# Public-Private Education Facilities and Infrastructure Act of 2002

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

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## Introduction

### Overview

The Public-Private Education Facilities and Infrastructure Act of 2002 (the "PPEA") 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" (RPE) to include any public entity that "has the power to develop or operate the applicable qualifying project." Individually negotiated interim or comprehensive agreements between a private entity and an RPE will define the respective rights and obligations of the RPE and the private entity.

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 that meets a public purpose and is developed or operated by or for 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;

(v) A recreational facility;

(vi) Technology infrastructure and services, including but not limited to telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services;

(vii) Technology, equipment, or infrastructure designed to deploy wireless broadband services to schools, businesses, or residential areas, or

(viii) Any improvements necessary or desirable to any unimproved locally- or state-owned real estate.

The PPEA establishes requirements that the RPE 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 interim or comprehensive agreement detailing the relationship between the RPE and the private entity.

In passing the legislation, and following subsequent amendments to the Act in 2005, 2006, and 2007, the General Assembly directed the Governor and the chairs of the House and Senate Committees on General Laws to facilitate the development of model guidelines to assist in the implementation of the PPEA. Because the PPEA is intended to encourage innovative partnerships between RPEs and private entities, RPEs are encouraged to maintain an open dialogue with private entities to discuss the need for infrastructure improvements.

**Guidelines for the review and approval of proposals and projects**

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

Guidelines adopted by all RPEs are required to include provisions that require the posting and publishing of public notice of a private entity's request for approval of a qualifying project, including (i) specific information and documentation to be released regarding the nature, timing, and scope of the qualifying project pursuant to subsection A of § 56-575.4; (ii) a reasonable time period of at least 45 days during which the RPE shall receive competing proposals pursuant to subsection A of § 56-575.4. Such time period shall also be determined by the RPE to encourage competition and public-private partnerships in accordance with the goals of the PPEA; and (iii) a requirement for advertising the public notice in the Virginia Business Opportunities publication and posting a notice on the Commonwealth's electronic procurement website.

RPEs that are agencies or institutions of the Commonwealth are required to include the following provisions in their guidelines:

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

2. Reasonable criteria for choosing among competing proposals;

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

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

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

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

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

8. Criteria for triggering the establishment of an advisory committee consisting of representatives of the RPE and the appropriating body to review the terms of the proposed interim or comprehensive agreement. Suggested criteria include the scope, costs, and duration of the qualifying project, as well as whether the project involves or impacts multiple RPEs;

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

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

Guidelines of local RPEs must include a requirement that such RPEs engage the services of qualified professionals, which may include an architect, professional engineer, or certified public accountant, not otherwise employed by the public entity, to provide independent analysis regarding the specifics, advantages, disadvantages, and the long- and short-term costs of any request by a private entity for approval of a qualifying project unless the governing body of the RPE determines that such analysis of a request by a private entity for approval of a qualifying project shall be performed by employees of the RPE.

**Statement of Purpose**

The following model guidelines have been developed to assist RPEs in adopting guidelines to guide the implementation of the PPEA. The guidelines are intended to serve as a general guide for the implementation of the PPEA. The RPE is not required to adopt the entire text of the model guidelines. Each RPE has the flexibility to add or delete provisions included in the model guidelines and to include provisions not contained in the model guidelines so long as the resulting guidelines comply with the PPEA. The complete text of the PPEA has been included in the Appendix to these model

guidelines. 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.

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

## I. General Provisions

### A. Proposal Submission

A proposal may be either solicited by the RPE or delivered by a private entity on an unsolicited basis. Proposers may be required to follow a two-part proposal submission process consisting 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 2001 for the development of education facilities using public-private partnerships, and to provide for carryovers of any unused limitation amount. The PPEA is a flexible development tool that allows the use of innovative financing techniques. Depending on the RPE's authority and the circumstances of each transaction, financing options might include the use of special purpose entities, sale and lease back transactions, enhanced use leasing, property exchanges, development agreements, conduit financing and other methods allowed by law.

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 RPE. 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 scope of work and a financial plan for the project, containing enough detail to allow an analysis by the RPE of the financial feasibility of the proposed project. The cost analysis of a proposal should not be linked solely to the financing plan, as the RPE may determine to finance the project through other available means.

The RPE should establish clearly delineated criteria for (i) selecting among competing proposals and (ii) the use of accelerated documentation, review, and selection processes for proposals involving a qualifying project that the RPE deems a priority. In addition, to facilitate the flow of critical information, the RPE may establish criteria by which the proposer may provide clarification to a submitted proposal.

**B. Affected Jurisdictions**

Any private entity requesting approval from or submitting a conceptual or detailed proposal to the RPE must provide each affected jurisdiction with a copy of the private entity's request or proposal by certified mail, express delivery, or hand delivery. Affected jurisdictions that are not RPEs under the proposed qualifying project shall have 60 days from the receipt of the request or proposal to submit written comments to the RPE 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 RPE, and no negative inference shall be drawn from the absence of comment by an affected jurisdiction.

**C. Proposal Review Fee**

The RPE shall receive an analysis of the proposal from appropriate internal staff or outside advisors or consultants with relevant experience in determining whether to enter into an agreement with the private entity. The RPE may charge a fee to the private entity to cover the costs 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, the RPE may require a proposal fee in an amount sufficient to cover all anticipated direct costs associated with evaluating the proposal, or the RPE may require a smaller initial processing fee with an additional proposal fee to be charged should the project proceed beyond the initial review.

The RPE may establish a fee schedule for the cost of the proposal review. The RPE 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 RPE may assess the proposer the additional costs deemed necessary to evaluate the proposal.

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

**D. Freedom of Information Act**

**1. General applicability of disclosure provisions.**

Proposal documents submitted by private entities are generally subject to the Virginia Freedom of Information Act ("FOIA") except that subdivision 11 of § 2.2-3705.6 exempts certain documents from public disclosure. FOIA exemptions, however, are discretionary, and the RPE may elect to release some or all of documents except to the extent the documents are:

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

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

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

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

An RPE may contact the Freedom of Information Act Council (FOIAC) regarding the applicability of the access provisions of FOIA:

| | |
|---|---|
| General Assembly Building, 2nd Floor | Telephone: 804/225-3056 |
| 910 Capitol Street Richmond, VA 23219 | Toll-Free: 1-866-448-4100 |
| E-mail: foiacouncil@leg.state.va.us | Fax: 804/371-8705 |

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

Before a document of a private entity may be withheld from disclosure, the private entity must make a written request to the RPE at the time the documents are submitted designating with specificity the documents for which the protection is being

sought and a clear statement of the reasons for invoking the protection with reference to one or more of three classes of records listed in Section I.D.1.

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

Once a written determination has been made by the RPE, the documents afforded protection under this subdivision shall continue to be protected from disclosure when in the possession of the RPE or any affected jurisdiction to which such documents are provided.

If a private entity fails to designate trade secrets, financial records, or other confidential or proprietary information for protection from disclosure, such information, records or documents shall be subject to disclosure under FOIA.

**3. Protection from mandatory disclosure for certain documents produced by the RPE.**

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

Cost estimates relating to a proposed procurement transaction prepared by or for the RPE shall not be open to public inspection.

**4. The RPE may not withhold from public access:**

(a) procurement records other than those subject to the written determination of the RPE;

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

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

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

However, to the extent that access to any procurement record or other document or information is compelled or protected by a court order, then the RPE must comply with such order.

**E. Use of Public Funds**

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

## II. Solicited Proposals

The RPE may issue Requests for Proposals (RFPs) or Invitations for Bids (IFBs), inviting proposals from private entities to develop or operate qualifying projects. An RPE may not issue a RFP until it has adopted guidelines to govern the PPEA documentation, review, and selection process. The RPE 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 RPE. In such a case the RPE 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 RPE may establish suggested timelines for selecting proposals for the review and selection of solicited proposals.

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 RPE's notices, including the RPE's website. Notices should also be published in a newspaper or other publications of general circulation and advertised in *Virginia Business Opportunities* and posted on the Commonwealth's electronic procurement site. In addition, solicited proposals should be posted pursuant to Section III.B. 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 RPE.

## III. Unsolicited Proposals

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

The RPE may publicize its needs and may encourage interested parties to submit unsolicited 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. The RPE may establish suggested timelines for selecting proposals for the review and selection of unsolicited proposals.

### 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 RPE should determine whether to accept the unsolicited proposal for the purpose of publication and conceptual-phase consideration. If the RPE 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 RPE chooses to accept an unsolicited proposal for publication and conceptual-phase consideration, it shall post a notice in a public area regularly used by the RPE for posting of public notices for a period of not less than 45 days. The RPE 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 be advertised in *Virginia Business Opportunities* and on the Commonwealth's electronic procurement website. The notice shall state that the RPE (i) has received an unsolicited proposal under the PPEA, (ii) intends to evaluate the proposal, (iii) may negotiate an interim or comprehensive agreement with the proposer based on the proposal, and (iv) will receive for simultaneous consideration any competing proposals that comply with the procedures adopted by the RPE and the PPEA. The notice also shall summarize the proposed qualifying project or projects, and identify their proposed locations.

To ensure that sufficient information is available upon which to base the development of a serious competing proposal, representatives of the RPE familiar with the unsolicited proposal and the guidelines established by the RPE shall be made available to respond to inquiries and meet with private entities that are considering the submission of a competing proposal. The RPE shall conduct an analysis of the information pertaining to the proposal included in the notice to ensure that such information sufficiently encourages competing proposals. Further, the RPE shall establish criteria, including key decision points and approvals to ensure proper consideration of the extent of competition from available private entities prior to selection.

**B. Posting Requirements**

1. Conceptual proposals, whether solicited or unsolicited, shall be posted by the RPE within 10 working days after acceptance of such proposals in the following manner:

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

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

2. Nothing shall be construed to prohibit the posting of the conceptual proposals by additional means deemed appropriate by the RPE so as to provide maximum notice to the public of the opportunity to inspect the proposals.

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

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

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

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

a. Standard procurement procedures consistent with the VPPA; or

b. Guidelines developed by the RPE that are consistent with procurement of other than professional services through "competitive negotiation" as the term is defined in § 2.2-4301 of the Code of Virginia. The RPE may proceed using such guidelines only if it makes a written determination that doing so is likely to be advantageous to the RPE and the public based upon either (i) the probable scope, complexity or priority of need; (ii) the risk sharing including guaranteed cost or completion guarantees, added

value or debt, or equity investments proposed by the private entity; or (iii) the increase in funding, dedicated revenue or other economic benefit that would otherwise not be available.

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

(i) not to proceed further with any proposa;

(ii) to proceed to the detailed phase of review with the original proposal;

(iii) to proceed to the detailed phase with a competing proposal;

(iv) to proceed to the detailed phase with multiple proposals; or

(v) to request modifications or amendments to any proposals.

In the event that more than one proposal will be considered in the detailed phase of review, the RPE 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.

4. Discussions between RPEs and private entities about the need for infrastructure improvements shall not limit the ability of a RPE to later determine to use standard procurement procedures to meet its infrastructure needs. The RPE retains the right to reject any proposal at any time prior to the execution of an interim or comprehensive agreement.

## IV. Proposal Preparation and Submission

### A. Format for Submissions at Conceptual Stage

A RPE 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 RPE may reasonably request to comply with the requirements of the PPEA. Suggestions for formatting information to be included in proposals at this stage include the items listed below, as well as any additional information or documents that RPE may request:

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 RPE.

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 RPE's use of the project.

i. Provide information relative to phased or partial openings of the proposed project prior to completion of the entire work.

j. List any other assumptions relied on for the project to be successful.

k. List any contingencies that must occur for the project to be successful.

3. Project Financing

a. Provide a preliminary estimate and estimating methodology of the cost of the work by phase, segment, or both.

b. Submit a plan for the development, financing, and operation of the project showing the anticipated schedule on which funds will be required. Describe the anticipated costs of and proposed sources and uses for such funds including any anticipated debt service costs. The operational plan should include appropriate staffing levels and associated costs. Include supporting due diligence studies, analyses, or reports.

c. Include a list and discussion of assumptions underlying all major elements of the plan. Assumptions should include all significant fees associated with financing given the recommended financing approach. In addition complete disclosure of interest rate assumptions should be included. Any ongoing operational fees, if applicable, should also be disclosed as well as any assumptions with regard to increases in such fees.

d. Identify the proposed risk factors and methods for dealing with these factors.

e. Identify any local, state, or federal resources that the proposer contemplates requesting for the project. Describe the total commitment, if any, expected from governmental sources and the timing of any anticipated commitment. Such disclosure should include any direct or indirect guarantees or pledges of the RPE's credit or revenue.

f. Identify the amounts and the terms and conditions for any revenue sources.

g. Identify any aspect of the project that could disqualify the project from obtaining tax-exempt financing.

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 RPE and whether the project is critical to attracting or maintaining competitive industries and businesses to the RPE or the surrounding region.

e. Describe compatibility with the local comprehensive plan, local infrastructure development plans, the capital improvements budget, or other government spending plan.

f. Provide a statement setting forth participation efforts that are intended to be undertaken in connection with this project with regard to the following types of businesses: (i) minority-owned businesses, (ii) woman-owned businesses, and (iii) small businesses.

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

If the RPE 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 RPE:

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;

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 project or 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 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 RPE'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 RPE may reasonably request.

## V. Proposal Evaluation and Selection Criteria

There are several factors that the RPE may wish to consider when evaluating and selecting a proposal under the PPEA. The following are some of the factors that may be considered by the RPE in the evaluation and selection of PPEA proposals.

**A. Qualifications and Experience**

Factors to be considered in either phase of the RPE's review to determine whether the proposer possesses the requisite qualifications and experience 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;
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 RPE;

2. Financing and the impact on the debt burden of the RPE or appropriating body;

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

4. Opportunity costs assessment;

5. Estimated cost;

6. Life-cycle cost analysis;

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

8. Such other items as the RPE deems appropriate.

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

**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.

**E. Other Factors**

Other factors that may be considered by the RPE in the evaluation and selection of PPEA proposals include:

1. The proposed cost of the qualifying project;

2. The general reputation, industry experience, and financial capacity of the private entity;

3. The proposed design of the qualifying project;

4. The eligibility of the project for accelerated documentation, review, and selection;

5. Local citizen and government comments;

6. Benefits to the public, including financial and nonfinancial;

7. The private entity's compliance with a minority business enterprise participation plan or good faith effort to comply with the goals of such plan;

8. The private entity's plans to employ local contractors and residents;

9. The recommendation of a committee of representatives of members of the RPE and the appropriating body which may be established to provide advisory oversight for the project; and

10. Other criteria that the RPE deems appropriate.

## VI. Additional Review Procedures.

### A. Public Private Partnership Oversight Advisory Committee

An RPE that is an agency or institution of the Commonwealth shall and all other RPEs may establish criteria to trigger establishment of an advisory committee consisting of representatives of the RPE and the appropriating body to review the terms of the proposed interim or comprehensive agreement. The criteria should include, but not be limited to, the scope, total cost and duration of the proposed project, and whether the project involves or impacts multiple public entities. Timelines for the work of the committee should be developed and made available to proposers.

### B. Appropriating Body

If the RPE for appropriating or authorizing funding to pay for a qualifying project is different from the RPE reviewing or approving the project, then the RPE reviewing or approving the project should establish a mechanism for that appropriating body to review any proposed interim or comprehensive agreement prior to execution. When a school board is the RPE, review by the local governing body shall satisfy this requirement..

## VII. Interim and Comprehensive Agreements

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

### A. Interim Agreement Terms

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

1. Project planning and development;

2. Design and engineering;

3. Environmental analysis and mitigation;

4. Survey;

5. Ascertaining the availability of financing for the proposed facility through financial and revenue analysis;

6. Establishing a process and timing of the negotiation of the comprehensive agreement; and

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

### B. Comprehensive Agreement Terms

The scope 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 RPE;

3. The rights of the RPE to inspect the qualifying project to ensure compliance with the comprehensive agreement;

4. The maintenance of a policy or policies of liability insurance or self-insurance reasonably sufficient to insure coverage of the project and the tort liability to the public and employees and to enable the continued operation of the qualifying project;

5. The monitoring of the practices of the private entity by the RPE to ensure proper maintenance;

6. The terms under which the private entity will reimburse the RPE for services provided;

7. The policy and procedures that will govern the rights and responsibilities of the RPE and the private entity in the event that the comprehensive agreement is terminated or there is a material default by the private entity including the conditions governing assumption of the duties and responsibilities of the private entity by the RPE and the transfer or purchase of property or other interests of the private entity by the RPE;

8. The terms under which the private entity will file appropriate financial statements on a periodic basis;

9. The mechanism by which user fees, lease payments, or service payments, if any, may be established from time to time upon agreement of the parties. Any payments or fees shall be set at a level that is the same for persons using the facility under like conditions and that will not materially discourage use for the qualifying project;

    a. A copy of any service contract shall be filed with the 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 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 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 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 III. B, 30 days prior to entering into an interim or comprehensive agreement, the 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 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 the RPE, the RPE shall post the proposed agreement in the following manner:

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

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

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

d. Any studies and analyses considered by the RPE in its review of a proposal shall be disclosed to the appropriating body at some point prior to the execution of an interim or comprehensive agreement.

3. Once an interim agreement or a comprehensive agreement has been entered into, the RPE shall make procurement records available for public inspection, upon request.

a. Such procurement records shall include documents protected from disclosure during the negotiation phase on the basis that the release of such documents would have adverse affect on the financial interest or bargaining position of the RPE or private entity in accordance with Section II.D.3.

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

To the extent access to procurement records are compelled or protected by a court order, then the RPE must comply with such order.

## VIII. Governing Provisions

In the event of any conflict between these guidelines and the PPEA, the terms of the PPEA shall control.

## Terms and Definitions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**"Private entity"** means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity, or other business entity.

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

**"Qualifying project"** means (i) any education facility, including, but not limited to a school building, any functionally related and subordinate facility and land of a school building (including any stadium or other facility primarily used for school events), 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) any building or facility that meets a public purpose and is developed or operated by or for any public entity; (iii) any 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; (v) a recreational facility; (vi) technology infrastructure and services, including, but not limited to, telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services; (vii) any technology, equipment, or infrastructure designed to deploy wireless broadband services to schools, businesses, or residential areas; or (viii) any improvements necessary or desirable to any unimproved locally- or state-owned real estate.

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

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

**"Service contract"** means a contract entered into between a public entity and the private entity pursuant to § 56-575.5.

**"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.