

Public Comments for the Draft Public Private Transportation Act Guidelines

Phase Four, Page 18, paragraph 2 states "If public funds are proposed within the detailed plan of finance, the Department will request the Oversight Board's approval prior to advancing to the detailed negotiations phase." It would seem that this would be more of an appropriate step after negotiations occur. Negotiations normally include the assignment of risks, agreement on price, private sector financial participation, etc. All of these issues could impact (positively or negatively) any request for public funds. If a certain amount of public funds is agreed to by the Oversight Board prior to negotiations of a Comprehensive Agreement it ties the hands of both the Public Body as well as the Private Proposer in the negotiations process.

VDOT should not turn control and day-to-day management of our public highways over to any private entity unless and until VDOT thoroughly documents that doing so would be more cost effective for Virginia taxpayers. VDOT or the Commonwealth of Virginia should issue bonds for tolled highway construction for repayment via the anticipated revenue from the new tolled highways. Compared to private entities, the Commonwealth should qualify for lower interest rates on the money borrowed, and the tax-exempt bonds should sell at higher prices. Entering into design-build agreements with private sector entities for discrete highway construction projects is one thing, but turning over the management and control of our public highways is quite another. Another very serious problem with the PPTA is that the proposal from the private sector most certainly biases the consideration of project build alternatives under the environmental review process. No PPTA should be considered by VDOT until the environmental review is completed; i.e., a Locally Preferred Alternative is selected and a Record of Decision is issued by a public agency subsequent to a comprehensive Environmental Impact Statement. The PPTA is either insanity, highway robbery, or both.

The PPTA Implementation Guidelines will shape proposals so they should be organized to encourage private sector creativity and efficiency and attract private sector risk capital. Separate sections should address the private sector innovations along with the private sector risk capital, the public funding required and how it fits the public funding available when requirements for spending public money are considered. Additional sections should address the improvement in land use and reduction in the transportation burden on Virginia's economy resulting from the investment and the impact on the existing and proposed transportation system. To further the goals of encouraging private sector creativity and efficiency and attracting private sector risk capital the blending of private and public funds should be avoided. The sections detailing the spending of private funds

should be heavily weighted in the evaluation and the part of the program requiring public or blended funds should given little or negative weight. The life cycle costs including any air quality mitigation and runoff control costs for the project should be included in the evaluation.

A major concern is that on one hand the allocation formula and current TIP do not restrict innovation and private investment while on the other hand the PPTA is not used to circumvent the allocation formula and TIP restrictions for expending public funds.

P 2, 2nd bullet: “The Act provides for procurement procedures consistent with either “competitive sealed bidding” or “competitive negotiation.” The Department may not use procedures consistent with competitive negotiation unless the Department provides a written determination to the Secretary of Transportation that such procedures are advantageous to the Department and to the public based on (1) the probable scope, complexity, or urgency of a project or (2) risk sharing, added value, an increase in funding, or economic benefit from the project that would not otherwise be available. Written approval of the procurement process is required by the Secretary of Transportation before an interim and/or a comprehensive agreement can be signed.” Recommend that the phrase “. . .or economic benefit from the project . . .” be changed to “. . . or economic benefit over the life of the project. . .”

P3, 1st bullet: “Proposals must fully disclose all public sector financial commitments, including any federal, state, regional or local public funds. Proposals must also identify the development of user fees or any long-term public sector commitments;” ADD “such as operating and maintenance costs.”

P 6, 2nd par. The Secretary of Transportation will appoint and designate a Chair for an Independent Review Panel (IRP) to evaluate the conceptual proposals. The IRP shall be composed of senior state transportation officials and other individuals having appropriate expertise to evaluate, which PPTA projects and proposals would promote the Commonwealth's transportation goals and advance the public interest, as defined in the Act and these guidelines. Please change “individuals” to “state employees”

P 8, last par. “Public notice of the RFP will be posted at least 60 days prior to the date set for receipt. . .” Please change “60 days” to “120 days.” Competition will only occur when competitors should have adequate time to prepare an alternate proposal.

P 17, “***Public Participation and Comment***”

Consistent with the Act, each proposer shall provide each affected jurisdiction with a copy of the conceptual and the detailed proposals. The IRP must consider all written local government comments that are submitted within sixty days of receipt of the proposal. In addition, the IRP must solicit additional public comment through the Internet, local advertisement or marketing efforts, public comment sessions accessible to the public, or other means deemed appropriate by the IRP Chair. The IRP must consider all written or oral public comments prior to its final recommendations.”

P 17 Please change this to: ***Public Participation and Comment***

Consistent with the Act, each proposer shall provide each affected jurisdiction with a copy of the conceptual and the detailed proposals. The IRP must resolve all written local government comments that are submitted within sixty days of receipt of the proposal. In addition, the IRP must solicit additional public comment through the Internet, local advertisement or marketing efforts, public comment sessions accessible to the public, public hearings if requested, or other means deemed appropriate by the IRP Chair. The IRP must consider all written or oral public comments prior to its final recommendations.

P19 Please change “Experience with Similar Infrastructure Projects” to “Successful Experience with Similar Infrastructure Projects”

P19 .4 Please change to “Does the Project Manager have successful experience leading this type and magnitude of project? Conversely, has the P.M. been associated with any ‘failed’ projects or does he have a record of infractions?”

P23 Please change to ‘Subsequent to resolving local government comments, and inclusion in the Commonwealth Transportation Program and prior to developing and/or operating a transportation facility, the private entity selected must enter into an agreement with the Department. The Department shall reserve the right to enter into either an Interim or a Comprehensive Agreement with the private entity. Each agreement will define the rights and obligations of the Department and the respective private entity with regard to the project. The Department will seek such policy, legal, financial, and technical advice as may be required to successfully negotiate the agreement(s). The Department shall seek the advice and involvement of affected state, local or regional public entities during the negotiation process.

I. Consistency with Transportation Needs, Goals, and Planning Processes

The PPTA was designed to leverage public sector transportation expenditures by attracting private sector investment and to bring private sector innovations and efficiency to building needed transportation projects. Yet experience with the PPTA, explored in a recent comprehensive study,¹ indicates that it has gone beyond this original intent and is now driving transportation policymaking and accelerating projects of questionable merit.

The draft guidelines contain several provisions that may help to address these problems, yet more is needed. First, the PPTA Goals and Principles section of the draft guidelines does a fairly good job of articulating the rationale for the PPTA and its process. Among other things, it includes the statement that proposals “must support the overall transportation goals and priorities of the Commonwealth” (p. 3). This is a necessary objective and requirement, yet it sets too low a threshold. We recommend that

¹ This issue and other shortcomings of the PPTA are discussed more fully in a study by Jim Regimbal of Fiscal Analytics, “An Analysis of the Evolution of the Public-Private Transportation Act of 1995,” which is available at www.southernenvironment.org.

it be amended to require proposals to “promote” rather to merely “support” transportation goals and priorities.

Proposals also should be consistent with transportation planning rather than end-running it. The guidelines suggest that proposals must “address the needs identified in the appropriate local, regional, state transportation plan” (part of the quality control criteria on page 15), and that proposals “address the needs of the city, county and regional transportation plans” (part of the proposal evaluation and selection criteria, page 23). It is unclear what it means to “address the needs” identified in the appropriate plan. We suggest amending these provisions to make them more specific and to help insure that proposals do not sidestep the normal transportation planning process, by at least requiring that any PPTA proposal seeking state and/or federal funds be part of the Six Year Transportation Plan or the transportation plans of the relevant Metropolitan Planning Organization before an Independent Review Panel (IRP) is appointed to review a proposal.

The proposed guidelines give the Oversight Board a greater role in the PPTA process. This is definitely a step in the right direction, since, for example, the Commonwealth Transportation Board (in those situations in which it is the Oversight Board) is generally responsible for the location, decision-making, and financing of transportation projects in Virginia. However, the role of the Oversight Board needs to be strengthened further. Two or more members of the Oversight Board should be on the Independent Review Panel and the Board should confirm the appointments to the Panel. Also, the Board’s role largely ends after Phase Three of the process outlined in the draft guidelines, although there is a provision that there be a presentation of “the major business points” of any comprehensive agreement before it is signed (page 18). This provision should be strengthened by requiring the Board to approve the comprehensive agreement after it is negotiated by the agency administrator.

Finally, the PPTA guidelines should state more clearly the relationship between the PPTA and transportation allocation formulas. Currently, there is a single reference at the top of page 7 calling upon the Oversight Board to support future allocations within the limits of “pertinent distribution formulas for State appropriations” if public funds are proposed to be used. Although it is appropriate to recognize the realities of current funding limitations, the PPTA is likely to promote bad investments if it follows a bad allocation formula, and it seems likely that multimodal PPTAs will rarely be proposed or approved. We recognize that the PPTA Implementing Guidelines are not the place to alter current allocation formulas; however, the role of the formulas and the allocation of both state and federal funding should be specified.

II. Consistency with NEPA Alternatives Process

As the recent study of the PPTA found, the Act “has moved from a process of determining the best financing and build alternatives for a consensus-driven project (e.g. Route 28 Interchanges), to a process advancing one alternative into the transportation decision-making process before a recommended transportation solution has been

achieved through NEPA or some other process (e.g. I-81 Widening).”² The ongoing experience with the proposed widening of I-81 highlights this problem, where a consortium that proposed to build a particular project has been selected as the vendor to build a project, and negotiations to develop a comprehensive agreement have been underway for over a year, yet—at least in theory and under federal law—alternatives are currently being examined under NEPA and there has been no decision made regarding what project is needed. This puts the cart before the horse and undermines the NEPA alternative process, potentially prejudicing the outcome of the process and undermining public confidence in the process.

The Goals and Policies section of the draft guidelines does state that “Proposals must be in compliance with or specify how it [sic] will satisfy all applicable state and/or federal laws and regulations,” including NEPA. (p. 3). The draft guidelines should go further and say that no proposal shall proceed beyond the initial quality control phase until the NEPA process is complete. At the very least, a comprehensive agreement should not be negotiated or entered into before the NEPA process has concluded. These provisions should be changed or deleted, and similar provisions should be included in the Proposal Evaluation and Selection Criteria section of the guidelines. This is, in fact, a problem throughout the draft, where the Goals and Policies are often not reflected in the Proposal Evaluation and Selection Criteria.³

Similarly, the provisions regarding the ability of the Department to proceed directly to sealed bids or negotiation in Phase Four should be altered. The second bullet says the Department can take such a short cut when “planning, engineering, and environmental review processes are sufficiently advanced to warrant and enable an objective procurement of selection” (p. 17), which could undercut NEPA. Even worse, the short cut to competitive sealed bidding or negotiation is permitted if any of the three conditions stated occur, so there need not even be a finding that environmental review is sufficiently advanced. These provisions should be changed.

III. Consistency with Environmental Protection and Land Use Planning

The seventh Project Characteristic listed in the Proposal Evaluation and Selection Criteria section is entitled “Meets/Exceeds Environmental Standards” (p. 21). This definitely should be one of the evaluation and selection criteria, but it needs to be strengthened. For one thing, the language under this heading is geared solely to meeting environmental standards; it should be broadened to call for projects to exceed minimum standards of environmental protection. In addition to asking if the project meets appropriate environmental standards, this provision should be amended to also ask if a proposal mitigates adverse environmental impacts. The section should also be broadened to ask if the proposal adequately addresses and takes steps to avoid adverse impacts on communities and on historic resources. Similarly, a statement should be added to the Goals and Principles section that states that proposals should indicate the steps that will

² Regimbal Report, p. 27.

³ The Goals and Policies also need to be better reflected in the draft guidelines for the Transportation Partnership Opportunity Fund; particularly in the Evaluation Criteria on page 4.

be taken to minimize any adverse impacts on communities, environmental quality, or historic resources.

Further, the guidelines are almost devoid of any reference to or consideration of the land use impacts of proposals, slighting the critical link between land use and transportation. A provision should be added to the Project Characteristics section, for example, that the proposal should explain steps taken to address adverse land use impacts of the project, such as access management controls. In addition, the Proposal Evaluation and Selection Criteria section on Project Compatibility begins with a focus of whether the project is compatible with “appropriate transportation and land use plans” (p. 23). None of the five bullets that follow, however, mention land use. Among other things, a criterion should be added that the project be consistent with local comprehensive plans.

IV. Promoting Multimodal and Intermodal Projects

The Goals and Principles section includes a statement that “Proposals must reflect the Commonwealth’s policy of multimodal and intermodal solutions to transportation problems.” (p. 3). We strongly support this statement; however, the remainder of the draft guidelines contains only an occasional passing reference such as in the Project Compatibility subsection of the Proposal Evaluation and Selection Criteria section, which asks in part if the project “improve connections among the transportation modes” and if it addresses the needs of the Multimodal Long Range Plans. (p. 23). More emphasis should be placed on multimodal and intermodal solutions throughout the draft.

V. Financial Role of Applicant and Risk to Taxpayer

As the recent analysis of the PPTA concluded, the Act for the most part has failed to achieve its primary purpose of spurring the investment of private risk capital in transportation projects. Most of the “private” contribution to public-private projects under the Act has been in the form of tolls paid by the public rather than private risk capital. The guidelines do contain some provisions that could help address this problem, such as the statement that proposals “must include specific actions that share cost and/or risk between the parties beyond those commonly obtained through the competitive negotiation process” (p. 2). This statement is followed by seven enumerated items that should be included in proposals, such as direct capital investment. (pp. 2-3). However, this language is only in the Goals and Principles section. These requirements should be repeated or shifted to other parts of the guidelines, such as the Proposal Evaluation and Selection Criteria, and should be given priority among the criteria.

Requiring applicants to have a greater stake in the proposal will also help to address the problem of optimism bias, since projections of toll-road traffic and revenue levels have consistently exceeded reality.⁴ Forecasts have been more accurate when conducted by those with some credit risk. In addition to requiring a larger stake in the proposal, the guidelines should require a proposer to pay for an independent verification of traffic and cost estimates.

⁴ Regimbal Report, p. 33.

The Goals and Principles section also states that proposals “must fully disclose all public sector financial commitments” and “identify the development of user fees or any long-term public sector commitments” (3). This provision may help reduce—or at least better identify—some of the taxpayer subsidies that have characterized most PPTA projects thus far. A further positive provision is the requirement that proposers include a financial plan with enough detail to show “the full extent of the public sector financing and concession commitments” (p. 12). This provision should be clarified and expanded, though, to require sufficient information to show the full extent of tolls or other costs the public will have to bear. The financing provisions on page 22 should similarly be expanded to focus more on the level and length of tolls that could be imposed on the public, as well as the proposed rate of return to the project proponent.

VI. Non-Compete Clauses

An issue that needs to be addressed in the guidelines is that PPTA toll road proposers have often sought non-compete clauses limiting improvements to other roads or to other transportation modes in a region so that drivers cannot avoid paying a toll by taking an alternative route. The ability of the state to improve its transportation infrastructure must not be compromised. The guidelines should strictly limit the use of non-compete clauses in any PPTA agreement.

VII. Limiting Ex Parte Communication

The final bullet of the Goals and Principles section limits contact by a proposer with the Executive Branch, “including advocacy efforts, to individuals or entities designated in these guidelines and/or any solicitation documents.” (p. 3). We strongly support this provision, which will help improve the integrity of the PPTA process. In addition, we believe similar statements outlining this limitation need to be added to the Proposal Evaluation and Selection Criteria.

VIII. Public Participation and Availability of Information

Public input and participation is essential to an effective and respected PPTA process. A number of changes are needed to improve the public participation provisions of the guidelines:

- Although the Goals and Principles section calls for a "structured opportunity for public participation" (p. 3), it is unclear what this means, and this should be clarified to more clearly state at least a minimum level of public participation that will be required.
- The IRP is to consider any comments from localities or the general public (pp. 6, 16, 17). We support this provision, but it should be clarified to state a minimum time period for public comment.
- It is unclear when public input is to be considered. At one point, the guidelines say that public input is to be considered “upon receipt of proposal” (p. 6) and at another they say the IRP must consider public input “prior to its final

recommendations” (p. 17). The latter provision makes more sense; we recommend revising the language on page 6 to be consistent with that on page 17.

- Provisions dealing with IRP consideration of comments from localities (pp. 6, 16) should be expanded to include regional entities (MPOs, Transit Districts, etc.) that may be affected by the proposed project.
- The alternatives for soliciting public input should be increased by amending the guidelines to mandate a traditional public hearing before the IRP makes its decision, at least for projects where the total cost will exceed \$50 million.
- The draft guidelines also state that proposers “may be required to give one or more oral presentation(s) of their proposal to the Independent Review Panel, the Oversight Board and/or the public.” (p. 12). This provision should be changed to state that there “shall” be at least one such presentation, so there is an opportunity for the public to hear the proposal at some point.
- There is no opportunity for public input other than at the IRP stage. This is inadequate. The public should be given an opportunity to weigh in before the Board makes its decision in order to give it an opportunity to respond to the IRP decision and/or written explanation of decision. And the public should have an opportunity to weigh in on any proposed comprehensive agreement before it is executed.

The Goals and Principles also call for transparency and accountability, and say that they “therefore should contain confidential information only when release would clearly and adversely affect the financial interest of the public or the private entity, or the bargaining position of either entity, as determined by the Department in its sole discretion.” (p. 3). This should be rephrased so it is clearer; it seems like these standards govern when a proposal should contain confidential information rather than when information in a proposal should be kept confidential. In addition, the standard for keeping information confidential is too broad and the phrase “or the bargaining position of either entity” should be deleted.⁵

In addition, if a proposer has concerns about proprietary information, a four step process is established in the draft guidelines to permit a determination of confidentiality prior to submission of the proposal. The second step of this process should be changed, though, to state that if there is an oral presentation it is recorded so that a record exists somewhere.

Finally, the second bullet provision on the application of FOIA to the PPTA process on page 13 contains an overly-broad definition of procurement records. Trade secrets are defined in the Virginia Code, balance sheets and financial statements are

⁵ A similar standard on page 9 should be narrowed as well.

widely understood, and these materials should remain confidential; however, it is unclear what constitutes "proprietary, commercial" information and these terms should be deleted.

General comment - there are several places in the document, particularly in the executive summary, where language does not comply with some of the legislative changes made in the 2005 session to the PPTA statute. These should be corrected.

Page 2, PPTA goal and Principles - Delaying the approval of the Secretary of Transportation to permit the use of competitive negotiation until the end of the process is too late. That effectively gives the Secretary veto authority over the entire process despite significant work to advance a proposal. The Secretary's approval should be part of the up front quality control process. Upon review of the competing proposals, he should determine whether the statutory requirements to use competitive negotiation have been met as outlined in the proposals and offer his endorsement then, not at the end of the process. Similar changes would also need to be made on Page 15.

Page 3, PPTA Goals and Principles, bullet #2 - "As appropriate" should be added to the statement about multimodal and intermodal solutions. Not all projects will have those aspects.

Page 2, PPTA Goals and Principles, bullet #3 - It is unclear what "support the overall transportation goals and priorities of the Commonwealth" means. If this is intentionally vague and intended to be so, that is fine, however, if this means that a project has to be in a published document or a regional or state plan, then that is likely exceeding the statutory requirement as amended in the 2005 session.

Page 3, PPTA Goals and Principles, last bullet - The restriction on advocacy efforts is unbalanced. While I accept VDOT wanting to have a single point of contact, it is unfair to restrict access to decision makers and likely unconstitutional. Further, only proposers are bound by this restriction while opponents to the project may use whatever means at their disposal to achieve their goals. This condition should either be eliminated or modified to establish a single point of contact for ANY executive branch contacts by ANY interested party or stakeholder.

Page 5, Solicited Proposals - A solicitation for a PPTA proposal is not exactly the same as an RFP in the traditional VDOT sense and should not be called as such. That change should also be made on Page 8 under Solicited proposals.

Page 5, Solicited Proposals, 2nd paragraph - The restriction on the Department's acceptance of a PPTA for a project that "is the subject of some, or all of an RFI" should be better defined. Does it mean the Department will NEVER accept an unsolicited PPTA on that project or does the restriction only exist while the RFI is active and responses are being accepted?

Page 5, Solicited Proposals, 2nd paragraph - there should be some limit on how long the Department can extend the timeframes for review (it should not be unlimited). This principle should be applied in the Unsolicited Section as well.

Page 5, Unsolicited proposals - You may want to add "or lesser" after "greater" in the sentence about posting of proposals to permit an accelerated review process if the Department's criteria for such review are met.

Page 7, Interim Agreement, bullet #1, - the list of activities that can be in an interim agreement should be preceded by "including, but not limited to,"

Page 8, Solicited Proposals, 2nd paragraph - Why should reimbursement wait until the environmental process is entirely complete? Payment could be part of an interim agreement or compensation could be made for participation in phases of the environmental process.

Page 8, Solicited proposals, 3rd paragraph - 60 days is too short of a time to respond to a VDOT solicitation, particularly if the information requirements are the same. I suggest that this be 90 days.

Page 9, Unsolicited proposals, 2nd paragraph - insert "an interim or" before "comprehensive" in line 8.

Page 9, Unsolicited proposals, 2nd paragraph - how does a notice similar to ones now posted in the newspaper include a conceptual design and a plan of finance? Further, the plan of finance is typically confidential at the conceptual phase.

Page 12, Proposal Review Fee, 1st paragraph - there should be some standard of reasonableness to the additional fees that could be assessed. This should not be a blank check for any and all costs to be passed on to the private sector.

Page 11, Proposal Submission, 4th paragraph - a coordinating responsible public entity is not necessarily required if the proposal is not to a state agency. For example, a proposal could be submitted to Arlington County and it is the only RPE. Please clarify this.

Page 13, Freedom of Information Act, 2nd paragraph - The Department should do more than "attempt" to provide the proposer advance notice of its intent to disclose. The Department should notify and if the proposer does not agree with the Department's decision, the proposer should be given the right to discuss the decision or revise/withdraw the proposal.

Page 14, Pledge of Confidentiality - there should be a suggested remedy if confidential information is intentionally or unintentionally released by the responsible public entity.

Page 15, Phase One: Quality Control, next to last bullet - Does this mean the Department can reject a proposal because it is just too busy on other activities?

Page 16, Independent Review Panel - I am concerned that the public will expect the IRP will be able to answer very complex questions about what is essentially a conceptual proposal. Thus, the public could become discouraged or opposition build because not enough of the details are known. Consideration should be given to including language in the guidelines such as "Proposals advanced to the IRP are conceptual in nature, and as such, issues regarding finance, environmental and right of way impacts, and final project scope may be undefined or subject to change as the result of recommendations made by the IRP, the Oversight Board, or affected jurisdictions. While considering comments received by the public, the Commonwealth's financial advisory, or affected jurisdictions, the IRP shall endeavor to make recommendations that lead to the resolution of such issues in subsequent review phases."

Page 17, Phase 4 - I am concerned that there are no opportunities here for public comments or for public discussion of the competing proposals when much could have changed about project scope since the conceptual phase.

Page 18, Phase 6 - It is unclear whether the Oversight Board has the ability to modify, veto, or otherwise impact the Department's recommendation. Is their role solely advisory? Further, it is unclear what kind of information will be made available to the public as negotiations begin. This should be better defined.

Page 19, Evaluation Criteria - it is unclear whether these criteria apply to the detailed proposal or the conceptual proposal as well. Some of them are so specific in nature that they may be unanswerable at the conceptual phase or are subject to negotiation in the interim or comprehensive agreement.

Page 20, Criteria #7 - A firm's actual track record on similar or other VDOT projects, not just their pledge for the proposed project, should be part of the evaluation criteria.

Page 21, Criteria #10 - Should be modified per Code changes in 2005. I believe the standard is "in conformance with standards acceptable to the Department" not the language as stated.

Page A-1, Disclaimer #1 appears to be inconsistent with the concept of a development fee as authorized by the 2005 session.

Page D-6 - there is no authorization in the guidelines for the Department to levy additional fees as stated here.

At the outset, we would like to commend you and the Department of Transportation for revising the Implementation Guidelines for the Public-Private Transportation Act (PPTA). This is an area of public policy of great importance to Virginia, its taxpayers and the construction community. We hope you find the following

recommendations helpful to your efforts to create the most effective PPTA Implementation Guidelines possible.

I. Introduction

As the government recognizes, public-private partnerships offer tremendous opportunities for public bodies and the private sector to work together to find sensible, cost-effective solutions for meeting the Commonwealth's infrastructure needs. Of course, the development of such projects must be done with extreme care to maintain public trust, ensure fair competition and address legitimate interests of affected stakeholders.

Given this context, these recommendations offer revisions to the PPTA Guidelines that are designed to:

- 1) ensure fairness and greater competition in the PPTA approval process;
- 2) require the selection of qualified, reputable firms to perform PPTA projects;
- 3) promote high skill training in Virginia's construction industry and positive economic benefits for local communities impacted by PPTA projects; and
- 4) establish project oversight mechanisms that permit the Commonwealth to properly monitor projects for compliance with PPTA Implementation Guidelines.

II. Recommended Revisions to Draft PPTA Guidelines

A. Include Provisions to Ensure Fair Competition and Full Transparency

While the use of unsolicited proposals offers certain advantages for the development of public-private projects, this flexibility can have negative consequences, including increased project costs, if it unduly limits competition. Therefore, the proposed "90 day" time frame in the draft Guidelines for allowing competing proposals to be submitted in response to an unsolicited proposal should be extended to at least 180 days (and perhaps longer for super-projects over a certain value, e.g., \$500 million).

In addition, to promote greater transparency in this area, the PPTA Guidelines should provide that prior to acceptance of an Interim Agreement or Comprehensive Agreement, the Department of Transportation should hold a public hearing wherein information on the project could be presented and questions could be asked and information obtained regarding the nature the project and its compliance with PPTA requirements. At this stage, Community Impact Statements, supplied to the Commonwealth by proposers, as recommended below, could be reviewed and discussed with the public and affected stakeholders.

B. Follow "PPEA" Guidelines Regarding Developer/Contractor Selection

There is no question that the contractors and developers selected for PPTA projects should be highly qualified, solidly reputable firms. After all, PPTA projects are still essentially “*public*” works projects that provide critical *government* facilities and *public* infrastructure systems. It is also clear, however, that the PPTA law permits the Commonwealth to bypass numerous state contracting and procurement rules that would otherwise be in place to ensure the use of qualified, reputable firms.

Given these conditions, and since the Commonwealth is still dependent on the timely, efficient projects, appropriate action to guarantee that firms used for PPTA projects are fully qualified for the proposed project. This means that such firms should have a solid performance track record, should be in compliance with all applicable laws and regulations and should have all requisite performance capabilities, including a reliable supply of properly skilled and trained construction craft personnel to staff these projects.

It is also evident that PPTA projects offer unique opportunities and lucrative rewards for participating developer. These projects will invariably still involve the use of public tax dollars and/or other forms of state assistance or state assets (e.g., land, right of way), all of which are extremely valuable to PPTA developers and contractors. Accordingly, such benefits should be *leveraged* by the Commonwealth to ensure the greatest return on its participation and approval of these projects. This can be done, in part, by promoting the selection of developers and contractors, who hire from the local workforce, participate in skill training programs, pay good wages and benefits and promote other local economic benefits for local communities impacted by such projects.

These concepts and substantive points were considered and recognized as wholly legitimate in the development of the *Implementation Guidelines for the Public-Private Education and Infrastructure Act* (PPEA), which affects education facilities and other public projects. Accordingly, the *PPEA Guidelines* include numerous provisions designed to: a) require the selection of qualified, reputable firms to perform public-private projects; b) promote positive economic benefits for local communities impacted by PPTA projects; and c) encourage high skill training programs in Virginia’s construction industry.

The last point here bears emphasis. There are at least two solid public policy reasons for promoting skill training in Virginia’s construction industry through the PPTA developers/contractors selection process.

- First, it helps ensure that the workforce used on the proposed facility will be staffed with skilled, qualified craft workers capable of successfully delivering the project.
- Second, it serves the Commonwealth’s long-term interest in building up a skilled labor pool to meet future project needs, which is critical given the acute needs for skill training in the industry.

Indeed, policies that encourage or require contractors to invest and participate in construction craft training programs have been advocated by leading project owner trade associations and are being used in numerous public works contracting programs around the country.⁶ These points were deemed compelling in the development of the “PPEA” Implementation Guidelines adopted by the Commonwealth in 2003.

Attached hereto is a copy of the “PPEA” Implementation Guidelines. In this document, all of the provisions relating to the above-referenced points are highlighted for your review. Most of these relate to the proposal evaluation and selection process. The Council strongly urges the Commonwealth, both for the sake of consistency and ultimate effectiveness, to incorporate ALL of these highlighted provisions in the new PPTA Guidelines.

While the complete highlighted language of the PPEA Guidelines should be included in the PPTA Guidelines, some of the main provisions include the following:

- (a) *State & Local Laws*: All state and local safety laws, contractor licensing laws and trade licensing laws apply to the projects.
- (b) *Subcontractor Listing*: Developers or general contractors are required to identify the subcontractors on their team up-front in the project development process.
- (c) *Key Evaluation Factors*: When selecting the winning developer and/or prime contractor for projects, State officials consider:
 - Contractor past performance track record: quality, schedule, cost
 - Law compliance records of contractors and subcontractors
 - Ability to obtain reliable labor supply/project staffing
 - Participation in apprenticeship & other training programs
 - Past safety performance/current safety capabilities
 - Hiring of local workers & local subcontractors
 - Positive local economic impact – wage levels & benefit packages

These issues and related matters covered in the highlighted provisions of the PPEA Guidelines impact *ALL* projects -- transportation and non-transportation -- and these issues should be considered in *ALL* public-private projects approved by the Commonwealth. Such action will benefit affected government agencies, Virginia’s construction industry and local workers and local communities.

C. Incorporate Oversight Mechanisms to Permit Effective Project Monitoring

⁶See *Confronting the Skilled Workforce Shortage*, Construction Users Roundtable, June 2004; *AGC Announces Model Language for “Training for the Trades” in RFPs*, February 8, 1999, AGC News & Bulletins; The Business Roundtable, Construction Cost Effectiveness Task Force, *Confronting the Skilled Construction Work Force Shortage* (1997). Additional information available upon request

Proper oversight and enforcement of the above-recommended provisions is paramount. First, the PPTA Guidelines should make clear that these provisions apply to BOTH solicited AND unsolicited proposals. In other words, rigorous screening of qualifications, past performance and proposed economic benefits should be conducted not only in solicited PPTA competitions, but in the review of any firm(s) offering an unsolicited proposal.

Second, in the development of Interim and Comprehensive Agreements, the Department of Transportation should ensure that the local community impact factors discussed above are properly addressed in a satisfactory manner and should NOT give final approval to any project, solicited or unsolicited, until such issues are properly addressed.⁷

Thus, in the context of negotiating Interim or Comprehensive Agreements, the Department should require PPTA developers and contractors to submit detailed information regarding construction project staffing and the impact the proposed project will have on local communities in terms of jobs, training and related information. The most straight-forward way to accomplish this would be to require proposers to submit, as a key component of their proposal, a “*Community Impact Statement*” (CIS), which includes, at a minimum, the following information:

- (1) Anticipated number of jobs created by the proposed project, approximate wage rates that will be paid and projected length of employment of the newly created jobs;
- (2) A description of reliable project staffing plans for the project’s construction workforce that shows how the proposer will obtain and ensure an adequate supply of safe, properly trained construction craft personnel;
- (3) Approximate number of job training opportunities to be created by the proposed project, particularly training opportunities in apprenticeship programs registered with the U.S. Department of Labor or State Apprenticeship Council;
- (4) Worker safety programs, including substance abuse, safety training and incident-avoidance programs;
- (5) The extent to which identified job opportunities will be filled by residents of the Commonwealth; and

⁷This point and the related recommendations set forth below are based on or taken directly from the Governor recent Executive Directive relating to enforcement, oversight and reporting requirements of the PPEA, Executive Directive 7, June 29, 2005.

- (6) The extent to which the project will utilize contractors and subcontractors who will generate tax revenue for the Commonwealth.⁸

Once the CIS information is obtained, the Department can use it to evaluate competing proposals. In the context of unsolicited proposals where no competition emerges, this information can be used in negotiations with the proposer to ensure that it is undertaking all reasonable efforts to deliver timely, successful projects that provide positive economic benefits to affected local communities.

To accomplish these goals, the PPTA Implementing Guidelines should also include the following provisions:

- (a) No PPTA proposal, solicited or unsolicited, shall be evaluated or considered by the Department of Transportation unless it contains a Community Impact Statement with the detailed information specified above.

Note: This check should be included within the context of the “Quality Control” process provided during the initial PPTA review and again during the subsequent review processes conducted by the Independent Review Panel and the Oversight Board.

- (b) Community Impact Statements should be included in the terms of any Interim Agreement or final Comprehensive Agreement.

- (c) The Department of Transportation shall not finalize or approve any PPTA Comprehensive Agreement unless and until the community impact aspects of the project have been fully addressed in a manner consistent with community impact goals and requirements of the PPTA Implementation Guidelines.

- (d) Appropriate sanctions shall apply to violations of the community impact aspects of Interim or Comprehensive Agreements to ensure that developers and contractors live up to representations regarding Community Impact Statements.

III. Conclusion

We appreciate the opportunity to submit these comments and hope they prove helpful to the development of the new PPTA Implementation Guidelines. Thank you for your time and attention.

⁸For PPTA projects that involve *federal funding*, special provisions may have to be made with regard to items nos. 5 and 6 here, to avoid potential conflicts with federal law and regulations.

1. p. 2 -PPTA Goals and Principals – As drafted, the private sector has no guidance on the preference of the Commonwealth relative to residual ownership vs. receipt of concession fees or minimizing capital contribution required. At the end of the second bullet, this timing on the Secretary’s approval comes too late in the process the only requirement is that it is before a proposal is signed. This should occur as soon as possible, ideally during Phase I, but not later than Phase II.

p.2 – third bullet - On the concept of state-supported debt, we assume that 63-20 debt is not being discouraged?

2. p.3, third bullet - This states that a proposal which does not support the overall goals and priorities of the Commonwealth... will be promptly returned to the proposer. However on page 5, the standard for acceptance is “meet all legal and policy requirements for initial review”. This doesn’t appear to be the same standard. For example, does review of the Dulles Toll Road proposal mean that the concept “supports the overall transportation goals and priorities” or is that an issue that will be sorted out over time through a competitive process requiring the investment of very substantial funds by competing proposers before the question is answered.

p.3 sixth bullet – The concept appears to be to a preference to minimize the request for confidential classification, but the wording may need revision to make clear.

3. p.3, last bullet – The proposed limitation of all communications within the Executive Branch is unclear in terms of the specific identification of individuals with whom we may communicate and the need to communicate with other officials on unrelated matters. The Guidelines do not provide clear direction to what is allowed and what is prohibited. Another concern is that only proposers are limited in their communications. This is an overly bureaucratic solution that allows opponents of projects free access and unnecessarily and unclearly limits proposers.

4. p .6 – The 6 Phase process does not include the phase where a Request for Detailed Proposal is issued or the process where a draft RFDP is issued for comment. Will this process change?

5. p.6, third paragraph – This section provides for the negotiation of a comprehensive agreement based on a Conceptual Proposal. This would be a significant improvement to expedite the process. Could this be used in a situation where there are multiple proposers at the Conceptual Proposal stage?

6. p.7, first paragraph - This introduces the concept of a maximum rate of return to the private entity. Our proposals are structured around revenue sharing with VDOT after achieving a Target Return. Will our structure be considered compliant with the concept of maximum return or will we have to also have a cap on return?

7. p. 7&8 Timeline section. – This seems to allow the Department to be non-responsive based on work load or any other unanticipated reason. The Department should be staffed

to process proposals on a timely basis and not be able to defer response at will if they want private sector investment in proposal development.

8. p.9, Unsolicited Proposal section – Does the original proposer have any right to amend his original proposal during the period for solicitation of competing proposals?

p.10 – Qualifying facilities - Add ITS, and Intermodal freight transfer facilities?

9. p.13, Virginia Freedom of Information Act section – In the event that Department intends to disclose requested materials the Department needs to notify the proposer, not merely attempt to notify them.

10. p.14 last paragraph – This states that the checklist for a conceptual proposal and a detailed proposal are the same. In the past, the Department has provided specific issues to be addressed in the Detailed Proposal. Will the Detailed Proposal involve questions specific to the Department’s review of the Conceptual Proposals?

11. p. 15 last paragraph – This states that the Department may return a proposal if they are submitted “when the Department staff is committed to development”. This implies that the private sector’s investment in the proposal may be lost if the Department is too busy to respond?

12. p.20 numbered point 9 – The question implies that joint and several liability is a requirement. Depending on the nature of the business structure, joint and several liability may not be appropriate. For example if a single member of the proposer’s team with adequate resources guarantees the obligation, no benefit may result in having all members guarantee and in fact, it may detract the ability to attract team members. This is especially relevant to phases of a project where the performance is dependent on different parties with different expertises.

13. p. 22, paragraph 4 - Is there a specific format for “analysis of projected rate of return and life-cycle cost estimate”?

14. p. 24, numbered paragraph 2 – The requirement that user fees shall be governed by a mechanism that is driven by rate of return would not allow a project to use congestion pricing where user fees must be based on road conditions and level of service in order to manage traffic flow and maximize throughput capacity.

Other comment:

The State should consider developing timelines for response similar to the guidelines incorporated in the recent transportation reauthorization bill.

Page 15 notes “the Department may return proposals...that are submitted during a period when Department staff are committed to development, evaluation, and negotiation of other proposals.” Recommend this item be revised to inform proposer(s) what the review schedule is and when they may expect results.

Pages 17 and 18 include Oversight Board approval as part of both Phase Three and Phase Four. Are these duplicate approvals?

On Page 18, it appears a selection decision must be made at the end of Phase Four and a maximum of one proposer advances to Phase Five. Please clarify.

Page 23 should read, “Prior to developing...”

Page D-6 requests a cashier’s check to cover review costs. Has consideration been given to accepting corporate checks as well?

At which phase of the process does VDOT commit to proposer(s) that the Department will enter into a Comprehensive Agreement if certain conditions are met?

Cover sheet should reference the 2005 Law changes.