

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

**Fort Monroe Authority
Guidelines and Procedures**

Revised July 9, 2010

Table of Contents

I. INTRODUCTION.....2

II. GENERAL PROVISIONS.....4

A. Proposal Submission.....4

B. Affected Local Jurisdictions.....5

C. Proposal Review Fee.....5

D. Freedom of Information Act.....6

E. Applicability of Other Laws.....8

III. SOLICITED PROPOSALS.....8

IV. UNSOLICITED PROPOSALS.....9

A. Decision to Accept and Consider Unsolicited Proposal; Notice.....9

B. Posting Requirements.....10

C. Initial Review by the Commonwealth at the Conceptual Stage (Part 1)...10

V. REVIEW OF SOLICITED AND UNSOLICITED PROPOSALS.....11

VI. PROPOSAL PREPARATION AND SUBMISSION.....12

A. Format for Submissions at Conceptual Stage (Part 1).....12

B. Format for Submissions at Detailed Stage (Part 2).....17

VII. PROPOSAL EVALUATION AND SELECTION CRITERIA.....19

A. Qualifications and Experience.....19

B. Project Characteristics.....19

C. Project Financing.....20

D. Public Benefit and Compatibility.....20

E. Other Factors.....21

VIII. PUBLIC-PRIVATE PARTNERSHIP OVERSIGHT COMMISSION.....21

IX. INTERIM AND COMPREHENSIVE AGREEMENTS.....22

A. Interim Agreement Terms.....22

B. Comprehensive Agreement Terms.....22

C. Notice and Posting requirements.....24

X. GOVERNING PROVISIONS.....25

XI. TERMS AND DEFINITIONS.....26

I. INTRODUCTION

The Public-Private Education Facilities and Infrastructure Act of 2002, as amended¹ (“PPEA”) is the legislative framework enabling departments, agencies, and institutions of the Commonwealth of Virginia, as well as local governments and certain other public bodies, to enter agreements authorizing private entities (sometimes referred to herein as a “private partner”) to develop and/or operate qualifying projects as defined in the PPEA. The guidelines and procedures presented in this document were developed pursuant to the requirements of *Virginia Code* § 56-575.3:1 and 56-575.16. These guidelines and procedures are to be followed by the Fort Monroe Authority (“FMA”) in considering and developing projects under the PPEA. The guidelines and procedures will also guide private entities who wish to partner with FMA in undertaking projects pursuant to the PPEA.

The PPEA grants the FMA authority to create public-private partnerships for development of a wide range of projects for public use if the FMA determines there is a need for such projects and that private involvement may provide the project in a more timely or cost-effective fashion, lead to productivity or efficiency improvements in the FMA’s processes or delivery of services, considering, among other things, the probable scope, complexity or priority of the project; risk sharing including guaranteed cost or completion guarantees; added value or debt or equity investments proposed by the private entity; or an increase in funding, dedicated revenue source or other economic benefit that would not otherwise be available.

Va Code §56-575.16.2, provides, in part: “When the responsible public entity determines to proceed according to the guidelines adopted by it pursuant to this subdivision, it shall state the reasons for its determination in writing.” The Executive Director of the FMA, or the FMA Board if applicable, may approve entering the interim and/or comprehensive agreement.

In order for a project to come under the PPEA, it must meet the definition of a “qualifying project.” The PPEA contains a broad definition of “qualifying project” that includes public buildings and facilities of all types, and certain infrastructure and services such as:

- (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;

¹ *Va. Code* §§ 56-575.1 through 56-575.18.

- (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 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; or
- (x) Any solid waste management facility as defined in *Va. Code* § 10.1-1400 that produces electric energy derived from solid waste.

Because the PPEA is intended to encourage innovative partnerships between responsible public entities and private entities, the FMA is encouraged to maintain an open dialogue with private entities to discuss the need for infrastructure improvements.

Although guidance with regard to the application of the PPEA is provided in this document, it is incumbent upon all entities, both public and private, to comply with the provisions of the PPEA and other applicable laws. In the event that the PPEA is amended in a manner that either conflicts with these guidelines or concerns material matters not addressed by these guidelines, then these guidelines shall be interpreted in a manner to conform to the new law.

Because it is not an agency or institution of the Commonwealth, *Va. Code* § 56-575.3:1(C) requires the FMA engage the services of qualified professionals, which may include an architect, professional engineer, or certified public accountant, not otherwise employed by the FMA, 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 Executive Director of the FMA or his/her designee, or the governing board of the FMA in the absence of both of the preceding, determines that such analysis of a request by a private entity for approval of a qualifying project shall be performed by employees of the FMA.

II. GENERAL PROVISIONS

A. Proposal Submission

Proposals may be invited through solicitation or they may be considered when delivered by a private entity on an unsolicited basis. In either case, proposers must follow a two-part submission process consisting of an initial Conceptual Stage (Part 1) and, after approval of the conceptual stage, a Detailed Stage (Part 2). The initial stage of the proposal should provide specified information on proposer qualifications and experience, project characteristics, project financing, anticipated public support or opposition, or both, and project benefit and compatibility. The Part 2 detailed proposal must provide detailed scope and budget estimates and identify deliverables.

Proposals should be prepared simply and economically, providing a concise description of the proposer's capabilities to complete the proposed qualifying project and the benefits to be derived from the project. Benefits to be considered are those occurring during the construction, renovation, expansion or improvement phase and during the life cycle of the project. Proposals should include a comprehensive scope of work and a financial plan for the project that contains enough detail to allow analysis of the proposed project's financial feasibility. The PPEA is a flexible development tool that allows use of innovative financing techniques. Depending on the circumstances of each transaction, the FMA may use any financing mechanism authorized by its enabling legislation. These financing options might include the use of special purpose entities, sale and lease-back transactions, enhanced use leasing, property exchanges, development agreements, conduit financing and other methods allowed by law. However, the cost analysis of a proposal should not be linked solely to the financing plan as the FMA may determine to finance the project through other available means such as through the Virginia Public Building Authority.

The PPEA is intended to encourage proposals from the private sector that offer the assumption of commensurate risk by the private partner through innovative approaches to project financing, development and/or use. However, while substantial private sector involvement is encouraged, qualifying facilities must serve a public purpose, typically involving facilities critical to public health, safety and welfare. Pursuant to *Va. Code* § 56-575.4(C), a public use is present if “[t]here is a public need for or benefit derived from the qualifying project...[t]he estimated cost of the qualifying project is reasonable in relation to similar facilities...[t]he private entity's plans will result in the timely development or operation of the qualifying project.” Accordingly, the FMA shall continue to exercise full and proper due diligence in the evaluation and selection of private entities to carry-out the proposals. In this regard, the qualifications, capabilities, resources, and other attributes of a prospective private partner and its entire team must be carefully examined for every project. Private entities proposing projects shall be held strictly accountable for representations regarding their qualifications, experience and any other content of their proposals, including all aspects of work to be performed.

B. Affected Local Jurisdictions

Va. Code § 56-575.6 requires that any private entity requesting approval from or submitting a proposal to the FMA must provide each affected unit of local government a copy of the private entity's request or proposal. The private entity is responsible for documenting delivery of the request or proposal.

Affected local jurisdictions must have 60 days from the receipt of the request or proposal to submit written comments to the FMA, and to indicate whether the proposed qualifying project is compatible with the (i) local comprehensive plan, (ii) local infrastructure development plans, or (iii) capital improvements budget or other government spending plan. Comments received by the FMA within the 60-day period shall be considered in evaluating the request or proposal; however, no negative inference shall be drawn from the absence of comment by a local jurisdiction.

In providing the request or proposal to the affected local jurisdiction, the private entity may withhold information that the FMA has deemed to be confidential and not subject to release under the Freedom of Information Act, in accordance with Section II. D of these Guidelines.

C. Proposal Review Fee

No fee will be charged by the FMA to process, review or evaluate any solicited proposal submitted under the PPEA.

For unsolicited proposals and competing proposals, the FMA shall charge a reasonable fee to cover the costs of processing, reviewing, and evaluating the request, including without limitation, reasonable attorney's fees and fees for financial, technical, and other necessary advisors and consultants. Such sums shall be paid with certified funds and shall be deposited in a special fund separately accounted for in the books of the FMA.

- If the cost of reviewing the proposal is less than the established proposal fee, the FMA may refund the excess to the proposer.
- If during the initial review the FMA decides not to proceed to conceptual-stage review of an unsolicited proposal, the proposal fee, less any direct costs of the initial review, shall be refunded to the private entity.
- If the FMA chooses to proceed with evaluation of proposal(s) under the PPEA, it shall not do so until the entire, non-refundable proposal fee has been paid in full.

D. Freedom of Information Act

1. General applicability of disclosure provisions.

Proposal documents submitted by private entities are generally subject to the Virginia Freedom of Information Act (“FOIA”) except that subdivision 11 of *Va. Code* § 2.2-3705.6 exempts certain documents from public disclosure. FOIA exemptions, however, are discretionary, and a responsible public body may elect to release some or all of documents except to the extent the documents are:

- a. Trade secrets of the private entity as defined in the Uniform Trade Secrets Act (*Va. Code* § 59.1-336 et seq.);
- b. Financial records of the private entity, including but not limited to, balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or
- c. Other information submitted by a private entity, where if the record or document were made public prior to the execution of an interim or comprehensive agreement the financial interest or bargaining position of the FMA or the private entity would be adversely affected.

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

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

Before a document of a private entity may be withheld from disclosure, the private entity must make a written request to the FMA at the time the documents are submitted designating with specificity the documents for which the protection is being sought and a clear statement of the reasons for invoking the protection with reference to one or more of three classes of records listed in Section D.1. above.

Upon the receipt of a written request for protection of documents, the FMA shall determine whether the documents contain (i) trade secrets, (ii) financial records, or (iii) other information that would adversely affect the financial interest or bargaining position of the FMA or private entity in accordance with Section D.1. The FMA shall make a written determination of the nature and scope of the protection to be afforded under this subdivision. If the written determination provides less protection than requested by the private entity, the private entity should be accorded an opportunity to withdraw its proposal. Nothing shall prohibit

further negotiations of the documents to be accorded protection from release, although what may be protected must be limited to the categories of records identified in Section D.1.

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

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

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

Memoranda, staff evaluations, or other records prepared by or for the FMA, its staff, outside advisors, or consultants, exclusively for the evaluation and negotiation of proposals may be withheld from disclosure where (i) if such records were made public prior to or after the execution of an interim or comprehensive agreement the financial interest or bargaining position of the FMA would be adversely affected, § 56-575.17 notwithstanding, and (ii) the basis for the determination of adverse affect is documented in writing by the FMA.

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

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

5. The FMA may not withhold from public access:

(a) Procurement records other than those subject to the written determination of the FMA;

(b) Information concerning the terms and conditions of any interim or comprehensive agreement, service contract, lease, partnership, or any agreement of any kind executed by the FMA 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 project.

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 FMA must comply with such order.

E. Applicability of Other Laws

Once an interim or comprehensive agreement has been executed, the FMA shall make available, upon request, procurement records in accordance with *Va. Code* § 2.2-4342.

In soliciting or entertaining proposals under the PPEA, the FMA shall comply with all applicable federal, state, and local laws not in conflict with the PPEA. Likewise, in submitting proposals and in developing, executing, or operating facilities under the PPEA, private entities shall comply with all applicable federal state and local laws. Such laws may include, but not necessarily be limited to, contractual obligations which require Workers Compensation insurance coverage, performance bonds or payment bonds from approved sureties, compliance with the Virginia Prompt Payment Act, compliance with the Ethics in Public Contracting Act, and compliance with environmental laws, workplace safety laws, and state or local laws governing contractor or trade licensing, building codes, and building permit requirements.

Proposals should avoid the creation of state-supported debt; however, should a proposal include such debt, procedures to secure specific approval by the Governor, General Assembly, the Department of Planning and Budget, the Department of the Treasury, and any other appropriate entities must be included in the proposal. In addition, a clear and detailed alternative if such approval is not achieved must be provided.

When considering construction of facilities through solicited or unsolicited proposals, the FMA shall be responsible for ensuring compliance with the provisions of *Va. Code* § 10.1-1188 as it regards environmental issues and the need for an Environmental Impact Report.

While procedures incorporated in these guidelines are consistent with those of *Va. Code* § 2.2-4301, under § 56-575.16, the selection process for solicited or unsolicited project proposals is not subject to the Virginia Public Procurement Act (*Va. Code* § 2.2-4300 et seq.).

III. SOLICITED PROPOSALS

With the written authorization of the head of the FMA, a Request for Proposals (“RFP”) may be issued inviting proposals from private entities to develop and/or operate qualifying projects. The FMA shall use a two-part proposal process consisting of an initial conceptual stage (Part 1) and a detailed stage (Part 2). The RFP shall invite qualified parties to submit proposals on individual projects identified by the FMA. In such case, the FMA shall set forth in the RFP the format and supporting information that is required to be submitted, consistent with the provisions of the PPEA.

The RFP must specify any information and documents required by the FMA and the factors that will be used in evaluating proposals. The RFP also should contain or incorporate by reference applicable Virginia standard terms and conditions, and should specify any unique capabilities or qualifications that will be required of the private entities. Pre-proposal conferences may be held as deemed appropriate by the FMA.

The FMA shall make public notice of the RFP at least 10 days prior to the date set for receipt of proposals. The notice shall be posted on the FMA's website: <http://www.fmauthority.com>. Notices may also be published in newspapers or other publications of general circulation in the area in which the contract is to be performed and advertised as appropriate to solicit maximum consideration from the private sector. The Commonwealth's electronic procurement website, www.eva.virginia.gov, may also be used whenever appropriate.

The FMA shall not be required to select the proposal with the lowest price offer, but may consider price as one factor in evaluating the proposals received.

IV. UNSOLICITED PROPOSALS

The PPEA permits the FMA to consider unsolicited proposals received from private entities for development and/or operation of qualifying projects.

The FMA may publicize its needs and 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 under the PPEA. Unsolicited proposals should be submitted to the head of the FMA, and the delivery should be confirmed for the submitter by written receipt.

A. Decision to Accept and Consider Unsolicited Proposal; Notice

1. The FMA reserves the right to reject any and all proposals at any time.
2. Upon receipt of any unsolicited proposal, or group of proposals, and payment of the required fee by the proposer or proposers, the FMA should determine whether to accept the unsolicited proposal for publication and conceptual stage consideration. If the FMA determines not to accept the proposal, it shall return the proposal, together with all fees and accompanying documentation, to the proposer.
3. a. If the FMA chooses to accept an unsolicited proposal for conceptual stage consideration, it shall invite competing proposals by posting notices as specified above for solicited proposals. The notices shall be posted for such period as the FMA deems necessary and reasonable, but in no event less than 45 days. The FMA should publish, at least once, the same notice

in one or more newspapers or periodicals of general circulation in the affected jurisdiction(s), providing notice of pending or potential action in not less than 45 days. The FMA shall provide for more than 45 days in situations where the scope or complexity of the original proposal warrants additional time for potential competitors to prepare proposals.

b. The notice shall state that the FMA (i) has received 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 FMA and the provisions of the PPEA. The notice will 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. Representatives of the FMA are encouraged to answer questions from private entities that are contemplating submission of a competing unsolicited proposal.

c. Prior to posting of the notices provided for in this subsection, the FMA shall receive from the initial proposer(s) the balance due, if any, of the required project proposal review fee.

B. Posting Requirements

1. Conceptual proposals, whether solicited or unsolicited, shall be posted by the FMA within 10 working days after acceptance of such proposals on the FMA website and on the eVA website.
2. Nothing shall be construed to prohibit the posting of the conceptual proposals by additional means deemed appropriate by the FMA so as to provide maximum notice to the public of the opportunity to inspect the proposals.
3. In addition to the posting requirements, at least one copy of the proposals shall be made available for public inspection. Trade secrets, financial records, or other records of the private entity excluded from disclosure under the provisions of subdivision 11 of *Va. Code* § 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the FMA and the private entity. Any inspection of procurement transaction records shall be subject to reasonable restrictions to ensure the security and integrity of the records.

C. Initial Review by the FMA at the Conceptual Stage (Part 1)

After reviewing the original proposal and any competing proposals submitted during the notice period, the FMA, or other appropriating body as necessary, may:

- (i) not proceed further with any proposal,

- (ii) proceed to the detailed (Part 2) stage of review with the original proposal,
- (iii) proceed to the detailed (Part 2) stage with a competing proposal, or
- (iv) proceed to the detailed (Part 2) stage with multiple proposals.

In the event that more than one proposal will be considered in the detailed (Part 2) stage of review, the FMA shall determine whether the unsuccessful private entity, or entities, shall be reimbursed, in whole or in part, for costs incurred in the detailed stage of review. In such case, reasonable costs may be assessed to the successful proposer as part of any ensuing interim or comprehensive agreement.

Discussions between the FMA and a private entity about the need for infrastructure improvements shall not inhibit the FMA's ability to employ other procurement procedures to meet such needs. The FMA retains the right to reject any proposal at any time, without penalty, prior to the execution of an interim or comprehensive agreement.

V. REVIEW OF SOLICITED AND UNSOLICITED PROPOSALS

1. Only proposals complying with the requirements of the PPEA that contain sufficient information for a meaningful evaluation and that are provided in an appropriate format will be considered by the FMA for further review at the conceptual stage. Formatting suggestions for proposals at the conceptual stage are found at Section VI A.
2. The FMA will determine at the initial review stage whether it will proceed using:
 - a. Standard procurement procedures (competitive sealed bidding) consistent with the Virginia Public Procurement Act²; or
 - b. Procedures developed that are consistent with procurement of other than professional services through "competitive negotiation" as the term is defined in *Va. Code § 2.2-4301* (competitive negotiation). The FMA may proceed using such procedures only if it makes a written determination that doing so is likely to be advantageous to the Commonwealth and the public based upon either (i) the probable scope, complexity or priority of need, or (ii) the risk sharing, including guaranteed cost or completion guarantees, added value or debt or equity investments proposed by the private entity, or increase in funding, dedicated revenue or other economic benefit from the project would otherwise not be available.

² *Va. Code § 2.2-4300 et seq.*

When the FMA elects to use competitive negotiations, its written determination should consider factors such as risk sharing, added value and/or economic benefits from the project that would not be available without competitive negotiation. In addition, the written determination should explain how the scope, complexity, and/or urgency of the project are such that competitive negotiation is determined necessary.

VI. PROPOSAL PREPARATION AND SUBMISSION

A. Format for Submissions at Conceptual Stage (Part 1)

Proposals at the Conceptual Stage must contain information in the following areas:

- (i) Qualifications and experience,
- (ii) Project characteristics,
- (iii) Project financing,
- (iv) Anticipated public support or opposition, or both,
- (v) Project benefit and compatibility, and
- (vi) Such additional information as may seem prudent which is not inconsistent with the requirements of the PPEA.

Suggestions for presenting information to be included in proposals at the Conceptual Stage include:

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 (\$1 million or more) in the structure fits into the overall team. All members of the offeror's team, including major subcontractors known to the proposer must be identified at the time a proposal is submitted for the Conceptual Stage. Include the status of the Virginia license of each partner, proposer, contractor, and major subcontractor. Identified team members, including major subcontractors (over \$5 million), may not be substituted or replaced once a project is approved and comprehensive agreement executed without the written approval of the FMA.

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. Describe the past safety performance record and current safety capabilities of the firm or consortium of firms. Describe the past technical performance history on recent projects of comparable size and complexity, including disclosure of any legal claims, of the firm or consortium of firms. Include the identity of any firms that will provide design, construction and completion guarantees and warranties and a description of such guarantees and warranties.

c. For each firm or major subcontractor (\$1 million or more) that will be utilized in the project, provide a statement listing all of the firm's prior projects and clients for the past three years with contact information for such clients (names/addresses /telephone numbers). If a firm has worked on more than 10 projects during this period, it may limit its prior project list to 10, but shall first include all projects similar in scope and size to the proposed project and, second, it shall include as many of its most recent projects as possible. Each firm or major subcontractor shall be required to submit all performance evaluation reports or other documents in its possession evaluating the firm's performance during the preceding three years in terms of cost, quality, schedule, safety and other matters relevant to the successful project development, operation, and completion.

d. Provide the names, addresses, and telephone numbers of persons within the firm or consortium of firms who may be contacted for further information.

e. Provide a current or most recently audited financial statement of the firm or firms and each partner with an equity interest of 20% or greater.

f. Identify any persons known to the proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to The Virginia State and Local Government Conflict of Interests Act, *Va. Code* § 2.2-3100 et seq.

g. Identify proposed plan for obtaining sufficient numbers of qualified workers in all trades or crafts required for the project.

h. Provide information on any training programs, including but not limited to apprenticeship programs registered with the U.S. Department of Labor or a State Apprenticeship Council, in place for employees of the firm and employees of any member of a consortium of firms.

i. Provide information on the level of commitment by the firm or consortium of firms to use Department of Minority Business Enterprise certified firms in developing and implementing the project.

j. For each firm or major subcontractor that will perform construction and/or design activities, provide the following information:

(1) A sworn certification by an authorized representative of the firm attesting to the fact that the firm is not currently debarred or suspended by any federal, state or local government entity.

(2) A completed qualification statement on a form developed by the Commonwealth that reviews all relevant information regarding technical qualifications and capabilities, firm resources and business integrity of the firm, including but not limited to, bonding capacities, insurance coverage and firm equipment. This statement shall also include a mandatory disclosure by the firm for the past three years any of the following conduct:

(A) Bankruptcy filings

(B) Liquidated damages

(C) Fines, assessments or penalties

(D) Judgments or awards in contract disputes

(E) Contract defaults, contract terminations

(F) License revocations, suspensions, other disciplinary actions

(G) Prior debarments or suspensions by a governmental entity

(H) Denials of prequalification, findings of non-responsibility

(I) Safety past performance data, including fatality incidents, "Experience Modification Rating," "Total Recordable Injury Rate," and "Total Lost Workday Incidence Rate"

(J) Violations of any federal, state or local criminal or civil law

(K) Criminal indictments or investigations

(L) Legal claims filed by or against the firm

k. Worker Safety Programs: Describe worker safety training programs, job-site safety programs, accident prevention programs, written safety and health plans, including incident investigation and reporting procedures.

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 FMA.

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. Indicate if environmental and archaeological assessments have been completed.

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. Identify contingency plans for addressing public needs in the event that all or some of the project is not completed according to projected schedule.

h. Propose allocation of risk and liability for work completed beyond the agreement's completion date and assurances for timely completion of the project.

i. State assumptions related to ownership, legal liability, law enforcement, and operation of the project and the existence of any restrictions on the public entity's use of the project.

j. Provide information relative to phased or partial openings of the proposed project prior to completion of the entire work.

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, including any anticipated debt service costs. The operational plan should include appropriate staffing levels and associated costs. Include any 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 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 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 the timing of any anticipated commitment. Such disclosure should include any direct or indirect guarantees or pledges of the Commonwealth's credit or revenue.
- f. Identify the amounts and the terms and conditions for any revenue sources.
- g. Identify any aspect of the project that could disqualify the project from obtaining tax-exempt financing.

4. Project Benefit and Compatibility

- a. Identify community benefits, including the economic impact the project will have on the Commonwealth and local community in terms of amount of tax revenue to be generated for the Commonwealth and political subdivisions, the number jobs generated for Virginia residents and level of pay and fringe benefits of such jobs, the training opportunities for apprenticeships and other training programs generated by the project and the number and value of subcontracts generated for Virginia subcontractors.
- 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 plan that will be carried out to involve and inform the general public, business community, local governments, and governmental agencies in areas affected by the project;

d. Describe the compatibility of the project with local, regional, and state economic development efforts.

e. Describe the compatibility with the local comprehensive plan, local infrastructure development plans, and any capital improvements budget or other local spending plan.

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

- (i) minority-owned businesses;
- (ii) woman-owned businesses;
- (iii) service disabled veteran-owned businesses and;
- (iv) small businesses.

See *Va. Code* § 2.2-4310 for more details.

B. Format for Submissions at Detailed Stage (Part 2)

If the FMA decides to proceed to the Detailed Stage (Part 2) with one or more proposals, each selected private entity must provide the following information, where applicable, unless the FMA waives the requirement or requirements:

1. A topographical map (1:2,000 or other appropriate scale) depicting the location of the proposed project;
2. A conceptual site plan indicating proposed location and configuration of the project on the proposed site;
3. Conceptual (single line) plans and elevations depicting the general scope, appearance, and configuration of the proposed project;
4. A detailed description of the proposed participation, use, and financial involvement of the FMA, the Commonwealth, and/or any locality in the project. Include the proposed terms and conditions for the project if they differ from the standard state General Conditions;
5. 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;

6. 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 proposer intends to request the FMA condemn;

7. 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;

8. 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;

9. A detailed discussion of assumptions regarding user fees or rates and usage of the projects;

10. Identification and discussion 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;

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

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

13. Description of an ongoing performance evaluation system or database to track key performance criteria, including but not limited to, schedule, cash management, quality, worker safety, change orders, and legal compliance;

14. Identification of the executive management and the officers and directors of the firm or firms submitting the proposal. In addition, identification of any known conflicts of interest or other disabilities that may impact the FMA'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 Interests Act, *Va. Code* § 2.2-3100 et seq.;

15. Acknowledge conformance with *Va. Code* §§ 2.2-4367 through 2.2-4377 (the Ethics in Public Contracting Act); and

16. Additional material and information as the FMA may request.

VII. PROPOSAL EVALUATION AND SELECTION CRITERIA

In selecting proposals, all relevant information from both the Conceptual Stage and the Detailed Stage must be considered, along with the following:

A. Qualifications and Experience

To determine whether the proposer possesses the requisite qualifications and experience, factors to consider in review of either phase should include:

1. Experience, training, and preparation with similar projects;
2. Demonstration of ability to perform work;
3. Demonstrated record of successful past performance, including timeliness of project delivery, compliance with plans and specifications, quality of workmanship, cost-control, and project safety;
4. Demonstrated conformance with applicable laws, codes, standards, regulations, and agreements on past projects;
5. Leadership structure;
6. Project manager's experience;
7. Management approach;
8. Project staffing plans, the skill levels of the proposed workforce, apprenticeship and other training programs offered for the project, and the proposed safety plans for the project;
9. Financial condition; and
10. Project ownership.

B. Project Characteristics

Factors to consider in determining the project characteristics include:

1. Project definition;
2. Proposed project schedule;

3. Operation of the project;
4. Technology and technical feasibility;
5. Conformance with applicable laws, regulations, codes, guidelines 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 include:

1. Cost and cost benefit to the FMA;
2. Financing and the impact on the debt or debt burden of the FMA and the Commonwealth;
3. Financial plan, including overall feasibility and reliability of plan; the private entity's past performance with similar plans and similar projects; degree to which the private entity has conducted a due diligence investigation and analysis of the proposed financial plan; and results of any such inquiries or studies;
4. Estimated cost;
5. Life-cycle cost;
6. The identity, credit history, and past performance of any third party that will provide financing for the project and the nature and timing of their commitment, as applicable; and,
7. Such other items as the FMA deems appropriate.

The FMA may elect to accept the private entity's financing proposal or may select its own finance team, source, and financing vehicle.

D. Public Benefit and Compatibility

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

1. Community benefits, including the economic impact the project will have on the Commonwealth and local community in terms of amount of tax revenue to be generated for the Commonwealth and political subdivisions, the number jobs generated for Virginia residents and level of pay and fringe benefits of such jobs, the training opportunities for apprenticeships and other training programs generated by the project and the number and value of subcontracts generated for Virginia subcontractors.
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 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 whether the project will lead to productivity or efficiency improvements in the FMA's processes or delivery of services to the public;
7. The private entity's compliance with a minority business plan, enterprise participation plan or good faith effort to comply with the goals of such plans;
8. The private entity's plan to employ local contractors and residents; and
9. Other criteria that the FMA deems appropriate.

VIII. PUBLIC-PRIVATE PARTNERSHIP OVERSIGHT COMMISSION

If required because of the source of funding or for other reasons, then prior to entering into negotiations with any private entity for an interim or comprehensive

agreement, the FMA shall submit copies of the detailed proposals to the Public-Private Partnership Advisory Commission (“Commission”) as required by *Va. Code* § 30-278 et seq. Unless the proposals meet the requirements of §30-278.B, the FMA shall not commence negotiation of an interim or comprehensive agreement until the Commission has submitted its recommendations to the FMA, or the Commission has declined to accept the detailed proposals for review.

IX. INTERIM AND COMPREHENSIVE AGREEMENTS

Neither the Commonwealth nor the FMA shall accept liability for any part or phase of a project prior to entering into a properly executed interim or comprehensive agreement. The Executive Director of the FMA, his/her designee, or the governing board of the FMA, in the absence of both of the preceding, shall approve any interim or comprehensive agreement executed pursuant to the PPEA. Any changes in the terms of an executed interim or comprehensive agreement shall be in the form of a written amendment.

A. Interim Agreement Terms

Interim agreements may be used when it is necessary or advisable to segment a project to produce distinct and clear deliverables necessary to keep the project moving towards development of a comprehensive agreement. An interim agreement may not be used to have the FMA assume risks that should be assumed by the proposer or to pay costs attributable to the private entity’s efforts in making the proposal. Interim agreements require the same level of approval as Comprehensive Agreements.

Development of an interim agreement is in the sole discretion of the Executive Director of the FMA, his/her designee, or the governing board of the FMA, in the absence of both of the preceding, and in no way limits the rights reserved by the FMA or the Commonwealth to terminate the evaluation of any or all proposals at any time.

B. Comprehensive Agreement Terms

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

1. The delivery of maintenance, performance and payment bonds, or letters of credit 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 FMA and in compliance with *Va. Code* § 2.2-4337 for those components of the qualifying project that involve construction;
2. The review of plans and specifications by the FMA and approval by the FMA if the plans and specifications conform to standards acceptable to the FMA. This shall not be construed as requiring the private entity to complete design of a qualifying project prior to the execution of a comprehensive agreement;

3. The rights of the FMA to inspect the project to ensure compliance with the comprehensive agreement and any development plans and specifications;
4. The maintenance of a policy or policies of public liability insurance (copies of which shall be filed with the FMA accompanied by proofs of coverage) or selfinsurance, each in form and amount 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. The monitoring of the practices of the private entity by the FMA, to ensure proper maintenance of the qualifying project;
6. The terms under which the private entity will reimburse the FMA for services provided;
7. The policy and procedures that will govern the rights and responsibilities of the FMA and the private entity in the event that the comprehensive agreement is terminated or there is a material default by the private entity including the conditions governing assumption of the duties and responsibilities of the private entity by the FMA and the transfer or purchase of property or other interests of the private entity by the FMA;
8. The terms under which the private entity will file appropriate financial statements on a periodic basis;
9. The mechanism by which user fees, lease payments, or service payments, if any, may be established from time to time upon agreement of the parties. Any payments or fees shall be set at a level that is the same for persons using the facility under like conditions and that will not materially discourage use for the qualifying project;
 - a. A copy of any service contract shall be filed with the FMA.
 - b. A schedule of the current user fees or lease payments shall be made available by the private entity to any member of the public upon request.
 - c. Classifications according to reasonable categories for assessment of user fees may be made.
10. The terms and conditions under which the FMA may be required to contribute financial resources, if any;
11. The terms and conditions under which existing site conditions will be addressed, including identification of the party responsible for conducting assessments and taking necessary remedial action;

12. The terms and conditions under which the FMA will be required to make grants or loans to the private entity and the amount of any such payments for the project;
13. A periodic reporting procedure that incorporates a description of the impact of the project on the Commonwealth;
14. The duties of the private entity in regards to the above; and
15. Such other terms and conditions as the FMA may deem appropriate.

The comprehensive agreement may provide for the development or operation of phases or segments of a qualifying project.

Parties submitting proposals understand that representations, information and data supplied in support of or in connection with proposals play a critical role in the competitive evaluation process and in the ultimate selection of a proposal by the FMA. Accordingly, as part of the comprehensive agreement, the private entity and its team members shall certify that all material representations, information, and data provided in support of, or in connection with, a proposal is true and correct. Such certifications shall be made by authorized individuals who have knowledge of the information provided in the proposal. In the event that material changes occur with respect to any representations, information or data provided for a proposal, the private entity shall immediately notify the FMA of same. Any violation of this section of the comprehensive agreement shall give the FMA the right to terminate the comprehensive agreement, withhold payment or other consideration due, and seek any other remedy available under the law.

The FMA must submit a copy of the comprehensive agreement to the Auditor of Public Accounts within 30 days after entering into the agreement.

C. Notice and Posting requirements

1. In addition to the posting requirements of Section IV, no later than 30 days prior to entering into an interim or comprehensive agreement, the FMA shall provide an opportunity for public comment on the proposals. Such public comment period may include a public hearing in the sole discretion of the FMA. After the end of the public comment period, no additional posting shall be required based on any public comment received.
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 FMA shall post the proposed agreement in the following manner:

- a. Posting shall be on the FMA website and on the Department of General Service's web-based electronic procurement program commonly known as "eVA" at www.eva.virginia.gov and
 - b. In addition to the posting requirements, at least one copy of the proposals shall be made available for public inspection. Trade secrets, financial records, or other records of the private entity excluded from disclosure under the provisions of subdivision 11 of *Va. Code* § 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the FMA and the private entity.
3. Once an interim agreement or a comprehensive agreement has been executed, the FMA shall make procurement records available for public inspection, upon request.
- a. Such procurement records shall include documents initially protected from disclosure on the basis that the release of such documents would adversely affect the financial interest or bargaining position of the FMA or private entity.
 - b. Such procurement records shall not include (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (*Va. Code* § 59.1-336 et seq.) or (ii) financial records, including balance sheets or financial statements of the private entity that are not generally available to the public through regulatory disclosure or otherwise.
 - c. Cost estimates relating to a proposed procurement transaction prepared by or for the FMA shall not be open to public inspection.
 - d. Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records.

X. GOVERNING PROVISIONS

In the event of any conflict between these guidelines and procedures and the PPEA, the terms of the PPEA shall control.

XI. TERMS AND DEFINITIONS

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

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

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

"Conceptual stage" means the initial phase of project evaluation when the FMA 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 FMA 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 the FMA 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 the FMA to a private entity for the use of a qualifying project.

"Lifecycle 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 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 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; or (x) any solid waste management facility as defined in Va. Code § 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. The FMA is the responsible public entity for qualifying projects under the PPEA.

"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 the FMA and the private entity pursuant to *Va. Code* § 56-575.5.

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

"State" means the Commonwealth of Virginia.

"User fees" 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.