

**Public-Private Education Facilities and Infrastructure
Act of 2002**

Guidelines

REVISED

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Public-Private Education Facilities and Infrastructure Act of 2002 Guidelines

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INTRODUCTION

Overview

On January 20, 2004 The Council of the City of Williamsburg adopted the "City of Williamsburg Procedures Regarding Proposals Made Pursuant to the Public-Private Education and Facilities Infrastructure Act of 2002" ("Guidelines"). The General Assembly has subsequently enacted various revisions and amendments to the Act (hereafter referred to as the "PPEA"). The provisions of the PPEA are set forth in § 56-575.1 et seq. of the Code of Virginia (1950), as amended. Accordingly, the Guidelines have been periodically updated and will be again updated by City Council's adoption of these "Revised Guidelines Regarding Proposals Made Pursuant to the Public-Private Education Facilities and Infrastructure Act of 2002" ("Revised Guidelines" or "Guidelines"). The Revised Guidelines are effective as of the date of their adoption by City Council.

The PPEA grants the City of Williamsburg ("City"), a "responsible public entity" ("RPE"), as defined in the PPEA the authority to create public-private partnerships for the development of a wide range of projects for public use if the public entities determine there is a need for the project and that private involvement may provide the project to the public in a timely or cost-effective fashion. Individually negotiated interim or comprehensive agreements between a private entity, as defined in the PPEA and the City will define the respective rights and obligations of the City and the private entity.

In order for a project to come under the PPEA, it must meet the definition of a "qualifying project" and the use of the term "project" throughout these Guidelines shall mean "qualifying project." The PPEA contains a broad definition of qualifying project that includes public buildings and facilities of all types, as well as some services; for example:

- (i) Any education facility, including but not limited to a school building (including any stadium or other facility primarily used for school events), any functionally related and subordinate facility and land to a school building and any depreciable property provided for use in a school facility that is operated as part of the public school system or as an institution of higher education;
- (ii) Any building or facility that meets a public purpose and is developed or operated by or for any public entity;
- (iii) Any Improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity;
- (iv) Utility and telecommunications and other communications infrastructure;
- (v) A recreational facility;

(vi) Technology infrastructure and services, and applications, including but not limited to telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services;

(vii) Any services designed to increase productivity or efficiency through the direct or indirect use of technology;

(viii) Technology, equipment, or infrastructure designed to deploy wireless broadband services to schools, businesses, or residential areas, or

(ix) Any improvements necessary or desirable to any unimproved locally- or state-owned real estate.

The PPEA establishes requirements that the City must adhere to when reviewing and approving proposals received pursuant to the PPEA. In addition, the PPEA specifies the criteria that must be used to select a proposal and the contents of the interim or comprehensive agreement detailing the relationship between the City and the private entity.

Section 56-575.16 of the PPEA provides that the public entity's governing body must adopt Guidelines that it will follow to receive and evaluate any proposal submitted to the public entity under the provisions of the PPEA. Accordingly, on December 10, 2015 the Council of the City of Williamsburg adopted the following Revised Guidelines dated December 10, 2015 to guide the City administration in implementation of the PPEA. The individual designated by the City Manager to respond to inquiries regarding the PPEA or these Guidelines and to serve as the point of contact to receive proposals submitted under the PPEA shall be the Purchasing Agent.

Guidelines adopted by all RPEs must require the posting and publishing of public notice of a private entity's request for approval of a qualifying project, including (i) specific information and documentation to be released regarding the nature, timing, and scope of the qualifying project pursuant to subsection A of Virginia Code § 56-575.4; (ii) a reasonable time period of at least forty-five (45) days during which the RPE shall receive competing proposals pursuant to subsection A of § 56-575.4. (Such time period shall also be determined by the RPE to encourage competition and public-private partnerships in accordance with the goals of the PPEA); and (iii) a requirement for advertising the public notice in the Virginia Business Opportunities publication and posting a notice on the Commonwealth's electronic procurement website.

Guidelines of local "responsible public entities" (RPEs) must include a requirement that such RPEs engage the services of qualified professionals, which may include an architect, professional engineer, or certified public accountant, not otherwise employed by the public entity, to provide independent analysis regarding the specifics, advantages, disadvantages, and the long- and short-term costs of any request by a private entity for approval of a qualifying project unless the governing body of the RPE determines that such analysis of a request by a private entity for approval of a qualifying project shall be performed by employees of the RPE. In accordance with this requirement, City Council, by adopting these Guidelines, determines

that since there are City employees who are professionals within the engineering and other fields, analysis of qualifying projects under these Guidelines shall be performed by City employees unless the City Manager determines there is a need for other professionals to provide analysis for a particular qualifying project. In such case, the City Manager may obtain such outside services as the City Manager deems necessary. **Furthermore, City Council shall review and approve any proposed interim or comprehensive agreement prior to its execution.**

Although guidance with regard to the application of the PPEA is provided herein, it will be incumbent upon all entities, both public and private, to comply with the then current applicable provisions of the PPEA. Should there be any amendments to the PPEA, these Guidelines shall be interpreted, to the extent possible, to be consistent with such amendments. However, if there should be any conflict, the amendments shall control.

Statement of Purpose

The following Guidelines are adopted to serve as a general guide for the implementation of the PPEA in the City of Williamsburg. The complete text of the PPEA is included as an Appendix to these Guidelines. Although guidance with regard to the application of the PPEA is provided herein, all entities, both public and private must comply with the provisions of the PPEA.

In the event that the PPEA is amended in a manner that either conflicts with these Guidelines or concerns material matters not addressed by such Guidelines, the City shall amend the Guidelines accordingly. If the Guidelines are not amended prior to the effective date of the PPEA amendments, the Guidelines nonetheless shall be interpreted in a manner to conform to such amendments.

Guidelines for Review and Approval of Proposals and Projects

I. General Provisions

A. Proposal Submission

A proposal to provide a qualifying project may be either solicited by the City (a "Solicited Bid/Proposal" by issuance of an "Invitation to Bid" or "Request for Proposal") or delivered by a private entity on an unsolicited basis (an "Unsolicited Proposal"), which can then involve competing Unsolicited Proposals as referred to in Section III. In either case, any such proposal shall be clearly identified as a "PPEA Proposal."

Private entities that respond to a Solicited Bid/Proposal or that submit an Unsolicited Proposal (Proposer(s) or private entity or party) shall be required to follow a two-part proposal submission process consisting of an initial conceptual phase and a detailed phase. The initial phase of the proposal must contain specified information on proposer qualifications and

experience, project characteristics, project financing, anticipated public support or opposition, or both, and project benefit and compatibility. The detailed proposal must contain specified deliverables.

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

Proposals should be prepared simply and economically, providing a concise description of the Proposer's capabilities to complete the proposed qualifying project and the benefits to be derived from the project by the City. Project benefits to be considered are those occurring during the construction, renovation, expansion or improvement phase and during the life-cycle of the project. Proposals also should include a comprehensive scope of work and a financial plan for the project, containing enough detail to enable the City to analyze the financial feasibility of the proposed project. The cost analysis of a proposal should not be linked solely to the financing plan as the City may elect to finance the project through other available means. For specific applications, the City may request, in writing, clarification to the submission.

The PPEA is intended to encourage proposals from the private sector that offer the provision of private financing in support of the proposed public project and the assumption of commensurate risk by the private entity, but also benefits to the entity through innovative approaches to project financing, development and use. However, while substantial private sector involvement is encouraged, qualifying facilities must be devoted primarily to public use and typically involve facilities that are important to the public health, safety and welfare. Accordingly, the City shall continue to exercise full and proper due diligence in the evaluation and selection of private entities for these projects. In this regard, the qualifications, capabilities, resources and other attributes of a Proposer and its whole team will be carefully examined for every project. In addition, Proposers shall be held strictly accountable for representations or other information provided regarding their qualifications, experience or other contents of their proposals, including all specific aspects of proposed plans to be performed by private entity.

B. Affected Jurisdictions

Any private entity requesting approval from or submitting a conceptual or detailed proposal to the City must provide other affected local jurisdictions as defined in the PPEA with a copy of the private entity's request or proposal. The proposal shall be provided by certified

mail, express delivery, or hand delivery within five (5) business days after its submission to the City. An affected local jurisdiction shall have sixty (60) days from the receipt from the private entity of its copy of the request or proposal to submit written comments to the City and to indicate whether the proposed qualifying project is compatible with the (i) local comprehensive plan, (ii) local infrastructure development plans, or (iii) capital improvements budget or other government spending plan. Comments received within the sixty-(60)day period shall be considered by the City in evaluating the request or proposal, and no negative inference shall be drawn from the absence of comments by an affected local jurisdiction.

C. Proposal Review Fee

The City shall seek an analysis of the proposal from appropriate internal staff or outside advisors or consultants with relevant experience in determining whether to enter into an agreement with the private entity.

The City will charge a fee to the private entity to cover the costs of processing, reviewing, and evaluating any Unsolicited Proposal or competing Unsolicited Proposal, submitted under the PPEA. Also if the solicitation so indicates, the City may require payment of a review fee by any private entities submitting Solicited Proposals. The fee shall not be greater than the direct costs associated with the evaluating the proposed qualifying project. "Direct costs" include (i) the cost of staff time required to process, evaluate, review and respond to the proposal and (ii) the out-of-pocket costs of any outside advisors or consultants, including, but not limited to, attorneys, and financial advisors.

Proposals solicited by the City that are not in response to an Unsolicited Proposal will not be subject to proposal review fees unless so indicated in the solicitation. The City may determine at its discretion whether to require Proposers to pay review fees for Solicited Proposals and if so, the amount of such fees if different than set forth below.

The fee will be administered as follows:

1. Initial Fee. The initial fee shall be one half of one percent (0.5%) of the reasonably anticipated total cost of the project, but shall be no less than \$5,000 regardless of the anticipated cost. Additional fees may be charged as set forth below. Payment of the initial fee in certified funds must accompany the proposal in order for the City to proceed with its review. However, the City Council reserves the right to specify a different initial fee amount in a solicitation issued under Section II of these Guidelines or for an Unsolicited Proposal and competing Unsolicited Proposals under Section III thereof.

2. Additional Fees. Additional fees over and above the initial fee shall be imposed on and paid by the private entity throughout the processing, review and evaluation of the Proposal if the City incurs costs in excess of the initial fee. The City will notify the private entity of the amount of such additional fees as it incurs such costs. Prompt payment of the additional fees is required before the City will continue to process, review and evaluate the Proposal

3. Return of initial fee if Proposal not accepted for consideration. If the City does not accept the Proposal for consideration pursuant to subsection C of Va. Code § 56-575.3, the City will return the Proposal, together with all fees and accompanying documentation, to the private entity. However, once the City accepts the Proposal for consideration, even if it is thereafter rejected at any subsequent time, the initial fee and all additional fees become non-refundable and will not be returned to the private entity.

D. Freedom of Information Act

1. General applicability of disclosure provisions.

Proposal documents submitted by private entities are generally subject to the Virginia Freedom of Information Act ("FOIA") except that subsection 11 of § 2.2-3705.6 exempts certain documents from public disclosure. FOIA exemptions, however, are discretionary, and the City may elect to release some or all of documents except to the extent the documents are:

a. Trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.);

b. Financial records of the private entity that are not generally available to the public through regulatory disclosure or otherwise, including but not limited to, balance sheets and financial statements; or

c. Other information submitted by a private entity, where if the record or document were made public prior to the execution of an interim or comprehensive agreement the financial interest or bargaining position of the City or private entity would be adversely affected.

Additionally, to the extent access to proposal documents submitted by private entities are compelled or protected from disclosure by a court order, the City must comply with the provisions of such order.

The City may contact the Freedom of Information Act Council (FOIAC) regarding the applicability of the access provisions of FOIA:

General Assembly Building, 2nd Floor

910 Capitol Street, Richmond, VA 23219

E-mail: foiacouncil@leg.state.va.us

Telephone: 804-225-3056

Toll-Free: 1-866-448-4100

Fax: 804-371-8705

2. Protection from mandatory disclosure for certain documents submitted by a private entity.

Before a document of a private entity may be withheld from disclosure, the private entity must make a written request to the City at the time the documents are submitted designating with specificity the documents for which the protection is being sought and a clear statement of the reasons for invoking the protection with reference

to one or more of three classes of records listed in subsection 11.b of Virginia Code § 2.2-3705.6.

Upon the receipt of a written request for protection of documents, the City shall determine whether the documents contain (i) trade secrets, (ii) financial records, or (iii) other information that would adversely affect the financial interest or bargaining position of the City or private entity in accordance with subsection 11.b. The City shall make a written determination of the nature and scope of the protection to be afforded by the City under such subsection. If the written determination provides less protection than requested by the private entity, the private entity should be accorded an opportunity to withdraw its proposal. Nothing shall prohibit further negotiations of the documents to be accorded protection from release although what may be protected must be limited to the categories of records identified in subsection 11.b.

Once a written determination has been made by the City, the documents afforded protection under this subdivision shall continue to be protected from disclosure when in the possession of the City or any affected jurisdiction to which such documents are provided.

If a private entity fails to designate trade secrets, financial records, or other confidential or proprietary information for protection from disclosure, such information, records or documents shall be subject to disclosure under FOIA.

3. Protection from mandatory disclosure for certain documents produced by the City.

The City may withhold from disclosure memoranda, staff evaluations, or other records prepared by the City, its staff, outside advisors, or consultants exclusively for the evaluation and negotiations of proposals where (i) if such records were made public prior to or after the execution of an interim or a comprehensive agreement, the financial interest or bargaining position of the City would be adversely affected, **and (ii) the basis for the determination required in clause (i) is documented in writing by the City.**

Cost estimates relating to a proposed procurement transaction prepared by or for the City shall not be open to public inspection.

4. Records that may not be withheld.

Except as otherwise permitted or required by law, the City may not withhold from public access:

a. Procurement records other than those subject to the written determination of the City;

b. Information concerning the terms and conditions of any interim or comprehensive agreement, service contract, lease, partnership, or any agreement of any kind entered into by the City and the private entity;

c. Information concerning the terms and conditions of any financing arrangement that involves the use of any public funds; or

d. Information concerning the performance of any private entity developing or operating a qualifying transportation facility or a qualifying project.

However, to the extent that access to any procurement record or other document or information is compelled or protected by order of a court of competent jurisdiction, then the City must comply with such order.

E. Use of Public Funds

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

F. Applicability of Other Laws

Nothing in the PPEA shall affect the duty of the City or any of its officers, employees, or agents to comply with all other applicable law not in conflict with the PPEA. The applicability of the Virginia Public Procurement Act (the "VPPA") is as set forth in the PPEA.

II. Solicited Bids/Proposals

The City may issue Requests for Proposals (RFPs) or Invitations for Bids (IFBs), inviting proposals from private entities to develop or operate qualifying projects. The City may use a two-part proposal process consisting of an initial conceptual phase and a detailed phase. The solicitation will set forth the format and supporting information that is required to be submitted, consistent with the provisions of the PPEA. The City reserves the right to cancel any solicited RFP or IFB in its sole discretion and at any time.

The solicitation will specify, but not necessarily be limited to information and documents that must accompany each proposal and the factors that will be used in evaluating the submitted proposals. The solicitation shall be posted in such public areas as where construction projects are normally posted, and may include the City's website. Notices shall also be published in a newspaper or other publications of general circulation in the City and in any publication required by the PPEA. Notices may also be posted on the Commonwealth's electronic procurement website. In addition, Solicited Proposals will be posted pursuant to Section III, herein below. The solicitation shall also contain or incorporate by reference other applicable terms and conditions, including any unique capabilities or qualifications that will be required of the private entities submitting proposals. Pre-proposal conferences may be held as the City deems appropriate.

III. Unsolicited Proposals

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

The City may publicize its needs and may encourage interested parties to submit unsolicited proposals subject to the terms and conditions of the PPEA. When such proposals are received pursuant to this procedure without solicitation by an Invitation to Bid or a Request for Proposals, such proposals shall be treated as competing Unsolicited Proposals. An Unsolicited Proposal and/or competing Unsolicited Proposals must be submitted to the Purchasing Agent by delivery of six complete copies, together with the required proposal fee.

A. Decision to Accept and Consider Unsolicited Proposal; Notice

1. The City reserves the right in its sole discretion to reject any and all proposals at any time.

2. Upon receipt of any Unsolicited Proposal or group of proposals and payment of any required fee by the proposer(s), the City will determine whether to accept some or all Unsolicited Proposals for the purpose of publication and a conceptual-phase consideration. If the City determines not to accept an Unsolicited Proposal for consideration, the City will return such Unsolicited Proposal, together with all fees and accompanying documentation, to the submitting Proposer, subject to the provisions set forth in Section III (C) below.

3. If the City chooses to accept an Unsolicited Proposal for publication and conceptual-phase consideration, it shall post a notice in a public area regularly used by the City for posting of public notices and the City's website for a period of not less than forty-five (45) days. In order to notify any parties that may be interested in submitting competing Unsolicited Proposals, the City shall also publish the same notice once in a newspaper of general circulation in the City and in any publication required by PPEA. The City may also post it on the Commonwealth's electronic procurement website. All of such notices shall be posted for not less than forty-five (45) days before competing proposals are due to be submitted for consideration by the City. The notice will state that the City (i) has received and accepted an Unsolicited Proposal under the PPEA, (ii) intends to evaluate the proposal, (iii) may negotiate an interim or comprehensive agreement with the proposer based on the proposal, and (iv) will receive for simultaneous consideration any competing Unsolicited Proposals that comply with the procedures adopted by the City and the PPEA. The notice shall also summarize the proposed qualifying project or projects, and the proposed locations thereof. Copies of Unsolicited and competing Unsolicited Proposals shall be available upon request, subject to the provisions of FOIA and VA. Code § 56-575.4(G) of the PPEA (protection of confidential and proprietary information).

4. To ensure that sufficient information is available upon which to base the development of a serious competing proposal, representatives of the City familiar with the Unsolicited Proposal and these Guidelines may be made available to respond to inquiries and meet with private entities that are considering the submission of a competing proposal. The

City may conduct an analysis of the information pertaining to the Proposal included in the notice to ensure that such information sufficiently encourages competing proposals. Further, the City may establish criteria, including key decision points and approvals to ensure proper consideration of the extent of competition from available private entities prior to selection.

5. Should the City receive an Unsolicited Proposal and subsequently receive one or more additional Unsolicited Proposals for the same or similar project prior to completing its review of the first Proposal and prior to accepting the first Proposal for consideration pursuant to this Section III, the City may choose to (i) not accept any of the subject Proposals, (ii) accept only one of the Proposals for consideration but not necessarily the first Proposal, or (iii) accept more than one Proposal for conceptual phase consideration. Should the City accept only one Proposal for consideration, the City shall return the unaccepted Proposals and any accompanying fees to the respective Proposers so that the Proposers may resubmit their Proposals as competing Unsolicited Proposal pursuant to Section III.

B. Posting Requirements

1. Conceptual Proposals, whether solicited or unsolicited, shall be posted by the City within ten (10) working days after the City's acceptance thereof for a detailed review in accordance with Section IV (B) herein below,

a. Posting shall be on the City's website or by publication in a newspaper of general circulation in the City, for not less than thirty (30) days, of a summary of the proposals and the location where copies of the proposals are available for public inspection. In the City's discretion, posting may also be on the Department of General Service's web-based electronic procurement program commonly known as "eVA."

2. Nothing shall be construed to prohibit the posting of the Conceptual Proposals by additional means deemed appropriate by the City so as to provide maximum notice to the public of the opportunity to inspect the Proposals.

3. In addition to the posting requirements, at least one copy of the Proposals shall be made available for public inspection. Trade secrets, financial records, or other records of the private entity excluded from disclosure under the provisions of subsection 11 or Va. Code § 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the City and the private entity. Any inspection of procurement transaction records shall be subject to reasonable restrictions to ensure the security and integrity of the records.

C. Initial Review by the City at the Conceptual State

1. Only proposals complying with the requirements of the PPEA that contain sufficient information for a meaningful evaluation and that are provided in an appropriate format should be considered by the City for further review at the conceptual stage. Details regarding required information are found in Section IV.A of these Guidelines.

The City reserves the right to select its own finance team, source and financing vehicle in the event any project is financed through the issuance of obligations that are deemed to be tax-supported debt of the City or if financing of such project may impact the City's debt-rating or financial position. The decision as to whether to use the financing plan contained in any proposal (whether solicited or unsolicited) is at the City's sole discretion.

2. The City will determine at this initial stage of review whether it will proceed using:

a. Procedures used by the City that are consistent with procurement through competitive sealed bidding, as defined in the VPPA; or

b. Procedures used by the City that are consistent with procurement of other than professional services through "competitive negotiation" as defined in VPPA. ***The City may proceed using such procedures only if the City Council or City Manager determines in writing, in advance that doing so is likely to be advantageous to the City and the public, based upon either (i) the probable scope, complexity or priority of need; (ii) the risk sharing including guaranteed cost or completion guarantees, added value or debt, or equity investments proposed by the private entity; or (iii) the increase in funding, dedicated revenue or other economic benefit that would otherwise not be available.***

3. After reviewing the original proposal and any competing proposals submitted during the notice period, the City shall determine:

a. not to proceed further with any proposal;

b. to proceed to the detailed phase of review with the original proposal;

c. to proceed to the detailed phase of review with a competing proposal;

d. to proceed to the detailed phase of review with multiple proposals; and/or

e. to request modifications or amendments to any proposals.

In the event that more than one proposal will be considered in the detailed phase of review, the City shall consider whether the unsuccessful proposer(s) should be reimbursed for costs incurred in the detailed phase of review. Such reasonable costs may be assessed to the successful proposer in the comprehensive agreement.

4. Discussion between the City and private entities about the need for infrastructure improvements shall not limit the City's ability to later determine to use standard procurement procedures to meet its infrastructure needs. The City retains the right to reject any proposal at any time prior to the execution of an interim or comprehensive agreement.

IV. Proposal Preparation and Submission

A. Format for Submissions at Conceptual Stage

Proposals at the conceptual stage shall contain information in the following areas: (i) qualifications and experience, (ii) project characteristics, (iii) project financing, (iv) anticipated public support or opposition, or both, (v) project benefit and compatibility and (vi) any additional information the City may reasonably request to comply with the requirements of the PPEA. Depending upon the nature of a particular project, the City in its discretion, may waive submission of information in one or more of the designated categories. Suggestions for formatting of Proposals in proposals at the Conceptual Stage are as follows:

1. Qualification and Experience

- a. Identify the legal structure of the firm or consortium of firms making the proposal. Identify the organizational structure for the project, the management approach and how each partner and major subcontractor in the structure fits into the overall team.
- b. Describe the experience of the firm or consortium of firms making the proposal and the key principals involved in the proposed project including experience with projects of comparable size and complexity. Describe the length of time in business, business experience, public sector experience and other engagements of the firm or consortium of firms. Include the identity of any firms that will provide design, construction and completion guarantees and warranties, and a description of such guarantees and warranties.
- c. Provide resumes of the key individuals who will be involved in each phase of the project.
- d. Provide the names, addresses, and telephone numbers of persons within the firm or consortium of firms who may be contacted for further information.
- e. Provide a current or most recently audited financial statement of the firm or firms and each partner with an equity interest of twenty percent (20%) or greater.
- f. Identify the officers and directors of the firm or firms submitting the proposals.
- g. Identify any persons known to the proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to the Virginia State and Local Government Conflict of Interest Act, Chapter 31, (§ 2.2-3100 et seq.)

2. Project Characteristics

- a. Provide a description of the project, including the conceptual design. Describe the proposed project in sufficient detail so that type and intent of the project, the location, and the communities that may be affected are clearly identified.

- b. Identify and fully describe any work to be performed by the City.
- c. Include a list of all federal, state, and local permits and approvals required for the project and a schedule for obtaining such permits and approvals.
- d. Identify any anticipated adverse social, economic, archaeological, and environmental impacts of the project. Specify the strategies or actions that will be used to mitigate known impacts of the project.
- e. Identify the projected positive social, economic, archaeological, and environmental impacts of the project.
- f. Identify the proposed schedule for the work on the project, including the estimated time for completion.
- g. Propose allocation of risk and liability for work completed beyond the agreement's completion date, and assurances for timely completion of the project.
- h. State assumptions related to ownership, legal liability, law enforcement, and operation of the project and the existence of any restrictions on the City's use of the project.
- i. Provide information relative to phased or partial openings of the proposed project prior to completion of the entire work.
- j. Describe any architectural, building, engineering, or other applicable standards that the proposed project will meet. Define applicable quality standards to be adhered to for achieving the desired project outcome(s).
- k. List any other assumptions relied on for the project to be successful.
- l. List any contingencies that must occur for the project to be successful.

3. Project Financing

- a. Provide a preliminary estimate and estimating methodology of the cost of the work by phase, segment, or both, (e.g. design, construction, and operation).
- b. Submit a plan for the development, financing, and operation of the project showing the anticipated schedule on which funds will be required. Describe the anticipated costs of and proposed sources and uses for such funds including any anticipated debt service costs. The operational plan should include appropriate staffing levels and associated costs. Include supporting due diligence studies, analyses, or reports.
- c. Include a list and discussion of assumptions underlying all major elements of the plan. Assumptions should include all significant fees associated with financing given the recommended financing approach including, but not limited to, underwriter's discount,

placement agent, legal, rating agency, consultant, feasibility study, and other related fees. A complete discussion of interest rate assumptions should be included given current market conditions. Any ongoing operational fees should also be disclosed as well as any assumptions with regard to increases in such fees and any escalator provisions that will be required in the comprehensive agreement.

d. Identify the proposed risk factors and methods for dealing with these factors.

e. Identify any local, state, or federal resources that the Proposer contemplates requesting for the project. Describe the total commitment, if any, expected from the governmental sources, including the City, and the timing of any anticipated commitment. Such disclosure should include any direct or indirect guarantees or pledges of the City's credit or revenue.

f. Identify the amounts and the terms and conditions for any revenue sources, including, but not limited to financing for which the private entity has received a commitment; conditional or otherwise. Describe the nature and timing of each such commitment, both one-time and ongoing.

g. Clearly describe the underlying support and commitment required from the City under the recommended plan of finance. Expectation with regard to the City providing its general obligation should be included. The underlying assumptions should address this need in detail.

h. Identify any aspect of the project that could disqualify the project from obtaining tax-exempt financing.

4. Project Benefit and Compatibility

a. Identify who will benefit from the project, how they will benefit, and how the project will benefit the City, as well as the overall community, region, or state.

b. Identify any anticipated public support or opposition, as well as any anticipated government support or opposition, for the project.

c. Explain the strategy and plans that will be carried out to involve and inform the general public, business community, and governmental agencies in areas affected by the project.

d. Describe the anticipated significant benefits to the City, the community, region or state, including anticipated benefits to the economic condition of the City and whether the project is critical to attracting or maintaining competitive industries and businesses to or in the City or the surrounding region.

e. Explain how the project is compatible with the local comprehensive plan, local infrastructure development plans, the capital improvements budget, or other government spending plan.

f. Provided a statement setting forth participation efforts that are intended to be undertaken in connection with this project with regard to the following types of businesses:

- (i) minority-owned businesses;
- (ii) women-owned businesses;
- (iii) small businesses.

B. Format for Submissions at Detailed Stage

If the City decides to proceed to the detailed phase of review with one or more proposals, the following information should be provided by the proposer(s) unless waived in writing by the City:

1. A topographical map (1:2,000 or other appropriate scale) depicting the location of the proposed project, electronic format may be permissible if compatible with City systems and may be required.

2. A list of public utility facilities, if any, that will be crossed by the qualifying project and a statement of the plans of the Proposer to accommodate such crossings;

3. A statement and strategy setting out the plans for securing all necessary property and the estimated cost of such property. The statement must include the names and addresses, if known, of the current owners of the subject property as well as a list of any property the Proposer intends to request the public entity to condemn for public use and a description of such public use;

4. A detailed listing of all firms that will provide specific design, construction and completion guarantees and warranties, and a brief description of such guarantees and warranties;

5. A total life-cycle cost specifying methodology and assumptions of the project or projects and the proposed project start date. Include anticipated commitment of all parties; equity, debt, and other financing mechanisms; and a schedule of project revenues and project costs. The life-cycle cost analysis should include, but not be limited to, a detailed analysis of the projected return, rate of return, or both, expected useful life of facility, and estimated annual operating expenses;

6. A detailed discussion of assumptions about user fees or rates, and usage of the project;

7. Identification of any known government support or oppositions or general public support or opposition for the project. Government or public support should be demonstrated

through resolution of official bodies, minutes of meetings, letters, or other official communications;

8. Demonstration of consistency with appropriate local comprehensive or infrastructure development plans or indication of the steps required for acceptance into such plans;

9. Sufficient design and engineering details to establish elevations, site characteristics and the proposed size and locations of buildings and other structures;

10. Explanation of how the proposed project would impact local development plans of each affected local jurisdiction;

11. Identification of the executive management and the officers and directors of the firm or firms submitting the proposal;

12. Identification of any known conflicts of interest or other disabilities that may impact the City's consideration of the proposal, including the identification of any persons known to the Proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to the Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.);

13. Identification of all known contractors or service providers, including but not limited to the providers of architectural services, real estate services, financial services, and legal services for all stages of the project, including preparation of the proposal;

14. Detailed analysis of the financial feasibility of the project, including impact on similar facilities operated or planned by the City. Include a detailed description of any financing plan proposed for the project, a comparison of that plan with financing alternatives that may be available to the City, and all underlying data supporting any conclusions reached in the analysis or the selection by the private entity of the financing plan proposed for the project;

15. Detailed listing of all performance securities the proposer will provide to guarantee completion and success of the project, and what payments or returns will be made to the City if the project is not fully and successfully completed; and

16. Additional material and information as the City may reasonably request.

V. Proposal Evaluation and Selection Criteria

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

A. Qualifications and Experience

Factors that may be considered in either phase of the City's review to determine whether the Proposer possesses the requisite qualifications and experience include:

1. Experience with similar projects;
2. Demonstration of ability to perform the work required to plan, finance, construct and operate the project;
3. Leadership structure;
4. Project manager's experience;
5. Management approach;
6. Financial condition; and
7. Project ownership; and
8. Such other items as the City deems appropriate.

B. Project Characteristics

Factors that may be considered in determining the project characteristics include:

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

C. Project Financing

The City reserves the right to select its own finance team, source, and financing vehicle in the event any project is financed through the issuance of obligations that are deemed to be tax-supported debt of the City, or if financing such project may impact the City's debt rating or financial position. The decision as to whether to use the financing plan contained in any proposal (whether solicited or unsolicited) is within the City's sole discretion.

Along with the information required for the initial and detailed proposals, factors to be considered in determining whether the proposed project financing allows access to the necessary capital at the lowest practical cost given the nature of the project include:

1. Cost and cost benefit to the City;
2. Financing and the impact on the debt burden of the City;
3. Financial plan including overall feasibility and reliability of the plan; default implications; Proposer's past performance with similar plans and similar projects; degree to which the Proposer has conducted due diligence investigation and analysis of the proposed financial plan and the results of any such inquiries or studies;
4. Opportunity costs assessment;
5. Estimated cost, including financing source, operating costs, etc;
6. Life-cycle cost analysis;
7. The identity, credit history, past performance of any third party that proposed to provide financing for the project and the nature and timing of their commitment, as applicable; and
8. Comparable costs of other project delivery methods; and
9. Such other items as the City deems appropriate.

D. Project Benefit and Compatibility

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

1. Community benefits;
2. Community support or opposition, or both;
3. Public involvement strategy;

4. Compatibility with existing and planned facilities;
5. Compatibility with local, regional, and state economic development efforts;
6. Fiscal impact to the City in terms of revenues and expenditures;
7. Economic output of the project in terms of jobs and total economic impact on the local economy; and
8. Such other items as the City deems appropriate.

E. Other Factors

Other factors that may be considered by the City in the evaluation and selection of PPEA proposals include:

1. The proposed cost of the project;
2. The general reputation, industry experience, and financial capacity of the private entity;
3. The proposed design of the project;
4. The eligibility of the project for accelerated documentation, review, and selection;
5. Local citizen and government comments;
6. Benefits to the public including, but not limited to, both financial and nonfinancial;
7. The private entity's compliance with a minority business enterprise participation plan that includes minority-owned businesses, women-owned businesses, and small businesses, or good faith effort to comply with the goals of such plan, including submission of any required statement regarding its compliance;
8. The private entity's plans to employ local contractors and residents;
9. The recommendation of a committee of representatives of members of the City and the appropriating body which may be established to provide advisory oversight for the project; and
10. Other criteria that the City deems appropriate.

VI. Additional Review Procedures

A. Public Private Partnership Oversight Advisory Committee

As to any specific project, the City Manager may in his or her discretion, establish an advisory committee and propound criteria for the Committee's consideration of the project. The Committee shall be composed of representatives of the City (which may include one or more members of City Council) who shall review the terms of a proposed interim or comprehensive agreement. The criteria should include, but not be limited to, the scope, total cost and duration of the proposed project and whether the project involves or impacts multiple public entities. Timelines for the work of the committee should be developed and made available to proposers.

B. Appropriating Body

If the RPE for appropriating or authorizing funding to pay for a project is different from the RPE reviewing or approving the project, then the RPE reviewing or approving the project should establish a mechanism for that appropriating body to also review and approve any proposed interim or comprehensive agreement prior to execution. When a school board is the RPE, review and approval by the school board and local governing body of the appropriating entity shall satisfy this requirement.

VII. Interim and Comprehensive Agreements

Prior to developing or operating the project, the selected private entity shall enter into a comprehensive agreement with the City. Prior to entering a comprehensive agreement, an interim agreement may be entered into that permits a private entity to perform compensable activities related to the project. The City Manager may designate a working group to be responsible for negotiating any interim or comprehensive agreement. Any interim or comprehensive agreement shall define the rights and obligations of the City and the selected Proposer with regard to the project. ***Furthermore, City Council shall review and approve any proposed interim or comprehensive agreement prior to its execution.***

A. Interim Agreement Terms

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

1. Project planning and development;
2. Design and engineering;
3. Environmental analysis and mitigation;
4. Survey;

5. Ascertaining the availability of financing for the proposed facility through financial and revenue analysis;

6. Establishing a process and timing of the negotiation of the comprehensive agreement; and

7. Any other provisions related to any aspect of the development or operation of the project that the parties may deem appropriate prior to the execution of a comprehensive agreement.

B. Comprehensive Agreement Terms

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

1. The delivery of maintenance, performance and payment bonds or letters of credit or other security in the forms and amounts satisfactory to the City in connection with any acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the project;

2. The review and approval of plans and specifications for the project by the City;

3. The rights of the City to inspect the project to ensure compliance with the comprehensive agreement;

4. The maintenance of a policy or policies of liability insurance or self-insurance in form and amount satisfactory to the City and reasonably sufficient to insure coverage of the project and the protection from the potential tort liability to the public and others and to enable the continued operation of the project;

5. The monitoring of the practices of the private entity by the City to ensure proper maintenance;

6. The terms under which the private entity will reimburse the City for services provided;

7. The policies and procedures that will govern the rights and responsibilities of the City and the private entity in the event that the comprehensive agreement is terminated or there is a material default by the private entity, including the conditions governing assumption of the duties and responsibilities of the private entity by the City and the transfer or purchase of property or other interests of the private entity to or by the City;

8. The terms under which the private entity will file appropriate financial statements on a periodic basis;

9. The mechanism by which user fees, lease payments, or service payments, if any, may be established from time-to-time upon agreement of the parties. Any payments or fees

shall be set at a level that are the same for persons using the facility under like conditions and that will not materially discourage use for the project;

a. A copy of the service contract shall be filed with the City.

b. A schedule of the current user fees or lease payments shall be made available by the private entity to any member of the public upon request.

c. Classifications according to reasonable categories for assessment of user fees may be made.

10. The terms and conditions under which the City may contribute financial resources, if any, for the project;

11. The terms and conditions under which existing site conditions will be assessed and addressed, including identification of the responsible party for conducting the assessment and taking necessary remedial action;

12. The terms and conditions under which the City will be required to pay money to the private entity and the amount of any such payments for the project;

13. Other requirements of the PPEA or other applicable law, including compliance with the federal immigration law and VA. Code § 2.2-4311.1;

14. A provision, in a form acceptable to the City, that will require the private entity to indemnify and hold harmless the City and its officers, agents, employees, and volunteers from any and all claims, damages, causes of action, suits of any nature, cost, and expenses, including reasonable attorney's fees, resulting from or arising out of the private entity's, or its agents' or subcontractors', acts or omissions that arise in the course of, or that are connected in any way to the project; and

15. Such other terms and conditions as the City may deem appropriate.

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

C. Notice and Posting Requirements

1. The City Manager may establish an advisory committee consisting of representatives of the City to review the terms of the proposed interim or comprehensive agreement and establish criteria for the Committee's consideration of the agreement. Such Committee will include representatives from the Department overseeing the project, the City Attorney's office, and the Finance Department. The criteria should include, but not be limited to, the scope, total cost and duration of the project and whether the project involves or impacts

multiple public entities. Timelines for the work of the Committee should be developed and made available to proposers.

2. Once the negotiation phase for the development of an interim or a comprehensive agreement is complete and the City has made a decision to award, the City shall post the proposed agreement in the following manner:

a. Posting shall be on the City's website or by publication in a newspaper or general circulation in the City. Posting may also be on the Department of General Service's web-based electronic procurement program commonly known as "eVA," in the discretion of the City.

b. In addition to the posting requirements, at least one copy of the proposals shall be made available for public inspection. Trade secrets, financial records, or other records of the private entity excluded from disclosure under the provisions of subsection 11 of Va. Code § 2.2-3705.6 (exclusions to application of chapter; proprietary records and trade secrets) shall not be required to be posted, except as otherwise agreed to by the City and the private entity.

3. Once an interim agreement or a comprehensive agreement has been entered into the City shall make procurement records available for public inspection, upon request.

a. Such procurement records shall include documents protected from disclosure during the negotiation phase on the basis that the release of such documents would have adverse affect on the financial interest or bargaining position of the City or private entity in accordance with subsection 11 a and b.

b. Such procurement records shall not include (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (Va. Code § 59.1-336 et seq.) or (ii) financial records, including balance sheets or financial statements of the private entity that are not generally available to the public through regulatory disclosure or otherwise.

To the extent access to procurement records is compelled or protected by a court order, then the City must comply with such order.

VIII. Governing Provisions

In the event of any conflict between these Guidelines and the PPEA, and/or FOIA, as they may be amended from time to time, the terms and provisions of the PPEA and/or FOIA, as amended, shall control.

Terms and Definitions

"Affected jurisdiction" means any county, city, or town in which all or a portion of a qualifying project is located.

"Appropriating body" means the body responsible for appropriating or authorizing funding to pay for a qualifying project.

"Comprehensive agreement" means the comprehensive agreement between the private entity and the responsible public entity that is required prior to the development or operation of a qualifying project.

"Conceptual stage" means the initial phase of project evaluation when the public entity makes a determination whether the proposed project serves a public purpose, meets the criteria for a qualifying project, assesses the qualifications and experience of a private entity proposer, reviews the project for financial feasibility, and warrants further pursuit.

"Cost-benefit analysis" means analysis that weighs expected costs against expected benefits in order to choose the best option. For example, a City Manager may compare the costs and benefits of constructing a new office building to those of renovating and maintaining an existing structure in order to select the most financially advantageous option.

"Detailed stage" means the second phase of project evaluation where the public entity has completed the conceptual stage and accepted the proposal and may request additional information regarding a proposed project prior to entering into competitive negotiations with one or more private entities to develop an interim or comprehensive agreement.

"Develop" or "development" means to plan, design, develop, finance, lease, acquire, install, construct, or expand.

"Interim agreement" means an agreement between a private entity and a responsible public entity that provides for phasing of the development or operation, or both, of a qualifying project. Such phases may included, but are not limited to, design, planning, engineering, environmental analysis and mitigation, financial and revenue analysis, or any other phase of the project that constitutes activity on any part of the qualifying project.

"Lease payment" means any form of payment, including a land lease, by a public entity to the private entity for the use of a qualifying project.

"Life-cycle cost analysis" means an analysis that calculates cost of an asset over its entire life span and includes the cost of planning, constructing, operating, maintaining, replacing and when applicable, salvaging the asset. Although one proposal may have a lower initial construction cost, it may not have the lowest life-cycle cost once maintenance, replacement, and salvage value is considered.

"Material default" means any default by the private entity in the performance of its duties that jeopardizes adequate service to the public from a qualifying project.

"Operate" means to finance, maintain, improve, equip, modify, repair, maintain or otherwise operate the facility.

"Opportunity cost" means the cost of phasing up another choice when making a decision or the increase in costs due to delays in making a decision.

"Private entity" means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity, or other business entity.

"Public entity" means the Commonwealth and any agency or authority thereof, any county, city or town and any other political subdivision of the Commonwealth, any public body politic and corporate or any regional entity that serves a public purpose.

"Qualifying project" means (i) any education facility, including, but not limited to a school building, any functionally related and subordinate facility and land of a school building (including any stadium or other facility primarily used for school events), and any depreciable property provided for use in a school facility that is operated as part of the public school system or as an institution of higher education; (ii) any building or facility that meets a public purpose and is developed or operated by or for any public entity; (iii) any improvements, together with equipment, necessary to enhance public safety and security of buildings to the principally used by a public entity; (iv) utility and telecommunications and other communications infrastructure; (v) a recreational facility; (vi) technology infrastructure and services, including, but not limited to, telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services; (vii) any technology, equipment, or infrastructure designed to deploy wireless broadband services to school, businesses, or residential areas; or (viii) any services designed to increase the productivity or efficiency through the use of technology or other means; (ix) any improvements necessary or desirable to any unimproved locally- or state-owned real estate; or (x) any solid waste management facility that produces electric energy derived from solid waste.

"Responsible public entity" ("RPE") means a public entity that has the power to develop or operate the applicable qualifying project.

"Revenues" means all revenues, income, earnings, user fees, lease payments, or other service payments arising out of or in connection with supporting the development or operation of a qualifying project, including without limitation, money received as grants or otherwise from the United States of America, from any public entity, or from any agency or instrumentality of the foregoing in aid of such facility.

"Service contract" means contract entered into between a public entity and the private entity pursuant to Virginia Code § 56-575.5.

"Service payments" means payments to the private entity of a qualifying project pursuant to a service contract.

"State" means the Commonwealth of Virginia.

"User fees" means the rates, fees, or other charges imposed by the private entity of a qualifying project for use of all or a portion of such qualifying project pursuant to the comprehensive agreement pursuant to Virginia Code § 56-575.9.

