

A New Tool For Procurement in Virginia - Learning To Use The PPEA

Guest Column by Clark H. Lewis, President - Virginia, Troutman Sanders Public Affairs Group, LLC and Nancyellen Keane, Of Counsel, Troutman Sanders LLP

Background

The Virginia General Assembly enacted the Public-Private Education Facilities and Infrastructure Act of 2002 ("PPEA") to provide governmental entities such as state agencies, regional authorities, and local governments with an additional procurement tool to develop qualifying projects faster and with alternative methods of financing. Qualifying projects may include almost any kind of capital project undertaken by a public entity with emphasis on facilities critical to public health, safety and welfare, such as schools, jails, recreational facilities, improvements to utility and telecommunications infrastructure and equipment to

enhance safety and security and certain service contracts. Revisions to the PPEA over the past three years expanded the definition of infrastructure to include Information Technology. The PPEA is intended to encourage proposals from the private sector that offer private financing and assumption of com-

mensurate risk by the private operator, with benefits also to the operator.

Within the last several years, the Commonwealth of Virginia has utilized the PPEA for several major capital projects including renovations to Capitol Square in Richmond and the consolidation of the

Commonwealth's Information Technology Infrastructure. Presently, the Commonwealth is utilizing the PPEA for the consolidation of the Virginia School for the Deaf and Blind and the Northern Virginia Forensics Laboratory. To date, approximately 25% of Virginia Counties and Cities have enacted PPEA guidelines to evaluate and construct needed capital projects.

Under the PPEA, a Qualifying project may begin in one of two ways. A developer, by filing an unsolicited proposal, may bring a qualifying project to the attention of a public entity for consideration, or a public entity may solicit proposals from developers for a designated project. Under either method, the proposal may not go forward unless the public entity has adopted procedures that comply with the PPEA statute. Once filed, the proposals will follow a two phase process. In the initial Conceptual Phase, the developer must provide basic information regarding the Qualifying project such as:

- The expertise and experience of the development team;
- The design of the Qualifying project; The price and Financing for the Qualifying project; and
- The public need for the project.

In the detailed phase, the developer must provide more information regarding the

financing and development of the Qualifying project. The PPEA statute identifies items that must be included in the developer's request for approval. This includes a description of the Qualifying project, a schedule for the initiation and completion of the qualifying project, a general statement of how the Qualifying project will be financed and a schedule showing the user fees, lease payments or other service payments related to the Qualifying project and the method for changing those fees or payments over time.

If a public entity determines that the Qualifying project serves the public purpose, it may approve the Qualifying project.

Approval is based upon a finding that there is a public need for, or benefit derived from, the Qualifying project, the estimated cost is reasonable in relation to similar facilities, and the developer's plan will result in the timely development of it. In evaluating any solicited or unsolicited proposal, a public entity may rely upon the expertise of its staff, or it may retain outside consultants. The resulting contractual agreement between a public entity and a developer is the comprehensive agreement, which requires approval by the appropriate governmental entity.

Lessons Learned

Although enacted in 2002, the PPEA is still a new method of procurement in



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Alcoa To Sell Residential Building Products Business

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PITTSBURGH - Alcoa Inc., the world's biggest aluminum producer, announced plans recently to sell its U.S.-focused home exteriors business, saying the construction and remodeling products no longer fit with the company's global portfolio.

Alcoa Home Exteriors, which employs 1,400 workers at facilities in five states, had revenues last year of about \$600 million, a company statement said.

Its 14,000-plus products include vinyl siding, soffits, fascias, trim and railings for decks.

"The Alcoa Home Exteriors business is a solid performer with good returns, but it no longer fits with our core global building and construction-business portfolio," Alcoa's chief executive, Alain Belda, said in the statement.

Alcoa spokesman Kevin Lowery said the company was "just beginning the sales process."

He said the planned sale would not immediately affect workers at plants in Atlanta; Denison, Texas; Gaffney, S.C.; Sidney, Ohio; and Stuarts Draft, Va.

Lehman Brothers will advise the

company on the sale.

On Tuesday, Alcoa reported first-quarter earnings of \$608 million, or 69 cents per share, up from \$260 million, or 30 cents per share, during the same period a year ago. Sales for the quarter were \$6.2 billion, up 16 percent from the same period last year.

Alcoa has 129,000 employees in 42 countries.

Alcoa shares lost 38 cents, or 1.1 percent, to close at \$33.71 on the New York Stock Exchange.



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Virginia. A great majority of developers and contractors (in-state and out-of-state) have little or no experience with the PPEA and its use. The great majority of state procurement has been conducted under the Virginia Public Procurement Act ("VPPA") by means of invitations to bid or requests for proposal issued by state agencies, institutions and local governments to purchase goods and services based on an identified need and a corresponding appropriation to purchase them. The PPEA, as its name suggests, encourages more private involvement in the development and unique funding of qualifying projects.

For the public-private partnership to succeed, it must begin in an atmosphere of mutual understanding and trust. A developer must be confident that the public entity will seriously consider its submitted proposal under the PPEA, and the public entity must have confidence that the developer will be able to construct and deliver

the needed qualifying facility at the agreed upon price. Competitive principles apply in the review process, although the VPPA does not specifically apply.

Proposal Process and Guidelines

One area where the parties must seek to avoid an initial misunderstanding of the PPEA is the review fee charged by the public entity. Many developers do not understand that a public entity likely will charge a fee to review a solicited or unsolicited PPEA proposal. This misunderstanding is based upon the fact that a review fee is not a part of the procurement process when the public entity solicits proposals to purchase goods and services pursuant to the VPPA. Moreover, developers sometimes have difficulty determining what amount of the review fee, if any, will be refunded to them if they are subsequently eliminated by the public entity. This confusion is understandable given that some public entities retain a portion of the fee to compensate the public

entity for the expense of reviewing the unsolicited or solicited proposal, while in other instances, public entities have retained the entire review fee even if a private developer is eliminated at an early stage in the PPEA review process.

To eliminate any confusion on these issues, a public entity should clearly identify in its PPEA guidelines the amount of the mandatory review fee and what portion, if any, will be refunded to an unsuccessful developer at the various stages of the review process. In addition, to prevent any additional confusion about the nature and scope of the project, the responsible governmental entity should consider meeting with all interested developers to (1) review the PPEA Guidelines (2) highlight any modifications from its guidelines that differ from the Commonwealth's Model Guidelines (3) answer any and all questions about the PPEA review process and (4) thoroughly discuss the nature and scope of the project(s) to the greatest extent

possible. These sessions are appreciated by interested developers and help alleviate concerns that the public entity is not mindful of the significant expenses a private developer must undertake to submit a PPEA proposal.

Demonstrating Knowledge to Establish Confidence

To avoid any confusion or misunderstanding, representatives of the public authority and the private sector must possess the necessary knowledge about the PPEA and the contemplated project to put a PPEA deal together. Troutman Sanders' experience is that it is essential for the public entity and the developer to have a unified team of experts that work as an integral unit from the beginning of a PPEA project through the successful negotiations of a comprehensive agreement. This team concept will further provide a private developer with the necessary confidence that the public entity is serious about the proposed project so as to warrant the significant investment of time and money.

Education About PPEA

Finally, as noted above, the PPEA is a relatively new procurement vehicle in Virginia. A great majority of the private and public sector are not familiar with this particular method of procurement. Accordingly, Troutman Sanders continually works with many developers, contractors, and governmental entities to educate key members about the advantages and disadvantages of the use of the PPEA to provide regular updates on how the PPEA works, and whether it may be the most advantageous procurement method for a particular project. Troutman Sanders is fully familiar with the PPEA selection criteria, enabling it to efficiently assist in developing the proposal, negotiating the comprehensive agreement, ensuring the integrity of the financial plan submitted, and in all legal issues applicable to ensuring that the conceptual proposal, detailed proposal, and comprehensive agreement meet PPEA guideline specifications, and applicable law.