

## **Title 22. Public Property**

### **Chapter XVII. Building Authority Division, Department of Shared Administrative Services**

#### **Subchapter A. Generally**

#### **Part 101. Partnerships for Public Facilities and Infrastructure**

##### **Subpart 1. Generally**

###### **22 CAR § 101-101. Purpose.**

The purpose of this part is to administer and implement Arkansas Code § 22-10-101 et seq., regarding partnerships for public facilities and infrastructure.

###### **22 CAR § 101-102. Definitions.**

As used in this part:

(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; or

(B) Any other local governmental entity that is directly impacted by a qualifying project;

(2) "Comprehensive agreement" means a final written agreement between a private entity and a public entity executed under Arkansas Code § 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 Arkansas Code § 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) "PPFIA" refers to the Partnership for Public Facilities and Infrastructure Act, Arkansas Code § 22-10-101 et seq.;

(7) "Private entity" means:

- (A) A natural person;
- (B) A corporation;
- (C) A general partnership;
- (D) A limited liability company;
- (E) A limited partnership;
- (F) A joint venture;
- (G) A business trust;
- (H) A public benefit corporation;
- (I) A nonprofit entity; and
- (J) Other business entity;

(8)(A) "Public entity" means an instrumentality of the state, including without limitation:

- (i) A department;
- (ii) An agency;
- (iii) An institution of higher education;
- (iv) A board; or
- (v) A commission.

(B) However, "public entity" does not include a political subdivision of the state or any other local or regional governmental entity, including without limitation:

- (i) A city of the first class;
- (ii) A city of the second class;
- (iii) An incorporated town;
- (iv) A county;
- (v) A school district;
- (vi) An improvement district;
- (vii) A water authority;
- (viii) A public facilities board;

- (ix) A solid waste management district; or
- (x) A water distribution district;

(9) "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;

(10) "Qualified respondent" means the private entity selected as the most qualified respondent to undertake a qualifying project based on a request for proposal issued under the Partnership for Public Facilities and Infrastructure Act, Arkansas Code § 22-10-101 et seq.;

(11) "Qualifying project" means a capital development or improvement of any nature that:

(A) Serves a public purpose, including without limitation:

- (i) A ferry;
- (ii) A mass transit facility;
- (iii) A vehicle parking facility;
- (iv) A port facility;
- (v) A power generation facility;
- (vi) A fuel supply facility;
- (vii) A combined heating and power facility;
- (viii) A central utility plant facility;
- (ix) A distributed generation facility;
- (x) An oil or gas pipeline;
- (xi) A water supply facility;
- (xii) A water treatment intake and distribution facility;
- (xiii) A waste water treatment and collection facility;
- (xiv) A waste treatment facility;
- (xv) A hospital;
- (xvi) A library;
- (xvii) A school;
- (xviii) An educational facility;

- (xix) A medical or nursing care facility;
- (xx) A recreational facility;
- (xxi) An administrative facility;
- (xxii) A law enforcement facility;
- (xxiii) A fire department facility;
- (xxiv) A public administrative office;
- (xxv) A toll road;
- (xxvi) A correctional facility;
- (xxvii) A technology infrastructure facility;
- (xxviii) A public building;
- (xxix) A transportation system as defined in Arkansas Code § 27-76-

103; or

(xxx) Other similar facility currently available or to be made available to a public entity for public use, including without limitation:

- (a) A structure;
- (b) A parking area;
- (c) An appurtenance; and
- (d) 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, 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 involving other characteristics presented to and approved by the Department of Shared Administrative Services;

(12) "Request for proposals (RFP)" means the notice that is issued by a public entity:

(A) Announcing the public entity's interest in developing a qualifying project; and

(B) Seeking proposals from private entities to develop the qualifying project that identifies without limitation:

(i) The anticipated scope and purpose of the qualifying project;

(ii) The financial and nonfinancial benefits related to the qualifying project;

(iii) Any anticipated revenues that might be realized as a result of the operation of the qualifying project;

(iv) The proposed timeline under which the qualifying project is to be completed; and

(v) Any other issues required by the Partnership for Public Facilities and Infrastructure Act, Arkansas Code § 22-10-101 et seq.;

(13) "Request for qualifications (RFQ)" means the 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;

(14) "Responsible public entity (RPE)" means a public entity that has the statutory or constitutional authority to develop and operate the applicable qualifying project;

(15) "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; and

(16) "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.

## **22 CAR § 101-103. Responsible public entity application.**

(a) Prior to issuing an RFP, any public entity wanting to utilize the Partnership for Public Facilities and Infrastructure Act, Arkansas Code § 22-10-101 et seq., for the development of partnership projects must submit an application to the Department of Shared Administrative Services requesting to be designated as a responsible public entity (RPE).

(b) The Department of Shared Administrative Services shall publish the Responsible Public Entity Application (application) on its website.

(c) A public entity shall submit two (2) copies of the signed, completed application and any supporting attachments to the Department of Shared Administrative Services.

(d) The Department of Shared Administrative Services and the Department of Commerce will concurrently review the application and if approved, designate the public entity as a responsible public entity for the purpose of developing a qualifying project.

(e) While not required, a public entity is encouraged to seek the advice of the Department of Shared Administrative Services and the Department of Commerce regarding potential partnership projects as early as possible, preferably prior to or during development of the application.

(f) Designation as an RPE does not bind the public entity to proceed with the:

- (1) Issuance of a request for proposal; or
- (2) Development of any partnership projects.

**22 CAR § 101-104. Requests for proposals.**

(a) A responsible public entity (RPE) may issue a request for proposal (RFP) or an invitation for bid (IFB) for the development of a qualifying project if the RPE determines:

- (1) There is a public need or benefit from the type of qualifying project being proposed;
- (2) The proposals or bids are anticipated to result in the timely development of a qualifying project; and
- (3) The qualifying project being considered satisfies or is anticipated to satisfy the criteria identified in this part.

(b) At least sixty (60) days prior to the issuance of the proposed RFP, the RPE shall prepare and submit the proposed RFP to the Department of Shared Administrative Services for advice and approval.

(c) Upon approval and issuance of the RFP, the RPE shall:

- (1) Notify each affected local jurisdiction and other public entities with shared responsibilities or concurrent authority in writing;
- (2) Make publicly available the Responsible Public Entity Application and RPE designation and any available Partnership for Public Facilities and Infrastructure Act, Arkansas Code § 22-10-101 et seq., program manuals; and
- (3) Identify a representative from the RPE to serve as the contact person for private entities considering submitting a proposal.

(d)(1) An RPE may issue a request for information (RFI), a request for qualifications (RFQ), or both, prior to issuing an RFP.

(2) Information received in an RFI may be utilized by an RPE to gauge interest in the project and develop more detailed, and technically specific, RFQs and RFPs.

(3)(A) An RFI is not a commitment to issue an RFQ or an RFP and responses are not required for future procurements.

(B) Responses are voluntary and do not create any preferential treatment or other advantage or disadvantage in any subsequent procurement process.

(4) 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, a capital improvement, or supply a product.

(5) The time required to complete the RFI or RFQ process, or both, is not contingent upon the timeframes specified in this part but should be completed within six (6) months to ensure timely development of the project.

(e) The RPE shall publish the RFP one (1) time per week for three (3) consecutive weeks in a newspaper of statewide circulation.

(f)(1) The period of time between the date of initial RFP publication and the RFP response deadline shall be in accordance with the timelines outlined in this part.

(2) The RFP response deadline may be extended by the RPE up to an additional one hundred twenty (120) days with the consent of the department.

(g) All proposals received in response to the RFP from private entities shall be evaluated in accordance to this part.

(h) A qualifying project shall be developed only after the RPE has issued an RFP.

(i)(1) A private entity that intends to be considered for a qualifying project is encouraged to submit a proposal to the RPE.

(2) Private entities are encouraged to support the participation of:

(A) Small business;

(B) Minority business; and

(C) Service-disabled veteran business enterprises.

(j)(1) Any affected local jurisdiction and other public entities with shared responsibilities or concurrent authority shall have until the RFP response deadline to submit written comments to the RPE regarding the proposed qualifying project.

(2) Written comments should include whether the proposed qualifying project is compatible with local plans and budgets.

**22 CAR § 101-105. RFP evaluation criteria.**

(a)(1) RFPs should ascertain the private entity's capability to:

(A) Complete the proposed qualifying project in a timely manner; and

(B) Ensure that proposed benefits will be derived throughout the life of the project.

(2) RFPs should request a scope of work and financial plan, including anticipated revenues, to allow the RPE to thoroughly analyze the financial feasibility of competing proposals.

(3) 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 qualifying project;

(C) **Project benefit and compatibility with existing plans.**

Integration of project with existing plans and future benefit; and

(D) **Financing plans.** Fiscal feasibility and financial sustainability.

(b) RFP responses shall be reviewed by an evaluation committee comprised from the following entities:

(1) One (1) designee from the Department of Shared Administrative Services;

(2) One (1) designee from the Department of Commerce; and

(3)(A) At least three (3) designees from the responsible public entity.

(B) Supervisors and their subordinates should not serve jointly without prior approval of the Department of Shared Administrative Services.

(c)(1) The evaluation committee shall review and rank all RFP responses in accordance with the criteria established by:

(A) The RFP;

(B) The Partnership for Public Facilities and Infrastructure Act, Arkansas Code § 22-10-101 et seq.; and

(C) This part.

(2) A scoring matrix may be weighted in any fair manner to adequately assess the critical elements of a proposal.

(3) The RPE is not required to select the proposal with the lowest price but may consider price as one (1) variable in evaluating the proposals.

(d) A financial analysis, including a comprehensive risk assessment, of each proposal should be conducted to ensure the proposed partnership meets the fiscal needs of the RPE with an acceptable level of risk.

(e) The RPE may engage independent consultants to assist the evaluation committee in its review of proposals.

(f)(1) During evaluation, the RPE may seek written clarification on any proposal.

(2) A request for written clarification may not be used for negotiation or for the sole purpose of improving the response.

(3) Any written clarifications received become part of the response.

(g) After reviewing and scoring the proposals, the evaluation committee shall provide a list of qualified respondents, based on rankings, to the chief officer or executive director of the RPE.

(h)(1) The RPE, in consultation with the Department of Shared Administrative Services and the Department of Commerce, shall begin negotiations with the first ranked qualified respondent of an interim or comprehensive agreement pursuant to this part.

(2) If the RPE and the first ranked qualified respondent do not reach an interim or comprehensive agreement in the time specified, then the RPE may conduct negotiations with the next ranked qualified respondent without publishing a new RFP.

(3) This process shall continue until the RPE executes an interim or comprehensive agreement with a qualified respondent or terminates the process.

(4) 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:

(A) Cancel the RFP; or

(B) Reject all proposals received in response to the RFP.

(i)(1) Any proposed agreements between the RPE and a qualified respondent shall be submitted to the Chief Fiscal Officer of the State and the Department of Shared Administrative Services for approval.

(2) If approval by the Chief Fiscal Officer of the State is received for an interim agreement, the parties may continue negotiations of a comprehensive agreement.

(3) Once a proposed comprehensive agreement has been reached, it shall be submitted to the Chief Fiscal Officer of the State and the Department of Shared Administrative Services for approval.

(j)(1) Upon approval of a comprehensive agreement, the governing body of the RPE shall conduct a public hearing on the comprehensive agreement.

(2) 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.

(3) The notice shall include:

(A) The date, time, and location of the public hearing;

(B) A general description of the project;

(C) The identification of the parties to the comprehensive agreement and the roles that each have in the project;

(D) The website where the proposed comprehensive agreement can be found by the public; and

(E) The maximum principal amount of any bonds proposed.

(4) The hearing shall be held within the locality to be affected.

(k) For purposes of this part, if the RPE does not have an independent, appointed governing body, the governing body shall be composed of the following members:

(1) Three (3) designees selected by the Secretary of the Department of Shared Administrative Services;

(2) Two (2) designees selected by the Secretary of the Department of Commerce;

(3) One (1) designee selected by the Secretary of the Department of Finance and Administration; and

(4) One (1) designee selected by the responsible public entity.

(l) If the RPE authorizes the execution of the comprehensive agreement at the public meeting, it shall be submitted to the Governor for approval and authorization to execute.

(m)(1) A comprehensive agreement shall be executed within one hundred eighty (180) calendar days of the RFP submission deadline.

(2) Upon approval of the Department of Shared Administrative Services, this deadline may be extended up to three hundred sixty-five (365) calendar days by mutual written agreement of the RPE and the qualified respondent.

## **22 CAR § 101-106. Qualifying projects.**

(a) A qualifying project shall:

(1) Be located on real property owned or leased by a public entity; and

(2) Include any improvements necessary or desirable to unimproved real property owned by a public entity.

(b) The RPE's development of a qualifying project is contingent on a private entity's entering into an interim or comprehensive agreement, or both, with the RPE.

(c) Any agreements made between the RPE and a private entity under the Partnership for Public Facilities and Infrastructure Act, Arkansas Code § 22-10-101 et seq., and this part do not enlarge, diminish, or affect the authority already possessed by the RPE to take action that would impact the debt capacity of the state.

## **22 CAR § 101-107. Interim and comprehensive agreements.**

(a) **Interim agreements.**

(1)(A) Interim agreements are not required but are encouraged and may be used where additional information is needed to further develop the concept of the qualifying project or to leave open items for further negotiations to be included in the comprehensive agreement.

(B) Additional information may include, but is not limited to, architectural and engineering (A/E) drawings and feasibility studies.

(2) An interim agreement may include, without limitation, any of the following:

- (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.

(3) 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.

**(b) Comprehensive agreements.**

(1) Comprehensive agreements are mandatory and must be approved and executed pursuant to the Partnership for Public Facilities and Infrastructure Act, Arkansas Code § 22-10-101 et seq., and this part before developing or operating the qualifying project.

(2) A comprehensive agreement shall fully detail the planning, design, development, ownership, financing, leasing, acquisition, installation, construction, operation, maintenance, expansion, and termination of a qualifying project.

(3) The comprehensive agreement shall include, without limitation, the following:

- (A) Any item identified in 22 CAR § 101-105(a)(3)(D);
- (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, Department of Commerce, and Department of Finance and Administration on a periodic basis;

(I) A process for monitoring and inspecting the development of the project by the RPE, Department of Commerce, and Department of Finance and Administration to ensure compliance with terms and conditions of written agreements, the Partnership for Public Facilities and Infrastructure Act, 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:

(i) Funds;

(ii) Anticipated revenues;

- (iii) User fees;
- (iv) Leases; and
- (v) 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;

(P) Processes and procedures regarding any changes to the terms of the comprehensive agreement;

(Q) Terms and conditions governing the transfer of ownership from the qualified respondent to the RPE upon the expiration of the:

- (i) Lease;
- (ii) Term; or
- (iii) Concession period; and

(R) Any other terms and conditions that the RPE determines will serve the public purpose of the Partnership for Public Facilities and Infrastructure Act.

**22 CAR § 101-108. Timelines.**

(a) The following timelines shall be followed for the development of qualified projects.

(b) If an RPE has requested and been approved for an accelerated timeline, the expedited timeline shall be followed for the selection of a qualified project.

(c) The days listed are calendar days.

<b>Event</b>	<b>Standard Timeframe</b>	<b>Expedited Timeframe</b>
Affected local jurisdiction and other public entity notification prior to RFP issuance	60 days	30 days
Submittal of RFP to TSS 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 one hundred twenty (120) days with the consent of the Department of Shared Administrative Services.

\*\*This deadline may be extended up to three hundred sixty-five (365) calendar days by mutual written agreement of both parties.

**22 CAR § 101-109. Fees.**

(a) Proposals which have technical, complex, or specialized information may require expert evaluation and review by third-party independent advisors and consultants to the RPE.

(b)(1) The RPE may charge reasonable, nonrefundable fees to private entities to cover the costs of processing, reviewing, and evaluating any proposal, including without limitation, reasonable attorney's fees and fees for financial, technical, or other advisors or consultants.

(2) 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 qualifying project proposal submitted for review as evidenced by signed disclosure certifications.

(3) Fees charged should not exceed the actual cost incurred by the RPE to conduct the necessary review of the proposal.

(4) RPEs must identify the fee or fee schedule to be applied, including methodologies used, in the application and RFP solicitation to ensure that private entities considering an RFP response are aware of the fees associated with the review.

(c)(1) A private entity assumes all risks in submission of a proposal.

(2) 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.

(d) The RPE should perform a periodic cost review of their review fees and methodologies to ensure that they are accurate and reasonable.

## **22 CAR § 101-110. Conditions.**

### **(a) Eminent domain.**

(1) A public entity may exercise its right of eminent domain under applicable law in connection with the development of a qualifying project.

(2) The power of eminent domain shall not be delegated to a private entity with respect to a qualifying project commenced or proposed under this part.

(3) Damages awarded to a third party in an eminent domain action may be included in the development budget for the qualifying project.

(4) 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 Partnership for Public Facilities and Infrastructure Act, Arkansas Code § 22-10-101 et seq.

(b) The Partnership for Public Facilities and Infrastructure Act does not waive the sovereign immunity of a public entity or the officers or employees of the public entity or extend a public entity's sovereign immunity to any private entity.

(c) Records related to a qualifying project that are provided to or compiled or developed by a public entity, the Chief Fiscal Officer of the State, or the Governor in furtherance of the entity's or officer's powers, duties, or obligations under the Partnership for Public Facilities and Infrastructure Act are exempt under Arkansas Code § 25-19-105(b)(9)(A), as files that would give an advantage to competitors or bidders.

(d)(1) Private entities and RPEs may utilize any funding sources legally available to them including without limitation:

(A) Issuing debt, equity, or other securities or obligations;

- (B) Entering into leases;
- (C) Tax credits;
- (D) Operating revenues;
- (E) Accessing designated trust funds; and
- (F) Borrowing or accepting grants from any state, federal, or private

source.

(2) However, any bonds issued by an RPE under the Partnership for Public Facilities and Infrastructure Act:

(A) Shall state plainly on the face of the bonds that they are issued under the Partnership for Public Facilities and Infrastructure Act;

(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.

(e) The Partnership for Public Facilities and Infrastructure Act 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) The expenditure of state funds in support of an interim or comprehensive agreement requires legal appropriations prior to expenditure of funds.

(g)(1) 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.

(2) In selecting a qualified respondent, Arkansas Code § 19-11-801 et seq., applies.

(3) Competitive bidding shall not be used.

(h)(1) A lawsuit brought concerning the validity of the Partnership for Public Facilities and Infrastructure Act, bonds issued under the Partnership for Public Facilities and Infrastructure Act, 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.

(2) 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.