

**Public-Private Education Facilities and
Infrastructure Act of 2002, as Amended**

Commonwealth of Virginia

Guidelines and Procedures

Revised October 1, 2006

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I. INTRODUCTION

The Public-Private Education Facilities and Infrastructure Act of 2002, as amended¹ (the Act, or PPEA) is the legislative framework enabling departments, agencies and institutions of the Commonwealth of Virginia, as well as local governments and certain other public bodies, to enter agreements authorizing private entities (sometimes referred to herein as “Private Partner” or “Contractor”) to develop and/or operate qualifying projects as defined in the Act. The guidelines and procedures presented in this document were developed pursuant to the requirements of Virginia Code § 56-575.3:1 and 56-575.16. These guidelines and procedures are to be followed by departments, agencies and institutions of the Commonwealth (all sometimes referred to herein as “Agency”) in considering and developing projects under the Act. The guidelines and procedures will also guide private entities who wish to partner with Agencies in undertaking projects pursuant to the Act.

The Act grants responsible public entities authority to create public-private partnerships for development of a wide range of projects for public use if the public entities determine there is a need for such projects and that private involvement may provide the project in a more timely or cost-effective fashion, considering, among other things, the probable scope, complexity or priority of the project; risk sharing including guaranteed cost or completion guarantees; added value or debt or equity investments proposed by the private entity; or an increase in funding, dedicated revenue source or other economic benefit that would not otherwise be available.

Virginia Code §56-575.16.2, provides, in part: “When the responsible public entity determines to proceed according to the guidelines adopted by it pursuant to this subdivision, it shall state the reasons for its determination in writing. If a state agency is the responsible public entity, the approval of the responsible Governor's Secretary, or the Governor, shall be required before the responsible public entity may enter into a comprehensive agreement pursuant to this subdivision.” Agencies may enter an interim agreement or a comprehensive agreement under the Act, if they are so advised, only after the Governor or responsible Cabinet Secretary has approved proceeding to the Detailed Stage (Part 2) of the PPEA process. With such approval, the head of the Agency, or the Agency’s Board if applicable, may approve entering the interim and/or comprehensive agreement.

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, such as:

¹ Va. Code §§56-575.1 through 56-575.17

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- (i) An education facility, including, but not limited to, a school building, any functionally-related and subordinate facility (a stadium, for example), land appurtenant 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, including, but not limited to, telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services, or
- (vii) Any improvements necessary or desirable to any unimproved locally or state-owned real estate.

Because the PPEA is intended to encourage innovative partnerships between responsible public entities and private entities, Agencies are encouraged to maintain an open dialogue with private entities to discuss the need for infrastructure improvements.

Although guidance with regard to the application of the PPEA is provided in this document, it is incumbent upon all entities, both public and private, to comply with the provisions of the PPEA and other applicable laws. The complete text of the PPEA (current through 2006) is included in the Appendix to this document.

II. GENERAL PROVISIONS

A. Proposal Submission

Proposals may be invited through solicitation or they may be considered when delivered by a private entity on an unsolicited basis. In either case, proposers must follow a two-part submission process

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consisting of an initial Conceptual Stage (Part 1) and, after approval of the conceptual stage, a Detailed Stage (Part 2). The initial stage of the proposal should provide specified information on proposer qualifications and experience, project characteristics, project financing, anticipated public support or opposition, or both, and project benefit and compatibility. The Part 2 detailed proposal must provide detailed scope and budget estimates and identify deliverables.

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. Benefits to be considered are those occurring during the construction, renovation, expansion or improvement phase and during the life cycle of the project. Proposals should include a comprehensive scope of work and a financial plan for the project that contains enough detail to allow analysis of the proposed project's financial feasibility. The PPEA is a flexible development tool that allows use of innovative financing techniques. Depending on the Agency'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. However, the cost analysis of a proposal should not be linked solely to the financing plan as the Commonwealth may determine to finance the project through other available means such as through the Virginia Public Building Authority.

The PPEA is intended to encourage proposals from the private sector that offer the assumption of commensurate risk by the private partner through innovative approaches to project financing, development and/or use. However, while substantial private sector involvement is encouraged, qualifying facilities must be devoted primarily to *public* use, typically involving facilities critical to public health, safety and welfare. Accordingly, Agencies shall continue to exercise full and proper due diligence in the evaluation and selection of private entities to carry-out the proposals. In this regard, the qualifications, capabilities, resources and other attributes of a prospective private partner and its entire team must be carefully examined for every project. Private entities proposing projects shall be held strictly accountable for representations regarding their qualifications, experience and any other content of their proposals, including all aspects of work to be performed.

B. Affected Local Jurisdictions

Va. Code § 56-575.6 requires that any private entity requesting approval from or submitting a proposal to the Commonwealth must provide each affected unit of local government a copy of the private entity's request or proposal. The private entity is responsible for documenting delivery of the request or proposal.

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Affected local jurisdictions must have 60 days from the receipt of the request or proposal to submit written comments to the responsible Agency. Comments received by the affected Agency within the 60-day period shall be considered in evaluating the request or proposal; however, no negative inference shall be drawn from the absence of comment by a local jurisdiction.

In providing the request or proposal to the affected local jurisdiction, the private entity may withhold information that the Agency has deemed to be confidential and not subject to release under the Freedom of Information Act.

C. Proposal Review Fee

No fee will be charged by Agencies to process, review or evaluate any solicited proposal submitted under the PPEA.

For unsolicited proposals and competing proposals, Agencies shall charge a fee of one-half of one percent (0.5%) of the estimated cost of implementing the proposal. The minimum fee shall be \$5,000 and the maximum fee shall be \$50,000. For purposes of initial processing of the proposal, the Agency may accept the \$5,000 minimum fee with the balance to be due and payable prior to proceeding beyond the initial review stage. Such sums shall be paid with certified funds and shall be deposited in the State Treasury on the books of the Comptroller in a special statewide fund known as the PPEA Fund.

- If the cost of reviewing the proposal is less than the established proposal fee, the Agency may refund the excess to the proposer.
- If during the initial review the Agency decides not to proceed to conceptual-stage review of an unsolicited proposal, the proposal fee, less any direct costs of the initial review, shall be refunded to the private entity.
- If the Agency chooses to proceed with evaluation of proposal(s) under the PPEA, it shall not do so until the entire, non-refundable proposal fee has been paid to the Commonwealth in full.

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 § 2.2-3705.6 (11) exempts certain documents from public disclosure. FOIA exemptions, however, are discretionary, and a

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responsible public body 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.
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 responsible public entity at the time the documents are submitted earmarking² 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 D.1.

Upon the receipt of a written request for protection of documents, the responsible public entity 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 responsible public entity or private entity in accordance with Section D.1. The responsible public entity shall make a written determination of the nature and scope of the protection to be afforded by the responsible public entity 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 D.1.

Once a written determination has been made by the responsible public entity, the documents afforded protection under this subdivision shall continue to be protected from disclosure when

² "Earmarking" denotes the process of identifying trade secrets and other proprietary records for which protection is sought.

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in the possession of the responsible public entity or any affected local jurisdiction to which such documents are provided.

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

3. Protection from mandatory disclosure for certain documents produced by the responsible public entity.

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

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

4. If a private entity fails to earmark confidential or proprietary information, records or documents for protection from disclosure, such information, records or documents shall be subject to disclosure under FOIA.

5. A responsible public entity may not withhold from public access:

- (a) procurement records other than those subject to the written determination of the responsible public entity;

- (b) information concerning the terms and conditions of any interim or comprehensive agreement, service contract, lease, partnership, or any agreement of any kind executed by the responsible public entity 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 project.

E. Applicability of Other Laws

Once an interim or comprehensive agreement has been executed, Agencies shall make available, upon request, procurement records in accordance with Va. Code §2.2-4342.

In soliciting or entertaining proposals under the PPEA, Agencies shall comply with all applicable federal, , state and local laws not in conflict with the PPEA. Likewise, in submitting proposals and in developing, executing or operating facilities under the PPEA, Contractors shall comply with all applicable federal, , state and local laws. Such laws may include, but not necessarily be limited to, contractual obligations which require Workers Compensation insurance coverage, performance bonds or payment bonds from approved sureties, compliance with the Virginia Prompt Payment Act, compliance with the Ethics in Public Contracting Act and compliance with environmental laws, workplace safety laws, and state or local laws governing contractor or trade licensing, building codes and building permit requirements.

Departments, agencies and institutions of the Commonwealth of Virginia are constitutionally prohibited from expending funds that are not appropriated by the Virginia General Assembly. Therefore, expenditure of state funds in support of an interim or comprehensive agreement requires and must be conditioned upon such appropriation of funds.

Proposals should avoid the creation of state-supported debt; however, should a proposal include such debt, procedures to secure specific approval by the Governor, General Assembly, the Department of Planning and Budget, the Department of the Treasury, and any other appropriate entities must be included in the proposal.. In addition, a clear and detailed alternative if such approval is not achieved must be provided.

Any Agency considering construction of facilities through solicited or unsolicited proposals shall be responsible for ensuring compliance with the provisions of § 10.1-1188 of the Code of Virginia as it regards environmental issues and the need for an Environmental Impact Report .

In accordance with existing state law, or pursuant to directive from the Governor's Office, other Agencies may also have a right and/or responsibility with respect to the project and the Contractor's compliance with the terms of the comprehensive agreement.

While procedures incorporated in these guidelines are consistent with those of Virginia Code §§ 2.2-4301, under § 56-573.1 the selection process for solicited or unsolicited project proposals is not subject to the Virginia Public Procurement Act (§ 2.2-4300 et seq.).

III. SOLICITED PROPOSALS

With the written authorization of the head of the Agency, a Request for Proposals (RFP) may be issued inviting proposals from private entities to develop and/or operate qualifying projects. The Agency shall use a two-part proposal process consisting of an initial conceptual stage (Part 1) and a detailed stage (Part 2). The RFP shall invite qualified parties to submit proposals on individual projects identified by the Agency. In such case, the Agency shall 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 must specify any information and documents required by the Agency and the factors that will be used in evaluating proposals. The RFP also should contain or incorporate by reference applicable Virginia standard terms and conditions, and should specify any unique capabilities or qualifications that will be required of the private entities. Pre-proposal conferences may be held as deemed appropriate by the Agency.

The RFP shall be posted on the Commonwealth's electronic procurement website (<http://www.eva.state.va.us/>). Notices shall also be published in a newspaper or other publications of general circulation and advertised on the *Virginia Business Opportunities Newsletter* website.

IV. UNSOLICITED PROPOSALS

The PPEA permits Agencies to consider unsolicited proposals received from private entities for development and/or operation of qualifying projects.

Agencies may publicize their needs and 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 under the Act. Unsolicited proposals should be submitted to the head of the affected Agency, and the delivery should be confirmed for the submitter by written receipt. If a proposal clearly affects multiple Agencies, or if it is uncertain as to which Agency is best suited to receive a proposal, it should be submitted to the Secretary of Administration.

A. Decision to Accept and Consider Unsolicited Proposal; Notice

1. The Commonwealth reserves the right to reject any and all proposals at any time.

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2. Upon receipt of any unsolicited proposal, or group of proposals, and payment of the required fee by the proposer or proposers, the agency or institution should determine whether to accept the unsolicited proposal for publication and conceptual stage consideration. If the Agency determines not to accept the proposal, it shall return the proposal, together with all fees and accompanying documentation, to the proposer.
3. a. If an Agency chooses to accept an unsolicited proposal for conceptual-stage consideration, it shall invite competing proposals by posting notices on the Commonwealth's electronic procurement website eVA at <http://www.eva.state.va.us/>, and in such other public area(s) as may be regularly used for posting of public notices. The notices shall be posted for such period as the Agency deems necessary and reasonable, but in no event less than 45 days. The Agency may also should publish, at least once, the same notice in one or more newspapers or periodicals of general circulation in the affected jurisdiction(s), providing notice of pending or potential action in not less than 45 days. The Agency shall provide for more than 45 days in situations where the scope or complexity of the original proposal warrants additional time for potential competitors to prepare proposals.
- b. The notice shall state that the Agency (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 accept for simultaneous consideration any competing proposals that comply with the procedures adopted by the Commonwealth and the provisions of the PPEA. The notice will 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. Representatives of the agency or institution are encouraged to answer questions from private entities that are contemplating submission of a competing unsolicited proposal.
- c. Prior to posting of the notices provided for in this subsection, the Agency shall receive from the initial proposer(s) the balance due, if any, of the required project proposal review fee.

B. Posting Requirements

1. Conceptual proposals, whether solicited or unsolicited, shall be posted by the responsible public entity within 10 working days after acceptance of such proposals on the

Department of General Service's web-based electronic procurement program commonly known as "eVA;".

2. Nothing shall be construed to prohibit the posting of the conceptual proposals by additional means deemed appropriate by the responsible public entity 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 responsible public entity 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 Commonwealth at the Conceptual Stage (Part 1)

After reviewing the original proposal and any competing proposals submitted during the notice period, the Agency may recommend to the responsible Cabinet Secretary, or the Governor:

- (i) not to proceed further with any proposal,
- (ii) to proceed to the detailed (Part 2) stage of review with the original proposal,
- (iii) to proceed to the detailed (Part 2) stage with a competing proposal, or
- (iv) to proceed to the detailed (Part 2) stage with multiple proposals.

The responsible Cabinet Secretary, or the Governor (if there is not a responsible Cabinet Secretary), shall approve, in writing, in advance, the course of action to be implemented by the agency or institution, after considering the comments of Secretaries of Finance and Administration.

In the event that more than one proposal will be considered in the detailed (Part 2) stage of review, the Agency shall determine whether the unsuccessful private entity, or entities, shall be reimbursed, in whole or in part, for costs incurred in the detailed stage of review. In such case, reasonable costs may be assessed to the successful proposer as part of any ensuing interim or comprehensive agreement.

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Discussions between the Agency and a private entity about the need for infrastructure improvements shall not inhibit the Agency's ability to employ other procurement procedures to meet such needs. The Commonwealth retains the right to reject any proposal at any time, without penalty, prior to the execution of an interim or comprehensive agreement.

V. REVIEW OF SOLICITED AND UNSOLICITED PROPOSALS

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 will be considered by the Agency for further review at the conceptual stage. Formatting suggestions for proposals at the conceptual stage are found at Section VI A.
2. The Agency will determine at the initial review stage whether it will proceed using:
 - a. Standard procurement procedures consistent with the Virginia Public Procurement Act³; or
 - b. Procedures developed that are consistent with procurement of other than professional services through "competitive negotiation" as the term is defined in Virginia Code § 2.2-4301 (competitive negotiation). The Agency may proceed using such procedures only if it makes a written determination that doing so is likely to be advantageous to the Commonwealth and the public based upon either (i) the probable scope, complexity or priority of need, or (ii) the risk sharing, including guaranteed cost or completion guarantees, added value or debt or equity investments proposed by the private entity, or increase in funding, dedicated revenue or other economic benefit from the project would otherwise not be available.

When an Agency elects to use competitive negotiations, its written determination should consider factors such as risk sharing, added value and/or economic benefits from the project that would not be available without competitive negotiation. In addition, the written determination should explain how the scope, complexity, and/or urgency of the project are such that competitive negotiation is determined necessary.

VI. PROPOSAL PREPARATION AND SUBMISSION

³ Va. Code § 2.2-4300 et seq.

A. Format for Submissions at Conceptual Stage (Part 1)

Proposals at the conceptual stage must 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) such additional information as may seem prudent which is not inconsistent with the requirements of the PPEA. Suggestions for presenting information to be included in proposals at the Conceptual 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 (\$1 million or more) in the structure fits into the overall team. All members of the offeror's team, including major subcontractors known to the proposer must be identified at the time a proposal is submitted for the Conceptual Stage. Include the status of the Virginia license of each partner, proposer, contractor, and major subcontractor. Identified team members, including major subcontractors (over \$5 million), may not be substituted or replaced once a project is approved and comprehensive agreement executed without the written approval of the responsible Agency.
- 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. Describe the past safety performance record and current safety capabilities of the firm or consortium of firms. Describe the past technical performance history on recent projects of comparable size and complexity, including disclosure of any legal claims, 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. For each firm or major subcontractor (\$1 million or more) that will be utilized in the project, provide a statement listing all of the firm's prior projects and clients for the past 3 years with contact information for such clients (names/addresses /telephone numbers).

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If a firm has worked on more than ten (10) projects during this period, it may limit its prior project list to ten (10), but shall first include all projects similar in scope and size to the proposed project and, second, it shall include as many of its most recent projects as possible. Each firm or major subcontractor shall be required to submit all performance evaluation reports or other documents in its possession evaluating the firm's performance during the preceding three years in terms of cost, quality, schedule, safety and other matters relevant to the successful project development, operation, and completion.

- d. Provide the names, addresses, and telephone numbers of persons within the firm or consortium of firms who may be contacted for further information.
- e. 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.
- f. 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.
- g. Identify proposed plan for obtaining sufficient numbers of qualified workers in all trades or crafts required for the project.
- h. Provide information on any training programs, including but not limited to apprenticeship programs registered with the U.S. Department of Labor or a State Apprenticeship Council, in place for employees of the firm and employees of any member of a consortium of firms.
- i. Provide information on the level of commitment by the firm or consortium of firms to use Department of Minority Business Enterprise certified firms in developing and implementing the project.
- j. For each firm or major subcontractor that will perform construction and/or design activities, provide the following information:
 - (1) A sworn certification by an authorized representative of the firm attesting to the fact that the firm is not currently debarred or suspended by any federal, state or local government entity.

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(2) A completed qualification statement on a form developed by the Commonwealth that reviews all relevant information regarding technical qualifications and capabilities, firm resources and business integrity of the firm, including but not limited to, bonding capacities, insurance coverage and firm equipment. This statement shall also include a mandatory disclosure by the firm for the past three years any of the following conduct:

- (A) bankruptcy filings
- (B) liquidated damages
- (C) fines, assessments or penalties
- (D) judgments or awards in contract disputes
- (E) contract defaults, contract terminations
- (F) license revocations, suspensions, other disciplinary actions
- (G) prior debarments or suspensions by a governmental entity
- (H) denials of prequalification, findings of non-responsibility
- (I) safety past performance data, including fatality incidents, "Experience Modification Rating," "Total Recordable Injury Rate" and "Total Lost Workday Incidence Rate"
- (J) violations of any federal, state or local criminal or civil law
- (K) criminal indictments or investigations
- (L) legal claims filed by or against the firm

k. Worker Safety Programs: Describe worker safety training programs, job-site safety programs, accident prevention programs, written safety and health plans, including incident investigation and reporting procedures.

l. Virginia Code 22.1-296.1C provides: "Prior to awarding a contract for the provision of services that require the contractor or his employees to have direct contact with students, the school board shall require the contractor and, when relevant, any employee who will have direct contact with students, to provide certification that (i) he has not been convicted of a felony or any offense involving the sexual molestation or physical or sexual abuse or rape of a child; and (ii) whether he has been convicted of a crime of moral turpitude." Identify the proposed plan for complying with the intent of Va. Code §22.1-296.1C (whether or not the statute applies to the client Agency) if the contractor or its employees or subcontractors, will have direct contact with students.

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. Indicate if environmental and archaeological assessments have been completed.
- 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. Identify contingency plans for addressing public needs in the event that all or some of the project is not completed according to projected schedule.
- h. Propose allocation of risk and liability for work completed beyond the agreement's completion date, and assurances for timely completion of the project.
- i. 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.
- j. Provide information relative to phased or partial openings of the proposed project prior to completion of the entire work.
- k. List any other assumptions relied on for the project to be successful.
- l. 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 any 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 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 Commonwealth'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 community benefits, including the economic impact the project will have on the Commonwealth and local community in terms of amount of tax revenue to be generated for the Commonwealth and political subdivisions, the number jobs generated for Virginia residents and level of pay and fringe benefits of such jobs, the training opportunities for

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apprenticeships and other training programs generated by the project and the number and value of subcontracts generated for Virginia subcontractors.

- 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 plan that will be carried out to involve and inform the general public, business community, local governments, and governmental agencies in areas affected by the project;
- d. Describe the compatibility of the project with local, regional, and state economic development efforts.
- e. Describe the compatibility with the local comprehensive plan, local infrastructure development plans, and any capital improvements budget or other local spending plan.
- f. Provide a statement setting forth participation efforts 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 (Part 2)

If the Commonwealth decides to proceed to the detailed stage (Part 2) with one or more proposals, each selected private entity must provide the following information, where applicable, unless the responsible Agency waives the requirement or requirements:

1. A topographical map (1:2,000 or other appropriate scale) depicting the location of the proposed project;
2. A conceptual site plan indicating proposed location and configuration of the project on the proposed site;
3. Conceptual (single line) plans and elevations depicting the general scope, appearance and configuration of the proposed project;

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4. A detailed description of the proposed participation, use and financial involvement of the State, agency and/or locality in the project. Include the proposed terms and conditions for the project if they differ from the standard state General Conditions;
5. 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;
6. 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;
7. 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;
8. 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.
9. A detailed discussion of assumptions regarding user fees or rates and usage of the projects.
10. Identification and discussion 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.
11. Demonstration of consistency with appropriate local comprehensive or infrastructure development plans or indication of the steps required for acceptance into such plans.
12. Explanation of how the proposed project would impact local development plans of each affected local jurisdiction.

13. Description of an ongoing performance evaluation system or database to track key performance criteria, including but not limited to, schedule, cash management, quality, worker safety, change orders, and legal compliance.

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

15. Acknowledge conformance with Virginia Code Sections 2.2-4367 thru 2.2-4377 (the Ethics in Public Contracting Act);

16. Additional material and information as the Agency may request.

VII. PROPOSAL EVALUATION AND SELECTION CRITERIA

In selecting proposals, all relevant information from both the Conceptual Stage and the Detailed Stage must be considered, along with the following:

A. Qualifications and Experience

To determine whether the proposer possesses the requisite qualifications and experience, factors to consider in review of either phase should include:

1. Experience, training and preparation with similar projects;

2. Demonstration of ability to perform work;

3. Demonstrated record of successful past performance, including timeliness of project delivery, compliance with plans and specifications, quality of workmanship, cost-control and project safety;

4. Demonstrated conformance with applicable laws, codes, standards, regulations, and agreements on past projects;
5. Leadership structure;
6. Project manager's experience;
7. Management approach;
8. Project staffing plans, the skill levels of the proposed workforce, apprenticeship and other training programs offered for the project, and the proposed safety plans for the project;
9. Financial condition; and
10. Project ownership.

B. Project Characteristics

Factors to consider in determining the project characteristics include:

1. Project definition;
2. Proposed project schedule;
3. Operation of the project;
4. Technology, technical feasibility;
5. Conformance with applicable laws, regulations, codes, guidelines 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 Agency;
2. Financing and the impact on the debt or debt burden of the Agency and Commonwealth;
3. Financial plan, including overall feasibility and reliability of plan; operator's past performance with similar plans and similar projects; degree to which operator has conducted due diligence investigation and analysis of proposed financial plan and results of any such inquiries or studies.
4. Estimated cost; and
5. Life-cycle cost.
6. The identity, credit history, and past performance of any third party that will provide financing for the project and the nature and timing of their commitment, as applicable; and,
7. Such other items as the Commonwealth deems appropriate.

The Commonwealth may elect to accept the private entity's financing proposal or may select its own finance team, source, and financing vehicle.

D. Public 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, including the economic impact the project will have on the Commonwealth and local community in terms of amount of tax revenue to be generated

for the Commonwealth and political subdivisions, the number jobs generated for Virginia residents and level of pay and fringe benefits of such jobs, the training opportunities for apprenticeships and other training programs generated by the project and the number and value of subcontracts generated for Virginia subcontractors.

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 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;
7. The private entity's compliance with a minority business plan, enterprise participation plan or good faith effort to comply with the goals of such plans;
8. The private entity's plan to employ local contractors and residents; and,
9. Other criteria that the Commonwealth deems appropriate.

VIII. INTERIM AND COMPREHENSIVE AGREEMENTS

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Neither the Commonwealth nor the Agency shall accept liability for any part or phase of a project prior to entering into a properly executed interim or comprehensive agreement. The head of the affected Agency, or the Agency's Board, shall approve any interim or comprehensive agreement executed pursuant to the PPEA, but no such agreement shall be executed prior to receiving approval by the Governor or the appropriate Cabinet Secretary authorizing the Agency to proceed to the Detailed stage (Part 2) of the PPEA.

Any changes in the terms of an executed interim or comprehensive agreement shall be in the form of a written amendment.

A. Interim Agreement Terms

Interim agreements may be used when it is necessary or advisable to segment a project to produce distinct and clear deliverables necessary to keep the project moving towards development of a comprehensive agreement. An interim agreement may not be used to have the Commonwealth assume risks that should be assumed by the proposer or to pay costs attributable to the private entity's efforts in making the proposal. Interim agreements require the same level of approval as Comprehensive Agreements.

Development of an interim agreement is in the sole discretion of the head of the affected Agency and in no way limits the rights reserved by the Agency or the Commonwealth to terminate the evaluation of any or all proposals at any time.

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 by the Commonwealth, its agencies or instrumentalities;
3. The rights of the Commonwealth to inspect the project to ensure compliance with the comprehensive agreement and any development plans and specifications;

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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 Commonwealth, its agencies or instrumentalities to ensure proper maintenance;
6. The terms under which the Contractor will reimburse the Commonwealth for services provided;
7. The policy and procedures that will govern the rights and responsibilities of the Commonwealth and the Contractor in the event that the comprehensive agreement is terminated or there is a material default by the Contractor including the conditions governing assumption of the duties and responsibilities of the Contractor by the Agency and the transfer or purchase of property or other interests of the Contractor by the Agency;
8. The terms under which the Contractor 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 Commonwealth.
 - b. A schedule of the current user fees or lease payments shall be made available by the Contractor 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 Agency may be required to contribute financial resources, if any;

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11. The terms and conditions under which existing site conditions will be addressed, including identification of the party responsible for conducting assessments and taking necessary remedial action;
12. The terms and conditions under which the Agency will be required to pay money to the private entity and the amount of any such payments for the project.
13. A periodic reporting procedure that incorporates a description of the impact of the project on the Commonwealth;
14. Such other terms and conditions as the Commonwealth may deem appropriate.

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

Parties submitting proposals understand that representations, information and data supplied in support of or in connection with proposals play a critical role in the competitive evaluation process and in the ultimate selection of a proposal by the Commonwealth. Accordingly, as part of the Comprehensive Agreement, the prospective operator and its team members shall certify that all material representations, information and data provided in support of, or in connection with, a proposal is true and correct. Such certifications shall be made by authorized individuals who have knowledge of the information provided in the proposal. In the event that material changes occur with respect to any representations, information or data provided for a proposal, the prospective operator shall immediately notify the Commonwealth of same. Any violation of this section of the Comprehensive Agreement shall give the Commonwealth the right to terminate the Agreement, withhold payment or other consideration due, and seek any other remedy available under the law.

C. Notice and Posting requirements

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

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

a. For responsible public entities 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;" at www.eva.state.va.us and

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

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 responsible public entity and the private entity.

3. Once an interim agreement or a comprehensive agreement has been executed, the responsible Agency shall make procurement records available for public inspection, upon request.

a. Such procurement records shall include documents protected from disclosure on the basis that the release of such documents would adversely affect the financial interest or bargaining position of the responsible public entity or private entity.

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.

IX. GOVERNING PROVISIONS

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

APPENDIX

Public-Private Education Facilities and Infrastructure Act of 2002 as amended (through 2006)

§ 56-575.1. Definitions.

As used in this chapter, unless the context requires a different meaning:

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

"Commission" means the State Corporation Commission.

"Comprehensive agreement" means the comprehensive agreement between the private entity and the responsible public entity required by § 56-575.9.

"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.

"Material default" means any default by the private entity in the performance of its duties under subsection E of § 56-575.8 that jeopardizes adequate service to the public from a qualifying project.

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

"Private entity" means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, non-profit 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 to 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, including, but not limited to, telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services; or (vii) 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.

(2002, c. 571; 2003, c. 1034; 2005, cc. 618, 865.)

§ 56-575.2. Declaration of public purpose.

A. The General Assembly finds that:

1. There is a public need for timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, operation, implementation, or installation of education facilities, technology infrastructure and other public infrastructure and government facilities within the Commonwealth that serve a public need and purpose;

2. Such public need may not be wholly satisfied by existing methods of procurement in which qualifying projects are acquired, designed, constructed, improved, renovated, expanded, equipped, maintained, operated, implemented, or installed;

3. There are inadequate resources to develop new education facilities, technology infrastructure and other public infrastructure and government facilities for the benefit of citizens of the Commonwealth, and there is demonstrated evidence that public-private partnerships can meet these needs by improving the schedule for delivery, lowering the cost, and providing other benefits to the public;

4. Financial incentives exist under state and federal tax provisions that promote public entities to enter into partnerships with private entities to develop qualifying projects;

5. Authorizing private entities to develop or operate one or more qualifying projects may result in the availability of such projects to the public in a more timely or less costly fashion, thereby serving the public safety, benefit, and welfare.

B. An action under § 56-575.4 shall serve the public purpose of this chapter if such action facilitates the timely development or operation of qualifying projects.

C. It is the intent of this chapter, among other things, to encourage investment in the Commonwealth by private entities and facilitate the bond financing provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 or other similar financing mechanisms, private capital and other funding sources that support the development or operation of qualifying projects, to the end that financing for qualifying projects be expanded and accelerated to improve and add to the convenience of the public, and such that public and private entities may have the greatest possible flexibility in contracting with each other for the provision of the public services that are the subject of this chapter.

D. This chapter shall be liberally construed in conformity with the purposes hereof.

(2002, c. 571; 2003, c. 1034; 2005, c. 865.)

§ 56-575.3. Prerequisite for operation of a qualifying project.

A. Any private entity seeking authorization under this chapter to develop or operate a qualifying project shall first obtain approval of the responsible public entity under § 56-575.4. Such private entity may initiate the approval process by requesting approval pursuant to subsection A of § 56-575.4 or the responsible public entity may request proposals or invite bids pursuant to subsection B of § 56-575.4.

B. Any facility, building, infrastructure or improvement included in a proposal as a part of a qualifying project shall be identified specifically or conceptually.

C. Upon receipt by the responsible public entity of a proposal submitted by a private entity initiating the approval process pursuant to subsection A of § 56-575.4, the responsible public entity shall determine whether to accept such proposal for consideration in accordance with § 56-575.16. If the responsible public entity determines not to accept for consideration the proposal submitted by the private entity pursuant to subsection A of § 56-575.4, it shall return the proposal, together with all fees and accompanying documentation, to the private entity.

D. The responsible public entity may reject any proposal initiated by a private entity pursuant to subsection A of § 56-575.4 at any time.

(2002, c. 571; 2003, cc. 292, 1034; 2005, c. 865.)

§ 56-575.3:1. Adoption of guidelines by responsible public entities.

A. Any responsible public entity requesting or considering a proposal for a qualifying facility shall adopt and make publicly available guidelines that are sufficient to enable the responsible public entity to comply with this chapter. Such guidelines shall guide the selection of projects under the purview of the responsible public entity and include, but not be limited to, reasonable criteria for choosing among competitive proposals and timelines for selecting proposals and negotiating an interim or comprehensive agreement.

B. Such guidelines shall permit accelerated selection, review and documentation timelines for proposals involving a qualifying facility that the responsible public entity deems a priority.

(2005, c. 865.)

§ 56-575.4. Approval of qualifying projects by the responsible public entity.

A. A private entity may request approval of a qualifying project by the responsible public entity. Any such request shall be accompanied by the following material and information unless waived by the responsible public entity:

1. A topographic map (1:2,000 or other appropriate scale) indicating the location of the qualifying project;

2. A description of the qualifying project, including the conceptual design of such facility or facilities or a conceptual plan for the provision of services or technology infrastructure, and a schedule for the initiation of and completion of the qualifying project to include the proposed major responsibilities and timeline for activities to be performed by both the public and private entity;

3. A statement setting forth the method by which the private entity proposes to secure necessary property interests required for the qualifying project;

4. Information relating to the current plans for development of facilities or technology infrastructure to be used by a public entity that are similar to the qualifying project being proposed by the private entity, if any, of each affected local jurisdiction;

5. A list of all permits and approvals required for the qualifying project from local, state, or federal agencies and a projected schedule for obtaining such permits and approvals;

6. A list of public utility facilities, if any, that will be crossed by the qualifying project and a statement of the plans of the private entity to accommodate such crossings;

7. A statement setting forth the private entity's general plans for financing the qualifying project including the sources of the private entity's funds and identification of any dedicated revenue source or proposed debt or equity investment on the behalf of the private entity;

8. The names and addresses of the persons who may be contacted for further information concerning the request;

9. User fees, lease payments, and other service payments over the term of the interim or comprehensive agreement pursuant to § 56-575.9 or 56-575.9:1 and the methodology and circumstances for changes to such user fees, lease payments, and other service payments over time; and

10. Such additional material and information as the responsible public entity may reasonably request.

B. The responsible public entity may request proposals or invite bids from private entities for the development or operation of qualifying projects.

C. The responsible public entity may grant approval of the development or operation of the education facility, technology infrastructure or other public infrastructure or government facility needed by a public entity as a qualifying project, or the design or equipping of a qualifying project so developed or operated, if the responsible public entity determines that the project serves the public purpose of this chapter. The responsible public entity may determine that the development or operation of the qualifying project as a qualifying project serves such public purpose if:

1. There is a public need for or benefit derived from the qualifying project of the type the private entity proposes as a qualifying project;

2. The estimated cost of the qualifying project is reasonable in relation to similar facilities; and

3. The private entity's plans will result in the timely development or operation of the qualifying project.

In evaluating any request, the responsible public entity may rely upon internal staff reports prepared by personnel familiar with the operation of similar facilities or the advice of outside advisors or consultants having relevant experience.

D. The responsible public entity may charge a reasonable fee to cover the costs of processing, reviewing and evaluating the request, including without limitation, reasonable attorney's fees and fees for financial, technical, and other necessary advisors or consultants.

E. The approval of the responsible public entity shall be subject to the private entity's entering into an interim or comprehensive agreement pursuant to § 56-575.9 with the responsible public entity.

F. In connection with its approval of the qualifying project, the responsible public entity shall establish a date for the commencement of activities related to the qualifying project. The responsible public entity may extend such date from time to time.

G. The responsible public entity shall take appropriate action to protect confidential and proprietary information provided by the private entity pursuant to an agreement under subdivision 11 of § 2.2-3705.6.

H. Nothing in this chapter or in an interim or comprehensive agreement entered into pursuant to this chapter shall be deemed to enlarge, diminish or affect the authority, if any, otherwise possessed by the responsible public entity to take action that would impact the debt capacity of the Commonwealth.

(2002, c. 571; 2003, c. 1034; 2004, c. 690; 2005, c. 865.)

§ 56-575.5. Service contracts.

In addition to any authority otherwise conferred by law, any public entity may contract with a private entity for the delivery of services to be provided as part of a qualifying project in exchange for such service payments and other consideration as such public entity may deem appropriate.

(2002, c. 571; 2005, c. 865.)

§ 56-575.6. Affected local jurisdictions.

A. Any private entity requesting approval from, or submitting a proposal to, a responsible public entity under § 56-575.4 shall notify each affected local jurisdiction by furnishing a copy of its request or proposal to each affected local jurisdiction.

B. Each affected local jurisdiction that is not a responsible public entity for the respective qualifying project shall, within sixty days after receiving such notice, submit any comments it may have in writing on the proposed qualifying project to the responsible public entity and indicate whether the facility is compatible with the local comprehensive plan, local infrastructure development plans, the capital improvements budget, or other government spending plan. Such comments shall be given consideration by the responsible public entity prior to entering a comprehensive agreement pursuant to § 56-575.9 with a private entity.

(2002, c. 571.)

§ 56-575.7. Dedication of public property.

Any public entity may dedicate any property interest, including land, improvements, and tangible personal property, that it has for public use in a qualifying project if it finds that so doing will serve the public purpose of this chapter by minimizing the cost of a qualifying project to the public entity or reducing the delivery time of a qualifying project. In connection with such dedication, a public entity may convey any property interest that it has, subject to the conditions imposed by general law governing such conveyances, to the private entity subject to the provisions of this chapter, for such consideration as such public entity may determine. The aforementioned consideration may include, without limitation, the agreement of the private entity to develop or operate the qualifying project. The property interests that the public entity may convey to the private entity in connection with a dedication under this section may include licenses, franchises, easements, or any other right or interest the public entity deems appropriate.

(2002, c. 571; 2005, c. 865.)

§ 56-575.8. Powers and duties of the private entity.

A. The private entity shall have all power allowed by law generally to a private entity having the same form of organization as the private entity and shall have the power to develop or operate the qualifying project and collect lease payments, impose user fees or enter into service contracts in connection with the use thereof.

B. The private entity may own, lease or acquire any other right to use or operate the qualifying project.

C. Any financing of the qualifying project may be in such amounts and upon such terms and conditions as may be determined by the private entity. Without limiting the generality of the foregoing, the private entity may issue debt, equity or other securities or obligations, enter into sale and leaseback transactions and secure any financing with a pledge of, security interest in, or lien on, any or all of its property, including all of its property interests in the qualifying project.

D. In operating the qualifying project, the private entity may:

1. Make classifications according to reasonable categories for assessment of user fees; and

2. With the consent of the responsible public entity, make and enforce reasonable rules to the same extent that the responsible public entity may make and enforce rules with respect to similar facilities.

E. The private entity shall:

1. Develop or operate the qualifying project in a manner that is acceptable to the responsible public entity, all in accordance with the provisions of the interim or comprehensive agreement pursuant to § 56-575.9 or 56-575.9:1;

2. Keep the qualifying project open for use by the members of the public at all times, or as appropriate based upon the use of the facility, after its initial opening upon payment of the applicable user fees, lease payments, or service payments; provided that the qualifying project may be temporarily closed because of emergencies or, with the consent of the responsible public entity, to protect the safety of the public or for reasonable construction or maintenance activities. In the event that a qualifying project is technology infrastructure, access may be limited as determined by the conditions of the interim or comprehensive agreement;

3. Maintain, or provide by contract for the maintenance or upgrade of the qualifying project, if required by the interim or comprehensive agreement;

4. Cooperate with the responsible public entity in making best efforts to establish any interconnection with the qualifying project requested by the responsible public entity; and

5. Comply with the provisions of the interim or comprehensive agreement and any lease or service contract.

F. Nothing shall prohibit an private entity of a qualifying project from providing additional services for the qualifying project to public or private entities other than the responsible public entity so long as the provision of additional service does not impair the private entity's ability to meet its commitments to the responsible public entity pursuant to the interim or comprehensive agreement as provided for in § 56-575.9 or 56-575.9:1.

(2002, c. 571; 2003, c. 1034; 2005, c. 865.)

§ 56-575.9. *Comprehensive agreement.*

A. Prior to developing or operating the qualifying project, the private entity shall enter into a comprehensive agreement with the responsible public entity. The comprehensive agreement shall provide for:

- 1. Delivery of maintenance, performance and payment bonds, letters of credit in connection with the development or operation of the qualifying project, in the forms and amounts satisfactory to the responsible public entity and in compliance with § 2.2-4337 for those components of the qualifying project that involve construction;*
- 2. Review of plans and specifications for the qualifying project by the responsible public entity and approval by the responsible public entity if the plans and specifications conform to standards acceptable to the responsible public entity. This shall not be construed as requiring the private entity to complete design of a qualifying project prior to the execution of a comprehensive agreement;*
- 3. Inspection of the qualifying project by the responsible public entity to ensure that the private entity's activities are acceptable to the responsible public entity in accordance with the provisions of the comprehensive agreement;*
- 4. Maintenance of a policy or policies of public liability insurance (copies of which shall be filed with the responsible public entity accompanied by proofs of coverage) or self-insurance, each in form and amount satisfactory to the responsible public entity and reasonably sufficient to insure coverage of tort liability to the public and employees and to enable the continued operation of the qualifying project;*
- 5. Monitoring of the practices of the private entity by the responsible public entity to ensure that the qualifying project is properly maintained;*
- 6. Reimbursement to be paid to the responsible public entity for services provided by the responsible public entity;*
- 7. Filing of appropriate financial statements on a periodic basis; and*
- 8. Policies and procedures governing the rights and responsibilities of the responsible public entity and the private entity in the event the comprehensive agreement is terminated or there is a material default by the private entity. Such policies and guidelines shall include conditions governing assumption of the duties and responsibilities of the private entity by the responsible public entity and the transfer or purchase of property or other interests of the private entity by the responsible public entity.*

B. The comprehensive agreement shall provide for such user fees, lease payments, or service payments as may be established from time to time by agreement of the parties. A copy of any service contract shall be filed with the responsible public entity. In negotiating user fees under this section, the parties shall establish payments or fees that are the same for persons using the facility under like conditions and that will not materially discourage use of the qualifying project. The execution of the comprehensive agreement or any amendment thereto shall constitute conclusive evidence that the user fees, lease payments, or service payments provided for comply with this chapter. User fees or lease payments established in the comprehensive agreement as a source of revenues may be in addition to, or in lieu of, service payments.

C. In the comprehensive agreement, the responsible public entity may agree to make grants or loans to the private entity from time to time from amounts received from the federal, state, or local government or any agency or instrumentality thereof.

D. The comprehensive agreement shall incorporate the duties of the private entity under this chapter and may contain such other terms and conditions that the responsible public entity determines serve the public purpose of this chapter. Without limitation, the comprehensive agreement may contain provisions under which the responsible public entity agrees to provide notice of default and cure rights for the benefit of the private entity and the persons specified therein as providing financing for the qualifying project. The comprehensive agreement may contain such other lawful terms and conditions to which the private entity and the responsible public entity mutually agree, including, without limitation, provisions regarding unavoidable delays or provisions providing for a loan of public funds to the private entity to develop or operate one or more qualifying projects. The comprehensive agreement may also contain provisions where the authority and duties of the private entity under this chapter shall cease, and the qualifying project is dedicated to the responsible public entity or, if the qualifying project was initially dedicated by an affected local jurisdiction, to such affected local jurisdiction for public use.

E. 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.

F. When a responsible public entity that is not an agency or authority of the Commonwealth enters into a comprehensive agreement pursuant to this chapter, it shall within 30 days thereafter submit a copy of the comprehensive agreement to the Auditor of Public Accounts.

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

(2002, c. 571; 2003, c. 1034; 2004, c. 986; 2005, c. 865.)

§ 56-575.9:1. Interim agreement.

Prior to or in connection with the negotiation of the comprehensive agreement, the responsible public entity may enter into an interim agreement with the private entity proposing the development or operation of the qualifying project. Such interim agreement may (i) permit the private entity to commence activities for which it may be compensated relating to the proposed qualifying project, including, but not limited to, project planning and development, design and engineering, environmental analysis and mitigation, survey, and ascertaining the availability of financing for the proposed facility or facilities; (ii) establish the process and timing of the negotiation of the comprehensive agreement; and (iii) contain any other provisions related to any aspect of the development or operation of a qualifying project that the parties may deem appropriate.

(2005, c. 865.)

§ 56-575.10. Federal, state and local assistance.

A. Any financing of a qualifying facility may be in such amounts and upon such terms and conditions as may be determined by the parties to the interim or comprehensive agreement. Without limiting the generality of the terms and conditions of the financing, the private entity and the responsible public entity may propose to utilize any and all funding resources that may be available to them and may, to the fullest extent permitted by applicable law, issue debt, equity, or other securities or obligations, enter into leases, access any designated trust funds, borrow or accept grants from any state infrastructure bank, and secure any financing with a pledge of, security interest in, or lien on, any or all of its property, including all of its property interests in the qualifying facility.

B. The responsible public entity may take any action to obtain federal, state, or local assistance for a qualifying project that serves the public purpose of this chapter and may enter into any contracts required to receive such assistance. If the responsible public entity is a state agency, any funds received from the state or federal government or any agency or instrumentality thereof shall be subject to appropriation by the General Assembly. The responsible public entity may determine that it serves the public purpose of this chapter for all or any portion of the costs of a qualifying project to be paid, directly or indirectly, from the proceeds of a grant or loan made by the local, state, or federal government or any agency or instrumentality thereof.

(2002, c. 571; 2005, c. 865.)

§ 56-575.11. Material default; remedies.

A. In the event of a material default by the private entity, the responsible public entity may elect to assume the responsibilities and duties of the private entity of the qualifying project, and in such case, it shall succeed to all of the right, title and interest in such qualifying project, subject to any liens on revenues previously granted by the private entity to any person providing financing thereof.

B. Any responsible public entity having the power of condemnation under state law may exercise such power of condemnation to acquire the qualifying project in the event of a material default by the private entity. Any person who has provided financing for the qualifying project, and the private entity, to the extent of its capital investment, may participate in the condemnation proceedings with the standing of a property owner.

C. The responsible public entity may terminate, with cause, the interim or comprehensive agreement and exercise any other rights and remedies that may be available to it at law or in equity.

D. The responsible public entity may make or cause to be made any appropriate claims under the maintenance, performance, or payment bonds; or lines of credit required by subsection A 1 of § 56-575.9.

E. In the event the responsible public entity elects to take over a qualifying project pursuant to subsection A, the responsible public entity may develop or operate the qualifying project, impose user fees, impose and collect lease payments for the use thereof and comply with any service contracts as if it were the private entity. Any revenues that are subject to a lien shall be collected for the benefit of and paid to secured parties, as their interests may appear, to the extent necessary to satisfy the private entity's obligations to secured parties, including the maintenance of reserves. Such liens shall be correspondingly reduced and, when paid off, released. Before any payments to, or for the benefit of, secured parties, the responsible public entity may use revenues to pay current operation and maintenance costs of the qualifying project, including compensation to the responsible public entity for its services in operating and maintaining the qualifying project. The right to receive such payment, if any, shall be considered just compensation for the qualifying project. The full faith and credit of the responsible public entity shall not be pledged to secure any financing of the private entity by the election to take over the qualifying project. Assumption of operation of the qualifying project shall not obligate the responsible public entity to pay any obligation of the private entity from sources other than revenues.

(2002, c. 571; 2003, c. 1034; 2005, c. 865.)

§ 56-575.12. Condemnation.

At the request of the private entity, the responsible public entity may exercise any power of condemnation that it has under law for the purpose of acquiring any lands or estates or interests therein to the extent that the responsible public entity finds that such action serves the public purpose of this chapter. Any amounts to be paid in any such condemnation proceeding shall be paid by the private entity.

(2002, c. 571; 2005, c. 865.)

§ 56-575.13. *Utility crossing.*

The private entity and each public service company, public utility, railroad, and cable television provider, whose facilities are to be crossed or affected shall cooperate fully with the other entity in planning and arranging the manner of the crossing or relocation of the facilities. Any such entity possessing the power of condemnation is hereby expressly granted such powers in connection with the moving or relocation of facilities to be crossed by the qualifying project or that must be relocated to the extent that such moving or relocation is made necessary or desirable by construction of, renovation to, or improvements to the qualifying project, which shall be construed to include construction of, renovation to, or improvements to temporary facilities for the purpose of providing service during the period of construction or improvement. Any amount to be paid for such crossing, construction, moving or relocating of facilities shall be paid for by the private entity. Should the private entity and any such public service company, public utility, railroad, and cable television provider not be able to agree upon a plan for the crossing or relocation, the Commission may determine the manner in which the crossing or relocation is to be accomplished and any damages due arising out of the crossing or relocation. The Commission may employ expert engineers who shall examine the location and plans for such crossing or relocation, hear any objections and consider modifications, and make a recommendation to the Commission. In such a case, the cost of the experts is to be borne by the private entity. Such determination shall be made by the Commission within ninety days of notification by the private entity that the qualifying project will cross utilities subject to the Commission's jurisdiction.

(2002, c. 571; 2005, c. 865.)

§ 56-575.14. *Police powers; violations of law.*

All police officers of the Commonwealth and of each affected local jurisdiction shall have the same powers and jurisdiction within the limits of such qualifying project as they have in their respective areas of jurisdiction and such police officers shall have access to the qualifying project at any time for the purpose of exercising such powers and jurisdiction.

(2002, c. 571.)

§ 56-575.15. *Sovereign immunity.*

Nothing in this chapter shall be construed as or deemed a waiver of the sovereign immunity of the Commonwealth, any responsible public entity or any affected local jurisdiction or any officer or employee thereof with respect to the participation in, or approval of all or any part of the qualifying project or its operation, including but not limited to interconnection of the qualifying project with any other infrastructure or project. Counties, cities and towns in which a qualifying project is located shall possess sovereign immunity with respect to its design, construction, and operation.

(2002, c. 571.)

§ 56-575.16. *Procurement.*

The Virginia Public Procurement Act (§ 2.2-4300 et seq.) and any interpretations, regulations, or guidelines of the Division of Engineering and Buildings of the Department of General Services or the Virginia Information Technologies Agency, including the Capital Outlay Manual and those interpretations, regulations or guidelines developed pursuant to §§ 2.2-1131, 2.2-1132, 2.2-1133, 2.2-1149, and 2.2-1502, except those developed by the Division or the Virginia Information Technologies Agency in accordance with this chapter when the Commonwealth is the responsible public entity, shall not apply to this chapter. However, a responsible public entity may enter into a comprehensive agreement only in accordance with guidelines adopted by it as follows:

1. A responsible public entity may enter into a comprehensive agreement in accordance with guidelines adopted by it that are consistent with procurement through competitive sealed bidding as defined in § 2.2-4301 and subsection B of § 2.2-4310.

2. A responsible public entity may enter into a comprehensive agreement in accordance with guidelines adopted by it that are consistent with the procurement of "other than professional services" through competitive negotiation as defined in § 2.2-4301 and subsection B of § 2.2-4310. Such responsible public entity shall not be required to select the proposal with the lowest price offer, but may consider price as one factor in evaluating the proposals received. Other factors that may be considered include (i) the proposed cost of the qualifying facility; (ii) the general reputation, industry experience, and financial capacity of the private entity; (iii) the proposed design of the qualifying project; (iv) the eligibility of the facility for accelerated selection, review, and documentation timelines under the responsible public entity's guidelines; (v) local citizen and government comments; (vi) benefits to the public; (vii) the private entity's compliance with a minority business enterprise participation plan or good faith effort to comply with the goals of such plan; (viii) the private entity's plans to employ local contractors and residents; and (ix) other criteria that the responsible public entity deems appropriate.

A responsible public entity shall proceed in accordance with the guidelines adopted by it pursuant to subdivision 1 unless it determines that proceeding in accordance with the guidelines adopted by it pursuant to this subdivision is likely to be advantageous to the responsible public entity and the public, based on (i) the probable scope, complexity or priority of the project; (ii) risk sharing including guaranteed cost or completion guarantees, added value or debt or equity investments proposed by the private entity; or (iii) an increase in funding, dedicated revenue source or other economic benefit that would not otherwise be available. When the responsible public entity determines to proceed according to the guidelines adopted by it pursuant to this subdivision, it shall state the reasons for its determination in writing. If a state agency is the responsible public entity, the approval of the responsible Governor's Secretary, or the Governor, shall be required before the responsible public entity may enter into a comprehensive agreement pursuant to this subdivision.

3. Nothing in this chapter shall authorize or require that a responsible public entity obtain professional services through any process except in accordance with guidelines adopted by it that are consistent with the procurement of "professional services" through competitive negotiation as defined in § 2.2-4301 and subsection B of § 2.2-4310.

4. A responsible public entity shall not proceed to consider any request by a private entity for approval of a qualifying project pursuant to subsection A of § 56-575.4 until the responsible public entity has adopted and made publicly available guidelines that are sufficient to enable the responsible public entity to comply with this chapter. Such guidelines shall:

a. If the responsible public entity is not an agency or authority of the Commonwealth, require the responsible public entity to engage the services of qualified professionals, which may include an architect, professional engineer or certified public accountant, not employed by the responsible public entity to provide to the responsible public entity 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 responsible public entity determines that such analysis of a request by a private entity for approval of a qualifying project shall be performed by employees of the responsible public entity.

b. Provide for the posting and publishing of public notice of a private entity's request for approval of a qualifying project pursuant to subsection A of § 56-575.4 and a reasonable time period, determined by the responsible public entity to be appropriate to encourage competition and public-private partnerships pursuant to the goals of this chapter, such reasonable period not to be less than 45 days, during which the responsible public entity will receive competing proposals pursuant to that subsection.

Such guidelines shall also require advertising the public notice in the Virginia Business Opportunities publication and posting a notice on the Commonwealth's electronic procurement website.

5. A responsible public entity that is a school board or a county, city or town may enter into an interim or comprehensive agreement under this chapter only with the approval of the local governing body.

(2002, c. 571; 2003, cc. 292, 968, 1034; 2004, c. 986; 2005, c. 865; 2006, c. 936.)

§ 56-575.17. Posting of conceptual proposals; public comment; public access to procurement records.

A. Conceptual proposals submitted in accordance with subsection A or B of § 56-575.4 to a responsible public entity shall be posted by the responsible public entity within 10 working days after acceptance of such proposals as follows:

1. For responsible public entities 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

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

In addition to the posting requirements, at least one copy of the proposals shall be made available for public inspection. Nothing in this section shall be construed to prohibit the posting of the conceptual proposals by additional means deemed appropriate by the responsible public entity so as to provide maximum notice to the public of the opportunity to inspect the proposals. 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 responsible public entity and the private entity.

B. In addition to the posting requirements of subsection A, for 30 days prior to entering into an interim or comprehensive agreement, a responsible public entity shall provide an

opportunity for public comment on the proposals. The public comment period required by this subsection may include a public hearing in the sole discretion of the responsible public entity. After the end of the public comment period, no additional posting shall be required.

C. Once the negotiation phase for the development of an interim or a comprehensive agreement is complete, but before an interim agreement or a comprehensive agreement is entered into, a responsible public entity shall make available the proposed agreement in a manner provided in subsection A.

D. Once an interim agreement or a comprehensive agreement has been entered into, a responsible public entity shall make procurement records available for public inspection, upon request. For the purposes of this subsection, procurement records shall not be interpreted to 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.

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

F. Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records.

G. The provisions of this section shall apply to accepted proposals regardless of whether the process of bargaining will result in an interim or a comprehensive agreement.

(2006, c. 936.)