

ARKANSAS REGISTER

Transmittal Sheet

Use only for FINAL and EMERGENCY RULES



Secretary of State

Mark Martin

500 Woodlane, Suite 026
Little Rock, Arkansas 72201-1094
(501) 682-5070

www.sos.arkansas.gov



For Office

Use Only:

Effective Date _____ Code Number _____

Name of Agency Arkansas Economic Development Commission

Department Strategic Planning and Research

Contact Kurt Naumann E-mail knaumann@arkansasedc.com Phone 501-682-7308

Statutory Authority for Promulgating Rules 22-10-502

Rule Title: Partnership for Public Facilities and Infrastructure Act Program Guidelines

Intended Effective Date
(Check One)

Date

<input type="checkbox"/> Emergency (ACA 25-15-204)	Legal Notice Published	<u>August 10, 2017</u>
<input checked="" type="checkbox"/> 10 Days After Filing (ACA 25-15-204)	Final Date for Public Comment	<u>September 8, 2017</u>
<input type="checkbox"/> Other _____ (Must be more than 10 days after filing date.)	Reviewed by Legislative Council	<u>October 17, 2017</u>
	Adopted by State Agency	<u>November 3, 2017</u>

Electronic Copy of Rule e-mailed from: (Required under ACA 25-15-218)

Kurt Naumann knaumann@arkansasedc.com October 24, 2017
Contact Person E-mail Address Date

CERTIFICATION OF AUTHORIZED OFFICER

I Hereby Certify That The Attached Rules Were Adopted
In Compliance with the Arkansas Administrative Act. (ACA 25-15-201 et. seq.)

Kurt Naumann

Signature

501-682-7308 knaumann@arkansasedc.com

Phone Number E-mail Address

Director, Strategic Planning and Research

Title

October 24, 2017

Date

Partnership for Public Facilities and Infrastructure Act Program Guidelines



Arkansas Economic Development Commission
October 2017

Partnership for Public Facilities and Infrastructure Act

Program Guidelines

Table of Contents

I.	Partnership for Public Facilities and Infrastructure Act	p. 3
	A. Overview.....	p. 3
	B. PPFIA Process.....	p. 4
	C. Guidelines Development and Amendments.....	p. 6
	D. Review Fees.....	p. 6
	E. PPFIA Legal Stipulations.....	p. 6
	F. Contact Information.....	p. 8
II.	Guidelines	p. 8
	A. Criteria for Selecting Qualifying Projects Undertaken by a Public Entity.....	p. 8
	B. Criteria for Selecting Among Competing Proposals.....	p. 10
	C. Timelines for Executing a Comprehensive Agreement with a Qualified Respondent.....	p. 14
	D. Guidelines for Negotiating a Comprehensive Agreement.....	p. 14
	E. Guidelines for Allowing Accelerated Selection of Qualified Respondents.....	p. 17
III.	Appendix A	
	Definitions.....	p. 18
IV.	Attachment A	
	Partnership for Public Facilities and Infrastructure Act (PPFIA) Application.....	p. 20

I. Partnership for Public Facilities and Infrastructure Act

A. Overview

The **Partnership for Public Facilities and Infrastructure Act (PPFIA)**, created by Act 813 of 2017¹, provides a framework by which public-private partnerships may be formed to expedite the timely and cost-efficient “development of”² private projects for public infrastructure and government facilities. Specific legislative intent of the PPFIA is that:

- There is a public need for the timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, operation, implementation, and installation of public infrastructure and government facilities within the state that serve a public purpose;
- The public need for government facilities and public infrastructure may not be satisfied by existing methods of procurement or funding available to the state;
- There are inadequate resources to develop public infrastructure and government facilities for the benefit of citizens of the state, and there is demonstrated evidence that public-private partnerships can:
 - promote the timely and cost-efficient development of public infrastructure and governmental facilities;
 - provide alternative and innovative funding sources to governmental entities; and
 - allow governmental entities to leverage and supplement the developmental cost of public infrastructure and governmental facilities through private funding and participation by the private sector in governmental incentive and tax programs that are not otherwise available to governmental entities; and
- The formation of public-private partnerships may result in the ability to develop private projects for public infrastructure and government facilities in a more cost-efficient and timely manner, resulting in increased benefits to the public safety and welfare of the citizens of the state and substantial cost benefits to the governmental entities and the public.

Only “responsible public entities (RPE)”³ as designated by the Arkansas Economic Development Commission (AEDC) and the Arkansas Development Finance Authority (ADFA), may solicit “requests for proposals (RFP)”⁴ from “private entities”⁵ for bids to develop “qualifying projects”⁶ under the PPFIA. Unsolicited proposals will not be accepted for consideration under the PPFIA.

¹ Codified at § 22-10-101 et seq.

² Words and terms in quotation marks are defined in Appendix A. See definition (3) of Appendix A.

³ See definition (13) of Appendix A.

⁴ See definition (11) of Appendix A.22-

⁵ See definition (6) of Appendix A.

⁶ See definition (10) of Appendix A.

B. PPFIA Process

The summary below delineates the process (through execution of comprehensive agreements) that participants in the PPFIA shall follow as defined throughout these guidelines.

1. A “public entity”⁷ is encouraged to seek the advice of AEDC and ADFA regarding potential PPFIA projects as early as possible, preferably prior to or during development of the Partnership for Public Facilities and Infrastructure Act (PPFIA) Application (Application)-see Attachment A. Public entities, however, are **required** to seek the advice and consent of AEDC and ADFA prior to issuing an RFP.
2. A public entity shall submit two (2) copies of the signed, completed Application and all required attachments to AEDC.
3. The AEDC and ADFA will concurrently review the Application for completeness and adherence to the PPFIA and all promulgated guidelines and rules.
 - a. Unapproved applicants will be notified in writing by AEDC.
 - b. AEDC and ADFA will designate the RPE for approved applications and will provide instruction on how they shall develop the qualifying project.
4. (Optional) A public entity may issue a Request for Information (RFI), or a “Request for Qualifications (RFQ)”⁸, or both, prior to issuing an RFP. The RFI, which may also include an Industry Forum, is a process by which industry feedback and perspective is sought prior to issuing an RFP regarding a potential public-private partnership project. Information received in an RFI may be utilized by public entities to gauge interest in the project and develop more detailed, and technically specific, RFQs and RFPs. An RFI is not a commitment to issue an RFQ or an RFP and responses are not required for future procurements. Responses are voluntary and do not create any preferential treatment or other advantage or disadvantage in any subsequent procurement process. An RFQ is a step sometimes used in the formal process of procuring a product or service as a screening step to establish a pool of vendors (businesses or individuals to provide a product or service) that are then qualified, and thus eligible to submit responses to an RFP. If the RFQ is conducted separately from an RFP, then RFQ responses shall describe the company or individual's general qualifications to perform a service or supply a product. The time required to complete the RFI or RFQ process, or both, is not contingent upon the timeframes specified throughout these guidelines but should be completed within six months to ensure timely development of the project.
5. Prior to issuing an RFP for the qualifying project, the RPE shall:
 - a. Adopt and make publically available⁹ these guidelines and the PPFIA application.
 - b. Notify each “affected local jurisdiction”¹⁰ and other public entities with shared responsibilities and/or concurrent authority¹¹ of the qualifying project in writing at least sixty (60) calendar days prior to issuing an RFP.

⁷ See definition (7) of Appendix A.

⁸ See definition (12) of Appendix A.

⁹ The PPFIA Application, guidelines, RFP notice, evaluation criteria, and any other documentation required to be made publically available in the guidelines or PPFIA rules promulgated under the Arkansas Administrative Procedure Act must be posted on a dedicated web page reserved exclusively by the RPE for the PPFIA project. The RPE may post additional, more detailed information when seeking proposals if deemed by the RPE to encourage competition. Multiple PPFIA projects may be posted simultaneously on the same web page as long as each project is clearly and separately delineated.

¹⁰ See definition (1) of Appendix A.

¹¹ Identify all public entities that will be fiscally impacted by the project or who have statutory or constitutional authority relative to development of the qualifying project.

- c. Prepare an RFP and submit to AEDC at least sixty (60) calendar days prior to publication.
6. The RPE shall “publish”¹² the RFP one (1) time per week for three (3) consecutive weeks in a newspaper of statewide circulation. The period of time between the date of initial RFP publication and the RFP response deadline must be at least forty-five (45) calendar days but no more than 120 calendar days. The timeframe between the date of initial RFP publication and the RFP response deadline may be extended by the RPE up to an additional 120 days with the consent of AEDC.
 7. The RPE shall receive proposals from private entities in response to the RFP and evaluate each in accordance with established criteria. See Section II.B. of these guidelines for further information.
 8. After review, the RPE selects the “qualified respondent”¹³ and begins negotiations.
 9. The RPE, in consultation with AEDC and ADFA, shall begin development of the qualified project via formal agreement(s) with the qualified respondent. “Comprehensive agreements”¹⁴ are mandatory. “Interim agreements”¹⁵ are not required but are encouraged. If the most qualified private entity and RPE fail to execute required written agreements within the specified time period, the RPE may begin negotiations with the next most-qualified RFP respondent. If so, then the negotiation period may be extended, upon AEDC approval, up to an additional 180 days.
 10. The RPE shall submit the proposed interim or proposed comprehensive agreement to the Chief Fiscal Officer (CFO) of the State of Arkansas and the AEDC.
 11. If approval by the CFO of the State of Arkansas is received for an interim agreement, the RPE and private entity may proceed with further development of the qualified project, leading up to development of a draft comprehensive agreement. RPEs must repeat steps 9 and 10 for comprehensive agreements prior to proceeding further. If approval is received from the CFO for a comprehensive agreement, the governing body of the RPE or a delegate thereof, shall conduct a public hearing on the comprehensive agreement. At least ten (10) days before the hearing, notice of the hearing must be published in a newspaper of general circulation in the locality to be affected. The notice shall contain the date, time, and location of the public hearing, a general description of the project, the identification of the parties to the comprehensive agreement and the roles that each have in the project. The notice shall also provide a website on which the proposed comprehensive agreement can be reviewed by interested parties. If bonds are proposed to be issued by the RPE, the maximum principal amount of the bonds shall be included in the notice. The hearing shall be held within the locality to be affected.¹⁶
 12. If the comprehensive agreement is approved by the CFO, the RPE shall submit it to the Governor after the public hearing has been conducted.
 13. The Governor shall review the comprehensive agreement and approve or disapprove.
 14. If approved, the RPE authorizes execution of the comprehensive agreement by order, ordinance, or resolution at a public meeting that complies with ACA § 25-19-106.¹⁷

¹² See definition (8) of Appendix A.

¹³ See definition (9) of Appendix A.

¹⁴ See definition (2) of Appendix A.

¹⁵ See definition (4) of Appendix A.

¹⁶ Revenue Bond Act of 1987.

¹⁷ Open Public Meeting requirements under the Freedom of Information Act of 1967.

C. Guidelines Development and Amendments

These guidelines have been developed to help public entities implement certain requirements of the PPFIA. The intent was to provide structure to the PPFIA without overly dictating process. In developing these guidelines, as required by § 22-10-502¹⁸, the AEDC relied extensively on legislative intent specified in Act 813 of 2017, and best practices of other states which have implemented public-private partnership programs similar in nature to Arkansas's. Subsequent development of detailed rules, as required by § 22-10-503¹⁹, which will implement application submittal, review, and approval procedures, will build upon these guidelines.

In the event that the PPFIA is amended in a manner that either conflicts with these guidelines or concerns material matters not addressed herein, the PPFIA shall solely govern. Projects initiated under these guideline must adhere to all current laws, rules, and guidelines.

The AEDC and ADFA may amend these guidelines, as necessary, under provisions of the Administrative Procedures Act, § 25-15-201 et seq.

D. Review Fees

Proposals which have technical, complex, or specialized information may require expert evaluation and review by third-party independent advisors and consultants to the RPE. The RPE may charge reasonable, nonrefundable fees to private entities to cover the costs of processing, reviewing, and evaluating any proposal under the PPFIA, including without limitation, reasonable attorney's fees and fees for financial, technical, or other advisors or consultants. RPEs shall ensure that advisors and consultants are licensed and certified to practice in good standing in Arkansas and have no fiduciary affiliation with the qualified project proposal submitted for review as evidenced by signed disclosure certifications.

Fees charged should not exceed the actual cost incurred by the RPE to conduct the necessary review of the proposal. RPEs must identify the fee or fee schedule to be applied, including methodologies used, in the PPFIA application and RFP solicitation to ensure that private entities considering an RFP response are aware of the fees associated with the review.

The RPE should perform a periodic cost review of their review fees and methodologies to ensure that they are accurate and reasonable. Data from public-private partnership projects in Arkansas and elsewhere in the United States may be utilized. Although specific costs to review individual PPFIA proposals will vary by project type, using a fee schedule based on quantitative data from historic projects should provide reliable guidance.

A private entity assumes all risks in submission of a proposal. An RPE shall not incur any obligation to reimburse a private entity for any costs, damages, or loss of property incurred in the creation, development, or submission of a proposal for a qualifying project.

E. PPFIA Legal Stipulations

The PPFIA specifically addresses certain legal issues that may arise during the development of a qualifying project. RPEs should consult with their legal counsel to confirm compliance with any legal

¹⁸ § 22-10-502(b) specifies guidelines items.

¹⁹ § 22-10-503(a) specifies rules items.

issues arising during the development of PPFIA qualifying projects. Below are specific PPFIA references to some of these major issues.

1. Eminent Domain

A public entity may exercise its right of eminent domain under applicable law in connection with the development of a qualifying project. The power of eminent domain shall not be delegated to a private entity with respect to a qualifying project commenced or proposed under the PPFIA. Damages awarded to a third party in an eminent domain action may be included in the development budget for the qualifying project.

An RPE may dedicate any real or personal property interest, including land, improvements, and tangible personal property, through lease, sale, or otherwise, to the qualified respondent to facilitate a qualifying project if so doing will serve the public purpose of the PPFIA.

2. Sovereign Immunity

The PPFIA does not waive the sovereign immunity of a public entity or the officers or employees of the public entity under state law; or extend a public entity's sovereign immunity to any private entity.

3. Freedom of Information

This PPFIA does not abrogate the obligation of an RPE to comply with the Freedom of Information Act of 1967, ACA § 25-19-101 et seq. However, records that would otherwise be exempt from disclosure under the Freedom of Information Act, including without limitation confidential and proprietary information, remain exempt when in the custody or control of a public entity, the Chief Fiscal Officer (CFO) of Arkansas, or the Governor.

Records related to a qualifying project that are provided to or compiled or developed by a public entity, the CFO of Arkansas, or the Governor in furtherance of the entity's or officer's powers, duties, or obligations under the PPFIA are exempt under ACA § 25-19-105(b)(9)(A) as files that would give an advantage to competitors or bidders.

4. Financing the Qualifying Project

Private entities and RPEs may utilize any funding sources legally available to them including without limitation issuing debt, equity, or other securities or obligations, entering into leases, tax credits, operating revenues, accessing designated trust funds, and borrowing or accepting grants from any state, federal, or private source. However, any bonds issued by an RPE under the PPFIA:

- a. Shall state plainly on the face of the bonds that they are issued under the PPFIA;
- b. Are obligations only of the RPE;
- c. Do not constitute an indebtedness of the state or a pledge of the full faith and credit of the state;
- d. Shall not be secured by a lien or security interest in any property of the state;
- e. May be secured by a pledge of the project revenues; and
- f. May be secured by a security interest in, or lien on, real or personal property of the qualified respondent, including any property interests in the qualifying project.

The expenditure of state funds in support of an interim or comprehensive agreement requires legal appropriations prior to expenditure of funds.

5. Procurement

Any comprehensive agreement entered into by an RPE may include terms and conditions specific to the procurement of services or materials related to the qualifying project. In selecting a qualified respondent, ACA § 19-11-801 et seq.²⁰ applies. Competitive bidding shall not be used. Procurements related to the development of a qualifying project are exempt from any procurement laws that are not contained in the PPFIA or any rules promulgated under the PPFIA that would otherwise apply to the responsible public entity.

6. Legal Actions Under the PPFIA

Any legal uncertainty or challenge to any aspect of the authorization and implementation of a public-private partnership seriously undermines the ability to attract private sector participation and impairs the timely implementation of public projects. A lawsuit brought concerning the validity of the PPFIA, bonds issued under the PPFIA, or the execution and delivery of an interim agreement or comprehensive agreement is of public interest and shall be advanced by the court and heard as a preferred cause of action. An appeal from a judgment or decree rendered in such a case shall be taken within thirty (30) calendar days after the judgment or decree is rendered.

The PPFIA is supplemental to all other powers conferred by law and does not restrict or limit any powers that a public entity has under any other law.

F. Contact Information

For more information, please contact:

Mike Preston, Executive Director
Arkansas Economic Development Commission
900 West Capitol, Suite 400
Little Rock, AR 72201
(501) 682-1121

II. Guidelines

A. Criteria for Selecting Qualifying Projects Undertaken by a Public Entity

Any public entity seeking approval of a proposed project to be developed under the PPFIA shall submit two (2) copies of the signed, completed Application to the AEDC. Public entities are encouraged to seek the advice of AEDC and ADFA regarding potential PPFIA projects as early as possible, preferably prior to or during development of the application. Public entities, however, are required to seek the advice and consent of AEDC and ADFA prior to issuing an RFP. Below are guidelines specific to the Application.

1. Applicant Information

- a. Applicants must receive AEDC and ADFA designation as an RPE prior to issuing an RFP under the PPFIA. Only applicants that meet the definition of “public entity” and are authorized to undertake projects as specified in the PPFIA may be designated as an RPE. Applicants must meet each of the criteria below to be eligible to submit an application.

²⁰ Procurement of Professional Services.

- i. Meet the definition of public entity. “Public entity” means an agency or instrumentality of the state, including, without limitation a department, an agency, an institution of higher education, a board, or a commission. “Public entity” does not include a political subdivision of the state or any other local or regional governmental entity, including without limitation a city of the first class, a city of the second class, an incorporated town, a county, a school district, an improvement district, a water authority, a public facilities board, a solid waste management district, or a water distribution district.
- ii. Have statutory or constitutional authority to develop and operate the qualifying project.
- iii. Not be specifically prohibited from submitting projects under the PPFIA.²¹

2. Project Description

The project description must satisfy each of the following criteria.

- a. Projects must meet the definition of “**qualifying project**” as defined by the PPFIA. A “qualifying project” means a capital development or improvement of any nature that:
 - i. Serves a public purpose, including without limitation a ferry, mass transit facility, vehicle parking facility, port facility, power generation facility, fuel supply facility, combined heating and power facility, central utility plant facility, distributed generation facility, oil or gas pipeline, water supply facility, water treatment intake and distribution facility, waste water treatment and collection facility, waste treatment facility, hospital, library, school, educational facility, medical or nursing care facility, recreational facility, administrative facility, law enforcement facility, fire department facility, public administrative office, toll road, correctional facility, technology infrastructure facility, public building, transportation system as defined in § 27-76-103²², or other similar facility currently available or to be made available to a public entity for public use, including without limitation a structure, parking area, appurtenance, and other related or unrelated infrastructure that might otherwise be described in a comprehensive agreement; and
 - ii. Has one (1) or more of the following characteristics:
 - 1. It is developed using a long-term operations and maintenance agreement, management agreement, or services agreement entered into with a private entity;
 - 2. It is designed and built in whole or in part by a private entity;
 - 3. It is a capital development or improvement in which a private entity:
 - a. Invests its own capital or third-party capital arranged by the private entity;
 - b. Sources or uses indebtedness, available funds, revenues, or financial or tax incentives to fund the capital development or improvement; or
 - c. Provides other consideration in the form of goods or services to the public entity to fund the project;
 - 4. It is owned in whole or in part by a private entity for the benefit of a public entity;
 - 5. It involves real or personal property owned by a public entity that is sold to, leased to, or exchanged with a private entity for leaseback or for use by the public entity; or
 - 6. It is a qualifying project as defined in PPFIA rules.
 - iii. A qualifying project shall be located on real property owned or leased by a public entity and include any improvements necessary or desirable to unimproved real property owned

²¹ Projects of the Arkansas Highway and Transportation Department (or successor name) are ineligible to submit projects.

²² Regional Mobility Authority Act.

- by a public entity.
- b. Applications must identify the geographic area to be served by the project. For some projects, this may encompass small geographic areas such as cities, parts of counties, or multiple counties. For larger projects, significant regions of Arkansas or all of Arkansas could benefit. Applicants are encouraged to provide a service or beneficiary area map.
 - c. Applications must identify each affected local jurisdiction and other affected public entities. "Affected local jurisdiction" means a county, a city of the first class, a city of the second class, an incorporated town, or a school district in which all or a portion of a qualifying project is located; and any other local governmental entity that is directly impacted by a qualifying project. Affected public entities are those public entities that will be fiscally impacted by the qualifying project or who have statutory or constitutional authority relative to development of the qualifying project.
 - d. Applications must include a statement of public purpose (i.e., how will the project serve Arkansans?). The statement should be supported by:
 - i. An estimate of the number of beneficiaries. Include demographic, geographic, and socio-economic data as available.
 - ii. An explanation as to how the qualifying project will be available for public use.
 - e. Applications must provide a determination of project need under the PPFIA and explain why the project is being developed under the PPFIA as opposed to utilizing traditional procurement and financing methods. Reasons may include timeliness, availability of alternative financing mechanisms, cost efficiencies/effectiveness, "opportunity cost"²³, etc. A "Value-for-Money Analysis"²⁴ performed by or on behalf of the RPE must be provided to justify project development under the PPFIA.
 - f. Applications must contain a preliminary capital development and maintenance and operation budget which lists all proposed public and private sources and uses of funds, financing, revenues²⁵, lease payments, and user fees²⁶ throughout the life of the project.
 - g. Applications must include the proposed review fee amount(s) (if any), fee schedule, and the methodology to be employed to charge fees for proposal reviews.

3. Application Certification

The chief officer or executive director of the public entity must acknowledge each required authorization, sign and date the application, and return two (2) original copies to the AEDC.

Any comments, reviews, approvals, or designation issued by the AEDC or ADFA shall not bind the RPE to proceed with the qualifying project.

B. Criteria for Selecting Among Competing Proposals

1. Preparing the RFP

The development of a detailed, comprehensive RFP package will ensure that RPEs will receive proposals that correspond to the scope, development, and feasibility of the qualifying project as envisioned.

²³ See definition (5) of Appendix A.

²⁴ See definition (16) of Appendix A.

²⁵ See definition (14) of Appendix A.

²⁶ See definition (15) of Appendix A.

A public entity may issue a Request for Qualifications (RFQ) prior to issuing an RFP. An RFQ is a step sometimes used in the formal process of procuring a product or service as a screening step to establish a pool of vendors (businesses or individuals to provide a product or service) that are then qualified, and thus eligible to submit responses to an RFP. If the RFQ is conducted separately from an RFP, then RFQ responses shall describe the company or individual's general qualifications to perform a service or supply a product.

Generally, RFPs should ascertain the proposer's capability to complete the proposed qualifying project in a timely manner and to ensure that proposed benefits will be derived throughout the life of the project. RFPs should also request a scope of work and financial plan, including anticipated revenues, to allow the RPE to thoroughly analyze the financial feasibility of competing proposals. Broad topical categories of the RFP should include:

- a. Qualifications and Experience
 - Capacity and capability to develop project
- b. Scope and Purpose of Project (Project Characteristics)
 - Technical and structural feasibility of qualified project
- c. Project Benefit and Compatibility with Existing Plans
 - Integration of project with existing plans and future benefit
- d. Financing Plans
 - Fiscal feasibility and financial sustainability

Significant detail to these broad categories can be augmented by incorporating specific criteria from Section II.B into the RFP solicitation.²⁷

2. Issuing the RFP

Prior to issuing an RFP for the qualifying project, the RPE shall:

- a. Adopt and make publically available²⁸ these guidelines, the Application, and RFP.
- b. Notify each affected local jurisdiction and other public entities with shared responsibilities and/or concurrent authority in regard to the qualifying project in writing at least sixty (60) calendar days prior to issuing an RFP. Affected local jurisdictions and other public entities have sixty (60) calendar days after receiving the notice to submit in writing any comments to the RPE and to indicate whether the qualified project is incompatible with any plans or budgets. The RPE must address all comments before entering into a comprehensive agreement with a private entity.
- c. Prepare an RFP and submit to AEDC at least fifteen (15) calendar days prior to publication.

The RFP must be published one (1) time per week for three (3) consecutive weeks in a

²⁷ The level of detail may differ significantly depending upon the degree to which the project has been defined by the RPE. See for example, *Governing Magazine*, *Governing Guide to Financial Literacy Volume 3, Understanding the Risks and Rewards of Public-Private Partnerships*, for a discussion of high-performance procurement vs. innovating early.

²⁸ The PPFIA application, guidelines, RFP notice, evaluation criteria, and any other documentation required to be made publically available in the guidelines or PPFIA rules promulgated under the Arkansas Administrative Procedure Act must be posted on a dedicated web page reserved exclusively by the RPE for the PPFIA project. The RPE may post additional, more detailed information when seeking proposals if deemed by the RPE to encourage competition. Multiple PPFIA projects may be posted simultaneously on the same web page as long as each project is clearly and separately delineated.

newspaper of statewide circulation. The period of time between the date of initial publication and the RFP response deadline must be at least forty-five (45) calendar days but no more than 120 calendar days. The timeframe between the date of initial RFP publication and the RFP response deadline may be extended by the RPE up to an additional 120 days with the consent of AEDC.

3. Selection Committee and Evaluation Criteria

If the RPE does not have an existing process to evaluate RFPs and select qualified respondents, it shall select an evaluation committee, subject to AEDC approval, to review, evaluate, and rank all RFP responses. All criteria to be used in the review, evaluation, and ranking of competing proposals for a qualifying project shall be determined by the evaluation committee prior to issuing an RFP. A scoring matrix can be weighted in any fair manner to adequately assess the critical elements of a proposal. There are several factors that may be used when evaluating and selecting a proposal, including without limitation, the following:

a. Qualifications and Experience

- i. Experience and reputation (references) involving similar projects;
- ii. Demonstration of ability to complete work;
- iii. Legal structure of firm;
- iv. Leadership structure of firm;
- v. Project manager's experience and managerial approach; and
- vi. Financial capacity of firm.

b. Scope and Purpose of Project (Project Characteristics)

- i. Project description (qualifying type under PPFIA, scope of work, location, planning/design, and service delivery plan);
- ii. Proposed project ownership and responsibilities of public and private entities;
- iii. Schedule and timelines for all phases of project development;
- iv. Technical feasibility of qualifying project;
- v. Conformity to laws, regulations, and standards;
- vi. Environmental impacts and mitigation plans;
- vii. Acquisition of permits, property, easements, and utility/transportation crossings; and
- viii. Ongoing maintenance and operation of the project.

c. Project Benefit and Compatibility with Existing Plans

- i. Direct and indirect public benefits;
- ii. Project support or opposition, or both (positive and adverse social, economic, and environmental benefits);
- iii. Public involvement strategy;
- iv. Compatibility with local, regional, and state development plans; and
- v. Utilization of local contractors and workers, including minority-owned and women-owned businesses.

d. Financing Plans

- i. Proposed project cost by phase, segment, or both;
- ii. Cost and benefit to the RPE; life-cycle cost analysis;
- iii. Impact on the debt burden/debt limitations of affected local jurisdictions;
- iv. Opportunity cost assessment;

- v. Long-term maintenance and operations cost;
- vi. Financing options including the sources and uses of public and private funding; estimated “revenues”²⁹, “user fees”³⁰, lease payments, service payments, etc., realized from the operation of the qualified project; and
- vii. Such other items as the RPE deems appropriate.

There are several public-private partnership models with varying levels of public and private responsibility and financial risk. It is imperative that the RPE conduct a thorough financial analysis, including a comprehensive risk assessment, to ensure that the partnership meets the fiscal needs of the RPE with an acceptable level of risk.

Components of the financial review and analysis of a proposal by the RPE may include several³¹ or all of the following prepared by or at the request of the RPE:

- *Cost-benefit analyses**;
- *Opportunity costs**;
- *Analysis of lifecycle costs**;
- *Nonfinancial benefits**;
- *Consideration of the results of all studies and analyses related to the proposed qualifying project**;
- Risk assessment;
- Cash flow analysis;
- Evaluation of the public need for or benefit derived from the qualifying project;
- Evaluation of the estimated cost of the qualifying project for reasonableness in relation to similar facilities;
- Evaluation of the source(s) of funding for the project;
- Evaluation of risk sharing, including cost or completion guarantees, added value, or debt or equity investments by the private entity;
- Consideration of any increase in funding, dedicated revenue sources, or other economic benefits that would not otherwise be available; and
- Estimates of all revenues, including user fees and leases, projected to accrue to the project.

After the RFP response deadline has expired, the RPE shall rank the proposals in accordance with the criteria adopted by the evaluation committee. The RPE (not required to select the proposal with the lowest price offer) may consider price as one variable in evaluating the proposals. The RPE shall also decide whether it will engage independent advisors to assist (and not be a member of) the evaluation committee in its review of proposals. The RPE may charge a reasonable, nonrefundable fee to cover the cost of processing, reviewing, and evaluating a PPFIA proposal, including without limitation reasonable attorney's fees and fees for financial, technical, or other advisors or consultants. See Section I.D. of these guidelines for additional information.

During evaluation, the RPE may seek written clarification from any proposer regarding the contents of the proposer's response. A request for written clarification may be made when a proposer's response contains conflicting information or is so ambiguous that it is possible for a reasonable person to attribute different meanings to the ambiguous portion of the proposer's response. A request for written

²⁹ See definition (14) of Appendix A.

³⁰ See definition (15) of Appendix A.

³¹ The items with * were delineated in the PPFIA as required review elements.

clarification may not be used for negotiation (i.e., request the private entity to revise or improve their response). Written clarifications received will become part of that proposer's response.

After ranking proposals, the evaluation committee shall make a recommendation to the chief officer or executive director of the RPE to begin the negotiation process with the qualified respondent based on the rankings. The RPE shall begin negotiations with the first ranked private entity. If the RPE and the first ranked private entity do not reach a comprehensive agreement or interim agreement in the time specified, then the RPE may conduct negotiations with the next ranked private entity. This process shall continue until the RPE either terminates the process or executes an interim or comprehensive agreement with a private entity.

At any time during the negotiation process, but before the execution of an interim or a comprehensive agreement, the RPE may, without liability to any private entity or third party, cancel the RFP or reject all proposals received in response to the RFP. Additionally, upon the RPE's entering into an interim agreement or a comprehensive agreement, the agreement shall govern the parties' obligations and liabilities.

C. Timelines for Executing a Comprehensive Agreement with a Qualified Respondent

Although a specific timeframe for selecting a qualified respondent is not mandatory, RPEs are encouraged to begin negotiations with qualified entities as soon as possible to ensure that a comprehensive agreement is executed within 180 calendar days. This deadline can be extended to up to 365 calendar days by mutual written agreement of both parties. The following section contains information regarding the development of interim agreements and comprehensive agreements.

D. Guidelines for Negotiating a Comprehensive Agreement

***Note:** Public entities (other than the RPE) appropriating or authorizing funding for financing qualified projects shall be afforded an opportunity to review any proposed interim agreement or comprehensive agreement prior to execution.*

1. Interim Agreements

Interim agreements are useful documents that are encouraged but are not required under the PPFIA. The PPFIA defines an interim agreement as a preliminary written agreement between a private entity and an RPE executed under ACA § 22-10-302 by which the development, scope, and feasibility of a qualifying project is identified.

An interim agreement will usually be less detailed than a comprehensive agreement and will leave open items for further negotiations to be included in the comprehensive agreement. An interim agreement may be used in situations where information is needed to further develop the concept of the qualifying project. Therefore, an interim agreement might be appropriate to have the selected private entity complete certain architectural and engineering (A/E) drawings and feasibility studies so that the RPE can determine how the final qualifying project might be developed or even if the project should proceed before entering into a more detailed comprehensive agreement.

An interim agreement may also be used to allow the private entity to start work on the A/E design and drawings as the comprehensive agreement is completed. An interim agreement could establish a process and timeframe for terminating the project if negotiations cease. This type of clause in the interim agreement would allow for termination of the agreement and provide for payment of agreed-upon compensation to the private entity for the work completed pursuant to the interim agreement.

An interim agreement may include, without limitation, any of the following items:

- a. Project planning and development;
- b. Design and engineering;
- c. Permitting;
- d. Environmental analysis and mitigation;
- e. Surveying;
- f. Land and easement acquisition;
- g. Ascertaining the availability of financing for the proposed facility through financial and revenue analysis;
- h. Establishing a process and timing of the negotiation of the comprehensive agreement; and
- i. 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.

If municipal financing by an RPE is a component of the interim agreement, the RPE shall obtain a written evaluation of the proposed qualifying project from a municipal advisor registered with the United States Securities and Exchange Commission and the Municipal Securities Rulemaking Board.

2. Comprehensive Agreements

The selected private entity and RPE shall enter into a comprehensive agreement which shall cover all developmental aspects of the qualifying project not previously covered in an interim agreement. (The AEDC and ADFA may consult in negotiations at the request of the RPE.) “Comprehensive agreement” means a final written agreement between a private entity (qualified respondent) and a responsible public entity governing the development of a qualifying project. It should fully detail the planning, design, development, ownership, financing, leasing, acquisition, installation, construction, operation, maintenance, expansion, and termination of a qualifying project.

The comprehensive agreement shall include without limitation the following items:

- a. Any items (a. through g.) identified above in interim agreements;
- b. A thorough description of the duties and responsibilities of each party in the completion and operation of the qualifying project;
- c. Dates and schedules for the completion of all phases or segments of the qualifying project;
- d. All financing components including the sources and uses of public and private funding; estimated revenues, user fees, lease payments, service payments, etc., realized from the operation of the project as well as any process for changing fees, payments, or funding terms and conditions throughout the duration of the agreement;
- e. A process for the review and approval of plans and specifications for the qualifying project by the RPE;
- f. Delivery of all required payment, performance, surety, and other bonds in the forms and

- amounts required by law for the qualifying project;
- g. Proof of all required insurance, in the forms and amounts required by law for the qualifying project;
- h. The filing of appropriate financial statements and progress reports to the RPE, AEDC, ADFA, and DFA on a periodic basis;
- i. A process for monitoring and inspecting the development of the project by the RPE, ADFA, AEDC, and DFA to ensure compliance with terms and conditions of written agreements, PPFIA law and rules;
- j. Provisions governing the rights and responsibilities of the RPE and private entity in the event that the comprehensive agreement is terminated or if there is a material default by the private entity or RPE;
- k. Terms and conditions related to the procurement of services or materials through additional contracts related to the qualifying project;
- l. Safeguards to ensure that additional costs or service disruptions are not imposed on the public in the event of material default or cancellation of the agreement by the RPE or qualified respondent;
- m. Financing terms including all sources and amounts of funds, anticipated revenues, user fees, leases, and other fiscal components;
- n. Plans for long-term operation and maintenance agreements, management agreements, or service agreements with private entities;
- o. Any reimbursements to be paid to the RPE for services provided or procured by the RPE; and
- p. Processes and procedures regarding any changes to the terms of the comprehensive agreement, as may be mutually agreed upon by the parties from time to time, as added by written amendment.

The comprehensive agreement may include other terms and conditions that the RPE determines will serve the public purpose of the PPFIA and to which the private entity and the RPE mutually agree, including, without limitation, provisions regarding unavoidable delays, liquidated damages, and provisions where the authority and duties of the private entity under the PPFIA shall transfer and the qualifying project is dedicated to the RPE for public use. Comprehensive agreements shall include a hand-back clause which specifies the terms and conditions governing the transfer of ownership from the private entity to the RPE upon expiration of the lease, term, or concession period.

E. Guidelines for Allowing Accelerated Selection of Qualified Respondents

The following expedited timeframe shall be followed for accelerated selection of prioritized projects. Days listed are calendar days.

Event	Standard Timeframe	Expedited Timeframe
Affected local jurisdiction and other public entity notification prior to RFP issuance	60 days	30 days
Submittal of RFP to AEDC prior to publication	60 days	30 days
Duration of RFP publication from advertisement to response deadline	45-120* days	45-90* days
Execution of Comprehensive Agreement	180** days after RFP response deadline	120 days**

* May be extended by the RPE up to an additional 120 days with the consent of AEDC.

** This deadline may be extended to up to 365 calendar days by mutual written agreement of both parties.

Appendix A Definitions

- (1) “Affected local jurisdiction” means:
 - (A) A county, a city of the first class, a city of the second class, an incorporated town, or a school district in which all or a portion of a qualifying project is located; and
 - (B) Any other local governmental entity that is directly impacted by a qualifying project, as specified in the rules promulgated under this chapter;
- (2) “Comprehensive agreement” means a final written agreement between a private entity and a public entity executed under § 22-10-303 by which a qualifying project shall be developed;
- (3) “Develop” or “development of” means to plan, design, develop, own, finance, lease, acquire, install, construct, operate, maintain, or expand a qualifying project;
- (4) “Interim agreement” means a preliminary written agreement between a private entity and a public entity executed under § 22-10-302 by which the development, scope, and feasibility of a qualifying project is identified;
- (5) “Opportunity cost” means the cost of passing up an alternative and the increase in costs as the result of delaying a decision;
- (6) “Private entity” means a natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity, and other business entity;
- (7)
 - (A) “Public entity” means an agency or instrumentality of the state, including without limitation a department, an agency, an institution of higher education, a board, or a commission.
 - (B) “Public entity” does not include a political subdivision of the state or any other local or regional governmental entity, including without limitation a city of the first class, a city of the second class, an incorporated town, a county, a school district, an improvement district, a water authority, a public facilities board, a solid waste management district, or a water distribution district;
- (8) “Publish” means the publication by a public entity of a request for proposals one (1) time a week for three (3) consecutive weeks in a newspaper of statewide circulation;
- (9) “Qualified respondent” means the private entity selected as the most qualified respondent to undertake a qualifying project based on a request for proposals issued under this chapter;
- (10) “Qualifying project” means a capital development or improvement of any nature that:
 - (A) Serves a public purpose, including without limitation a ferry, mass transit facility, vehicle parking facility, port facility, power generation facility, fuel supply facility, combined heating and power facility, central utility plant facility, distributed generation facility, oil or gas pipeline, water supply facility, water treatment intake and distribution facility, waste water treatment and collection facility, waste treatment facility, hospital, library, school, educational facility, medical or nursing care facility, recreational facility, administrative facility, law enforcement facility, fire department facility, public administrative office, toll road, correctional facility, technology infrastructure facility, public building, transportation system as defined in § 27-76-103³², or other similar facility currently available or to be made available to a public entity for public use, including without limitation a structure, parking area, appurtenance, and other related or unrelated infrastructure that might otherwise be described in a comprehensive agreement; and
 - (B) Has one (1) or more of the following characteristics:
 - (i) It is developed using a long-term operations and maintenance agreement,

³² The Regional Mobility Authority Act, established by Act 389 of 2007.

- management agreement, or services agreement entered into with a private entity;
 - (ii) It is designed and built in whole or in part by a private entity;
 - (iii) It is a capital development or improvement in which a private entity:
 - (a) Invests its own capital or third-party capital arranged by the private entity;
 - (b) Sources or uses indebtedness, available funds, revenues, or financial or tax incentives to fund the capital development or improvement; or
 - (c) Provides other consideration in the form of goods or services to the public entity to fund the project;
 - (iv) It is owned in whole or in part by a private entity for the benefit of a public entity;
 - (v) It involves real or personal property owned by a public entity that is sold to, leased to, or exchanged with a private entity for leaseback or for use by the public entity; or
 - (vi) It is a qualifying project as defined in the rules promulgated under this chapter;
- (11) “Request for proposals” means a notice that is issued by a public entity announcing the public entity's interest in developing a qualifying project and seeking proposals from private entities to develop the qualifying project that identifies without limitation:
- (A) The anticipated scope and purpose of the qualifying project;
 - (B) The financial and nonfinancial benefits related to the qualifying project;
 - (C) Any anticipated revenues that might be realized as a result of the operation of the qualifying project;
 - (D) The proposed timeline under which the qualifying project is to be completed; and
 - (E) Any other issues required by the rules promulgated under this chapter;
- (12) “Request for qualifications” means an optional process, conducted prior to a request for proposals, by which a public entity may request potential vendors to submit specific qualifications in response to a formal request to perform specified services or activities, so that a pool of qualified vendors may be chosen by the public entity to respond to a request for proposals;
- (13) “Responsible public entity” means a public entity that has the statutory or constitutional authority to develop and operate the applicable qualifying project;
- (14) “Revenues” means the rates, revenues, income, earnings, user fees, lease payments, service payments, other available funds, and other revenue and cash flow of any nature arising out of or in connection with the development of a qualifying project, including without limitation the funds derived from the operation of a qualifying project or otherwise provided by the parties as stated in the comprehensive agreement, and excluding any revenues that are prohibited by law;
- (15) “User fees” means the rates, fees, or other charges imposed by a private entity for use of all or a portion of a qualifying project pursuant to a comprehensive agreement; and
- (16) “Value-for-money analysis” means the value calculated, in percentage terms, when comparing the costs to develop a qualifying project outside of this chapter to the costs to develop the qualifying project under this chapter to determine which procurement approach produces the best value to the public over a long-term period.

Attachment A
Partnership for Public Facilities and Infrastructure Act (PPFIA)
Application

A. Applicant Information

Legal Name of Public Entity*: _____

Name and Title of Chief Officer/Executive Director: _____

Address: _____

City: _____ State: _____ Zip Code: _____

Phone: _____

Project Contact**: _____ Title: _____

Phone: _____ Email: _____

Web Address***: _____

*Must have statutory or constitutional authority to develop and operate the qualifying project.

**Representative of public entity who is responsible for project management/meeting with private entities/meeting with state agencies.

***Web address of public entity where PPFIA documents are available for public review.

B. Project Description (Briefly describe how this project meets the requirements of the Act)

Project Title: _____

Qualifying Project Type: _____

Summary of Project: (A detailed description of the project; what is to be accomplished; what are the goals/objectives of the project; timeline/when will key milestones be completed.)

Geographic Area(s) Served:

Affected Local Jurisdiction(s) (List each separately):

1. _____
2. _____
3. _____
4. _____
5. _____

Affected Public Entities (e.g., co-funders, complementary authority) (List each separately)

1. _____
2. _____
3. _____
4. _____
5. _____

Statement of Public Purpose: What public purpose or need is being served by the project? How will the project be available for public use? What issues or purposes do you plan to address through this project? Identify who will benefit from the project, how (financial and nonfinancial) they will benefit, and how the project will benefit the overall community, region, or state.

Determination of Project Need: Explain how development of a public-private partnership will produce a higher quality, more timely, and cost-efficient project, resulting in increased benefits to the public safety and welfare to the citizens of Arkansas. Attach a Value-for-Money Analysis to justify project development under the PPFIA.

Projected Project Development Budget:

List all proposed public and private sources and uses of funds, financing, revenues, lease payments, and user fees for capital development and maintenance and operations during the life of the project.

Source	Purpose	Amount	Commitment Date	Terms	Conditions, Contingencies, Assumptions
Capital Development Budget					
Maintenance and Operation Budget (Annual)					

Review Fees: List the proposed review fee amount, fee schedule, and the methodology to be employed to charge review fees for proposal reviews:

C. Application Certification:

Authorizing Signature (President/Executive Director/Elected Official)

Please check each item below:

- I verify that the information provided is correct and accurate to the best of my knowledge.
- The applicant meets the definition of “public entity” under the PPFIA and is not specifically prohibited from submitting an application.
- The applicant has statutory and constitutional authority to develop a project under the PPFIA.
- I agree to abide to all terms and conditions of the PPFIA as defined in legislation, guidelines, rules, and any written agreements executed pursuant to a qualified project.

Authorized Applicant (Print Name and Title): _____

Signature: _____

Date: _____

Submitting the Application

Please return two (2) copies of the completed PPFIA application and all supporting documents to:

Mike Preston, Executive Director

Arkansas Economic Development Commission

900 West Capitol Avenue, Suite 400

Little Rock, AR 72201