

Public-Private Education Facilities and Infrastructure

Act of 2002

Model Procedures

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

Table of Contents

I. Introduction.....	p.1
II. General Provisions.....	p. 2
A. Proposal Submission.....	p. 2
B. Affected Jurisdictions.....	p. 3
C. Proposal Review. Fee.....	p. 3
D. Virginia Freedom of Information Act	p. 4
E. Use of Public funds.....	p. 4
F. Applicability of Other Laws.....	p. 5
III. Solicited Proposals.....	p. 5
IV. Unsolicited Proposals.....	p. 5
A. Decision to Accept and Consider Unsolicited Proposal; Notice.....	p. 6
B. Initial Review by the Responsible Public Entity.....	p. 6
V. Proposal Preparation and Submission.....	p. 7
A. Format for Submissions at the Conceptual Stage.....	p. 7
B. Format for Submissions at the Detailed Stage.....	p. 10
VI. Proposal Evaluation and Selection Criteria.....	p. 11
A. Qualifications and Experience.....	p. 11
B. Project Characteristics.....	p. 11
C. Project Financing.....	p. 12
D. Public Benefit and compatibility.....	p. 12
VII. Comprehensive Agreement.....	p. 13

I. Introduction

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

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

- (i) An education facility, including, but not limited to, a school building (including any stadium or other facility primarily used for school events), any functionally-related and subordinate facility and land to a school building and any depreciable property provided for use in a school facility that is operated as part of the public school system or as an institution of higher education;
- (ii) A building or facility for principal use by any public entity;
- (iii) Improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity;
- (iv) Utility and telecommunications and other communications infrastructure; or
- (v) A recreational facility.

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

In passing the legislation, the General Assembly directed the Governor and the chairs of the House and Senate Committees on General Laws to facilitate the development of model procedures to assist in the implementation of the PPEA. The respective governing body of the public entity must first adopt procedures that it will

¹ Chapter 571, 2002 Va. Acts; Va. Code § 56-575.1 through § 56-575.16.

Public-Private Education Facilities and Infrastructure Act of 2002

follow to receive and evaluate any proposal submitted to the public entity under the provisions of the PPEA. The procedures adopted by the public entity should designate an individual to serve as the point of contact to receive proposals submitted under the PPEA and to respond to inquiries regarding the PPEA or the procedures.

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

II. General Provisions.

A. Proposal Submission

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

The PPEA allows private entities to include innovative financing methods, including the imposition of user fees or service payments, in a proposal. Such financing arrangements may include the issuance of debt instruments, equity or other securities or obligations, including, if applicable, the portion of the tax-exempt private activity bond limitation amount to be allocated annually to the Commonwealth of Virginia pursuant to the Economic Growth and Tax Relief Reconciliation Act of 2001² for the development of education facilities using public-private partnerships, and to provide for carryovers of any unused limitation amount.

Proposals should be prepared simply and economically, providing a concise description of the proposer's capabilities to complete the proposed qualifying project and the benefits to be derived from the project by the public entity. Project benefits to be considered are, those occurring during the construction, renovation, expansion or improvement phase and during the life cycle of the project. Proposals also should include a comprehensive scope of work and a financial plan for the project, containing enough detail to allow an analysis by the public entity of the financial feasibility of the proposed project. The public entity may establish criteria by which the proposer may provide clarification to the submission.

² Public Law 107-16; Section 142(k)(5) of the Internal Revenue Code of 1986, as amended.

Public-Private Education Facilities and Infrastructure Act of 2002

B. Affected Local Jurisdictions

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

C. Proposal Review Fee

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

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

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

For rejected proposals, the public entity may establish a schedule for refunding any portion of fees paid in excess of its direct costs associated with evaluating the proposal. If the cost of reviewing the proposal is less than the initially established

Public-Private Education Facilities and Infrastructure Act of 2002

proposal fee, the public entity may refund to the proposer the excess fee. As noted in section IV.A. 1 below, fees should be refunded entirely if the public entity decides not to proceed to publication and conceptual-phase review of an unsolicited proposal.

D. Freedom of Information Act

Generally, proposal documents submitted by private entities subject to the Virginia Freedom of Information Act ("FOIA").³ In accordance with § 2.2-3705 A 56 of FOIA, such documents are releasable if requested, except to the extent that they relate to (i) confidential proprietary information submitted to the responsible public entity under a promise of confidentiality or (ii) memoranda, working papers or other records related to proposals if making public such records would adversely affect the financial interest of the public or private entity or the bargaining position of either party. '

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

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

E. Use of Public Funds

Virginia constitutional and statutory requirements as they apply to appropriation and expenditure of public funds apply to any comprehensive agreement entered into under the PPEA. Accordingly, the processes and procedural requirements associated

³ Virginia Code § 2.2-3700 et seq.

Public-Private Education Facilities and Infrastructure Act of 2002

with the expenditure or obligation of public funds shall be incorporated into planning for any PPEA project or projects.

F. Applicability of Other Laws

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

III. Solicited Proposals

A public entity may issue Requests for Proposals (RFPs), inviting proposals from private entities to acquire, construct, improve, renovate, expand, maintain or operate qualifying projects or to design or equip projects so constructed, improved renovated, expanded, maintained or operated. The public entity may use a two-part proposal process consisting of an initial conceptual phase and a detailed phase. An RFP may invite proposers to submit proposals on individual projects identified by the public entity. In such a case the responsible public entity should set forth in the RFP the format and supporting information that is required to be submitted, consistent with the provisions of the PPEA.

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

IV. Unsolicited Proposals

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

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

Public-Private Education Facilities and Infrastructure Act of 2002

A. Decision to Accept and Consider Unsolicited Proposal Notice

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

2. If the responsible public entity chooses to accept an unsolicited proposal for conceptual-phase consideration, it shall post a notice in a public area regularly used by the public entity for posting of public notices for a period of not less than 45 days. The responsible public entity shall also publish the same notice for a period of not less than 45 days in one or more newspapers or periodicals of general circulation in the jurisdiction to notify any parties that may be interested in submitting competing unsolicited proposals. In addition, the notice should also be advertised in Virginia Business Opportunities. The notice shall state that the public entity (i) has received and accepted an unsolicited proposal under the PPEA, (ii) intends to evaluate the proposal, (iii) may negotiate a comprehensive agreement with the proposer based on the proposal, and (iv) will accept for simultaneous consideration any competing proposals that comply with the procedures adopted by the public entity and the PPEA. The notice also shall summarize the proposed qualifying project or projects, and identify their proposed locations. Copies of unsolicited proposals shall be available upon request, subject to the provisions of FOIA and § 56-575.4 G of the PPEA.

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

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

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

a. Standard procurement procedures consistent with the VPPA; or.

b. Procedures developed by the responsible public entity that are consistent with procurement of other than professional services through "competitive negotiation" as the term is deemed in § 2.2-4301 of the Code of Virginia. The responsible public entity may proceed using such procedures only if it makes a written determination that doing so is likely to be advantageous to the responsible public entity and the public based upon either (i) the probable scope, complexity or urgency of need, or (ii) the risk sharing, added value, increase in funding or economic benefit from the project would otherwise not be available.

Public-Private Education Facilities and Infrastructure Act of 2002

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

- (i) Not to proceed further with any proposal
- (ii) To proceed to the detailed phase of review with the original proposal,
- (iii) To proceed to the detailed phase with a competing proposal, or
- (iv) To proceed to the detailed phase with multiple proposals.

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

V. Proposal Preparation and Submission

A. Format for Submissions at Conceptual Stage

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

1. Qualification and Experience -

- a. Identify the legal structure of the firm or consortium of firms making the proposal. Identify the organizational structure for the project, the management approach and how each partner and major subcontractor in the structure fits into the overall team.
- b. Describe the experience of the firm or consortium of firms making the proposal and the key principals involved in the proposed project including experience with projects of comparable size and complexity. Describe the length of time in business, business experience, public sector experience and other engagements of the firm or consortium of firms. Include the identity of any firms that will provide design, construction and completion guarantees and warranties and a description of such guarantees and warranties.

c. Provide the names, addresses, and telephone numbers of persons within the firm or consortium of firms who may be contacted for further information.

d. Provide a current or most recently audited financial statement of the firm or firms, and each partner with an equity interest of twenty percent or greater.

e. Identify any persons known to the proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31. (§ 2.2-3100 et seq.) of Title 2.2.

2. Project Characteristics

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

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
- c. Include a list and discussion of assumptions underlying all major elements of the plan. -
- 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.

4. Project Benefit and Compatibility

- a. Identify who will benefit from the project, how they will benefit and how the project will benefit the overall community, region, or state.
- b. Identify any anticipated public support or opposition, as well as any anticipated government support or opposition, for the project.
- c. Explain the strategy and plans that will be carried out to involve and inform the general public, business community, and governmental agencies in areas affected by the project.
- d. Describe the anticipated significant benefits to the community, region or state including anticipated benefits to the economic condition of the public entity and whether the project is critical to attracting or maintaining competitive industries and businesses to the public entity or the surrounding region
- e. Compatibility with the local comprehensive plan, local infrastructure development plans, the capital improvements budget or other government spending plan.

B. Format for Submissions at Detailed Stage

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

1. A topographical map (1:2,000 or other appropriate scale) depicting the location of the proposed project)
2. A list of public utility facilities, if any, that will be crossed by the qualifying project and a statement of the plans of the proposer to accommodate such crossings;
3. A statement and strategy setting out the plans for securing all necessary property. The statement must include the names and addresses, if known, of the current owners of the subject property as well as a list of any property the proposer intends to request the public entity to condemn;
4. A detailed listing of all firms that will provide specific design, construction and completion guarantees and warranties, and a brief description of such guarantees and warranties;
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.

Public-Private Education Facilities and Infrastructure Act of 2002

10. Identification of any known conflicts of interest or other disabilities that may impact the public entity's consideration of the proposal, including the identification of any persons known to the proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2.

11. Additional material and information as the public entity may reasonably request.

VI. Proposal Evaluation and Selection Criteria

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

A. Qualifications and Experience

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

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

Public-Private Education Facilities and Infrastructure Act of 2002

4. Technology; technical feasibility;
5. Conformity to laws, regulations, and standards
6. Environmental impacts;
7. Condemnation impacts
8. State and local permits; and
9. Maintenance of the project.

C. Project Financing

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

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

D. Project Benefit and Compatibility

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

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

VII. Comprehensive Agreement

Prior to acquiring, designing, constructing, improving, renovating, expanding, equipping, maintaining, or operating the qualifying project, the selected proposer shall enter into a comprehensive agreement with the responsible public entity. The responsible public entity may designate a working group to be responsible for negotiating the comprehensive agreement. Each comprehensive agreement shall define the rights and obligations of the responsible public entity and the selected proposer with regard to the project.

The terms of the comprehensive agreement shall include but not be limited to:

1. The delivery of maintenance, performance and payment bonds or letters of credit in connection with any acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project;
2. The review of plans and specifications for the qualifying project by the responsible public entity;
3. The rights of the responsible public entity 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 operator by the responsible public entity to ensure proper maintenance;
6. The terms under which the operator will reimburse the responsible public' entity for services provided;
7. The policy and procedures that will govern the rights and responsibilities of the responsible public entity and the operator in the event that the comprehensive agreement is terminated or there is a material default by the operator including the conditions governing assumption of the duties and responsibilities of the operator by the responsible public entity and the transfer or purchase of property or other interests of the operator by the responsible public entity;
8. The terms under which the operator will file appropriate financial statements on a periodic basis.

Public-Private Education Facilities and Infrastructure Act of 2002

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 are 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.
 - b. A schedule of the current user fees or lease payments shall be made available by the operator 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 may contribute financial resources, if any, for the qualifying project; and
11. Other requirements of the PPEA.

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