

**CITY OF CHESAPEAKE, VIRGINIA**

**GUIDELINES FOR THE IMPLEMENTATION OF THE  
PUBLIC-PRIVATE EDUCATION FACILITIES AND  
INFRASTRUCTURE ACT OF 2002**

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## **I. Introduction**

The Public-Private Education Facilities and Infrastructure Act of 2002 (the "PPEA") grants the City of Chesapeake, VA (the "City"), a responsible public entity as defined in the Act, the authority to create public-private partnerships for the development of a wide range of projects for public use if the City determines there is a need for the project and that private involvement may provide the project to the public in a timely or cost-effective fashion. Individually negotiated interim or comprehensive agreements between a private entity and the City will define the respective rights and obligations of the City and the private entity. Although guidance with regard to the application of the PPEA is provided herein, it will be incumbent upon the City and all private entities to comply with the provisions of the PPEA as applicable. A copy of the PPEA is annexed as Appendix I.

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, but is not limited to public buildings and facilities of all types, for example:

- An education facility, including but not limited to a school building (including any stadium or other facility primarily used for school events), any functionally related and subordinate facility and land to a school building and any depreciable property provided for use in a school facility that is operated as part of the public school system or as an institution of higher education;
- A building or facility that meets a public purpose and is developed or operated by or for any public entity;
- Improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity;
- Utility and telecommunications and other communications infrastructure;
- A recreational facility;
- Technology infrastructure and services, including but not limited to telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services;
- Services designed to increase the productivity or efficiency of the responsible public entity through the use of technology or other means;
- Technology, equipment, or infrastructure designed to deploy wireless broadband services to schools, businesses, or residential areas;

- Any improvements necessary or desirable to any unimproved locally- or state-owned real estate; or
- Any solid waste management facility as defined in Virginia Code § 10.1-1400 that produces electric energy derived from solid waste.

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

The City has adopted these guidelines to implement the PPEA. Therefore, the City will follow these guidelines to receive and evaluate any proposal submitted to the City under the provisions of the PPEA. The procedures provided in this policy may be amended only by act of the City Council; however, the City Manager (or designee) is authorized to the fullest extent permitted by law to implement these guidelines and take action on behalf of the City as to any PPEA matter or transaction in any instance when these guidelines make reference to the “City.”

These Guidelines shall govern all City PPEA projects. The City Manager shall evaluate any and all proposals and negotiate any Interim Agreement and Comprehensive Agreement. The City Manager is also authorized to designate a Selection Committee (the “Selection Committee”) to be responsible for evaluating proposals and negotiating any Interim Agreement and the Comprehensive Agreement. The City Manager (or designee) shall serve as the point of contact for implementation of these Guidelines, to receive proposals submitted under the PPEA, and to respond to inquiries regarding the PPEA or these Guidelines.

The Selection Committee will be chaired by the City Manager or his/her designee and comprised of the Director of Public Utilities (or designee), the Director of Public Works (or designee), the Director of Planning (or designee), the Director of Finance (or designee), and the City Attorney (or designee). The Composition of the Selection Committee may be modified or supplemented by the City Manager at any time. The City Manager, depending on the project, may elect to place one or more State or Federal representatives on the Selection Committee.

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, the City shall appropriately amend the Guidelines. If these Guidelines are not amended prior to the effective date of the new law, these Guidelines nonetheless shall be interpreted in a manner to conform to the PPEA as amended.

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

## **II. General Provisions**

### **A. Proposal Submission**

A proposal may be either solicited by the City or delivered by a private entity on an unsolicited basis. In either case, the proposal shall be clearly identified as a “PPEA PROPOSAL.” To be considered, one original and twenty (20) copies of any unsolicited proposal must be submitted along with the applicable fee (as set out in these Guidelines) to the City Manager, 306 Cedar Road, 6<sup>th</sup> Floor – City Manager’s Office, Chesapeake, Va. 23322.

Proposers may be required to follow a two-part proposal submission process consisting of an initial conceptual phase and a detailed phase as described herein.

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

Proposals should be prepared simply and economically, providing a concise description of the proposer's capabilities to complete the proposed qualifying project and the benefits to be derived from the project by the City. Project benefits to be considered are those occurring before and during the construction, renovation, expansion or improvement phase and during the life cycle of the project. Proposals also should include a scope of work and a financial plan for the project, containing enough detail to allow an analysis by the City of the financial feasibility of the proposed project. The City may, at any time, require the proposer to provide additional information, additional copies of prior submissions, and/or clarification as to any submission. The cost analysis of a proposal should not be linked solely to the financing plan, as the City may determine to finance the project through other available means.

The City may use an accelerated documentation, review, and selection process for proposals involving a qualifying project that the City deems a priority. In addition, to facilitate the flow of critical information, the City may establish criteria by which the proposer may provide clarification to the submission.

## **B. Affected Local Jurisdictions**

The term "affected local jurisdiction" means any county, city or town in which all or a portion of the qualifying project is located. Any private entity requesting approval from or submitting a conceptual or detailed proposal to the City must provide each affected local jurisdiction with a copy of the private entity's request or proposal by certified mail, express delivery or hand delivery within five (5) business days of acceptance of the proposal by the City. Evidence of the delivery of the proposal to any other affected local jurisdiction shall be provided to the City within five (5) business days of such delivery. Affected local jurisdictions that are not responsible public entities under the proposed qualifying project shall have 60 days from the receipt of the request or proposal to submit written comments to the City and to indicate whether the proposed qualifying project is compatible with the local comprehensive plan, local infrastructure development plans, or capital improvements budget or other government spending plan. Comments received within the 60-day period shall be given consideration by the City, and no negative inference shall be drawn from the absence of comment by an affected local jurisdiction. The City may begin or continue its evaluation of any such proposal during the 60-day period for the receipt of comments from other affected local jurisdictions.

## **C. Proposal Review Fee**

The City shall receive an analysis of the proposal from appropriate internal staff or outside advisors or consultants with relevant experience in determining whether to enter into an agreement with the private entity. In regard to proposals submitted under the PPEA, the City will require an initial processing fee of \$5,000 at the time of submission. The initial processing fee shall be submitted with the initial proposal or competing proposal. Upon the City's decision to proceed with a detailed stage of review, the proposer shall pay an additional review fee calculated at the rate of two and one half percent (2.5%) of the reasonably anticipated total cost of the proposed project, but not less than Five Thousand Dollars (\$5,000.00) nor more than Fifty Thousand Dollars (\$50,000.00), at the time of the submittal of the detailed stage of review. The City will refund any portion of fees paid in excess of its direct costs which include, but are not limited to, all staff costs, and outside consultants, financial advisors, engineers and attorney's fees, associated with evaluating the proposal. In the event either the initial processing fee of \$5,000 or the additional proposal fee is determined by the City Manager (or designee) to be insufficient to cover all of the direct costs incurred or expected to be incurred by the City in reviewing the proposal, the proposer shall pay the additional amount(s) as specified by the City

Manager (or designee). Any proposal submitted without payment of the required fee or any failure to pay the additional amount(s) as specified by the City Manager (or designee) within 5 days shall result in the proposal not being considered.

#### **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 Virginia Code § 2.2-3705.6 (11) exempts certain documents from public disclosure. FOIA exemptions, however, are discretionary, and the City may elect to release some or all of the documents except to the extent the documents are:

- a. Trade secrets of the private entity as defined in the Uniform Trade Secrets Act (Virginia Code § 59.1-336 et seq.);
- b. Financial records of the private entity that are not generally available to the public through regulatory disclosure or otherwise, including but not limited to, balance sheets and financial statements; ~~or~~
- c. Other information submitted by a private entity, where if the record or document were made public prior to the execution of an interim or comprehensive agreement the financial interest or bargaining position of the City or private entity would be adversely affected; or
- d. Documents or information that would raise public safety or security concerns as described in Virginia Code § 2.2-3705.2.

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

Before a document of a private entity may be withheld from disclosure, the private entity must make a written request to the City at the time the documents are submitted earmarking 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.

Upon the receipt of a written request for protection of documents, the City shall determine whether the documents contain trade secrets, financial records, or other information that would adversely affect the financial interest or bargaining position of the City or private entity in accordance with Section D.1. The City shall make a written determination of the

nature and scope of the protection to be afforded by the City 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 City, the documents afforded protection under this subdivision shall continue to be protected from disclosure when in the possession of the City or any affected local jurisdiction to which such documents are provided.

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

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

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

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

4. The City may not withhold from public access:
  - a. procurement records other than those subject to the written determination of the City;
  - b. information concerning the terms and conditions of any interim or comprehensive agreement, service contract, lease, partnership, or any agreement of any kind entered into by the City and the private entity;
  - c. information concerning the terms and conditions of any financing arrangement that involves the use of any public funds; or

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

5. In all cases, where a conflict in terms between these Guidelines and mandatory provisions of the PPEA or Virginia Freedom of Information Act exist, the provisions of the Virginia Code shall apply.

#### **E. Use of Public Funds**

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

#### **F. Applicability of Other Laws**

Nothing in the PPEA shall affect the duty of the City to comply with all other applicable laws not in conflict with the PPEA. The applicability of the Virginia Public Procurement Act (the "VPPA") is as set forth in the PPEA.

Pursuant to Virginia Code § 56-575.17:1, if the stated or expected value of the proposal or interim or comprehensive agreement is stated or expected to be \$5 million or more, no proposer, or its officers or directors, 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 the Governor, his political action committee, or the Governor's Secretaries, if the Secretary is responsible to the Governor for an agency with jurisdiction over the matters at issue, following the submission of a proposal under these guidelines until the execution of a comprehensive agreement thereunder.

#### **G. Schedule**

The City will make every attempt to complete the procurement process expeditiously. However, variations in any schedule may be necessary due to the volume, complexity of proposals received, the need for further information, timely cooperation by proposer, or other unanticipated circumstances. The following schedule is provided for illustrative purposes and depicts the time frames within which the City anticipates completion of each phase of the proposal selection process.

Initial/Conceptual Stage Review	1 – 3 Months
Receipt of Competitive Proposals	1 – 2 Months
Selection of Proposal for Detailed Stage Review	1 – 3 Months

Detailed Stage Review	8 – 14 Months
Final Project Selection – City Council Considerations	1 – 3 Months
Negotiation of Interim or Comprehensive Agreement	2 - 12 Months

Any solicitations pursuant to these guidelines will contain estimated schedules for each phase. All proposals advanced to the second phase will be provided a schedule for evaluation of the proposals.

The City shall provide a prioritized documentation, review, and selection process for qualifying projects that have approved or pending state and federal environmental clearances, secured significant right of way, have previously allocated significant state or federal funding, or exhibit other circumstances that could reasonably increase or reduce the amount of time to develop and/or operate the qualifying project.

### **III. Solicited Proposals**

The City may issue Requests for Proposals (RFPs), inviting proposals from private entities to develop or operate qualifying projects. The City may use a two-part proposal process consisting of an initial conceptual phase and a detailed phase. The City will set forth in the solicitation the format and supporting information that is required to be submitted, consistent with the provisions of the PPEA. The City may establish suggested timelines for selecting proposals for the review and selection of solicited proposals.

The solicitation will specify, but not necessarily be limited to, information and documents that must accompany each proposal and the factors that will be used in evaluating the submitted proposals. The solicitation will be posted in such public areas as are normally used for posting of the City's notices, including the City's website. Notice will also be published in a newspaper or other publications of general circulation. The solicitation will also contain or incorporate by reference other applicable terms and conditions, including any unique capabilities or qualifications that will be required of the private entities submitting proposals. Information meetings and/or pre-proposal conferences may be held as deemed appropriate by the City.

### **IV. Unsolicited Proposals**

The PPEA permits the City to receive, evaluate and select for negotiations unsolicited proposals from private entities to develop or operate a qualifying project. The City may publicize its needs and may encourage interested parties to submit unsolicited proposals subject to the terms and conditions of the PPEA. When such proposals are received without issuance of a solicitation, the proposal shall be treated as an unsolicited proposal. The City may establish suggested timelines for selecting proposals for the review and selection of unsolicited proposals.

Upon receipt of any unsolicited proposal or group of proposals and payment of the required fee(s) by the proposer or proposers, the City will determine whether to accept the unsolicited proposal for publication and conceptual-phase consideration. If the City determines not to accept the proposal and not proceed to publication and conceptual-phase consideration, it will return the proposal, together with all fees and accompanying documentation, to the proposer.

If the City chooses to accept an unsolicited proposal for conceptual-phase consideration, it shall post a notice in a public area regularly used by the City for posting of public notices for a period of not less than 45 days. The City shall also publish the same notice once not less than 45 days prior to deciding whether to proceed further with the proposal in one or more newspapers or periodicals of general circulation in the area to notify any parties that may be interested in submitting competing unsolicited proposals. In addition, the notice may also be advertised in other publications of general circulation, *Virginia Business Opportunities* and on the Commonwealth's electronic procurement website "eVa." The notice shall state that the City has received and accepted an unsolicited proposal under the PPEA, intends to evaluate the proposal, may negotiate an interim or comprehensive agreement with the proposer based on the proposal, and will accept for simultaneous consideration any competing proposals that comply with the procedures adopted by the City and the PPEA. The notice also shall summarize the proposed qualifying project or projects, and identify their proposed locations. Interested parties shall have at least 45 days from the date the notice is first published by the City to submit competing unsolicited proposals.

The City will engage the services of qualified professionals, which may include an architect, professional engineer, or certified public accountant, not otherwise employed by the City, to provide independent analysis regarding the specifics, advantages, disadvantages, and the long and short-term costs of any request by a private entity for approval of a qualifying project unless the City Council determines that such analysis of a request by a private entity for approval of a qualifying project shall be performed by employees of the City.

## **V. Posting Requirements and Initial Conceptual Stage Review**

### **A. Posting**

1. Conceptual proposals, whether solicited or unsolicited, shall be posted by the City within 10 working days after acceptance of such proposals as follows:

The City's posting shall be on the City's website or by publication in a newspaper of general circulation in the area 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 Virginia Department of General Service's web-based electronic procurement program commonly known as "eVA," in the discretion of the City Manager (or designee).

2. Nothing shall be construed to prohibit the posting of the conceptual proposals by additional means deemed appropriate by the City Manager (or designee) so as to provide maximum notice to the public of the opportunity to inspect the proposals.

In addition to the posting requirements, at least one copy of the proposals shall be made available for public inspection in the City Clerk's Office during regular business hours. Trade secrets, financial records, or other records of the private entity excluded from disclosure under the provisions of the Virginia Freedom Of Information Act shall not be required to be posted, except as otherwise agreed to by the City and the private entity. Any inspection of procurement transaction records shall be subject to reasonable restrictions to ensure the security and integrity of the records.

### **B. Initial Conceptual Stage Reviews**

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 City for further review at the conceptual stage.
2. The City, acting through the City Manager (or designee), will determine by written finding at this initial stage of review whether it will proceed using:
  - a. Standard procurement procedures consistent with the VPPA; or
  - b. Guidelines developed by the City that are consistent with procurement of other than professional services through "competitive negotiation" as the term is defined in § 2.2-4301 of the Code of Virginia. The City may proceed using competitive negotiation guidelines only if it makes a written determination that doing so is likely to be advantageous to the City and the public based upon either (i) the probable scope, complexity or urgency 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) increase in funding, dedicated revenue or other economic benefit that would otherwise not be available.
3. After reviewing the original proposal and any competing proposals submitted during the notice period, the City may determine:
  - not to proceed further with any proposal,
  - to proceed to the detailed phase of review with the original proposal,

- to proceed to the detailed phase with a competing proposal,
- to proceed to the detailed phase with multiple proposals, or
- to request modifications or amendments to any aspect of the proposal.

In the event that more than one proposal will be considered in the detailed phase of review, the City will 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 City and private entities about the need for infrastructure improvements shall not limit the ability of the City to later determine to use standard procurement procedures to meet its infrastructure needs. The City retains the right to reject any proposal at any time prior to the execution of an interim or comprehensive agreement.
5. Ownership and Use of Concepts
  - a. The City shall have the right to develop the project or aspects of it in any manner that the City determines in its sole discretion and may incorporate into the project any concept that is included in any proposal submitted to it.
  - b. By submitting a proposal, a proposer acknowledges that it is submitting merely a concept which has no monetary or intellectual property value, and disclaims any proprietary or other legal interest in any such concept(s).

## **VI. Proposal Preparation and Submission**

### **A. Format for Submissions at Conceptual Stage**

The City will require that proposals at the conceptual stage contain the completed form as found in Appendix II to these Guidelines, and an executive summary of the proposal satisfactory for posting and publication to satisfy the requirements of Virginia law. In addition, information, unless expressly waived by the City Manager (or designee), in the following areas must be provided by the private entity: (i) qualifications and experience, (ii) project characteristics, (iii) project financing, (iv) anticipated public support or opposition, or both, (v) project benefit and compatibility and (vi) any additional information as the City may reasonably request to comply with the requirements of the PPEA.

## 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, and prior experience bringing similar projects to completion on budget and in compliance with design, land use, service and other standards. Describe the length of time in business, business experience, public sector experience and other engagements of the firm or consortium of firms. Include the identity of any firms that will provide design, construction and completion guarantees and warranties and a description of such guarantees and warranties.
- c. Provide the names, street and mailing addresses, as well as email addresses and telephone numbers of all persons within the firm or consortium of firms who will be directly involved in the project or who may be contacted for further information.
- d. Provide current or most recently audited financial statements of the firm or firms and each partner with an equity interest of twenty percent or greater.
- e. Identify any persons known to the proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2, of the 1950 Code of Virginia, as amended.

## 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. Describe in detail, showing calculations, how the use of the PPEA and these guidelines will yield significant cost savings for the City and other financial and quantifiable benefits, showing a comparison to what would be the case using traditional procurement procedures under the terms of the Virginia Public Procurement Act.

- c. Identify and fully describe any work to be performed by the City or any other public entity.
- d. 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.
- e. Identify any anticipated adverse social, economic and environmental impacts of the project. Specify the strategies or actions to mitigate known impacts of the project.
- f. Identify the projected positive social, economic and environmental impacts of the project.
- g. Identify the proposed schedule for the work on the project, including sufficient time for the City's review and the estimated time for completion.
- 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 for the City's use of the project.
- j. Provide information relative to phased or partial openings of the project prior to completion of the entire work proposed.
- 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 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 a

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. Describe methods and remedies associated with any financial default.
  - e. Identify any local, state or federal resources that the proposer contemplates requesting for the project along with an anticipated schedule of resource requirements. 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 City's revenue stream.
  - 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 .
  - h. Any debt issuance should be expected to receive an investment grade rating from a nationally recognized statistical rating agency. If the natural rating is investment grade, the City may require the use of credit enhancements.
  - i. Outline the financial penalties, if any, that would result should the City wish to terminate a project early or restructure the cash flows for some reason of its own choosing.
  - j. Provide a breakout of the fees to any underwriting firms(s) and the type of obligation the firm(s) are using with a financing component. Be specific as to tax-exempt, taxable, floating rate, fixed rate, etc.
  - k. Provide a letter of interest or commitment from the financial institution which proposer has identified as a financial partner in the project.
4. Project Benefit and Compatibility
- a. Identify who will benefit from the project, how they will benefit and how the project will benefit the City, region, or state.
  - b. Identify any anticipated public support or opposition, as well as any anticipated government support or opposition, for the project.

- c. Explain the strategy and plans, including the anticipated timelines that will be carried out to involve and inform the general public, business community, and governmental agencies in areas affected by the project.
- d. Describe the anticipated significant benefits to the community and the City, region or state, including anticipated benefits to the economic condition of the public entity and whether the project is critical to attracting or maintaining competitive industries and businesses to the City.
- e. Describe compatibility with the City's comprehensive plan, infrastructure development plans, the 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.

**B. Format for Submissions at Detailed Stage**

If the City decides to proceed to the detailed phase of review with one or more proposals, the completed form as found in Appendix II and the following information, unless expressly waived by the City Manager (or designee), must be provided by the private entity:

- 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 proposer to accommodate such crossings;
- 3. A statement and strategy setting out the plans for securing all necessary property and/or easements or other rights implicated or to be affected or created. The statement must include the names and addresses, if known, of the current owners and the parcel or tax map identification numbers and current zoning and use of the subject properties.
- 4. A detailed listing of all firms, along with their relevant experience and abilities, that will provide specific design, construction and completion guarantees and warranties, and a brief description of such guarantees and warranties along with a record of any prior defaults in performance;
- 5. A total life-cycle cost including maintenance, specifying methodology and assumptions of the project or projects including major building systems, 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, lease payments and other service payments and the methodology and circumstances for changes and usage of the projects over the useful life 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 City comprehensive plans (including related environmental, land use and facility standards ordinances where applicable) or infrastructure development plans or indication of the steps required for acceptance into such plans.
9. Explanation of how the proposed project would impact the City's development plans and the 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. In addition, identification of any known conflicts of interest or other disabilities that may impact the City's consideration of the proposal, including the identification of any persons known to the proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to the Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.), Title 2.2, of the 1950 Code of Virginia, as amended.
11. Additional material and information as the City may reasonably request.

### **C. Additional Terms and Conditions on Proposal Submission**

The following additional terms and conditions apply to the submission of any proposals to the City pursuant to the PPEA, whether unsolicited, competing unsolicited, or solicited, and by submitting any proposal to the City, the private entity submitting the proposal agrees also to them.

1. Neither these Guidelines, nor any request or solicitation, nor the City's receipt or consideration of any proposal shall create any contract, express

or implied, any contractual obligation by the City to any proposer, or any other obligation by the City to any proposer. The City makes no promise, express or implied, regarding whether it will enter into a comprehensive agreement with any proposer or regarding the manner in which it will consider proposals. The City will only be bound by the terms of any comprehensive agreement(s) or interim agreements into which it enters should it choose to enter into any such agreements.

2. The City will not be responsible for any expenses incurred by a proposer in preparing and submitting a proposal or in engaging in oral presentations, discussions, or negotiations.
3. Proposers may be required to make an oral presentation or oral presentations of their proposal in the City of Chesapeake, Virginia, at their own expense. The City Manager (or designee) may request the presence of proposers' representatives from their development, financial, architectural engineering and construction teams at these presentations. The City Manager (or designee) will schedule the time and location for these presentations. By submitting its proposal, the proposer agrees to make these representatives reasonably available in the City of Chesapeake, Virginia.
4. The City reserves the right of the City Manager (or designee) to waive any informality with respect to any proposal submitted.
5. The City reserves the right to accept or reject any and all proposals received, in whole or in part, and to negotiate separately in any manner necessary to serve the best interests of the City. Any procurement under these Guidelines may result in multiple awards to multiple offerors.
6. The City reserves the right to reject any and all proposals without explanation.
7. These provisions of these guidelines shall apply automatically to all PPEA procurements by the City.
8. The City will not discriminate against an offeror because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment.

## **VII. Proposal Evaluation and Selection Criteria**

The following items shall be considered in the evaluation and selection of PPEA proposals. The City, however, reserves and retains the right to reject any request or proposal at any time for any reason whatsoever.

## **A. Qualifications and Experience**

Factors to be considered in either phase of the City's review to determine whether the proposer 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; and
7. Project ownership.

## **B. Project Characteristics**

Factors to be considered in determining the project characteristics include:

1. Project definition;
2. Proposed project schedule;
3. Operation of the project;
4. Technology; technical feasibility;
5. Conformity to laws, regulations, and standards;
6. Environmental impacts;
7. Condemnation impacts;
8. State and local permits; 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, but are not necessarily limited to:

1. Cost and cost benefit to the City;
2. Financing and the impact on the debt or debt burden of the City;
3. Financial plan, including the degree to which the proposer has conducted a due diligence investigation and analysis of the proposed financial plan and the results of any such inquiries or studies;
4. Opportunity cost assessment;
5. Cash flow requirements of the City,
6. Estimated cost;
7. Life-cycle cost analysis;
8. 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, as applicable;
9. Credit history of the proposer; and
10. Such other items as the City deems appropriate.

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

### **D. Project Benefit and Compatibility**

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

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 City, regional, and state economic development efforts.

#### **E. Other Factors**

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

1. The proposed cost of the qualifying project;
2. The general reputation, industry experience, and financial capacity of the private entity;
3. The proposed design of the qualifying project;
4. The eligibility of the project for accelerated documentation, review, and selection;
5. Local citizen and government comments;
6. Benefits to the public, including financial and non-financial;
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;
9. The recommendation of a committee of representatives of members of the public entity and the appropriating body which may be established to provide advisory oversight for the project; and
10. Other criteria that the City deems appropriate.

#### **VIII. Interim and Comprehensive Agreements**

Prior to developing or operating the qualifying project, the selected private entity shall enter into a comprehensive agreement with the City. Prior to entering into a comprehensive agreement an interim agreement may be entered into that permits a private entity to perform compensable activities related to the project. The City may designate a working group to be responsible for negotiating any interim or comprehensive agreement. Any interim or comprehensive agreement shall define the rights and obligations of the City and the selected proposer with regard to the project. Any interim or comprehensive agreement shall establish a date for the

commencement of activities related to the qualifying project, which may be extended by written agreement.

Prior to execution of any interim or comprehensive agreement, the agreement shall be submitted for approval by the City Council.

#### **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.

#### **B. Comprehensive Agreement Terms**

The scope of the comprehensive agreement shall include, as deemed appropriate by the City, but not be limited to:

1. The delivery of maintenance, performance and payment bonds or letters of credit in connection with development and/or operation of the qualifying project in a manner satisfactory to the City;
2. The review of plans and specifications for the qualifying project by the responsible public entity;
3. The rights of the City to inspect and/or terms under which the City would receive certified third-party inspections of the qualifying project to ensure compliance with the comprehensive agreement;
4. The maintenance of a policy or policies of liability insurance or self-insurance reasonably sufficient to insure coverage of the project and the

tort liability to the public and private entity employees and to enable the continued operation of the qualifying project;

5. The monitoring of the practices of the private entity by the City to ensure proper maintenance, safety, use and management of the qualifying project;
6. The terms under which the private entity will reimburse the City for services provided;
7. The policy and procedures that will govern the rights and responsibilities of the City and the private entity in the event that the comprehensive agreement is terminated or there is a material default by the private entity including the conditions governing assumption of the duties and responsibilities of the private entity by the City and the transfer or purchase of property or other interests of the private entity by the City;
8. The terms under which the private entity will file appropriate financial statements on a periodic basis;
9. The mechanism by which user fees, lease payments, or service payments, if any, may be established from time to time upon agreement of the parties. Any payments or fees shall be set at a level that 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 City.
  - b. A schedule of the current user fees or lease payments shall be made available by the private entity to any member of the public upon request.
  - c. Classifications according to reasonable categories for assessment of user fees may be made.
10. The terms and conditions under which the City may contribute financial resources, if any, for the qualifying project;
11. The terms and conditions under which existing site conditions will be assessed and addressed, including identification of the responsible party for conducting the assessment and taking necessary remedial action;
12. The terms and conditions under which the City will be required to pay money to the private entity and the amount of any such payments for the project;
13. Other requirements of the PPEA or other applicable law; and

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

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

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

### **C. Notice and Posting Requirements**

1. In addition to the posting requirements of Section V, no later than 30 days prior to entering into an interim or comprehensive agreement, the City shall hold a public hearing on the proposals.
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 City, the City shall post the proposed agreement in the following manner:
  - a. Posting shall be on: (i) the City's website or by publication in a newspaper of general circulation in the area in which the contract is to be performed, containing a summary of the proposals, and (ii) in the City Clerk's Office where copies of the proposals shall be available for public inspection. Posting may also be on the Virginia Department of General Service's web-based electronic procurement program commonly known as "eVA," in the discretion of the City Manager (or designee).
  - b. Trade secrets, financial records, or other records of the private entity excluded from disclosure under the provisions of subdivision 11 of Virginia Code Section §2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the City and the private entity.
  - c. Any studies and analyses considered by the public entity in its review of a proposal shall be disclosed to the City Council 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 City shall make procurement records available for public inspection, upon request.
  - a. Such procurement records shall include documents protected from disclosure during the negotiation phase on the basis that the release of such documents would have adversely affected the financial interest or

bargaining position of the City or private entity in accordance with Section II.D.2, above.

- b. Such procurement records shall not include (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (Virginia 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.
4. Upon execution of an interim or comprehensive agreement, the City shall within 30 days thereafter electronically file a copy of the comprehensive agreement and its supporting documents with the Auditor of Public Accounts.

#### **D. Disputes, Claims and Other Matters Relating to any Comprehensive Agreement or Interim Agreement**

The following provisions apply to any disputes, claims or other matters arising under or relating to any comprehensive agreement or interim agreement entered into pursuant to the PPEA by the City and any private entity. Disputes, claims and other matters in question between the parties arising under or relating to any comprehensive agreement or any interim agreement shall only be resolved as follows:

1. The private entity shall give the City written notice of any claim for any additional compensation, damages, delay or other relief within ten (10) days of the beginning of the occurrence of the event leading to the claim being made, and the private entity shall submit the actual claim and any supporting data within thirty (30) days after the occurrence giving rise to the claim. The written notice shall be a document addressed to the City that clearly states the private entity's intention to make a claim and the occurrence involved and shall be transmitted in a manner to ensure prompt receipt by the City. The claim must be certified under oath as true and correct by a principal of the private entity. The term "occurrence" means the condition encountered in the field or the issue or matter giving rise to the claim and not a later dispute about payment for that condition. Claims of time impacts will be resolved as they occur, and no claims of cumulative impacts or deferral of claimed time impacts will be allowed. Complete satisfaction of this subparagraph is an absolute prerequisite for the private entity to pursue a claim, dispute, or other matter arising under or relating to the agreement. Failure by the private entity to satisfy these provisions shall constitute a waiver by the private entity of the claim, dispute, or other matter for which such failure occurs.

2. The parties shall first endeavor to resolve any disputes, claims or other matters in question between them through direct negotiations, and if such direct negotiations fail, at the City's sole option, by non-binding mediation conducted pursuant to the Rules of the American Arbitration Association, with the site of the mediation being Chesapeake, Virginia. Should the dispute, claim or other matter in question remain unresolved for the shorter of (i) following negotiation and mediation, or (ii) more than 90 days after mediation is requested by a party, either party may proceed in accordance with subparagraph 3 below. However, nothing in this subparagraph 2 excuses the private entity from compliance with all the provisions of subparagraph 1, above.
3. If the procedures of subparagraph 2 above have been followed, but, more than 90 days have passed since a party has invoked mediation, and the dispute, claim or other matter in question remains unresolved, then either party may institute and maintain a lawsuit solely in the Circuit Court of the City of Chesapeake, Virginia, or if the subject or amount in controversy is within its jurisdiction, the General District Court of the City of Chesapeake, Virginia, and may thereafter pursue all available appeals solely in Virginia state courts, to the extent jurisdiction exists.
4. Nothing in subparagraphs 2 and 3 above shall prevent a party from seeking temporary injunctive or other temporary equitable relief in the Circuit Court of the City of Chesapeake, Virginia, if circumstances so warrant.
5. In the event of any dispute, claim, or other matter in question arising, the private entity shall continue its performance diligently during its pendency as if no dispute, claim or other matter in question had arisen. During the pendency of any claim, dispute or other matter in connection with the payments of moneys, the private entity shall be entitled to receive payments for non-disputed items, subject to any right of set-off by the City.
6. These procedures and the provisions of the comprehensive agreement supersede any right at common law by the private entity for a claim of material breach or for rescission of the agreement.
7. These procedures shall be deemed automatically incorporated by reference into any agreement entered into by the City pursuant to the PPEA.
8. For purposes of these procedures, the private entity includes its successors, assigns, sureties or others claiming through the private entity.
9. The City Manager (or designee) may further supplement the provisions herein with the terms and conditions of any agreements.

## **IX. Protests of PPEA Procurements**

### **A. Coverage**

The following are the exclusive procedures for contesting or challenging (protesting) the terms or conditions of any solicitation of proposals by the City pursuant to the PPEA, nonselection of a PPEA proposal for further consideration, and the selection of any PPEA proposal for entry into a comprehensive agreement or interim agreement under the PPEA.

### **B. Process and Conditions**

1. Any protest to any term or condition of a solicitation or any term or condition imposed by the City Manager (or designee) must be made in writing and delivered to the City Manager (or designee) so it is received by the City Manager (or designee) before proposals are due. Otherwise, any such protest shall be deemed to be waived.
2. A protest of a City decision not to select a PPEA proposal for further consideration may only be made by the entity which submitted the proposal at issue. A protest of a City decision to select a PPEA proposal for entry into an agreement or to enter into an agreement may only be made by an entity which submitted a proposal for the procurement at issue and which was reasonably likely to have its proposal accepted but for the City's decision. Protests shall only be granted if (a.) the protester has complied fully with this Section and there has been a violation of law, these guidelines, or mandatory terms of the solicitation that clearly prejudiced the protestor in a material way, or (b.) a statute requires voiding of the decision.
3. Any entity desiring to protest a City decision not to select a PPEA proposal for further consideration, to select a PPEA proposal for entry into an agreement, or to enter into an agreement shall submit the protest in writing and deliver it so that it is received by the City Manager (or designee) not later than 5 business days after announcement of the decision. Otherwise any such protest shall be deemed to be waived.
4. The City Manager (or designee) shall issue a written decision on a protest within 10 days of its receipt.
5. If the protest is denied, the protester may only appeal the denial or otherwise contest or challenge the procurement by then filing an appeal with the Chesapeake General District Civil Court or Circuit Court, which shall decide the appeal within 30 days of its receipt. To the fullest extent permitted by law, the decision of the City shall be binding and final.

6. The exclusive relief allowed if a protest is granted is to void the decision being protested. Under no circumstances will any monetary relief be allowed.
7. Strictly following these procedures shall be a mandatory prerequisite for any challenge of any nature to a decision by the City relating to terms and conditions of a PPEA solicitation or terms and conditions imposed by the City Manager (or designee), nonselection of a PPEA proposal for further consideration, selection of a PPEA proposal, or entry into an agreement. A failure to follow all these procedures strictly shall constitute a waiver of any right to challenge a City decision (a.) as to terms or conditions in a PPEA solicitation or imposed by the City Manager (or designee) (b.) not to select a PPEA proposal for further consideration, (c.) to select a PPEA proposal, or (d.) to enter into an agreement.

**X. Participation of Small and Minority-Owned Business**

1. The City's policy is to facilitate participation of all qualified proposers, including small businesses and businesses owned by women and minorities in its procurement transactions.
2. Persons making proposals to the City pursuant to the PPEA should ensure that reasonable efforts are made to facilitate participation of small businesses and businesses owned by women and minorities as part of their proposals. Resort to lists of such businesses available from the Virginia Department of Minority Enterprise is encouraged.

**XI. Governing Provisions**

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

## **APPENDIX I**

The Public-Private Education Facilities and Infrastructure Act of 2002, Chapter 22.1 (§ 56-575.1 *et seq.*), Title 56, of the 1950 Code of Virginia, as amended, is incorporated herein by reference.

**Appendix II - PPEA Proposal Submission Certification Form**

Proposer's Name: \_\_\_\_\_

Proposer's Address: \_\_\_\_\_ Proposer's: \_\_\_\_\_

\_\_\_\_\_ Telephone No: \_\_\_\_\_

\_\_\_\_\_ Facsimile No: \_\_\_\_\_

\_\_\_\_\_ E-mail Address: \_\_\_\_\_

Proposer's Virginia Class-A General Contractor's License Number: \_\_\_\_\_

The proposer acknowledges receipt of the following addenda, if any:

Addendum No. _____	Dated _____
Addendum No. _____	Dated _____
Addendum No. _____	Dated _____

After first being placed under oath, I hereby certify that I have authority to submit this proposal on behalf of the proposer whose name appears above, that I am a principal of the proposer, that the proposer hereby agrees to all of the terms and conditions of the solicitation for this procurement and in the City of Chesapeake's April 19, 2011, PPEA Implementing Guidelines, that neither the proposer nor any member of its team or its principals is currently suspended or debarred from public contracting by any federal, state or local government entity, that I have taken reasonable steps to ascertain the accuracy of all the information contained in this proposal and this certification, and that the information in this proposal and certification is accurate to the best of my knowledge or information and belief.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed/Typed Name

\_\_\_\_\_  
Title (Principal or Proposer)

Commonwealth of Virginia :  
: to wit  
County/City of \_\_\_\_\_ :

On \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, (same name as above)  
appeared before me, and after satisfying me of his/her identity and after being placed  
under oath, swore to the truthfulness of the above statement.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_ Notary Registration No: \_\_\_\_\_