



MEMORANDUM

TO: Mayor Greenlaw and Members, Fredericksburg City Council
FROM: Kathleen Dooley, City Attorney
SUBJECT: PPEA Guidelines - Update
DATE: May 18, 2021 (for the May 25, 2021 Council Meeting)

ISSUE

Shall City Council update the City’s PPEA Guidelines per the staff proposal?

RECOMMENDATION

Yes. These guidelines establish the City’s process for reviewing proposals under the Public-Private Education Facilities and Infrastructure Act of 2002. This Virginia law authorizes “responsible public entities,” like the City, to use a design-build, design-build-operate, or even design-build-operate-finance model for the procurement of large public projects including school buildings, but more broadly, any building or facility that meets a public purpose – such as upgrades to the Wastewater Treatment Plant.

City Council last adopted combined PPEA/PPTA Guidelines in 2005. The proposed updated PPEA Guidelines reflect changes in the law that have taken place since that time.

DISCUSSION

1. PPEA Generally:

The General Assembly adopted the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA) as an innovative alternative to the traditional design-bid-build procurement model, making the following legislative findings on behalf of the Commonwealth:

There is a public need for timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, operation, implementation, or installation of education facilities, technology infrastructure and other public infrastructure and government facilities within the Commonwealth that serve a public need and purpose;

Such public need may not be wholly satisfied by existing methods of procurement in which qualifying projects are acquired, designed, constructed, improved, renovated, expanded, equipped, maintained, operated, implemented, or installed;

There are inadequate resources to develop new education facilities, technology infrastructure and other public infrastructure and government facilities for the benefit of citizens of the Commonwealth, and there is demonstrated evidence that public-private partnerships can meet these needs by improving the schedule for delivery, lowering the cost, and providing other benefits to the public;

Financial incentives exist under state and federal tax provisions that promote public entities to enter into partnerships with private entities to develop qualifying projects;

Authorizing private entities to develop or operate one or more qualifying projects may result in the availability of such projects to the public in a more timely or less costly fashion, thereby serving the public safety, benefit, and welfare.

2. City's past experience with, and future potential for, PPEA projects:

The City of Fredericksburg was an early adopter of this new authority, beginning with City Council's adoption of "Procedures Adopted Implementing the Public-Private Education Facilities and Infrastructure Act of 2003" on May 13, 2003; and adoption of Resolution 03-65 authorizing the Fredericksburg City School Board to use PPEA, on June 24, 2003. The School Board adopted procedures implementing the PPEA and then used this new authority to negotiate a Comprehensive Agreement for the design and construction of the new Upper Elementary School and the new James Monroe High School, subject to City Council approval, which was granted by adoption of Resolution 04-13 on February 24, 2004.

In the following years, the City used PPEA to design and construct the Wolfe/Sophia Street Parking Deck (Res. 04-59), the Police Department Headquarters (Res. 05-106), the Princess Anne Street Courthouse (Res. 11-96), and multiple water and sewer facility improvement projects. The courthouse project was a solicited PPEA; the other projects were unsolicited PPEA projects. City Council last updated the PPEA Guidelines in 2005 (Res. 05-102, adopted September 27, 2005.)

PPEA could be an appropriate vehicle for the design and construction of upgrades to the Wastewater Treatment Plant, for design and construction of a new fire station, and expansion or new construction of public school facilities. The updated guidelines may be used to structure

those procurement processes and outcomes. The design-build feature of PPEA can be a benefit to the City, as recognized by the General Assembly's findings.¹

3. Major proposed Guidelines changes:

The proposed Guidelines:

- Continue to use the 2005 Guidelines as the basis for the update. New provisions have been added to the 2005 Guidelines to reflect new laws, but the 2005 Guidelines continue to provide the structure and organization, and the majority of substance of the new Guidelines.
- Drop references to the Public-Private Transportation Act of 1995 ("PPTA"). The 2005 Guidelines are combined PPEA/PPTA Guidelines; but in the intervening years, emerging differences in technical aspects of these two Virginia Code chapters complicated the combination of these two sets of guidelines. The City has not used the PPTA authority yet, but if it wishes to do so in the future, it can adopt standalone PPTA guidelines adapted from the PPEA set.
- Add posting and public notice requirements from Va. Code §56-575.17. These new requirements apply to the posting of solicited and unsolicited conceptual proposals, and posting, public notice, and public hearings on proposed interim and comprehensive agreements. These topics are now addressed in Guidelines §VII(E).
- Increase the review fee for Unsolicited Proposals from \$5000 to \$7500 to cover the City's costs for reviewing and processing these proposals. The proposed guidelines retain and carry forward a review fee equal to 2.5% of the total estimated cost of the project at the Detailed Design stage. The City is required to refund excess review fees to each proposer at the end of the review process. These two review fees, and the graduated fee structure, reflect the City's actual costs while still lowering barriers to entry for smaller design-build teams.
- Address the interplay between the School Board as a "responsible public entity" and the City Council as the "appropriating body" for school board projects. In this situation, the School Board would adopt its own guidelines, receive unsolicited proposals or issue a request for proposals, post proposals, and undertake all of the responsibilities of the "responsible public entity," but the City Council's approval of any interim or comprehensive agreement as the "appropriating body" is required as a final step. The proposed guidelines include a City Council public hearing prior to approval of either of these agreements.

¹ For more on the benefits of the design-build model, see [Design-Build Institute of America's "What is Design Build?"](#)

FISCAL IMPACT:

There is no direct fiscal impact to the adoption of the updated Guidelines. The use of PPEA for future projects should result in cost savings to the City inherent in the design-build procurement model.

The proposed Guidelines shift more of the cost of the initial review of Unsolicited Proposals to proposers; but there is no direct fiscal impact caused by the adoption of the updated Guidelines.

Attachments: Proposed Guidelines



May 25, 2021
Regular Meeting
Resolution 21-

MOTION:

SECOND:

RE: Approving Updated Guidelines for Qualifying Projects Under the Public-Private Education Facilities and Infrastructure Act of 2002

ACTION: APPROVED: Ayes: 0; Nays: 0

The Public-Private Education Facilities and Infrastructure Act of 2002 (“PPEA”) grants responsible public entities the authority to create public-private partnerships for the development of a wide range of qualifying projects for public use.

The City of Fredericksburg is a municipal corporation with the authority to acquire, construct, and operate facilities in the City of Fredericksburg, and therefore is a “responsible public entity” as that term is used in the PPEA.

Prior to accepting a private proposal, the City must adopt guidelines that define proposal submission requirements, evaluation and selection criteria, and other general provisions.

Therefore, the City Council hereby resolves that:

- The City Council does hereby adopt the Public-Private Education Facilities and Infrastructure Act of 2002 Guidelines for the City of Fredericksburg, Virginia, in substantially the form submitted for approval.
- The 2005 Combined Guidelines for Qualifying Projects under the Public-Private Education Facilities and Infrastructure Act of 2002 and the Public-Private Transportation Act of 1995 are hereby rescinded for projects submitted after the effective date of this resolution.

Votes:

Ayes:

Nays:

Absent from Vote:

Absent from Meeting:

Clerk's Certificate

I certify that I am Clerk of Council of the City of Fredericksburg, Virginia, and that the foregoing is a true copy of Resolution No. 21-__, adopted at a meeting of the City Council held Date, 2021, at which a quorum was present and voted.

Tonya B. Lacey, MMC
Clerk of Council

**Public-Private Education Facilities and
Infrastructure Act of 2002, as amended**



Guidelines

for the

**City of Fredericksburg, Virginia
Adopted [date][Res. 21-xx]**

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I. Introduction¹

A. Guideline Overview

The City of Fredericksburg (the "City") is municipal corporation with the authority to acquire, construct, and operate facilities in the City of Fredericksburg, and therefore is a "responsible public entity" as that term is used in the PPEA. The PPEA provides that a responsible public entity shall not proceed to consider any proposal by a private entity for approval of a qualifying project until the responsible public entity has adopted and made publicly available guidelines that are sufficient to enable the responsible public entity to comply with the provisions of the PPEA. Va. Code § 56-575.16(4). On September 27, 2005, City Council approved Combined PPEA/PPTA Guidelines for the City of Fredericksburg (Res. 05-102). In order to conform to subsequent amendments to the PPEA, the City Council adopted these updated guidelines on May 25, 2021. These guidelines are no longer combined with the PPTA Guidelines due to the emerging differences in technical aspects of the two statutes.

These guidelines contain the implementation procedures and guidelines developed by the City to guide the selection of projects as authorized by the PPEA. These guidelines shall be made publicly available. The person designated as the primary point of contact for information on these guidelines and for submission of solicited or unsolicited proposals under the PPEA is:

The City Manager
City of Fredericksburg
715 Princess Anne Street, Room 203
P.O. Box 7447
Fredericksburg, VA 22401

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

B. Qualifying Projects

Under the PPEA, a "qualifying project" includes:

- (i) Any education facility, including, but not limited to, a school building, any functionally-related and subordinate facility and land to 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;

¹ Unless specifically noted, these guidelines apply generally to all PPEA projects.

- (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, 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 the productivity or efficiency of the responsible public entity through the use of technology or other means;
- (viii) Any technology, equipment, or infrastructure designed to deploy wireless broadband services to schools, businesses, or residential areas;
- (ix) Any improvements necessary or desirable to any unimproved locally- or state-owned real estate; and
- (x) Any solid waste management facility as defined in Va. Code §10.1-1400 that produces electric energy derived from solid waste.

C. Reservation of City Rights

As set forth in these Guidelines, the City reserves all rights available to it by law in administering these Guidelines including, without limitation, the right in its sole discretion to:

- (i) Reject any and all proposals at any time;
- (ii) Terminate consideration or evaluation of any and all proposals at any time;
- (iii) Suspend, discontinue and/or terminate discussions regarding confidentiality agreements, interim agreements and comprehensive agreements at any time prior to the authorized execution of such agreements by all parties;
- (iv) Suspend or eliminate conceptual phase review and proceed directly to detailed phase review;

- (v) Negotiate with a proposer without being bound by any provision in its proposal;
- (vi) Negotiate with fewer than all proposers at any given time;
- (vii) Request and/or receive additional information regarding any proposal;
- (viii) Issue addenda to and/or cancel any RFP or IFB;
- (ix) Revise, supplement or withdraw all or any part of these Guidelines;
- (x) Assess, retain and/or waive any and all fees required to be paid by proposers in accordance with these Guidelines;
- (xi) Request revisions to conceptual or detailed phase proposals.

II. Definitions

"Affected Local Jurisdiction" means any county, city or town in which all or a portion of a qualifying project is located. (PPEA)

"Appropriating Body" means the body responsible for appropriating or authorizing funding to pay for a qualifying project. City Council is the appropriating body for a City School Board qualifying project, for example.

"Comprehensive Agreement" means the comprehensive agreement between the private entity and the responsible public entity required by § 56-575.9 of the PPEA.

"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 include, 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.

"Material Default" means any default by the private entity in performance of its duties under § 56-575.8 that jeopardizes adequate service to the public from a qualifying project (PPEA).

"Operate" or "Operation" means to finance, maintain improve, equip, modify, repair, or operate.

"Private entity" means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, non-profit 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.

"Responsible Public Entity" means a public entity, including local government and regional authorities, that has the power to develop and/or operate the applicable qualifying project (PPEA). Both the City of Fredericksburg and the Fredericksburg City Public Schools are responsible public entities as defined by the PPEA.

"Revenues" means all revenues, including but not limited to 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 a contract entered into between a public entity and the private entity pursuant to § 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 for the use of all or a portion of a qualifying project pursuant to the comprehensive agreement under § 56-575.9.

III. General Provisions

A. Proposal Submission; posting

1. Proposals may be submitted by private entities to the City either on an unsolicited basis ("Unsolicited Bid/Proposal") or in response to a solicitation for such proposals by the City ("Solicited Bid/Proposal").
2. The City may require that any proposal be clarified. Such clarification may include, but shall not be limited to, the submission of additional documentation,

responses to specific questions, and interviews with potential project participants.

3. Conceptual solicited and unsolicited proposals submitted to the City shall be posted within 10 working days after acceptance on the City's website. In addition, the City may publish a summary of the proposals and the location where copies of the proposals are available for public inspection in the local newspaper. The City will also post an initial unsolicited proposal on the Department of General Services' central electronic procurement website (commonly known as eVA) to provide the public with centralized visibility and access to the City's procurement opportunities, as provided in §V.B, below. Trade secrets, financial records, or other confidential records of the private entity shall not be posted.

B. Affected Local Jurisdictions

Any private entity submitting a proposal to the City must provide any other affected local jurisdiction with a copy of the proposal by certified mail, express delivery, or hand delivery within five (5) business days of submission of the proposal to the City. Any such other jurisdiction shall have sixty (60) days from the date it receives its copy of the proposal to submit written comments to the City (to the attention of the City Manager). Such written comments shall indicate whether the proposed project or facility is compatible with the affected local jurisdiction's (i) local comprehensive plan; (ii) local infrastructure development plans; or (iii) capital improvements budget, or other government spending plans. The City will consider comments received within the sixty (60) day period prior to entering into a comprehensive agreement pursuant to the PPEA regarding the proposal. No negative inference shall be drawn from the absence of comment by an affected local jurisdiction. However, the City may begin or continue its evaluation of any such proposal during the sixty (60) day period. Va. Code §§ 56-575.6.

C. Proposal Review Fee

1. The City shall receive 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; this analysis must include the specifics, advantages, disadvantages, as well as long- and short-term costs of the proposed agreement. The City is authorized by the PPEA to charge a fee to the private entity to cover the costs of processing, reviewing, and evaluating any unsolicited proposal or competing unsolicited proposal, including reasonable attorney's fees and fees for financial, technical and other necessary advisors or consultants. Any fee charged for such review of a proposal should be reasonable in comparison to the level of expertise required to review the proposal and should not be greater than the direct costs associated with evaluating the proposed qualifying project. "Direct costs" may include (i) the

cost of materials, supplies and internal staff time required to process, evaluate, review and respond to the proposal; and (ii) the out-of-pocket costs for attorneys, consultants and financial advisors engaged by the City in its sole discretion to assist in such review.

2. No proposal fee shall be charged for the review of proposals solicited by a Request for Proposal or Invitation for Bid.
3. Review fees shall be charged to any applicant whose Unsolicited Proposal has been accepted by the City for Conceptual Phase review. Such review fees shall be based on the reasonably anticipated costs of the City in accordance with the following schedule:
 - (i) Initial or Conceptual Phase Review Fee: The Initial or Conceptual Review Fee shall be \$7500 and must be submitted with the Unsolicited Proposal.
 - (ii) Detailed Phase Review Fees. Upon the City's decision to proceed with a Detailed Phase Proposal, the proposer shall pay an additional review fee calculated at the rate of two and one half percent (2.5%) of the reasonably anticipated total cost of the proposed project, but not more than \$50,000 at the time of the submittal of the Detailed Phase Proposal. Additional fees may be imposed on and paid by the proposer throughout the processing, review, and evaluation of the unsolicited proposal if and as the City reasonably anticipates incurring costs in excess of the initial Detailed Phase Review Fee. The City shall notify the applicant of the amount of such additional fees as and when it anticipates incurring such costs. Prompt payment of such additional fees is required before the City will continue the process, review, and evaluation of the proposal.
4. The City may at its sole discretion at any time before or during the Detailed Phase Review enter into an Interim Agreement with the proposer, under which the City may compensate the proposer for Detailed Phase Proposal activities described therein. The City is required, however, to review all proposed Interim and Comprehensive Agreements prior to execution.
5. Reimbursement of excess fees paid. In the event the total fees paid by the proposer exceed the City's reasonably estimated total costs incurred in processing, reviewing, and evaluating the proposal, the City shall reimburse the difference. Otherwise, the City shall retain all fees paid.

D. Virginia Freedom of Information Act; Confidential and Proprietary Information

1. Any confidential and proprietary information provided to the City by a private entity pursuant to the PPEA shall be subject to disclosure under the Virginia

Freedom of Information Act (Va. Code § 2.2-3700 et seq.) ("FOIA"), except as provided by Va. Code §§ 56-575.4(G) (PPEA). Such documents are releasable if requested, except to the extent that they relate to (i) confidential proprietary information submitted to the City under a promise of confidentiality, or (ii) memoranda, working papers or other records related to proposals if making such records would adversely affect the financial interest of the City or private entity or the bargaining position of either party. At no time shall the City be liable to a proposer for the disclosure of all or a portion of a proposal submitted under these guidelines.

2. In order to prevent the release of any confidential and proprietary information that otherwise could be held in confidence by the City pursuant to § 56-575.4(G) (PPEA), the private entity submitting the information must (i) invoke the exclusion from FOIA when the data or materials are submitted to the City or before such submission; (ii) identify the data and materials for which protection from disclosure is sought, and (iii) state why the exclusion from disclosure is necessary. A private entity may request and receive a determination from the City as to the anticipated scope of protection prior to submitting the proposal. The City is authorized and obligated to protect only confidential proprietary information and will not protect any portion of a proposal from disclosure if the entire proposal has been designated confidential by the private entity without reasonably differentiating between the proprietary and non-proprietary information contained therein.
3. Upon receipt of a request from a private entity that designates portions of a proposal for protection from disclosure as confidential and proprietary, the City will determine whether such protection is appropriate under applicable law and, if appropriate, the scope of such appropriate protection, and shall communicate its determination to the private entity. If the determination regarding protection of the scope thereof differs from the private entity's request, then the City will afford the private entity a reasonable opportunity to clarify and justify its request. Upon a final determination by the City to afford less protection than requested by the private entity, the private entity will be given an opportunity to withdraw its proposal. A proposal so withdrawn will be treated in the same manner as a proposal not accepted for publication and conceptual phase consideration as provided below in Paragraph V.B.2, except that all or a portion of the proposal review fee may be retained by the City at its sole discretion to cover the costs of processing the proposal, including determinations regarding disclosure pursuant to this Paragraph.
4. In accordance with Va. Code § 2.2-3705.6(11), the City and a private entity may enter a written confidentiality agreement upon mutually acceptable terms regarding the treatment of confidential and proprietary data or materials included in a proposal submitted under these guidelines.

5. Once a comprehensive agreement has been entered into, and the process of bargaining of all phases or aspects of the comprehensive agreement is complete, the City shall make available, upon request, procurement records (but not confidential information) in accordance with Va. Code § 2.2-4342.

E. Use of Public Funds

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

F. Applicability of Other Laws

Nothing in the PPEA shall affect the duty of the City to comply with all other federal, state, and local laws including the City's Procurement Ordinance (City Code §§ 2-301, *et seq.*) not in conflict therewith. In particular, the applicability of the Virginia Public Procurement Act and shall be as set forth in the PPEA. Va. Code §56-575.16.

IV. Solicited Proposals

The procedures and requirements applicable to any particular solicited bid or proposal shall be specified in the solicitation for that proposal and shall be consistent with the requirements of the PPEA and other applicable law. All such solicitations shall be by issuance of a written Invitation to Bid ("IFB") or Request for Proposal ("RFP"), in accordance with the City Code. Any proposal submitted pursuant to the PPEA that is not received in response to an IFB or RFP shall be deemed an Unsolicited Proposal under Section V. This shall include (a) proposals received in response to a notice issued by the City that it has received another Unsolicited Proposal, and (b) proposals received in response to publicity by the City concerning particular needs but where the City has not issued a formal IFB or RFP.

The City shall proceed by issuing an IFB unless the City Manager determines that proceeding with an RFP is likely to be advantageous to the City and the public, based on (i) the probable scope, complexity, or priority of the project; (ii) risk sharing including guaranteed cost or completion guarantees, added value or debt or equity investments proposed by the private entity; or (iii) an increase in funding, dedicated revenue source or other economic benefit that would not otherwise be available. The City Manager shall state the reasons for proceeding with an RFP in writing.

Whenever the City proposes to obtain professional services, as defined in the Virginia Public Procurement Act, it shall proceed with an RFP process that is consistent with the procurement of professional services through competitive negotiation as set forth in Va. Code

§2.2-4302.2 and subsection B of §2.2-4310.

The RFP or IFB should 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 RFP should be posted in such public areas as are normally used for posting of the City's notices, including the City's website. Notices may be posted on the Commonwealth's electronic procurement site commonly known as eVA. Notices may also be published in a newspaper or other publications of general circulation. The RFP or IFB should 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 deemed appropriate by the City.

V. Unsolicited Proposals

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 without issuance of an RFP, the proposal shall be treated as an Unsolicited Proposal.

The following four-step procedure for evaluating Unsolicited Proposals shall serve as the City's general process for encouraging the receipt and consideration of proposed projects under the PPEA. This procedure shall not preclude the City, however, from discontinuing its evaluation of any proposal at any time. Furthermore, if the City determines that it is in the City's interest to do so with respect to any Unsolicited Proposal, the City may cease or eliminate review at the conceptual phase and proceed directly to the detailed review phase.

A. Step One: Decision to Accept and Consider an Unsolicited Proposal

1. Delivery of Initial Submission

Any private entity seeking to submit an Unsolicited Proposal under the PPEA to the City shall deliver six (6) complete copies and one electronic copy of the proposal in a text searchable format (either MS Word or text searchable PDF), as provided below, to the City Manager, City Hall, 715 Princess Anne Street, Fredericksburg, Virginia 22401. The term "Public Private Education Facilities and Infrastructure Proposal" must be clearly labeled on the outside of the envelope or package. A working group may be designated by the City Manager to review and evaluate any such proposal. A list of all local jurisdictions being provided a copy of the proposal must accompany the conceptual proposal with the name and address of recipient and date delivered.

Upon receipt of any Unsolicited Proposal, accompanied by the required fee, the City Manager shall determine whether to accept the Unsolicited Proposal for publication and conceptual phase consideration, as described below. If the City

Manager determines not to accept the proposal at this phase, he shall notify the proposer and City Council, with an explanation of why no further consideration is warranted.

2. Contents of Initial Submission

- (i) An Unsolicited Proposal must contain information on the proposer's qualifications and experience, project characteristics, project financing, anticipated public reaction, and project benefit and compatibility. Suggested format and information to satisfy these requirements are included in Section V.C.5., below. The information should be adequate to enable the City to evaluate the practicality and sufficiency of the proposal. The private entity may request that the City consider a two part proposal process consisting of an initial conceptual submission (Step Three below) to be followed by a more detailed submission (Step Four below).
- (ii) Unsolicited Proposals should provide concise description of the applicant's capability to complete the proposed qualifying project and the benefits to be derived from the project by the City. Project benefits to be considered may include benefits to be realized during the construction, renovation, expansion or improvement phase as well as 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 allow an analysis by the City of the financial feasibility of the proposed project, including but not limited to: (a) identity of any parties expected or provide financing for the project; and (b) a statement indicating whether the applicant intends to request the City to provide resources for financing the project and the nature and extent of any such resources.
- (iii) The City may require additional submissions to clarify information previously provided or to address other areas of concern to the City.

B. Step Two: Decision to Proceed With Conceptual Phase Review Notice

- 1. Upon review of the applicant's initial submission, the City Manager may choose to accept an Unsolicited Proposal for Conceptual Phase consideration and will so notify the applicant of his decision.
- 2. If the City Manager chooses not to accept an Unsolicited Proposal for Conceptual Phase consideration, he shall promptly return the Initial Review Fee to the proposer.

3. Upon a determination to accept an Unsolicited Proposal for Conceptual Phase consideration, the City Manager shall post and publish a notice of the City's decision to accept the proposal for Conceptual Phase consideration. Such notice is intended to encourage competition and must be posted in a public area regularly used by the City for the posting of public notices for a period of not less than forty-five (45) days. In addition, the City Manager may also publish the same notice once a week for four (4) successive weeks in one or more newspapers of general circulation in the City to notify any parties that may be interested in submitting competing Unsolicited Proposals. If the City accepts the proposal for consideration under the PPEA, the City Manager must also publish such notice on the Commonwealth's electronic procurement website commonly known as eVA. Said notices shall state that the City: (i) has received and accepted an Unsolicited Proposal under the Act; (ii) intends to evaluate the proposal; (iii) may negotiate an interim and/or comprehensive agreement with the proposer; and (iv) will accept for simultaneous consideration, within a specific period of time of not less than forty-five (45) days, any competing proposals that comply with City regulations. The notice shall also summarize the proposed qualifying project and identify its proposed location.
4. During the forty-five (45) day period for receiving competing Unsolicited Proposals, the City may continue to evaluate the original Unsolicited Proposal. Representatives of the City are encouraged to answer question from private entities that are contemplating submission of a competing unsolicited proposal.

C. Step Three: Conceptual Phase Review

1. Only proposals complying with the requirements of the PPEA and this Section, that contain sufficient information for a meaningful evaluation, and that are provided in an appropriate format, as described below, will be considered by the City for further review at the Conceptual Phase.
2. The City will determine at this point whether it will proceed, using:
 - (i) procurement through competitive sealed bidding, as defined in Virginia Code § 2.2-4301 and subsection B of Virginia Code § 2.2-4310; or
 - (ii) procedures for competitive negotiation, as defined under Va. Code § 2.2-4301, subsection B of Virginia Code § 2.2-4310 and City Code § 2-301. The City may only use competitive negotiation upon a written determination by the City Manager that doing so would likely be advantageous to the City and the public based upon either (1) the probable scope, complexity, or priority of need; (2) risk sharing including guaranteed cost of completion guarantees, added value or debt or equity investments proposed by the private entity; or (3) an increase in funding,

dedicated revenue or economic benefit from the project that would not otherwise be available. The City Manager shall state his or her reasons for this determination in writing.

3. After reviewing the Unsolicited Proposal and any competing Unsolicited Proposals submitted during the notice period, the City may determine: (i) not to proceed further with any proposal; (ii) to proceed to the detailed review phase with the original proposal; (iii) to proceed to the detailed review phase with a competing proposal; or (iv) to proceed to the detailed review phase with multiple proposals.
4. Discussions between the City and private entity about the need for infrastructure improvements shall not limit the ability of a public entity 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 for any reason prior to the execution of an interim or comprehensive agreement.
5. Format for Submissions at the Conceptual Phase: Unsolicited Proposals at the Conceptual Phase shall contain information in the following areas: (i) qualifications and experience; (ii) project characteristics; (iii) project financing; and (iv) anticipated public support and/or opposition. The following are suggestions for the format and content of the proposal at this phase. The City may request such additional information as it deems appropriate.
 - (i) Qualification and Experience
 - a. Identify the legal structure of the firm or consortium of firms making the proposal (i.e. corporation, partnership, joint venture, limited liability corporation.). Identify the organizational structure for the project, the management approach, and how each principal (i.e. major shareholder, member, partner) and major subcontractor in the structure fit 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. Provide resumes of the key individuals who will be involved in the project.

- c. Provide the names, addresses, and telephone numbers of persons who may be contacted for further information.
- d. 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.
- e. Identify any persons known to the applicant who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to Virginia State and Local Government Conflict of Interest Act (Va. Code §§ 2.2-3100 *et seq.*).

(ii) 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 or any other private entity.
- 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, and environmental impacts of the project. Specify the strategies or actions to mitigate such impacts of the project.
- e. Identify the projected positive social, economic 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 project 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 (including, where appropriate, historic district considerations), building, engineering, or other applicable standards that the proposed project will meet.
- k. Describe the method by which all necessary property interests, including rights-of-way or easements, are to be secured. Include the names and addresses of current property owners, if known, the nature of property to be acquired, and a description of any property that the City is expected to condemn.

(iii) Project Financing

- a. Provide a preliminary estimate and describe the estimating methodology of the cost of the work by phase, segment, or both.
- 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.
- c. Include a list and discussion of assumptions underlying all major elements of the plan.
- 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 governmental sources (and identify of each such source) and the timing of any anticipated commitment.
- f. Identify the amounts and the terms and conditions for any revenue sources, including any third parties that the applicant contemplates will provide financing for the project, and describe the nature and timing of each such commitment.
- g. Identify any aspect of the project that could disqualify the project from eligibility for tax-exempt financing.

(iv) Project Benefit and Compatibility

- a. Describe the anticipated benefits to the community, region, or state, including anticipated benefits to the economic condition of the City, and identify who will benefit from the project and how they will benefit.
- 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. Explain whether the project is likely to attract or maintain industries and businesses to the City or the surrounding region and, if so, explain how.
- e. Explain whether the project is compatible with the City's comprehensive plan, infrastructure development plans, capital improvements budget, or other government spending plan and, if so, explain how.

D. Step Four: The Detailed Review Phase

1. If the City decides to proceed to the detailed review phase with one or more Unsolicited Proposals, then the following information shall be provided by the proposer unless included in the conceptual phase proposal or expressly waived by the City:
 - (i) A topographical map (1:2000 or other appropriate scale) depicting the location of the proposed project;
 - (ii) 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;
 - (iii) A statement and strategy setting out the plans for securing all necessary property. The statement shall 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 City to condemn;
 - (iv) 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;
 - (v) 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;

- (vi) A detailed discussion of assumptions about user fees or rates, and usage of the projects;
- (vii) Identification of any known government support or opposition, 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;
- (viii) Demonstration of consistency with appropriate local comprehensive or infrastructure development plans or indication of the steps required for acceptance into such plans;
- (ix) Explanation of how the proposed project would impact local development plans of each affected local jurisdiction;
- (x) 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.*);
- (xi) Detailed analysis of the financial feasibility of the proposed project, including its impact on similar facilities operated or planned by the City. Include a detailed description of any financial 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 applicant of the financing plan proposed for the project; and,
- (xii) Additional material and information as the City may request.

VI. Proposal Evaluation and Selection Criteria

In addition to evaluation of materials and information described in Section V., some or all of the following matters may be considered in the evaluation and selection of PPEA proposals.

A. Qualifications and Experience

Factors to be considered in either phase of the City's review to determine whether the proposer possessed the requisite qualifications and experience may include but shall not be limited to:

1. Experience with similar projects;
2. Demonstration of ability to perform work;
3. Leadership structure;
4. Project manager's experience;
5. Management approach;
6. Financial condition; and
7. Project ownership.

B. Project Characteristics

Factors to be considered in determining the project characteristics may include but shall not be limited to:

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; and
9. Maintenance of the project.

C. Project Financing

Factors to be considered in determining whether the proposed project financing allows adequate access to the necessary capital to finance the project may include but shall not be limited to:

1. Cost and cost benefit to the City;
2. Financing and the impact on the debt or debt burden of the City;
3. Financial plan;
4. Estimated cost;
5. Life-cycle cost analysis;
6. The identity of any third party that will provide financing for the project and the nature and timing of their commitment.

D. Project Benefit and Compatibility

Factors to be considered in determining the proposed project's compatibility with the appropriate local or regional comprehensive or development plans may include but shall not be limited to:

1. Community benefits;
2. Community support or opposition, or both;
3. Public involvement strategy;
4. Compatibility with existing and planned facilities; and
5. Compatibility with local, regional, and state economic development efforts.

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 qualifying project;
2. The general reputation, industry experience, and financial capacity of the private entity;

3. The proposed design of the qualifying project;
4. The eligibility of the project for accelerated documentation, review, and selection;
5. Local citizen and government comments;
6. Benefits to the public;
7. The private entity's compliance with a minority business enterprise participation plan or good faith effort to comply with the goals of such plans;
8. The private entity's plans to employ local contractors and residents; and
9. Other criteria that the City deems appropriate.

F. Independent Analysis

The City shall engage the services of qualified professionals, which may include an architect, professional engineer, or certified public accountant, not otherwise employed by the City, 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 City Council determines that such analysis of a request by a private entity for approval of a qualifying project shall be performed by City employees. Va. Code §56-575.3:1(C)(1).

VII. Interim and Comprehensive Agreements

Prior to developing or operating the qualifying project, the selected private entity shall enter into a comprehensive agreement with the City and may enter into an interim agreement as described in Section VII.A. The City 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. Any such interim or comprehensive agreement, and any amendment thereto, shall be subject to approval by the City Council.

A. Interim Agreement Terms

Prior to entering into a comprehensive agreement with the City, an interim agreement may be entered into that permits a private entity to perform compensable activities related to the project.

The scope of an interim agreement may include, but shall not be limited to:

1. Project planning and development;
2. Design and engineering;
3. Environmental analysis and mitigation;
4. Site planning and survey;
5. Ascertaining the availability of financing for the proposed facility through financial and revenue analysis;
6. Establishing a process for and timing of the negotiation of the comprehensive agreement; and
7. Any other provisions related to any aspect of the development or operation of a qualifying project that the parties deem appropriate prior to the execution of a comprehensive agreement.

B. Comprehensive Agreement Terms

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

1. Delivery of maintenance, performance, and payment bonds or letters of credit in connection with any acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project, in the forms and amounts satisfactory to the City;
2. Review and approval of plans and specifications for the qualifying project by the City;
3. The right of the City to inspect the qualifying project to ensure compliance with the comprehensive agreement;
4. 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 tort liability to the public and employees and to enable the continued operation of the qualifying project;
5. Monitoring and acting upon the practices of the operator by the City to ensure proper maintenance;
6. The terms under which the private entity will reimburse the City for services

provided;

7. Policies and procedures governing 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 operator, 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 by the City;
8. Filing by the private entity of 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 qualifying project. In addition:
 - (i) A copy of any service contract shall be filed with the City.
 - (ii) 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.
 - (iii) 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 qualifying project;
11. The terms and conditions under which existing site conditions will be assessed and addressed, including indemnification of the City for conducting the assessment and taking necessary remedial action; and
12. Any changes to the terms of the interim or comprehensive agreement may be agreed upon by the parties from time to time shall be added to the interim or comprehensive agreement only by written amendment.
13. The comprehensive agreement may provide for the development or operation of phases or segments of a qualifying project.
14. Other requirements of the PPEA and other applicable law.

C. Comprehensive Agreement Provisions Relating to Construction Projects

With respect to construction projects considered under the PPEA, the City generally anticipates addressing the following in the Comprehensive Agreement. Private entities are encouraged to include a discussion of these matters in proposals relating to construction projects.

1. The City prefers the design-build project delivery system. In design-build construction projects the private entity will be expected to assume single-point responsibility and liability for all design and construction activities.
2. To the fullest extent possible, the City expects the private entity to perform its own geotechnical investigation of subsurface conditions at the project site. The risk of inadequate geotechnical investigation or improper interpretation of the results of the geotechnical investigation will be allocated to the private entity in the comprehensive agreement. The City will consider assuming part or all of the risk of subsurface conditions that could not reasonably be foreseen notwithstanding the performance of a geotechnical investigation meeting the ordinary standard of care of geotechnical engineers working under similar conditions.
3. The City encourages private entities to propose a formula for the mutual sharing of cost savings realized during construction. Mutually agreed upon terms for the sharing of such savings will be incorporated in the comprehensive agreement.

D. Comprehensive Agreement Provisions Relating to Private Entity Legal Structure

The City is willing to enter comprehensive agreements with private entities who have formed business associations such as joint ventures and limited liability corporations ("LLC"). In such cases, however, the City will expect one or more of the principal members of the association to provide a performance guaranty of all obligations undertaken in the comprehensive agreement. This requirement is in addition to the statutory requirement for a performance bond. Individuals, corporations and other businesses interested in entering public-private partnerships with the City under the PPEA must be willing to provide this security if their proposal is submitted as part of a joint venture, LLC or other business entity that limits the liability of its members, owners or partners.

E. Public Hearing; Notice and Posting Requirements

1. In addition to the posting requirements of Section III.A of these Guidelines, the City Council shall hold a public hearing on the proposals during the proposal review process, but not later than 30 days prior to entering into an interim or comprehensive agreement.

2. Once the negotiation phase for the development of an interim or a comprehensive agreement is complete, but before an interim agreement or comprehensive agreement is entered into, the City shall post the proposed agreement in the following manner:
 - a. Posting shall be made on the City's public website of a summary of the proposed agreement and the location where copies of the proposed agreement are available for public inspection. At the discretion of the City, posting may also be by publication, in a newspaper of general circulation in the area in which the contract is to be performed, or on the Commonwealth of Virginia's Department of General Service's web-based electronic procurement program commonly known as eVA.
3. When the City Council acts as the appropriating body, but not the responsible public entity on a specific project (e.g. a School Board PPEA qualifying project), approval of any interim or comprehensive agreement requires City Council approval. City Council will post the proposed interim or comprehensive agreement and hold a public hearing on the proposed agreement prior to approving the interim or comprehensive agreement.

F. Comprehensive Agreement approval; findings

1. City Council may grant approval of the development or operation of the qualifying project upon a determination that the project serves the public purpose of the PPEA as set forth in Va. Code §56-575.2. The City Council may make this determination if:
 - i. There is a public need for or benefit derived from the qualifying project of the type the private entity proposes as a qualifying project;
 - ii. The estimated cost of the qualifying project is reasonable in relation to similar facilities; and
 - iii. The private entity's plans will result in the timely development or operation of the qualifying project.
2. In connection with the approval of the qualifying project, the City shall establish a date for the commencement of activities related to the qualifying project. The City may extend such date from time to time.