responsible public entity" means a public entity that has the power to develop or  
37 operate the applicable qualifying project.

38  
39 "Revenues" means all revenues, income, earnings, user fees, lease payments, or other  
40 service payments arising out of or in connection with supporting the development or  
41 operation of a qualifying project, including without limitation, money received as grants  
42 or otherwise from the United States of America, from any public entity, or from any  
43 agency or instrumentality of the foregoing in aid of such facility.

44  
45 "Service contract" means a contract entered into between a public entity and the private  
46 entity pursuant to 56-575.5.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11

"Service payments" means payments to the private entity of a qualifying project pursuant to a service contract.

"State" means the Commonwealth of Virginia.

"User fees" mean the rates, fees or other charges imposed by the private entity of a qualifying project for use of all or a portion of such qualifying project pursuant to the comprehensive agreement pursuant to 56-575.9.