

Tom Folk's Comments on 2007 Public  
Comment DRAFT –  
Public-Private Education  
Facilities and Infrastructure  
Act of 2002 – Model Guidelines

1. The language from page 5, line 27, through page 6, line 37, is confusing and appears inaccurate. Page 5, lines 27-28, indicates that guidelines adopted by state public entities shall include, and guidelines adopted by other public entities may include, 12 listed provisions. Listed item 12, however, includes a requirement that does not apply to a state public entity and that is mandatory for local public entities. (See Va. Code § 56-575.16.4.a.) This is in contradiction to what page 5, lines 27-28, states. Similarly, item #11 appears to include some aspects that are mandatory for local public entities.

2. Page 6, line 8 – Change "criteria includes" to "criteria include" to make grammatically correct.

3. Page 6, lines 43-45 – The sentence on these lines should use the terminology "public entity" rather than "public body" and should clarify that each local public entity also has the flexibility not to include in its PPEA guidelines provisions in the model guidelines that are not required by the PPEA.

4. Page 8, lines 24-25 – Eliminate the sentence "No fee may be charged by a public entity to process, review, or evaluate any solicited proposal submitted under the PPEA." While the PPTA has an express prohibition on charging fees for solicited proposals, see Va. Code §56-560B, the PPEA does not. Whether to charge a fee for solicited PPEA proposals is a policy choice for the local public entity to make.

5. Page 9, line 38 and note 6, and page 10, line 16. Creation of yet another new, specialized PPEA term, "earmarking," does not appear to add anything to the guidelines, while such specialized jargon makes the process appear less accessible and understandable.

6. Page 13, lines 25-27 – The provision added that appears to call for individual meetings with prospective proposers after a procurement has been initiated appears inconsistent with what are generally accepted to be best practices in competitively negotiated public procurements and may lead to appearances of impropriety and favoritism. Typically, before proposal submissions, all prospective proposers are invited to preproposal conferences where all may attend and any guidance resulting is reduced to writing as an addendum provided to all proposers. Otherwise, meetings with proposers are typically limited to negotiation sessions. Typically, other individual sessions of public procurement officials with proposers are generally prohibited precisely to avoid favoritism or appearances of favoritism and to ensure all competitors compete on a level playing field. Accordingly, the provision should be eliminated.

7. Page 14, lines 26-27 – The RPE should determine, before it issues the RFP, in the case of a solicited proposals, or before it accepts an unsolicited proposal, in the case of unsolicited proposals, whether to proceed using competitive sealed bid procedures or competitive negotiation procedures. This is because in a procurement using competitive negotiation and a "best value" methodology, typical for PPEA procurements, the evaluation criteria and their order of importance should be stated before proposals are received and should be tailored to the project. Disclosure of these tailored evaluation criteria and their order of importance should be done in the RFP in the case of solicited proposals. This is part of the communication process with proposers and allows proposers to better understand and respond to the RPE's needs and priorities. Even with nonsolicited proposals, the better practice is to have evaluation criteria and

their order of importance established before competing proposals are sought. If the RPE waits until after it has received conceptual-phase proposals, this is too late in the process.

8. Page 15, lines 1-3 and line 5 – These provisions are potentially misleading and confusing to public entities in that they imply that it is acceptable or normal to proceed to the detailed phase of proposal review with just one proposal, without any consideration of the requirements of competitive negotiation that normally negotiations be held with at least two proposers. The PPEA requires public entities using competitive negotiation to do so in a manner consistent with the procurement of other than professional services through competitive negotiation as defined in Va. Code § 2.2-4301. Va. Code § 56-575.16.2. The definition of competitive negotiation in §2.2-430 1 says the process involves selection of "two or more offerors" and then negotiations "with each of the offerors so selected" unless certain specified written determinations are made. Va. Code § 2.2-4301 "Competitive, Negotiation", ¶3b. Thus, under the PPEA, the RPE is required either to negotiate with at least 2 proposers or to make the written determinations required by § 2.2-4301 to justify selection and negotiation with only one proposer. Not only the law, but common sense and best practices call for negotiating with at least two proposers except in exceptional circumstances

9. Page 19, line 32, through Page 22, line 10 – The long list of factors tends to discourage RPEs from developing meaningful evaluation criteria that effectively communicate to proposers the RPEs' needs and priorities for a particular PPEA procurement. PPEA procurements tend to be done through competitive negotiation using a best value methodology. Best practices for this kind of procurement call for a limited number of evaluation criteria (for example 5 to 10) listed in their relative order of importance that are developed for the specific procurement.

10. Page 22, lines 33-36 – The highlighted portion is unclear as written. There is a Virginia Attorney General Opinion that clarifies who the governing body is under Va. Code 56-575.16.5 when the RPE is a School Board. See Va. Attorney General Op. No.04-011. Why not just say "When a school board is the RPE, review by the local governing body (e.g., the County Board of Supervisors, City Council, etc., as applicable, that provides appropriated funds for the School Board) satisfies the requirement of this section"?

FRXLIB-482466.2- TRFOLK7/6107 4.46 PM