Town of Christiansburg Guidelines to the Public-Private Education Facilities and Infrastructure Act of 2002

Town of Christiansburg
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I. INTRODUCTION

A. Statement of Purpose

1. 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;
2. 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;
3. 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;
4. Financial incentives exist under state and federal tax provisions that promote public entities to enter into partnerships with private entities to develop qualifying projects;
5. 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.

The PPEA is a flexible development tool that allows private entities to include innovative financing methods, including the imposition of user fees or service payments, in a proposal.

B. 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.

"Commission" means the State Corporation Commission.

"Comprehensive agreement" means the comprehensive agreement between the private entity and the responsible public entity that is required by § 56-575.9 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 an 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 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.

“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 lifecycle cost once maintenance, replacement, and salvage value is considered.

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

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

“Opportunity cost” means the cost of passing 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 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; (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 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 technology, equipment, or infrastructure designed to deploy wireless broadband services to schools, businesses, or residential areas; (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 as defined in § 10.1-1400 that produces electric energy derived from solid waste.

"Responsible public entity" 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 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" mean 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 § 56-575.9.

C. An action under § 56-575.4 shall serve the public purpose of this chapter if such action facilitates the timely development or operation of qualifying projects.

D. It is the intent of this document, among other things, to encourage investment in the Town by private entities and facilitate financing mechanisms, private capital and other funding sources that support the development or operation of qualifying projects, to the end that financing for qualifying projects be expanded and accelerated to improve and add to the

convenience of the public, and such that public and private entities may have the greatest possible flexibility in contracting with each other for the provision of the public services that are the subject of this chapter.

E. The Public-Private Education Facilities and Infrastructure Act of 2002, Va. Code Ann. §§ 56-575.1 to -575.16 (the "PPEA"), grants a public entity the authority to create public-private partnerships for the development of "qua1ifying projects" if the public entity determines that there is a need for a 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 and a "responsible public entity" (RPE) will define the respective rights and obligations of the RPE and the private entity.

According to § 56-575.16 of the PPEA provides that a "responsible public entity" may not consider any proposal by a private entity for approval of the qualifying project pursuant to the PPEA until the responsible public entity has adopted and made publicly available procedures that are sufficient to enable the responsible public entity to comply with the PPEA. Accordingly, these procedures (the "Procedures") are hereby adopted by the Town Council (the "Council") as the governing body of the Town of Christiansburg (the "Town").

II. GENERAL PROVISIONS

A. Proposals

1. Pursuant to § 56-575.4 of the PPEA, a proposal to provide a qualifying project to a responsible public entity may be either solicited from private entities by the public entity according to §56-575.4 Subsection B (a "Solicited Bid/Proposal") or delivered to the public entity by a private entity on an unsolicited basis according to §56-575.4 Subsection A (an "Unsolicited Proposal"). In either case, any such proposal shall be clearly identified as a "PPEA Proposal."

2. The requirements for any particular Solicited Bid/Proposal shall be as specified in the solicitation by the Town for that particular proposal and shall be consistent with all applicable provisions of the PPEA.

3. Any Unsolicited Proposal shall be submitted to the Town by delivering six complete copies, together with the required initial review fee as provided below in § IV(C), to the Office of the Town Manager, Christiansburg, Virginia 24073. Other requirements for an Unsolicited Proposal are as set forth below in § IV. A working group may be designated by the Town Manager to review and evaluate all unsolicited proposals.

4. The Town may require that any proposal be clarified. Such clarification may include but is not limited to submission of additional documentation, responses to specific questions, and interviews with potential project participants.

5. The Town may engage the services of qualified professionals, which may include an architect, professional engineer, or certified public accountant, not otherwise

employed by the Town, 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 Town Council determines that such analysis of a request by a private entity for approval of a qualifying project shall be performed by employees of the Town.

Because the PPEA is intended to encourage innovative partnerships between RPEs and private entities, the Town will encourage maintaining an open dialogue with private entities to discuss the need for infrastructure improvements.

B. Affected Local Jurisdictions

1. Any private entity submitting a Solicited Bid/Proposal or an Unsolicited Proposal to the Town as the responsible public entity for a qualifying project 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 Town. Any such other affected local jurisdiction shall have 60 days from the date it receives its copy of the proposal to submit written comments to the Town and to indicate whether the proposed qualifying project is compatible with the affected local jurisdiction's local comprehensive plan, local infrastructure development plans, capital improvements budget, or other government spending plan. The Town will consider comments received within the 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 jurisdiction. However, the Town may begin or continue its evaluation of any such proposal during the 60-day period for the receipt of comments from affected local jurisdictions.

C. Virginia Freedom of Information Act

1. Any confidential and proprietary information provided to a responsible public entity by a private entity pursuant to the PPEA shall be subject to disclosure under the Virginia Freedom of Information Act ("FOIA") except as provided by § 56-575.4(G) of the PPEA.

2. In order to prevent the release of any confidential and proprietary information that otherwise could be held in confidence pursuant to § 56-575.4(G) of the PPEA, the private entity submitting the information must (i) invoke the exclusion from FOIA when the data or materials are submitted to the Town 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 in writing. A private entity may request and receive a determination from the Town as to the anticipated scope of protection prior to submitting the proposal. The Town is authorized and obligated to protect only confidential proprietary information, and thus 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 designated portions of a proposal be protected from disclosure as confidential and proprietary, the Town will determine

whether such protection is appropriate under applicable law and, if appropriate, the scope of such appropriate protection, and shall communicate in writing its determination to the private entity. If the determination regarding protection or the scope thereof differs from the private entity's request, then the Town will accord the private entity a reasonable opportunity to clarify and justify its request. Upon a final determination by the Town to accord 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 § IV(A)(1).

4. The Town may withhold from disclosure memoranda, staff evaluations, or other records prepared by the Town, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation 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 Town would be adversely affected, and (ii) the basis for the determination required in clause (i) is documented in writing by the Town.

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

5. Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records. However, to the extent that access to any procurement record or other document or information is compelled or protected by a court order, then the Town must comply with such order.

6. The provisions of this section shall apply to accepted proposals regardless of whether the process of bargaining will result in an interim or a comprehensive agreement.

7. The Town may not withhold from public access:

a. procurement records other than those subject to the written determination of the Town;

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 Town 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.

D. <u>Use of Public Funds</u>

Virginia constitutional and statutory requirements as they apply to appropriation and expenditure of public funds apply to any 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.

E. Dedication of Public Property

Any public entity may dedicate any property interest, including land, improvements, and tangible personal property, that it has for public use in a qualifying project if it finds that so doing will serve the public purpose of this chapter by minimizing the cost of a qualifying project to the public entity or reducing the delivery time of a qualifying project. In connection with such dedication, a public entity may convey any property interest that it has, subject to the conditions imposed by general law governing such conveyances, to the private entity subject to the provisions of state code, for such consideration as such public entity may determine. The aforementioned consideration may include, without limitation, the agreement of the private entity to develop or operate the qualifying project. The property interests that the public entity may convey to the private entity in connection with a dedication under this section may include licenses, franchises, easements, or any other right or interest the public entity deems appropriate.

F. Contributions and Gifts; Prohibition during Approval Process

1. No private entity that has submitted a bid or proposal to a public entity and is seeking to develop or operate a qualifying project pursuant to this chapter, and no individual who is an officer or director of such a private entity, shall knowingly provide a contribution, gift, or other item with a value greater than $50 or make an express or implied promise to make such a contribution or gift to members of Town Council, the Town Manager, Staff , or others with jurisdiction over the matters at issue, following the submission of a proposal under this chapter until the execution of a comprehensive agreement thereunder. The provisions of this section shall apply only for any proposal or an interim or comprehensive agreement where the stated or expected value of the contract is $5 million or more.

2. Any person who violates this section shall be subject to a civil penalty of $500 or up to two times the amount of the contribution or gift, whichever is greater. The attorney for the Commonwealth shall initiate civil proceedings to enforce the civil penalties. Any civil penalties collected shall be payable to the State Treasurer for deposit to the general fund.

G. Police Powers; Violations of Law

All police officers of the Commonwealth and of each affected local jurisdiction shall have the same powers and jurisdiction within the limits of such qualifying project as they have in their respective areas of jurisdiction and such police officers shall have access to the qualifying project at any time for the purpose of exercising such powers and jurisdiction.

H. Sovereign Immunity

Nothing in this chapter shall be construed as or deemed a waiver of the sovereign immunity of the Commonwealth, any responsible public entity or any affected local jurisdiction or any officer or employee thereof with respect to the participation in, or approval of all or any part of the qualifying project or its operation, including but not limited to interconnection of the qualifying project with any other infrastructure or project. Counties, cities and towns in which a qualifying project is located shall possess sovereign immunity with respect to its design, construction, and operation.

I. Applicability of Other Laws

Nothing in the PPEA shall affect the duty of the Town 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.

III. SOLICITED BID/PROPOSALS

The procedures applicable to any particular Solicited Bid/Proposal shall be specified in the solicitation for that proposal and shall be consistent with the requirements of the PPEA and any other applicable law. All such solicitations shall be by issuance of a written Invitation to Bid ("ITB") or Request for Proposal ("RFP") within the meaning of those terms as used in the VPPA. Any proposal submitted pursuant to the PPEA that is not received in response to an ITB or RFP shall be an Unsolicited Proposal under these procedures, including but not limited to (a) proposals received in response to a notice of the prior receipt of another Unsolicited Proposal as required by the PPEA and provided for below in § IV(A)(2) and (b) proposals received in response to publicity by the Town concerning particular needs when the Town has not issued a corresponding ITB or RFP, even if the Town otherwise has encouraged the submission of proposals pursuant to the PPEA that address those needs. Pre-proposal conferences may be held as deemed appropriate by the Town.

The RFP should be posted in such public areas as are normally used for posting of the Town's notices, including the Town's website. Notices may also be published in a newspaper or other publications of general circulation and advertised in *Virginia Business Opportunities* and posted on the Commonwealth's electronic procurement site. In addition, solicited proposals should be posted pursuant to § VII (C).

IV. UNSOLICITED PROPOSALS

The process for evaluating an Unsolicited Proposal, which is described in detail below, consists of four steps. Briefly summarized, upon receipt of an Unsolicited Proposal the Town's first step will be to determine whether to accept it for consideration at the conceptual stage. If so, then in step two the Town will give public notice of the Unsolicited Proposal. In step three the Town will proceed with a review at the conceptual stage of the original Unsolicited Proposal and/or any proposal received in response to the public notice and accepted for consideration at the conceptual stage. Step four is an in-depth review at the detailed stage of the original

Unsolicited Proposal and/or any proposal received in response to the public notice and accepted for consideration at the detailed stage. However, the Town may discontinue its evaluation of any proposal at any time. Furthermore, if the Town determines that it is in the Town's interest to do so with respect to any Unsolicited Proposal, the Town may eliminate review at the conceptual stage and proceed directly to a review at the detailed stage.

A. Decision to Accept and Consider Unsolicited Proposal; Notice

1. Upon receipt from a private entity of any Unsolicited Proposal accompanied by payment of any required fees, the Town will determine whether to accept the Unsolicited Proposal for publication and conceptual-phase consideration, as described below. If the Town determines not to accept the proposal at this stage it will return the proposal and the accompanying initial review fee to the private entity.

2. If the Town chooses to accept an Unsolicited Proposal for conceptual-phase consideration, it shall give public notice within 10 working days of acceptance of the proposal in accordance with the PPEA and shall specify a period of time not less than 45 days during which it will receive competing Unsolicited Proposals pursuant to § 56-575.4(A) of the PPEA. Notice shall be posted on the Town's website or by publication, in a newspaper of general circulation in the area in which the contract is to be performed. In addition, the notice may be advertised in *Virginia Business Opportunities* and on the Commonwealth's electronic procurement website. Although not required by the PPEA, at the discretion of the Town such notice may be given consistent with the requirements for public notice as set forth in the VPPA. The notice shall state that the public entity (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 accept for simultaneous consideration any competing proposals that comply with the procedures adopted by the public entity and the PPEA. The notice also shall summarize the proposed qualifying project or projects, and identify their proposed locations. Copies of Unsolicited Proposals shall be available upon request, subject to the provisions of FOIA and § 56-575.4(G) of the PPEA. During the 45-day period for receiving competing Unsolicited Proposals, the Town may continue to evaluate the original Unsolicited Proposal.

To ensure that sufficient information is available upon which to base the development of a serious competing proposal, representatives of the Town familiar with the unsolicited proposal and the guidelines established by the Town shall be made available to respond to inquiries and meet with private entities that are considering the submission of a competing proposal. The Town shall 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 Town shall establish criteria, including key decision points and approvals to ensure proper consideration of the extent of competition from available private entities prior to selection.

B. Contents of Initial Submission

1. An Unsolicited Proposal must contain information on the private entity's qualifications and experience, project characteristics, project financing, anticipated public

reaction, and project benefit and compatibility. The information should be adequate to enable the Town to evaluate the practicality and sufficiency of the proposal. The private entity may request that the Town consider a two-step proposal process, consisting of an initial conceptual submission to be followed by a more detailed submission.

2. Unsolicited Proposals should provide a concise description of the private entity's capability to complete the proposed qualifying project and the benefits to be derived from the project by the Town. Project benefits to be considered may occur 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 allow an analysis by the Town of the financial feasibility of the proposed project, including but not limited to (a) the identity of any parties expected to provide financing for the project and (b) a statement indicating whether the private entity intends to request the Town to provide resources for financing the project and the nature and extent of any such resources.

3. The Town may require additional submissions to clarify information previously provided or to address other areas of concern to the Town,

C. <u>Review Fees</u>

1. A review fee will be charged a private entity submitting an Unsolicited Proposal to the Town, to cover the Town's costs of processing, reviewing, and evaluating the proposal, including the cost to compare it to any competing proposals. Such costs include but are not limited to Town staff time, the cost of any materials or supplies expended, and the cost of any outside advisors or consultants, including but not limited to attorneys, consultants, and financial advisors, used by the Town in its sole discretion to assist in processing, reviewing, or evaluating the proposal. Such fees generally shall be in the amount necessary to completely cover all of the Town's costs.

Any fee charged for such review of a proposal should not be greater than the direct costs associated with evaluating the proposed qualifying project.

2. Such fees shall be imposed based on the reasonably anticipated costs to the Town in accordance with the following schedule:

a. Initial fee. Payment of an initial fee must accompany the submission of the Unsolicited Proposal to the Town in order for the Town to proceed with its review. The initial fee shall be two and one-half percent (2.5%) of the reasonably anticipated total cost of the proposed qualifying project, but shall be no less than $2,500 nor more than $50,000, regardless of the anticipated total cost.

b. Additional fees. Additional fees shall be imposed on and paid by the private entity throughout the processing, review, and evaluation of the Unsolicited Proposal if and as the Town reasonably anticipates incurring costs in excess of the initial fee paid by the private entity. The Town will notify the private entity 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 Town will continue to process, review, and evaluate the proposal.

c. Reimbursement of excess fees paid. In the event the total fees paid by the private entity exceed the Town's total costs incurred in processing, reviewing, and evaluating the proposal, the Town shall reimburse the difference. Otherwise, the Town shall retain all fees paid.

D. <u>Initial Review at the Conceptual Stage</u>

1. Only proposals complying with the requirements of the PPEA and these Procedures that contain sufficient information for a meaningful evaluation and that are provided in an appropriate format, as described below, will be considered by the Town for further review at the conceptual stage.

2. The Town will determine at this initial stage of review whether it will proceed using procurement through competitive sealed bidding as defined in the VPPA or procedures developed by the Town that are consistent with procurement of other than professional services through competitive negotiation as defined in the VPPA.

The Town may proceed using such guidelines only if it makes a written determination that doing so is likely to be advantageous to the Town 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 an Unsolicited Proposal and any competing Unsolicited Proposals submitted during the notice period, the Town may 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 with a competing proposal (d) to proceed to the detailed phase with multiple proposals, or (e) to request modifications or amendments to any proposals. The Town at all times retains the right to reject any proposal at any time for any reason whatsoever.

In the event that more than one proposal will be considered in the detailed phase of review, the Town should consider whether the unsuccessful proposer should be reimbursed for costs incurred in the detailed phase of review, and such reasonable costs may be assessed to the successful proposer in the comprehensive agreement.

4. Discussions between the Town and private entities about the need for infrastructure improvements shall not limit the ability of the Town to later determine to use standard procurement procedures to meet its infrastructure needs.

E. <u>Format for Submissions at the Conceptual Stage</u>

Unsolicited Proposals at the conceptual stage shall contain the following information in the following format, plus such additional information as the Town may request:

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. Provide resumes of the key individuals who will be involved in the project.

c. Provide the names, addresses, and telephone numbers of persons within the firm or consortium of firms 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 or greater.

e. Identify any persons known to the private entity 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.) of Title 2.2.

f. A list of all projects in the past ten years in which the contractor served as prime contractor and the contract value of the project was within 25% more or less of the proposed contract price of this project. For each such project, state whether or not the contractor or owner submitted any claims against the other for damages or losses and whether or not there was settlement or litigation of such a claim. Describe each claim fully and the result.

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 Town or any other public 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 known 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 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 Town's or any other public entity'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.

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.

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. 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. In addition complete disclosure of interest rate assumptions should be included. Any ongoing operational fees, if applicable, should also be disclosed as well as any assumptions with regard to increases in such fees.

d. Identify all anticipated risk factors and methods for dealing with these factors.

e. Identify any local, state or federal resources that the private entity contemplates requesting for the project. Describe the total commitment, if any, expected from governmental sources (and identify each such source) and the timing of any anticipated commitment. Such disclosure should include any direct or indirect guarantees or pledges of the Town's credit or revenue.

f. Identify any third parties that the private entity contemplates will provide financing for the project and describe the nature and timing of each such commitment.

g. Identify the amounts and the terms and conditions for any revenue sources.

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

4. Project Benefit and Compatibility

a. Describe the anticipated benefits to the community, region or state, including anticipated benefits to the economic condition of the Town, 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 and, if so, how the project is critical to attracting or maintaining competitive industries and businesses to the Town or the surrounding region.

e. Explain whether and, if so, how the project is compatible with the Town's comprehensive plan, infrastructure development plans, capital improvements budget, or other government spending plan.

f. Provide 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) woman-owned businesses, and (iii) small businesses.

F. <u>Format for Submissions at the Detailed Stage</u>

If the Town decides to proceed to the detailed phase of review with one or more Unsolicited Proposals, then the following information must be provided by the private entity unless waived by the Town:

1. A topographical map (1:2,000 or other appropriate scale) depicting the location of the proposed project.

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 private entity to accommodate such crossings.

The private entity and each public service company, public utility, railroad, and cable television provider, whose facilities are to be crossed or affected shall cooperate fully with the other entity in planning and arranging the manner of the crossing or relocation of the facilities. Any such entity possessing the power of condemnation is hereby expressly granted such powers in connection with the moving or relocation of facilities to be crossed by the qualifying project or that must be relocated to the extent that such moving or relocation is made necessary or desirable by construction of, renovation to, or improvements to the qualifying project, which shall be construed to include construction of, renovation to, or improvements to temporary facilities for the purpose of providing service during the period of construction or improvement. Any amount to be paid for such crossing, construction, moving or relocating of facilities shall be paid for by the private entity. Should the private entity and any such public service company, public utility, railroad, and cable television provider not be able to agree upon a plan for the crossing or relocation, the Commission may determine the manner in which the crossing or relocation is to be accomplished and any damages due arising out of the crossing or relocation. The Commission may employ expert engineers who shall examine the location and plans for such crossing or relocation, hear any objections and consider modifications, and make a recommendation to the Commission. In such a case, the cost of the experts is to be borne by the private entity. Such determination shall be made by the Commission within ninety days of notification by the private entity that the qualifying project will cross utilities subject to the Commission's jurisdiction.

3. A statement and strategy setting out the plans for securing all necessary 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 private entity intends to request the public entity to condemn.

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 projects.

7. 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.

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

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

10. Identification of the executive management and the officers and directors of the firm or firms submitting the proposal. Identification of any known conflicts of interest or other limitations that may impact the Town's consideration of the proposal, including the identification of any persons known to the private entity 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.) of Title 2.2.

11. Detailed analysis of the financial feasibility of the proposed project, including its impact on similar facilities operated or planned by the Town. 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 Town, 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.

12. Additional material and information as the Town may request.

V. PROPOSAL EVALUATION AND SELECTION CRITERIA

Some or all of the following matters may be considered in the evaluation and selection of PPEA proposals. However, the Town retains the right at all times to reject any proposal at any time for any reason whatsoever.

A. Qualifications and Experience

Factors to be considered in either phase of the Town's review to determine whether the private entity possesses the requisite qualifications and experience may include but are not necessarily 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;

7. Project ownership; and

8. Contractor's history of litigation and/or claims.

B. <u>Project Characteristics</u>

Factors to be considered in determining the project characteristics may include but are not necessarily 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. <u>Project Financing</u>

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 are not necessarily limited to:

1. Cost and cost benefit to the Town;

2. Financing and the impact on the debt or debt burden of the Town;

3. Financial plan; including the 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. Estimated cost;

5. Life-cycle cost analysis; and

6. The identity, credit history, past performance of any third party that will provide financing for the project and the nature and timing of their commitment.

7. Opportunity costs assessment;

In the event that any project is financed through the issuance of obligations that are deemed to be tax-supported debt of the Town, or if financing such a project may impact the Town's debt rating or financial position, the Town may select its own finance team, source, and financing vehicle.

Any financing of a qualifying facility may be in such amounts and upon such terms and conditions as may be determined by the parties to the interim or comprehensive agreement. Without limiting the generality of the terms and conditions of the financing, the private entity and the Town may propose to utilize any and all funding resources that may be available to them and may, to the fullest extent permitted by applicable law, issue debt, equity, or other securities or obligations, enter into leases, access any designated trust funds, borrow or accept grants from any state infrastructure bank, and secure any financing with a pledge of, security interest in, or lien on, any or all of its property, including all of its property interests in the qualifying facility.

The Town may take any action to obtain federal, state, or local assistance for a qualifying project that serves the public purpose of this chapter and may enter into any contracts required to receive such assistance. The Town may determine that it serves the public purpose of this chapter for all or any portion of the costs of a qualifying project to be paid, directly or indirectly, from the proceeds of a grant or loan made by the local, state, or federal government or any agency or instrumentality thereof.

D. <u>Project Benefit and Compatibility</u>

Factors to be considered in determining the proposed project's compatibility with the appropriate local or regional comprehensive or development plans may include but are not necessarily 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. <u>Other Factors</u>

Other factors that may be considered by the Town 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, including financial and nonfinancial;

7. The private entity's compliance with a minority business enterprise participation plan or good faith effort to comply with the goals of such plan;

8. The private entity's plans to employ local contractors and residents; and

9. The recommendation of a committee of representatives of members of the Town and the appropriating body which may be established to provide advisory oversight for the project; and

10. Other criteria that the Town deems appropriate.

F. <u>Point of Contact; Unsuccessful Proposals</u>

In addition, to facilitate communication, the Town should designate an individual to serve as the point of contact for receiving proposals submitted under the PPEA and responding to inquiries regarding the PPEA or the guidelines.

To facilitate the free flow of information and efficiency the Town may wish to establish a single point of contact once the open competition period has closed through which all questions may be

addressed. The Town should if requested, make staff available to an unsuccessful proposer to discuss generally the basis for the decision.

VI. ADDITIONAL REVIEW PROCEDURES

A. Public Private Partnership Oversight Advisory Committee

The Town may establish criteria to trigger establishment of an advisory committee consisting of representatives of the Town and the appropriating body to review the terms of the 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 qualifying 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 review any proposed interim or comprehensive agreement prior to execution. When a school board is the RPE, review by the local governing body shall satisfy this requirement.

C. In connection with its approval of the qualifying project, the Town shall establish a date for the commencement of activities related to the qualifying project. The Town may extend such date from time to time.

D. Nothing in the chapter or in an interim or comprehensive agreement entered into pursuant to this chapter shall be deemed to enlarge, diminish or affect the authority, if any, otherwise possessed by the responsible public entity to take action that would impact the debt capacity of the Commonwealth.

E. Service Contracts

In addition to any authority otherwise conferred by law, any public entity may contract with a private entity for the delivery of services to be provided as part of a qualifying project in exchange for such service payments and other consideration as such public entity may deem appropriate.

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 Town. 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 Town 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 Town and the selected proposer with regard to the project.

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 a qualifying project that the parties may deem appropriate prior to the execution of a comprehensive agreement.

In addition, the Interim Agreement should allow the Town or private entity to terminate the Interim Agreement if matters do not work out during continued negotiations. This type of clause in the Interim Agreement would allow for termination of the agreement and provide for payment of the agreed-upon compensation to the private entity for the scheduled work that the private entity completed pursuant to the Interim Agreement.

B. Comprehensive Agreement

Prior to acquiring, designing, constructing, improving, renovating, expanding, equipping, maintaining, or operating any qualifying project, a selected private entity shall enter into a comprehensive agreement with the Town as provided by the PPEA. Any such comprehensive agreement, and any amendment thereto, must be approved by the Town Council before it is entered into on behalf of the Town.

As provided by the PPEA, the terms of the 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 Town and in compliance with § 2.2-4337 for those components of the qualifying project that involve construction;

2. Review and approval of plans and specifications for the qualifying project by the Town;

3. The right of the Town 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 Town and reasonably sufficient to insure coverage of tort liability to the public and employees and to enable the continued operation of the qualifying project;

5. Monitoring of the practices of the operator by the Town to ensure proper maintenance;

6. Reimbursement to be paid to the Town for services provided by the Town;

7. Filing by the operator of appropriate financial statements on a periodic basis;

8. Policies and procedures governing the rights and responsibilities of the Town and the operator 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 operator by the Town and the transfer or purchase of property or other interests of the operator by the Town;

Powers and Duties of the Private Entity

A. The private entity shall have all power allowed by law generally to a private entity having the same form of organization as the private entity and shall have the power to develop or operate the qualifying project and collect lease payments, impose user fees or enter into service contracts in connection with the use thereof.

B. The private entity may own, lease or acquire any other right to use or operate the qualifying project.

C. Any financing of the qualifying project may be in such amounts and upon such terms and conditions as may be determined by the private entity. Without limiting the generality of the foregoing, the private entity may issue debt, equity or other securities or obligations, enter into sale and leaseback transactions and secure any financing with a pledge of, security interest in, or lien on, any or all of its property, including all of its property interests in the qualifying project.

D. In operating the qualifying project, the private entity may:

1. Make classifications according to reasonable categories for assessment of user fees; and

2. With the consent of the responsible public entity, make and enforce reasonable rules to the same extent that the responsible public entity may make and enforce rules with respect to similar facilities.

E. The private entity shall:

1. Develop or operate the qualifying project in a manner that is acceptable to the responsible public entity, all in accordance with the provisions of the interim or comprehensive agreement pursuant to § 56-575.9 or 56-575.9:1;

2. Keep the qualifying project open for use by the members of the public at all times, or as appropriate based upon the use of the facility, after its initial opening upon payment of the applicable user fees, lease payments, or service payments; provided that the qualifying project may be temporarily closed because of emergencies or, with the consent of the responsible public entity, to protect the safety of the public or for reasonable construction or maintenance activities. In the event that a qualifying project is technology infrastructure, access may be limited as determined by the conditions of the interim or comprehensive agreement;

3. Maintain, or provide by contract for the maintenance or upgrade of the qualifying project, if required by the interim or comprehensive agreement;

4. Cooperate with the responsible public entity in making best efforts to establish any interconnection with the qualifying project requested by the responsible public entity; and

5. Comply with the provisions of the interim or comprehensive agreement and any lease or service contract.

F. Nothing shall prohibit an private entity of a qualifying project from providing additional services for the qualifying project to public or private entities other than the responsible public entity so long as the provision of additional service does not impair the private entity's ability to meet its commitments to the responsible public entity pursuant to the interim or comprehensive agreement as provided for in § 56-575.9 or 56-575.9:1.

Material default; remedies

A. In the event of a material default by the private entity, the responsible public entity may elect to assume the responsibilities and duties of the private entity of the qualifying project, and in such case, it shall succeed to all of the right, title and interest in such qualifying project, subject to any liens on revenues previously granted by the private entity to any person providing financing thereof.

B. Any responsible public entity having the power of condemnation under state law may exercise such power of condemnation to acquire the qualifying project in the event of a material default by the private entity. Any person who has provided financing for the qualifying project, and the private entity, to the extent of its capital investment, may participate in the condemnation proceedings with the standing of a property owner.

C. The responsible public entity may terminate, with cause, the interim or comprehensive agreement and exercise any other rights and remedies that may be available to it at law or in equity.

D. The responsible public entity may make or cause to be made any appropriate claims under the maintenance, performance, or payment bonds; or lines of credit required by subsection A 1 of § 56-575.9.

E. In the event the responsible public entity elects to take over a qualifying project pursuant to subsection A, the responsible public entity may develop or operate the qualifying project, impose user fees, impose and collect lease payments for the use thereof and comply with any service contracts as if it were the private entity. Any revenues that are subject to a lien shall be collected for the benefit of and paid to secured parties, as their interests may appear, to the extent necessary to satisfy the private entity's obligations to secured parties, including the maintenance of reserves. Such liens shall be correspondingly reduced and, when paid off, released. Before any payments to, or for the benefit of, secured parties, the responsible public entity may use revenues to pay current operation and maintenance costs of the qualifying project, including compensation to the responsible public entity for its services in operating and maintaining the qualifying project. The right to receive such payment, if any, shall be considered just compensation for the qualifying project. The full faith and credit of the responsible public entity shall not be pledged to secure any financing of the private entity by the election to take over the qualifying project. Assumption of operation of the qualifying project shall not obligate the responsible public entity to pay any obligation of the private entity from sources other than revenues.

Condemnation

At the request of the private entity, the responsible public entity may exercise any power of condemnation that it has under law for the purpose of acquiring any lands or estates or interests therein to the extent that the responsible public entity finds that such action serves the public purpose of this chapter. Any amounts to be paid in any such condemnation proceeding shall be paid by the private entity.

9. Providing for such user fees, lease payments, or service payments, if any, as may be established from time to time by agreement of the parties, which shall be the same for persons using the facilities under like conditions and shall not materially discourage use of the qualifying project. Classifications according to reasonable categories for assessment of user fees may be made;

10. Requiring a copy of any service contract to be filed with the Town and providing that a schedule of the current user fees or lease payments shall be made available by the operator to any member of the public upon request.

11. The terms and conditions under which the Town may contribute financial resources, if any, for the qualifying project;

12. 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;

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

14. Other requirements of the PPEA or other applicable law; and

15. Such other terms and conditions as the Town 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 only by written amendment.

C. <u>Public hearing during proposal review process; notice and posting requirements</u>

1. At some point during the proposal review process, but at least 30 days prior to entering into an interim or comprehensive agreement, the Town shall hold a public hearing on the proposals that have been received.

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

a. Posting shall be on the Town's website or by publication, in a newspaper of general circulation in the area in which the contract work is to be performed, of a summary of the proposals and the location where copies of the proposals are available for public inspection. 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 Town.

b. 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 subdivision 11 of § 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the Town and the private entity.

c. Any studies and analyses considered by the Town in its review of a proposal shall be disclosed to the appropriating body at some point prior to the execution of an interim or comprehensive agreement.

3. Once an interim agreement or a comprehensive agreement has been entered into, the Town 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 Town or private entity in accordance with § II (C).

b. Such procurement records shall not include (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 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 are compelled or protected by a court order, then the Town must comply with such order.

4. The Town shall electronically file a copy of all interim and comprehensive agreement and any supporting documents with the Auditor of Public Accounts. Such agreements and supporting documents should be provided within 30 days of the execution of the interim or comprehensive agreement.

VIII. GOVERNING PROVISIONS AND REVIEW

Compliance by the Town with all applicable provision of the PPEA is mandatory. In order to keep the Town's PPEA guidelines consistent with the PPEA statute, the Town shall perform annual compliance reviews and periodically engage in a more comprehensive review of the guidelines and its overall PPEA process.