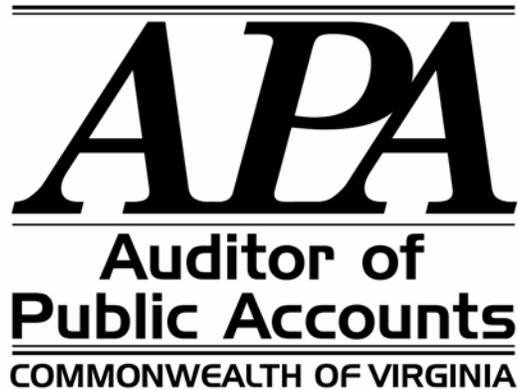


**REVIEW OF THE
PUBLIC PRIVATE EDUCATION
AND INFRASTRUCTURE ACT**

NOVEMBER 2005



EXECUTIVE SUMMARY

The Public Private Education and Infrastructure Act of 2002 (PPEA) sought to speed up the process of procuring school buildings, equipment and other infrastructure for the public good. The PPEA did this by allowing private entities to propose the type of structure, financing, and possibly where to build the structure; therefore, placing the risk on the private sector for project completion. Subsequent PPEA revisions expanded the definition of infrastructure to include information technology.

The PPEA statute provides few specific requirements and allows public entities to set guidelines. The absence of specific requirements has resulted in the following questions concerning the intent of the General Assembly in enacting this legislation:

- What roles should the General Assembly have to exercise its oversight and fiscal control responsibilities?
- What constitutes a qualifying project both in scope and level of services?
- What should the public entity possess at the end of the agreement?
- What constitutes open competition?
- What analysis or review should the public entity perform and what rigor should the public entity apply?
- Should there be additional opportunities for outside competition when the public entity starts with a PPEA that begins from a conceptual proposal?

Our report provides information relative to these questions and makes recommendations that the General Assembly may wish to consider.

1. Amending the statute to incorporate a means for General Assembly's involvement in the process and provides alternative methods of involvement.
2. Seeking clarification of legislative intent relative to whether service only agreements, which do not result in the public entity acquiring any assets, are part of the PPEA process.
3. Seeking clarification of legislative intent relative to the rigor of analysis and review required and should consider having the public entity disclose this analysis and review prior to signing a comprehensive agreement. The General Assembly may also consider requiring this information to be publicly available for some period before signing the comprehensive agreement.
4. Seeking clarification of legislative intent relative to the requirement to include several decision points in which a public entity considers competition before continuing with a PPEA.

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INTRODUCTION

The General Assembly enacted the Public Private Education and Infrastructure Act of 2002 (PPEA) to provide state agencies and institutions and local governments another procurement tool to obtain larger qualifying projects faster and with alternative financing methods. The qualifying project could include schools, support facilities, computers, and computer networks. As part of the enactment, the following clause was included in the original bill:

“...that it is the intent of the General Assembly that the Auditor of Public Accounts periodically review the comprehensive agreements approved under this chapter for compliance with this chapter.”

Within the last several years, the Commonwealth has been expanding the use of the PPEA for major capital renovations and is now using this vehicle for improving the Commonwealth’s information technology infrastructure and several major information system projects. Our work in this area has resulted in several unanswered questions regarding the PPEA process. These questions are:

1. What roles should the General Assembly have to exercise its oversight and fiscal control responsibilities?
2. What constitutes a qualifying project both in scope and level of service?
3. What should the public entity possess at the end of the agreement?
4. What constitutes open competition?
5. What analysis or review should the public entity perform and what rigor should the public entity apply?
6. Should there be additional opportunities for outside competition when the public entity starts with a PPEA that begins from a conceptual proposal?

BACKGROUND

The originally enacted Public Private Education and Infrastructure Act of 2002 (PPEA) sought to speed up the process of procuring school buildings and equipment and other infrastructure for the public good. The PPEA did this by allowing private entities to propose the type of structure, financing, and possibly where to build the structure; therefore, placing the risk on the private sector for project completion. Subsequent revisions of the PPEA expanded the definition of infrastructure to include information technology so now agencies can consider the acquisition of an entire computer system for themselves and even the Commonwealth.

In order to understand the PPEA process it is necessary to define the terms that are unique to the statute. The statutory definitions of terms are in Appendix A: Terms and Definition. Briefly, the “public entity” is any state agency or institution, local government or authority, board, or commission. A “private entity” is a company, corporation, not for profit, or other organization, independent of the public entity. An “unsolicited proposal” is when a private entity sees a public entity’s need and, without any action by the public entity, submits a plan to address the need.

Public entities can also request proposals under the PPEA to address certain needs. If the public entity has a need, but does not know how to address the need, they can solicit proposals in which the private entity analyzes the problem and proposes a solution, which is known as a “conceptual proposal.”

This background will also explain the requirements of the PPEA and will compare and contrast these requirements to a procurement using recognized best practices as well as a traditional procurement following the Virginia Public Procurement Act process. PPEA statutes do not include an extensive number of mandatory procedures or prohibitions. These limited mandatory procedures or prohibitions allow the public entity to have extensive flexibility in developing guidelines to consider PPEA proposals.

There are three unique aspects of the PPEA process as compared to a normal procurement process and they also introduce a different degree of risk to the process. These include:

1. Allowing private entities to give public entities unsolicited proposals to deal with facilities and infrastructure needs,
2. Having private entities offer financing proposals other than the use of the public entity's resources, and
3. Finally, requiring each public entity to develop its own guidelines to deal with proposals under the PPEA.

The PPEA does indicate for both the private entity and public entity the type of projects envisioned for its use. Below is the PPEA definition of a "Qualifying project."

"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 for principal use by 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; or (v) a recreational facility; or (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.

As stated earlier, the statute requires that the public entity establish internal guidelines on how it will review, select, and eventually negotiate with private entities within the PPEA statute. The statute generally has few requirements and the following is a summary of the statutory process the PPEA lays out. This process is shown in the order in which events occur, which is different than the order in which they appear in the statute.

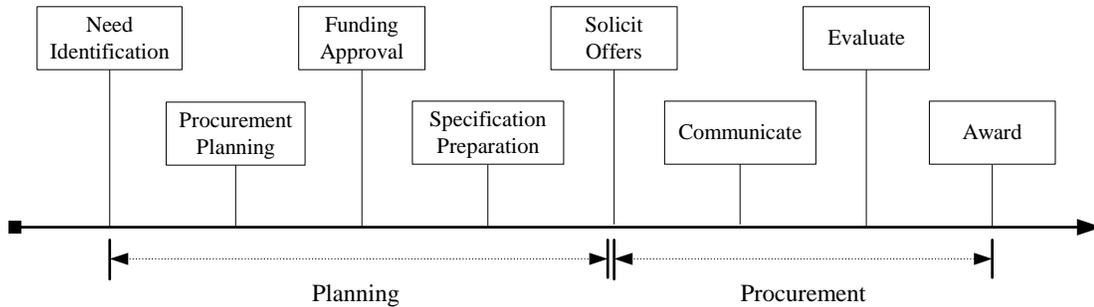
Summary of the PPEA Statute Requirements

1. The public entity must adopt guidelines for selecting projects and they must be consistent with competitive sealed bidding procurements, other than professional services competitive negotiations, and professional services competitive negotiations.
2. The public entity must advertise the public notice in the Virginia Business Opportunities publication and post a notice on the Commonwealth's electronic procurement website.
3. The private entity proposal must identify the facility, building, infrastructure or improvement.
4. A private entity's proposal must include the following:
 - a. A map of the project's location;
 - b. A description of the facility, a plan for services, or the plan for the technology infrastructure, including major responsibilities and an activities timeline;
 - c. A statement of how the company will secure property interests;
 - d. Information about public entity plans that are similar to the proposed project;
 - e. A list of required permits and a schedule for obtaining them;
 - f. Public utilities that the project will cross and the company's plans to accommodate those utility crossings;
 - g. General plans for financing the project including the source of company funds and any dedicated revenue source or debt investment that the company plans to incur;
 - h. Names and addresses of company contacts; and
 - i. Fees, leases and service payments required and a description of how those fees, leases and service payments may change.
5. The private entity must notify each affected local jurisdiction and provide them a copy of the proposal. Jurisdictions have 60 days to submit any comments to the public entity on whether the project is compatible with local plans.
6. The public entity must decide to accept or reject the proposal and if rejected, return the proposal and fee.
7. Private entities must receive the public entity's approval to develop or operate a project.
8. A public entity's agency cannot take action that would impact the debt capacity of the public entity unless they already have the authority to do so.
9. The public entity must set a date for the project to begin and may extend a date from time to time.
10. The public entity must take action to protect confidential and proprietary information provided by the company.
11. After completing the comprehensive agreement, the public entity must make it available, upon request.
12. Changes to the agreement must be by written amendment.

Procurement Best Practices

To better understand the major differences between the PPEA and traditional procurement methods used in Virginia, we have compared and contrasted the two methods below. However, it is important to first have a basic frame of reference for this comparison. Therefore beneath we provide best practices from both private and public sectors for acquisition of major items such as buildings, equipment, or enterprise computer systems.

Procurement Process Best Practices*



Identification of Need: Based on strategic plans, management identifies organizational needs. Management performs a market analysis to determine the availability of conforming existing facilities, goods, or services, as well as the extent of competition in the market. Internal sourcing options receive consideration in conjunction with the effects of the budgeting and financing process and other external factors on the timing of acquisition.

Procurement Planning: Determine the available procurement options for meeting the identified need. Maintain awareness of and consider federal and state mandates, administration initiatives, socio-economic policy objectives, and other factors external to the entity affecting the procurement. Make formal and informal requests for information from the vendor community to refine the scope. Develop anticipated project costs for each of the options identified. Select the procurement option.

Funding Approval: Identify and confirm funding sources and obtain necessary approvals.

Preparation of Specifications: Write specifications to reflect the identified need, including functional and performance requirements. Specifications written should foster an environment of fair and open competition. Identify criteria against which to evaluate proposals.

Solicitation of Offers: Execute the procurement option, requesting responses from the vendor community.

Communications: Hold a site visit, informal meeting, or other communications with vendors for clarification purposes. Translate the outcomes of those communications, if any, into proposal addenda and send to all potential proposers.

Evaluation of Offers: Evaluate the offers based on the criteria established during planning and specification preparation as well as the overall strategic plan for the entity.

Award Contract: Post an award or notice of intent to award the contract based on the procurement method selected.

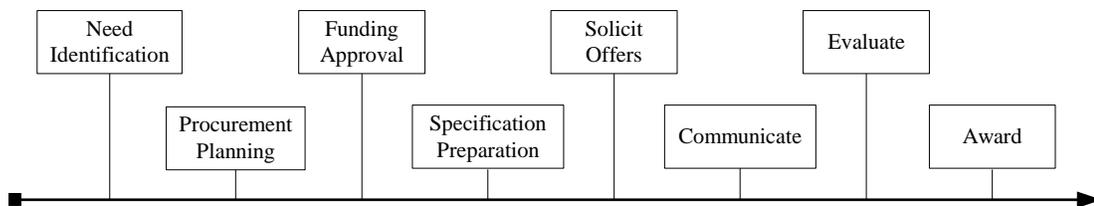
**Best practices compiled from US General Accountability Office, Office of Financial Management of New South Wales, UK, NHWA, NIGP and VPPA.*

Virginia Public Procurement Act and Best Practices

The Virginia Public Procurement Act (Procurement Act) is the statute which governs general procurement in the Commonwealth by most public entities. The Procurement Act covers purchasing everything from goods and services to capital outlay and infrastructure. Several public entities have exemptions from either the entire Procurement Act or exemptions for specific purchases. In general, however, most public entities must follow the Procurement Act in its entirety.

As shown in the chart below, from beginning to end, the Procurement Act set out in the Code of Virginia and the procedures that most public entities have adopted follow the best practice process outlined above, with some minor exceptions.

VPPA Procurement Process



*The VPPA does not specifically address funding. However, most public entities will not consider any type of procurement actions without having first secured funding which is usually provided as a biennial appropriation. Commonwealth procurement guidelines require that a secured source of funding exists before moving forward on capital or infrastructure projects.

The only best practice not specifically set out in the Procurement Act is funding. Generally, almost all public entities will not consider any type of procurement actions without having the funding secured. For most major construction or infrastructure projects, most public entities will not move forward with procurement, except for some preliminary planning, without an agreement to have an appropriation or the authorization to incur debt. The Commonwealth procurement guidelines require that a secured source of funding must exist before moving forward on a capital or infrastructure project.

The Procurement Act requires that all public entities use the Act for all acquisitions over \$50,000 and construction over \$1 million, with some further exceptions for transportation infrastructure. These upper limits have been in place since 2000 for acquisitions and 2004 for construction. A number of public entities, including the Commonwealth of Virginia's Department of General Services and Virginia Information Technologies Agency, have lower thresholds for internal purchases.

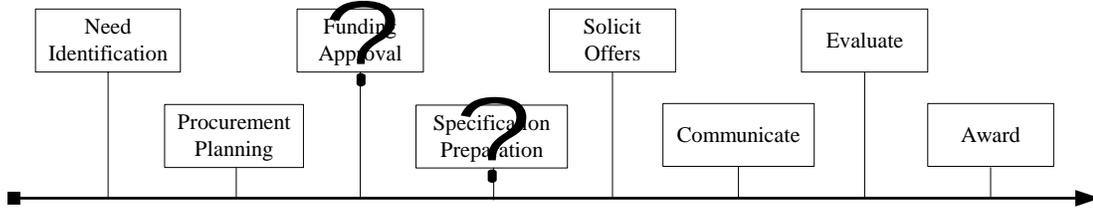
These thresholds are an exception to best practices since they result in a high volume of procurements requiring compliance with the Procurement Act. However, the proponents of these limits argue that they provide more open competition. Others argue that they increase the chances of small firms getting state business. For this discussion on the PPEA we are assuming that all of the proposals will exceed these thresholds and would need to follow the Procurement Act.

PPEA and Best Practices

Since the PPEA allows each public entity to adopt their own unique procedures, we used the PPEA Guidelines issued by the Governor's Office and the Secretaries of Administration and Finance for the purposes of this comparison. The guidelines allow public entities to consider solicited proposals, solicited proposals based on a concept, and unsolicited proposals. We compared these proposal types to the best

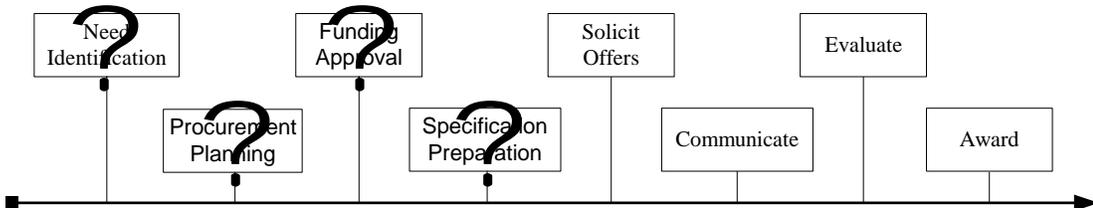
practices and, as shown in the charts below, found that generally the guidelines also comply with the best practices described above, with the exception of unsolicited proposals and conceptual proposals.

Solicited PPEA Procurement Process



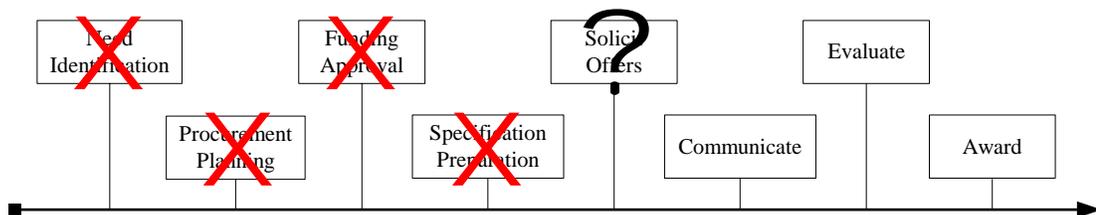
*While solicited PPEAs more closely mirror traditional procurements in the Commonwealth, the amount of planning that occurs can vary. Specification preparation may be more limited than with traditional procurements and funding approval may or may not be addressed in advance of the solicitation.

Solicited Conceptual PPEA Procurement Process



*The amount of planning that occurs with solicited conceptual PPEAs is limited as the public entity is looking for the private entity to develop many of the requirements for the project.

Unsolicited PPEA Procurement Process



*Private entities initiate Unsolicited PPEAs, thus no planning occurs before receiving the proposal. Further, it is uncertain whether the public entity will be able to obtain competing proposals or have sufficient knowledge to effectively evaluate the proposals it does receive.

Typically companies do not start procurements from either unsolicited proposals or conceptual proposals. While salesmen and vendors are constantly seeking new business, private entities do not normally openly share their business plans. Therefore, many vendors do not want to incur the cost of developing a proposal unless they believe an opportunity exists to get the procurement.

We found that once the initial review of the unsolicited proposal is completed and the public entity shares the proposal for competition, the process does follow best practices. However, we do have some reservations on how public entities implement this process.

What makes the conceptual proposal approach unique under the PPEA is that the proposer is often the private entity, who must develop the requirements for the project. Obtaining information about new practices or information from private entities is a fairly common procurement practice. A number of companies and government entities will regularly solicit information about concepts or ideas to develop the requirements for a large procurement. In some cases, obtaining the information for a future procurement becomes a separate procurement by itself and results in the drafting of a request for proposal.

Under the PPEA, depending on the timing and the amount of shared information under a conceptual design proposal, the public entity could find that obtaining competition may be difficult. The vendor may restrict significant aspects of the conceptual design proposal from public disclosure and other firms' would need that information to consider making a proposal. Additionally, there is a risk that the public entity may not possess the expertise necessary to evaluate and compare the conversion of the conceptual design proposals to the detailed design requirements which other private entities might propose. A further risk is that the private entity will restrict the amount of information that the public entity can share, resulting in insufficient competition or inadequate information to allow others to address the public entities' needs.

The risks described above can especially arise when purchasing and implementing a computer system and the larger the system the more important the need to evaluate the detailed design requirements. Many private entities may have sound, working systems, but they do not provide consulting services and rely on other private entities that they regularly work with for these services. If the public entity bundles the computer system with services and other components as a requirement for submitting a proposal, competition may be limited because fewer entities can satisfy all components. Additionally there is potential that a public entity dealing with a PPEA and using one private entity for both concept and detailed design may not have the expertise to prepare and then evaluate other proposals, therefore increasing the risk of not raising questions and issues and limiting competition.

CONCERNS WITH THE IMPLEMENTATION OF THE PPEA PROCESS

We have reviewed the comprehensive agreements for the Capitol Square projects and the process followed for several information technology PPEA projects involving Virginia Information Technologies Agency, the Department of Social Services, and the Governor's Office and the Secretaries of Administration and Finance. Generally, all of the agencies are following the PPEA guidelines issued by the Governor's Office and the Secretaries of Administration and Finance, which complies with the statutory requirements. However, the process of allowing agencies to set guidelines without specific statutory guidance raises some policy issues concerning the intent of the General Assembly in enacting this legislation.

This report will take each audit objective below and examine the policy issue and, if appropriate, propose changes to the existing statute.

1. Determine whether the PPEA statute provides for the General Assembly's oversight and fiscal control responsibilities in the process.
2. Determine whether the statute specifically allows service-only contracts to be a qualifying project or whether it anticipates public entity ownership of a physical asset at the end of the agreement.
3. Determine whether the statute provides for the extent of analysis or review that the public entity should perform concerning proposals.
4. Determine whether the statute expects open competition and if so, determine whether this can be effectively accomplished with proposals based on a concept.

Role of the General Assembly in the PPEA Process

We reviewed the PPEA statute and determined that the role of the public entity's governing body is not set out in the statute. Instead, it is up to the public entity to adopt guidelines that define the role of any governing body. At the local government level, the Board of Supervisors, School Board, or City Council appears to have extensive involvement in the PPEA process because they approve the local budget. Therefore, they must clearly understand the financial commitment and its effect on the future revenue and expense streams.

In addition, the public entity at the local level is clearly the group who develops the guidelines, must make sure that funding is available for the comprehensive agreement, and sets in place the mechanism to monitor the agreement. Thus, the limited structure of the local public entity causes the direct participation of the governing body in the process. This relationship at the State level is less clearly defined and can work to exclude the General Assembly from participating in the approval, oversight, or fiscal control of a project.

Under the Commonwealth's current guidelines, the Governor or state agency head serves as the public entity. Therefore, the Governor or agency head can go through the PPEA process and approve a comprehensive agreement without the General Assembly having any involvement in the evaluation process and with only limited information concerning the long-term financial ramifications of the agreement.

Unlike the local government arrangement, the statute only requires the General Assembly's approval of an agreement when it affects the Commonwealth's debt capacity. Therefore, if an agency determines that there are no debt capacity concerns, they have no responsibility to inform the General Assembly of the PPEA's long-term financial commitment and its impact on their ability to affect appropriations.

Both the PPEA statute and guidelines only require the General Assembly's approval if the project incurs some form of debt, whether through the direct issuance of bonds or a capital lease. However, this restriction depends heavily on both the agency and executive branch's interpretation of debt. As an example, both Virginia Information Technologies Agency and the State Comptroller currently disagree over whether portions of the recently negotiated Infrastructure comprehensive agreement result in capital leases, and therefore debt.

Since neither the statute nor the guidelines provide for the General Assembly's review or oversight of all comprehensive agreements, problems with the validity of the proposal's economic and financial feasibility may not come to light until after the completion of the agreement. Additionally, the executive branch may place restrictions or requirements on the private entity that the General Assembly may or may not agree with, which can significantly affect the cost of the agreement.

Comprehensive agreements can also significantly affect the long-term delivery of services and the General Assembly's budget flexibility and distribution. They can also result in limited future competition thereby restricting the Commonwealth's ability to control cost; include significant costs should the Commonwealth terminate the contract; and, include commitments of future revenue streams during the contract. While all of these risks can occur in a traditional procurement, the size and magnitude of PPEA comprehensive agreements dramatically increase these risks.

The effects on the delivery of services may depend on the structure of the comprehensive agreement and may require the continuation of services at a fixed level of cost or include significant cost increases for service level changes. Budget flexibility may be lost if the conversion from State provided to contractor provided services includes fixed costs that the General Assembly had historically controlled during bad economic times by deferring salary increases or other optional costs. Entering into a large, long-term agreement may also result in limited or no other vendors being willing to provide the service in the future. In

addition, some alternative financing arrangements rely on the vendor assuming current revenue collection efforts, making the State reliant on the vendor for the revenue.

The potential risks associated with the PPEA process clearly indicate the need for the General Assembly to have a mechanism to assert its involvement in the process, similar to local governing bodies. Clearly, continuing to require approval before incurring any form of debt will cause the General Assembly's direct involvement in this process. However, the General Assembly should also consider a mechanism to review disagreements over whether debt exists so that the Commonwealth does not unintentionally affect its debt capacity.

Changes during the 2005 Session of the General Assembly amended the PPEA statute to allow for interim agreements. Interim agreements allow the private entity to begin moving forward while the parties continue to work out the details of the final comprehensive agreement. The General Assembly should consider expanding this process to allow the General Assembly to conduct a fatal flaw review during their regular sessions, and at the same time allow the PPEA process to continue forward under the interim agreement.

The General Assembly could also consider the model that the Public Private Partnership Oversight Committee enacted to oversee the provisions of the Department of Taxation's contract with a software vendor. This oversight committee originally had the power to direct the policies of the Tax Commissioner in signing the terms of the software contract. Provisions of the contract allowed the software vendor to generate new revenue sources and for Taxation to retain a portion of the collections to pay for the software. The oversight committee had membership of legislative and executive branch staff. A similar type of arrangement in the statute could provide the legislature with oversight of the PPEA process.

Recommendation: Unlike the local public entity governing bodies, the PPEA statute does not provide for the General Assembly's active participation in the process. Considering the long-term financial commitments that a PPEA agreement may represent to the Commonwealth, the General Assembly may wish to amend the statute to incorporate a means for their involvement.

Product of a PPEA

A simple reading of the PPEA statute would generally lead one to conclude that the General Assembly intends for public entities to seek the private sector's assistance in acquiring and potentially operating qualifying projects. Further reading would lead one to believe that at the end of the comprehensive agreement, the public entity would have possession of the qualifying project.

The statute clearly allows the private entity to service and operate the qualifying project during the period of the comprehensive agreement. These service contracts could include operating significant physical assets, such as schools, prisons, office buildings, and data centers. It does not appear that the General Assembly intended that public entities could use the PPEA to substitute for other existing procurement processes for acquiring service-only contracts.

The Virginia Information Technologies Agency (VITA) is working on a PPEA, which will update and improve the Commonwealth's information technology infrastructure. However, VITA also has stated that at the termination of the agreement the Commonwealth will not own anything. The entire infrastructure, which includes desktop computers, servers, mainframe computers, a service center, and all the other information technology equipment, is a long-term rental and service agreement and property ownership remains with the vendor. If the Commonwealth wants to retain any of the equipment or facilities, it will need to purchase these items at the conclusion of the agreement or find another vendor to replace the equipment.

While the staff of both the State Controller's Office and VITA are discussing certain aspects of this agreement, such as whether specific items in the agreement constitute capital leases, there are clearly significant portions of the agreement that do not result in the Commonwealth acquiring any infrastructure or other assets. If VITA's original assumptions are true and the Commonwealth has no assets at the conclusion of the agreement, there remains the question of whether this service-only agreement complies with the PPEA legislative intent.

Recommendation: The General Assembly may wish to clarify its intent relative as to whether service agreements, which do not result in the public entity acquiring any assets, are part of the PPEA process.

Analysis and Review of PPEA

Part of the PPEA process involves an analysis and review of the proposal, which the public entity must develop as part of its guidelines. We have conducted a limited review of some of the various local public entity guidelines and the Commonwealth's guidelines. We found that most guidelines do not include specific procedures, but deal with general topics, since the guidelines attempt to address all types of potential PPEA's.

Most local public entity guidelines appear written to deal primarily with construction projects while the Commonwealth guidelines set out a process and indicate the analysis and review the Commonwealth thinks is appropriate relative to the PPEA. Relative to analysis and review, most of our observations below tend to involve Commonwealth projects and questions raised within that process.

The construction analysis and review appears to include extensive work with architect and engineering evaluations, however, some of the financial analysis and review focuses primarily on the cost of borrowing. While the cost of borrowing is important, financial analysis and review should also consider factors such as the opportunity cost of obtaining a fixed price contract in a time of rising material costs or meeting a deadline.

Currently, one of the only PPEA under consideration that is sufficiently far enough along to have begun the detailed financial analysis and review is the VITA infrastructure project. In this PPEA, VITA has measured its cost of continuing to do business as if nothing changed compared to the private entity's preliminary cost estimate. However, VITA had in hand some independently performed analysis which recommended substantial changes in personnel staffing levels and other changes. This independent analysis was part of the work done by a consulting firm to show the savings that could result from the creation of VITA and its related transformation. Neither this analysis nor any other internally-generated reports showing potential savings were considered when comparing the Commonwealth's costs to the private entity's cost.

For a public entity to thoroughly evaluate a PPEA, a rigorous and thorough review of the proposal is necessary, especially from a financial perspective. Limiting financial reviews only to the cost of borrowing or not including all known cost saving measures prevents the public entity from effectively evaluating a proposal. By not considering the loss of opportunity costs, the public entity may ignore a proposal with a fixed price and deadline which shifts all the inflationary cost to the private entity. Including known savings in reviewing the proposal allows the public entity to strengthen their negotiating position to obtain a lower cost over the life of the comprehensive agreement.

Finally, review and analysis requirements should clearly state considerations other than direct financial issues since these considerations may affect the decision-making process. For example, a locality with a need for new and expanded schools should include the non-financial benefit of providing a better learning environment in their review and analysis. In yet another example, the consideration of threat of

litigation or regulatory problems should be part of the review and analysis process when deciding to upgrade or renovate a care facility.

Recommendation: The General Assembly may wish to clarify its intent relative to the rigor of the analysis and review required and should consider having the public entity disclose this analysis and review prior to signing a comprehensive agreement. Consideration of the change could provide having this information publicly available for some period, before signing the comprehensive agreement.

Competition in the PPEA Process

Neither the statute nor any of the guidelines we reviewed provide much in the way of guidance for developing and maintaining competition within the PPEA process. We also found it difficult to differentiate between a general solicitation and a conceptual solicitation. Many of the existing solicitations we reviewed included more general requirements rather than specifics.

We raise the issue of competition since most procurement literature indicates that a purchaser receives the best price if there are a reasonable number of vendors competing for a contract. Best procurement practices also indicate that providing specific versus general requirements, without introducing either product or vendor bias, also maintains the best price competition in a procurement.

We noted that solicited PPEA's for construction or other structures appear to follow best practices by providing sufficient detail about the public entity's needs and objectives. However, we have noticed the public entity provides a decreased level of detail when following an unsolicited proposal.

The Freedom of Information Advisory group is currently addressing the confusion centered on what PPEA information can be released by the public entity. We have reviewed their work in this area and believe they are beginning to address the matter. However, the public entity retains appropriate discretion over the release of information, and perhaps a policy statement in the PPEA statute would provide some additional direction in this area.

With only a limited number of information technology related PPEA projects, the release of information appears to have the potential to result in a significant loss of competition both following unsolicited proposals and conceptual proposals. Based on the history in this area, there appears to be confusion by both public and private entities regarding what information can and should be publicly released.

In the case of the VITA infrastructure, VITA solicited private entities to propose work in nine specific areas. The private entities that offered to take on the largest number of areas received the opportunity to continue in the PPEA process. Additionally, VITA required the private entities to finance the consolidated operation. These two factors significantly reduced the number of private entities that could respond to this PPEA solicitation.

While we are not questioning VITA's approach, the natural consequence of this action is a reduction of competition. A review of the nine individual areas noted a number of vendors who operate and finance contracts within any one or several of the areas; however, only a few could take on all.

What represents a more problematic issue is the conceptual design proposal under which the public entity can move from conceptual design to implementation without any competition beyond the initial proposal. We have reviewed both the Enterprise Application PPEA process in the Governor's Office and the Department of Social Services systems PPEA process and find that both of these PPEA's are contracting for a system and its financing without a clear understanding of what they want to achieve.

The Enterprise Application PPEA is heavily dependent on having the selected private entity determine the Commonwealth's needs and providing a solution. Since the Commonwealth is unaware of its needs and is letting the private entity recommend a solution, the Commonwealth has limited outside sources to determine if a more economical alternative exists. The Commonwealth's Enterprise System initiative is attempting to achieve control over the project by having several decision points in the process that allows for halting the process. However, these decision points, while allowing for halting work, are not intended to seek additional competition.

Of the two projects, the Social Services process may in the long run provide a model for such significant undertakings. Social Services was attempting to solicit proposals for a conceptual design before completing a study of its needs. Social Services has now decided to delay the solicitation while they complete a major review of their operations. With the assistance of consultants they are reviewing how they operate today and determining how they should operate in the future with the assistance of better technology resources. These two documents will provide a framework to evaluate any private entity proposing on this PPEA.

Both the Enterprise Applications and Social Services projects do not have sufficient information to determine which will be the best solution to the problem. Under the PPEA statute and guidelines for conceptual proposals, these projects could move forward without review to determine if competition could reduce the cost or provide a different outcome.

Both the Enterprise Applications and Social Services projects have an estimated combined contract value of over \$500 million and each project may take between five to eight years from the signing of the comprehensive agreement to the implementation. While with any project there comes a point where selecting and committing to a vendor is a must, allowing a commitment to a vendor from beginning to end may not provide for the level of competition that would provide the best value and cost to the Commonwealth.

Recommendation: The General Assembly may wish to clarify its intent relative to the requirement to include several decision points in which a public entity considers competition before continuing with a PPEA.



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General Assembly Building
Richmond, Virginia

We have completed a review of the Public Private Education and Infrastructure Act (PPEA) process and are pleased to submit our report entitled “**Review of the Public Private Education and Infrastructure Act.**” We conducted our review in accordance with the standards for performance audits set forth in Government Auditing Standards, issued by the Comptroller General of the United States.

Objectives

We had four objectives for our review of the PPEA statute. These objectives were to:

1. determine whether the PPEA statute provides for the General Assembly’s oversight and fiscal control responsibilities in the process;
2. determine whether the statute specifically allows service-only contracts to be a qualifying project or whether it anticipates public entity ownership of a physical asset at the end of the agreement;
3. determine whether the statute provides for the extent of analysis or review that the public entity should perform concerning the proposals; and
4. determine whether the statute expects open competition and if so, determine whether this can be effectively accomplished with proposals based on a concept.

Scope and Methodology

In conducting this review, we researched the Code of Virginia, the PPEA Guidelines issued by the Governor and the Secretaries of Administration and Finance, and the PPEA Guidelines used by various local governments in Virginia. We examined documents surrounding PPEA projects for the Virginia Information Technologies Agency and the Governor’s Office. We researched procurement best practices compiled from the United States Government Accountability Office and other organizations. We attended meetings of the Freedom of Information Act Advisory Council to understand their work relative to the PPEA statute. We participated in meetings with the Virginia Information Technologies Agency and the Department of Accounts to understand issues surrounding whether an agreement represents a lease or service and associated issues

affecting the Commonwealth's debt capacity. We conducted interviews with personnel from the Department of General Services and the Department of Corrections on the implementation and use of the PPEA for project acquisition. We also gained knowledge of the Department of Social Services approach to the PPEA through following their systems development projects.

Conclusion

Generally we found that the PPEA statute is vague in several aspects. The General Assembly may wish to amend the statute to clarify its intent relative to their involvement in the process, service only contracts, the rigor of analysis and review required before signing a comprehensive agreement and decision points to consider competition.

AUDITOR OF PUBLIC ACCOUNTS

KKH/kva

APPENDIX A: TERMS AND DEFINITIONS

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

Develop or development: To plan, design, develop, finance, lease, acquire, install, construct, or expand.

Interim agreement: 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: 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: 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: To finance, maintain, improve, equip, modify, repair, or operate.

Private entity: 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: 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: (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: A public entity that has the power to develop or operate the applicable qualifying project.

Revenues: 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: A contract entered into between a public entity and the private entity pursuant to § 56-575.5.

Service payments: Payments to the private entity of a qualifying project pursuant to a service contract.

State: The Commonwealth of Virginia.

User fees: 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.