

Franklin County Broadband Authority

**Public-Private Education Facilities and
Infrastructure Act Guidelines**

ADOPTED

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Table of Contents

| | | |
|-----------|---|-----------|
| 1. | Introduction | 3 |
| 2. | General Provisions | 3 |
| 2.1. | Proposal Submission | 3 |
| 2.2. | Affected Local Jurisdictions..... | 4 |
| 2.3. | Proposal Review Fee | 4 |
| 2.4. | Virginia Freedom of Information Act | 4 |
| 2.5. | Use of Public Funds | 5 |
| 2.6. | Applicability of Other Laws..... | 5 |
| 2.7. | Individual Responsible to Receive Proposals and Respond to Inquiries..... | 6 |
| 3. | Solicited Proposals | 6 |
| 4. | Unsolicited Proposals..... | 6 |
| 4.1. | Decision to Accept and Consider Unsolicited Proposal; Notice | 6 |
| 4.2. | Initial Review by the Authority at the Conceptual Stage | 7 |
| 5. | Proposal Preparation and Submission..... | 8 |
| 5.1. | Format for Submissions at Conceptual Stage..... | 8 |
| 5.1.1. | Qualification and Experience | 8 |
| 5.1.2. | Project Characteristics..... | 8 |
| 5.1.3. | Project Financing..... | 9 |
| 5.1.4. | Project Benefit and Compatibility..... | 9 |
| 5.2. | Format for Submissions at Detailed Stage..... | 10 |
| 6. | Proposal Evaluation and Selection Criteria | 11 |
| 6.1. | Independent Evaluation | 11 |
| 6.2. | Criteria for Evaluation | 11 |
| 6.2.3. | Qualifications and Experience..... | 11 |
| 6.2.4. | Project Characteristics..... | 11 |
| 6.2.5. | Project Financing..... | 12 |
| 6.2.6. | Project Benefit and Compatibility..... | 12 |
| 6.2.7. | Other Factors | 12 |
| 7. | Interim and Comprehensive Agreements | 13 |
| 7.1. | Interim Agreement Terms..... | 13 |
| 7.2. | Comprehensive Agreement Terms | 13 |

1. Introduction

The Franklin Broadband Authority (the “Authority”) has adopted these Guidelines to provide guidance for private entities seeking to have the Authority approve qualifying projects under the Virginia Public-Private Education Facilities and Infrastructure Act of 2002, Chapter 22.1 of Title 56 of the Code of Virginia, 1950, as amended, §§56-575.1, et seq (the “PPEA”).

The Authority, in adopting these Guidelines and naming its PPEA officer charged with the responsibility of open communication with private entities seeking to have projects approved, states that its policy is to provide these Guidelines and PPEA Procedures at no cost to the Authority, and that the Authority is requiring private entities submitting unsolicited proposals to pay a proposal review fee and to be responsible for additional fees that the Authority might incur in engaging experts and other consultants to review and advise on the proposal (See 2.3); in providing or assisting in providing qualifying communication services in the most economical and in a fair and equitable manner giving equal opportunity to all private entities who choose to submit proposals.

2. General Provisions

2.1. Proposal Submission

A proposal may be either solicited by the Authority or delivered by a private entity on an unsolicited basis. Proposers will be required to follow a two-part proposal submission process consisting of an initial conceptual phase and a detailed phase. The initial phase of the proposal should contain specified information on proposer qualifications and experience, project characteristics, project financing, anticipated public support or opposition, or both, and project benefit and compatibility (See 5.1). The detailed proposal should contain specified deliverables (See 5.2).

The PPEA allows private entities to include innovative financing methods, including the imposition of user fees or service payments, in a proposal. Such financing arrangements may include the issuance of debt instruments, equity or other securities or obligations, including, if applicable, the portion of the tax-exempt private activity bond limitation amount to be allocated annually to the Commonwealth of Virginia pursuant to the Economic Growth and Tax Relief Reconciliation Act of 2001 for the development of education facilities, or other qualifying facilities such as “exempt facilities” under Internal Revenue Code §142, using public-private partnerships, and to provide for carryovers of any unused limitation amount. The PPEA is a flexible development tool that allows the use of innovative financing techniques. Depending on the Authority's authority and the circumstances of each transaction, financing options might include the use of special purpose entities, sale and lease back transactions, enhanced use leasing, property exchanges, development agreements, conduit financing and other methods allowed by law.

Proposals should be prepared simply and economically, providing a concise description of the proposer's capabilities to complete the proposed qualifying project and the benefits to be derived from the project by the Authority. Project benefits to be considered are those occurring during the construction, renovation, expansion or improvement phase and during the life cycle of the project. Proposals also should include a scope of work and a financial plan for the project, containing enough detail to allow an

analysis by the Authority of the financial feasibility of the proposed project. The Authority may establish criteria by which the proposer may provide clarification to the submission. The cost analysis of a proposal should not be linked solely to the financing plan as the Authority may determine to finance the project through other available means.

2.2. Affected Local Jurisdictions

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

2.3. Proposal Review Fee

The Authority shall receive an analysis of the proposal from appropriate internal staff or outside advisors or consultants with relevant experience in determining whether to enter into an agreement with the private entity. No fee may be charged by the Authority to process, review or evaluate any proposal solicited by the Authority and submitted under the PPEA. The Authority charges a fee of \$10,000 to the private entity to cover the costs of processing, reviewing, and evaluating any unsolicited proposal or competing unsolicited proposal submitted under the PPEA, to cover the costs of outside attorneys, consultants, and financial advisors. The Authority has determined that such fee is reasonable in comparison to the level of expertise required to review the proposal and is not to be greater than the direct costs associated with evaluating the proposed qualifying project. "Direct costs" may include (i) the cost of staff time required to process, evaluate, review and respond to the proposal and (ii) the out-of-pocket costs of attorneys, consultants and financial advisors.

The proposal fee is intended to cover all of the initial review process. If the cost of reviewing the proposal exceeds the proposal fee, the Authority may assess the proposer the additional costs deemed necessary to evaluate the proposal.

For rejected proposals, the Authority will refund any portion of fees paid in excess of its direct costs associated with evaluating the proposal. If the cost of reviewing the proposal is less than the proposal fee, the Authority will refund to the proposer the excess fee. Fees will be refunded entirely if the Authority decides not to proceed to publication and conceptual-phase review of an unsolicited proposal.

2.4. Virginia Freedom of Information Act

Generally, proposal documents submitted by private entities are subject to the Virginia Freedom of Information Act ("FOIA"). In accordance with § 2.2-3700 *et seq.* of the Code of Virginia, such documents are releasable if requested, except to the extent that they relate to (i) confidential proprietary information submitted to the Authority under a promise of confidentiality or (ii) memoranda, working papers or other records related to

proposals if making public such records would adversely affect the financial interest of the public or private entity or the bargaining position of either party.

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

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

Once a comprehensive agreement has been entered into, and the process of bargaining of all phases or aspects of the comprehensive agreement is complete, an Authority shall make available, upon request, procurement records in accordance with the applicable provision of FOIA.

2.5. Use of Public Funds

Virginia constitutional and statutory requirements as they apply to appropriation and expenditure of public funds apply to any interim or comprehensive agreement entered into under the PPEA. Accordingly, the processes and procedural requirements associated with the expenditure or obligation of public funds shall be incorporated into planning for any PPEA project or projects.

2.6. Applicability of Other Laws

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

2.7. Individual Responsible to Receive Proposals and Respond to Inquiries

The individual assigned the responsibility of receiving proposals under the PPEA and also to respond to inquiries as well as to hold informational meetings, and to insure the fair treatment of all who submit proposal shall be:

3. Solicited Proposals

The Authority may issue Requests for Proposals (RFPs), inviting proposals from private entities to develop or operate qualifying projects. The Authority is using a two-part proposal process consisting of an initial conceptual phase and a detailed phase. An RFP may invite proposers to submit proposals on individual projects identified by the Authority. In such a case the Authority will set forth in the RFP the format and supporting information that is required to be submitted, consistent with the provisions of the PPEA.

The RFP should specify, but not necessarily be limited to, information and documents that must accompany each proposal and the factors that will be used in evaluating the submitted proposals. The RFP should be posted in such public areas as are normally used for posting of the Authority's notices, including the Authority's website. Notices will also be published in a newspaper or other publications of general circulation and posted on the Commonwealth's electronic procurement site.¹ The RFP will contain or incorporate by reference other applicable terms and conditions, including any unique capabilities or qualifications that will be required of the private entities submitting proposals. Pre-proposal conferences will be held as deemed appropriate by the Authority.

4. Unsolicited Proposals

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

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

4.1. Decision to Accept and Consider Unsolicited Proposal; Notice

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

If the Authority chooses to accept an unsolicited proposal for conceptual-phase consideration, it shall post a notice in a public area regularly used by the Authority for posting of public notices for a period of not less than 45 days. The Authority will also publish the same notice for a period of not less than 45 days in one or more newspapers or periodicals of general circulation in the jurisdiction to notify any parties that may be interested in submitting competing unsolicited proposals. In addition, the notice will also be advertised on the Commonwealth's electronic procurement website.² The notice shall

state that the Authority (i) has received and accepted 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 Authority and the PPEA. The notice also shall summarize the proposed qualifying project or projects, and identify their proposed locations. Copies of unsolicited proposals shall be available upon request, subject to the provisions of FOIA and § 56-575.4 G of the PPEA. The Authority's PPEA officer is encouraged to answer questions from private entities that are contemplating submission of a competing unsolicited proposal.

4.2. Initial Review by the Authority at the Conceptual Stage

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 Authority for further review at the conceptual stage. Formatting suggestions for proposals at the conceptual stage are found at Section 5.1.

The Authority will determine at this initial stage of review whether it will proceed using:

- a. Standard procurement procedures consistent with the VPPA; or
- b. Guidelines developed by the Authority that are consistent with procurement of other than professional services through "competitive negotiation" as the term is defined in § 2.2-4301 of the Code of Virginia. The Authority may proceed using such guidelines only if it makes a written determination that doing so is likely to be advantageous to the Authority and the public based upon either (i) the probable scope, complexity or priority of need; (ii) the risk sharing including guaranteed cost or completion guarantees, added value or debt or equity investments proposed by the private entity; or (iii) increase in funding, dedicated revenue or other economic benefit that would otherwise not be available.³

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

- c. not to proceed further with any proposal,
- d. to proceed to the detailed phase of review with the original proposal,
- e. to proceed to the detailed phase with a competing proposal, or
- f. to proceed to the detailed phase with multiple proposals.

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

Discussions between the Authority and private entities about the need for infrastructure improvements shall not limit the ability of the Authority to later determine to use standard procurement procedures to meet its infrastructure needs. The Authority

retains the right to reject any proposal at any time prior to the execution of an interim or comprehensive agreement.⁴

5. Proposal Preparation and Submission

5.1. Format for Submissions at Conceptual Stage

The Authority requires that proposals at the conceptual stage contain information in the following areas: (a) qualifications and experience, (b) project characteristics, (c) project financing, (d) anticipated public support or opposition, or both, (e) project benefit and compatibility and (f) any additional information as the Authority may reasonably request to comply with the requirements of the PPEA. Suggestions for formatting information to be included in proposals at this stage include:

5.1.1. Qualification and Experience

- a. Identify the legal structure of the firm or consortium of firms making the proposal. Identify the organizational structure for the project, the management approach and how each partner and major subcontractor in the structure fits into the overall team.
- b. Describe the experience of the firm or consortium of firms making the proposal and the key principals involved in the proposed project including experience with projects of comparable size and complexity. Describe the length of time in business, business experience, public sector experience and other engagements of the firm or consortium of firms. Include the identity of any firms that will provide design, construction and completion guarantees and warranties and a description of such guarantees and warranties.
- c. Provide the names, addresses, and telephone numbers of persons within the firm or consortium of firms who may be contacted for further information.
- d. Provide a current or most recently audited financial statement of the firm or firms and each partner with an equity interest of twenty percent or greater.
- e. Identify any persons known to the proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2.

5.1.2. 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 Authority.
- c. Include a list of all federal, state and local permits and approvals required for the project and a schedule for obtaining such permits and approvals.

- d. Identify any anticipated adverse social, economic and environmental impacts of the project. Specify the strategies or actions to mitigate known impacts of the project.
- e. Identify the projected positive social, economic and environmental impacts of the project.
- f. Identify the proposed schedule for the work on the project, including the estimated for completion.
- g. Propose allocation of risk and liability for work completed beyond the agreement's completion date, and assurances for timely completion of the project.
- h. State assumptions related to ownership, legal liability, law enforcement and operation of the project and the existence of any restrictions on the Authority's use of the project.
- i. Provide information relative to phased or partial openings of the proposed project prior to completion of the entire work.

5.1.3. Project Financing

- a. Provide a preliminary estimate and estimating methodology of the cost of the work by phase, segment, or both.
- b. Submit a plan for the development, financing and operation of the project showing the anticipated schedule on which funds will be required. Describe the anticipated costs of and proposed sources and uses for such funds.
- c. Include a list and discussion of assumptions underlying all major elements of the plan.
- d. Identify the proposed risk factors and methods for dealing with these factors.
- e. Identify any local, state or federal resources that the proposer contemplates requesting for the project. Describe the total commitment, if any, expected from governmental sources and the timing of any anticipated commitment.
- f. Identify the amounts and the terms and conditions for any revenue sources.⁵
- g. Identify any aspect of the project that could disqualify the project from obtaining tax-exempt financing.

5.1.4. Project Benefit and Compatibility

- a. Identify who will benefit from the project, how they will benefit and how the project will benefit the overall community, region, or state.
- b. Identify any anticipated public support or opposition, as well as any anticipated government support or opposition, for the project.

- c. Explain the strategy and plans that will be carried out to involve and inform the general public, business community, and governmental agencies in areas affected by the project.
- d. Describe the anticipated significant benefits to the community, region or state including anticipated benefits to the economic condition of the Authority and whether the project is critical to attracting or maintaining competitive industries and businesses to the Authority or the surrounding region.
- e. Compatibility with the local comprehensive plan, local infrastructure development plans, the capital improvements budget or other government spending plan.
- f. Identify 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.

5.2. Format for Submissions at Detailed Stage

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

1. A topographical map (1:2,000 or other appropriate scale) depicting the location of the proposed project;
2. A list of public utility facilities, if any, that will be crossed by the qualifying project and a statement of the plans of the proposer to accommodate such crossings;
3. A statement and strategy setting out the plans for securing all necessary property⁶;
4. A detailed listing of all firms that will provide specific design, construction and completion guarantees and warranties, and a brief description of such guarantees and warranties;
5. A total life-cycle cost specifying methodology and assumptions of the project or projects and the proposed project start date. Include anticipated commitment of all parties; equity, debt, and other financing mechanisms; and a schedule of project revenues and project costs. The life-cycle cost analysis should include, but not be limited to, a detailed analysis of the projected return, rate of return, or both, expected useful life of facility and estimated annual operating expenses.
6. A detailed discussion of assumptions about user fees or rates, and usage of the projects.
7. Identification of any known government support or opposition, or general public support or opposition for the project. Government or public support should be demonstrated through resolution of official bodies, minutes of meetings, letters, or other official communications.

8. Demonstration of consistency with appropriate local comprehensive or infrastructure development plans or indication of the steps required for acceptance into such plans.
9. Explanation of how the proposed project would impact local development plans of each affected local jurisdiction.
10. Identification of any known conflicts of interest or other disabilities that may impact the Authority's consideration of the proposal, including the identification of any persons known to the proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2.
11. Additional material and information as the Authority may reasonably request.

6. Proposal Evaluation and Selection Criteria

6.1. Independent Evaluation

The Authority shall engage the services of qualified professionals, which may include an architect, profession engineer, or certified public accountant, not otherwise employed by the responsible public entity, to provide independent analysis regarding the specifics, advantages, disadvantages, and the long- and short-term costs of any request by a private entity for approval of a qualifying project unless the governing body of the 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.

6.2. Criteria for Evaluation

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

6.2.3. Qualifications and Experience

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

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

6.2.4. Project Characteristics

Factors to be considered in determining the project characteristics include:

1. Project definition;
2. Proposed project schedule;
3. Operation of the project;
4. Technology; technical feasibility;
5. Conformity to laws, regulations, and standards;
6. Environmental impacts;
7. Condemnation impacts;
8. State and local permits; and
9. Maintenance of the project.

6.2.5. 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 to the Authority;
2. Financing and the impact on the debt or debt burden of the Authority;
3. Financial plan;
4. Estimated cost; and
5. Life-cycle cost analysis.

6.2.6. Project Benefit and Compatibility

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

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

6.2.7. Other Factors

Other factors that may be considered by an Authority 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 enterprise participation plan or good faith effort to comply with the goals of such plan;
8. The private entity's plans to employ local contractors and residents; and
9. Other criteria that the Authority deems appropriate.

7. Interim and Comprehensive Agreements

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

The Authority, or other appropriating body, if any, shall review any comprehensive or interim agreement prior to execution.

7.1. Interim Agreement Terms

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

1. Project planning and development;
2. Design and engineering;
3. Environmental analysis and mitigation;
4. Survey;
5. Ascertaining the availability of financing for the proposed facility through financial and revenue analysis;
6. Establish a process and timing of the negotiation of the comprehensive agreement; and
7. Any other provisions related to any aspect of the development or operation of a qualifying project that the parties may deem appropriate prior to the execution of a comprehensive agreement.⁷

7.2. Comprehensive Agreement Terms

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

1. The delivery of maintenance, performance and payment bonds or letters of credit in connection with any acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project;

2. The review of plans and specifications for the qualifying project by the Authority;
3. The rights of the Authority to inspect the qualifying project to ensure compliance with the comprehensive agreement;
4. The maintenance of a policy or policies of liability insurance or self-insurance reasonably sufficient to insure coverage of the project and the tort liability to the public and employees and to enable the continued operation of the qualifying project;
5. The monitoring of the practices of the private entity by the Authority to ensure proper maintenance;
6. The terms under which the private entity will reimburse the Authority for services provided;
7. The policy and procedures that will govern the rights and responsibilities of the Authority and the private entity in the event that the comprehensive agreement is terminated or there is a material default by the private entity including the conditions governing assumption of the duties and responsibilities of the private entity by the Authority and the transfer or purchase of property or other interests of the private entity by the Authority;
8. The terms under which the private entity will file appropriate financial statements on a periodic basis.
9. The mechanism by which user fees, lease payments, or service payments, if any, may be established from time to time upon agreement of the parties. Any payments or fees shall be set at a level that are the same for persons using the facility under like conditions and that will not materially discourage use for the qualifying project;
 - a. A copy of any service contract shall be filed with the Authority;
 - b. A schedule of the current user fees or lease payments shall be made available by the private entity to any member of the public upon request;
 - c. Classifications according to reasonable categories for assessment of user fees may be made;
10. The terms and conditions under which the Authority may contribute financial resources, if any, for the qualifying project;
11. The terms and conditions under which existing site conditions will be assessed and addressed, including identification of the responsible party for conducting the assessment and taking necessary remedial action; and ⁸
12. Other requirements of the PPEA.

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

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

¹ 56-575.16(4)

² *Id.*

³ 56-575.16(2)

⁴ 56-575.3(D)

⁵ 56-575.4(A)(7)

⁶ 56-575.4(A)(3)

⁷ 56-575.4(A)(10)

⁸ Language adopted by the Work Group.