



Date of Council Meeting: February 10, 2014

**TOWN OF LEESBURG
TOWN COUNCIL WORK SESSION**

Subject: Potential PPEA Opportunity for Liberty Street

Staff Contact: John Wells, Town Manager *John*

Background: At a recent Council Work Session, Council Member Hammler asked to place on a future meeting agenda a discussion item regarding the potential to have a solicited PPEA for a parking structure at the Liberty Street Parking Lot.

Discussion

Over the past several years, a few developers and local businessmen have inquired about the possibility of presenting a PPEA to the Town Council to create a parking structure at the Liberty Street Parking lot. None of the discussions or inquiries have resulted in a formal proposal submitted to the Council.

Parking structure, office space and residential development have been suggested as possibilities.

In addition to the parking spaces, the Town Sign Shop, along with other storage (both indoor and outdoor) and a staff break room are located on the site.

PPEA Process

Attached are the Town guidelines and regulations to accept or solicit a PPEA proposal. Staff will be present to answer any questions.

- Attachment(s):**
- (1) Combined Guidelines for the Public-Private Education Facilities and Infrastructure Act of 2002, as revised and Public-Private Transportation Act of 1995, as revised
 - (2) Checklist and Recommended Practices for Implementation of PPEA/PPTA Guidelines

**TOWN OF LEESBURG
COMBINED GUIDELINES
FOR THE**

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

and

Public-Private Transportation Act of 1995, as revised

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I. Introduction¹

The Public-Private Transportation Act of 1995 (Va. Code §§ 56-556, et seq.) ("PPTA") and the Public-Private Education Facilities and Infrastructure Act of 2002 (Va. Code §§ 56-575.1, et seq.) ("PPEA"), grant responsible public entities the authority to create public-private partnerships for the development of a wide range of projects for public use if the public entity determines: (i) that there is a need for the facility or project; (ii) that the estimated cost of the facility or project is reasonable in relation to similar facilities or projects; (iii) that the public-private partnership's plans will result in the timely development or operation of the project and, in the case of transportation facilities, the more efficient operation of a transportation facility; and, (iv) in the case of transportation facilities, that the proposed development and/or operation of the facility or facilities and the proposed interconnection with existing transportation facilities are reasonable and will address the needs identified in an appropriate state, regional, or local transportation plan by improving safety, reducing congestion, increasing capacity, and/or enhancing economic efficiency.

The PPTA and PPEA define "responsible public entity" to include any public entity that "has the power to develop or operate the applicable qualifying project." Individually negotiated interim or comprehensive agreements between a private entity and the Town will define the respective rights and obligations of the Town and the private entity.

A. Guideline Overview

The Town of Leesburg (the "Town") is municipal corporation with the authority to acquire, construct, and operate facilities in the Leesburg, VA and therefore is a "responsible public entity" as that term is used in both the PPTA and PPEA. The PPEA provides that a responsible public entity shall not proceed to consider any proposal by a private entity for approval of a qualifying project until the responsible public entity has adopted and made publicly available guidelines that are sufficient to enable the responsible public entity to comply with the provisions of the PPEA. Va. Code § 56-575.16(4). Guidelines are also required by the PPTA. Va. Code §§ 56-560.D and 56.573.1. In order to facilitate the consideration by the Town of qualifying projects under the PPEA and PPTA, these guidelines were adopted by the Town Council of the Town of Leesburg, Virginia on _____, 2006.

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

The Procurement Officer
Town of Leesburg
P.O. Box 88
Leesburg, VA 20178

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

The guidelines apply to proposals submitted under the authority of the PPTA or PPEA, or both. The Town reserves the right to consider a proposal under either or both the PPTA or PPEA. While the PPTA and PPEA are fundamentally similar, prospective proposers should review both statutes closely as there are significant differences between the PPTA and PPEA.

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

B. Qualifying Facilities and Projects

Under the PPEA, a "qualifying project" includes:

- (i) Any education facility, including, but not limited to, a school building, any functionally-related and subordinate facility and land to a school building (including any stadium or other facility primarily used for school events), and any depreciable property provided for use in a school facility that is operated as part of the public school system or as an institution of higher education;
- (ii) Any building or facility that meets a public purpose and is developed or operated by or for any public entity;
- (iii) Any improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity;
- (iv) Utility and telecommunications and other communications infrastructure;
- (v) A recreational facility;
- (vi) Technology infrastructure, including, but not limited to, telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services; and
- (vii) Any improvements necessary or desirable to any unimproved locally- or state-owned real estate.

Under the PPTA, a "qualifying transportation facility" means: one or more transportation facilities developed and/or operated by a private entity pursuant to the PPTA.

C. Reservation of Town Rights

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

- (i) Reject any and all proposals at any time;
- (ii) Terminate consideration or evaluation of any and all proposals at any time;
- (iii) Suspend, discontinue and/or terminate discussions regarding confidentiality agreements, interim agreements and comprehensive agreements at any time prior to the authorized execution of such agreements by all parties;
- (iv) Suspend or eliminate conceptual phase review and proceed directly to detailed phase review;
- (v) Negotiate with a proposer without being bound by any provision in its proposal;
- (vi) Negotiate with fewer than all proposers at any given time;
- (vii) Request and/or receive additional information regarding any proposal;
- (viii) Issue addenda to and/or cancel any RFP or IFB;
- (ix) Revise, supplement or withdraw all or any part of these Guidelines;
- (x) Assess, retain and/or waive any and all fees required to be paid by proposers in accordance with these Guidelines;
- (xi) Request revisions to conceptual or detailed phase proposals.

II. Definitions

Definitions are applicable to both PPTA and PPEA unless otherwise specified. Additional definitions appear in the text of these Guidelines.

"Affected Jurisdiction" means any county, city or town in which all or a portion of a qualifying transportation facility is located and any other responsible public entity directly affected by the qualifying transportation facility. (PPTA)

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

"Comprehensive Agreement" means the comprehensive agreement between the private entity and the responsible public entity required by § 56-566 of the PPTA and § 56-575.9 of the PPEA.

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

"Interim Agreement"

- under the PPTA means an agreement, including a memorandum of understanding or binding preliminary agreement, between the private entity and the responsible public entity that provides for completion of studies and any other activities to advance the development and/or operation of a qualifying transportation facility.
- under the PPEA means an agreement between a private entity and a responsible public entity that provides for phasing of the development or operation, or both, of a qualifying project. Such phases may include, but are not limited to, design, planning, engineering, environmental analysis and mitigation, financial and revenue analysis, or any other phase of the project that constitutes activity on any part of the qualifying project.

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

"Maintenance" means that term as defined in Va. Code § 33.1-23.02. (PPTA)

"Material Default" means any default by the private entity in performance of its duties under subsection E of § 56-565 (PPTA) or § 56-575.8 (PPEA) that jeopardizes adequate service to the public from a qualifying transportation facility (PPTA) or qualifying project (PPEA). Under the PPTA the default remains unremedied after the responsible public entity has provided notice to the private entity and a reasonable cure period has elapsed.

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

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

"Public entity" means the Commonwealth and any agency or authority thereof, any county, city, or town and any other political subdivision of the Commonwealth (PPTA and PPEA). Under the PPTA, "public entity" shall not include any public service company. Under the PPEA, "public entity" includes any public body politic and corporate, or any regional entity that serves a public purpose.

"Responsible Public Entity" means a public entity, including local government and regional authorities, that has the power to develop and/or operate the applicable qualifying transportation facility (PPTA) or qualifying project (PPEA).

"Revenues" means all revenues, including but not limited to income, earnings, user fees, lease payments, allocations, federal, state and local appropriations, bond proceeds, equity investments, and/or service payments arising out of or in connection with supporting the development and/or operation of a qualifying transportation facility (PPTA) or qualifying project (PPEA), including without limitation, money received as grants or otherwise from the United States of America, from any public entity, or from any agency or instrumentality of the foregoing in aid of such facility.

"Service Contract" means a contract entered into between a public entity and the private entity pursuant to § 56-561 (PPTA) or § 56-575.5 (PPEA).

"Service Payments" means payments to the private entity in connection with the development and/or operation of a qualifying transportation facility (PPTA) or qualifying project (PPEA) pursuant to a service contract.

"State" means the Commonwealth of Virginia.

"Transportation Facility" means any road, bridge, tunnel, overpass, ferry, airport, mass transit facility, vehicle parking facility, port facility or similar commercial facility used for the transportation of persons or goods, together with any buildings, structures, parking areas, appurtenances, and other property needed to operate such facility. (PPTA)

"User fees" means the rates, tolls (PPTA), fees or other charges imposed by the private entity for the use of all or a portion of a qualifying transportation facility (PPTA) or qualifying project (PPEA) pursuant to the comprehensive agreement under § 56-575.9 (PPEA) or pursuant to the interim or comprehensive agreement (PPTA).

III. General Provisions

A. Proposal Submission

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

B. Affected Jurisdictions (PPTA) and Affected Local Jurisdictions (PPEA)

1. Any private entity submitting a proposal to the Town must provide any other affected jurisdiction (PPTA) or affected local jurisdiction (PPEA) with a copy of the proposal by certified mail, express delivery, or hand delivery within five (5) business days of submission of a proposal to the Town. Any such other jurisdiction shall have sixty (60) days from the date it receives its copy of the proposal to submit written comments to the Town (to the attention of the Town Manager). Such written comments shall indicate whether the proposed project or facility is compatible with the affected local jurisdiction's (i) local comprehensive plan; (ii) local infrastructure development plans; or (iii) capital improvements budget, or other government spending plans. The Town will consider comments received within the sixty (60) day period prior to entering into a comprehensive agreement pursuant to the PPEA and PPTA regarding the proposal. No negative inference shall be drawn from the absence of comment by an affected local jurisdiction. However, the Town may begin or continue its evaluation of any such proposal during the sixty (60) day period. Va. Code §§ 56-575.6 (PPEA) and 56-563 (PPTA).
2. Affected jurisdictions submitting comments to the Town under the PPTA shall additionally indicate whether the facility will address the needs identified in the appropriate state, regional, or local transportation plan by improving safety, reducing congestion, increasing capacity, and/or enhancing economic efficiency.

C. Proposal Review Fee

1. The Town 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. The Town is authorized by the PPEA and PPTA to charge a fee to the private entity to cover the costs of processing, reviewing, and evaluating any unsolicited proposal or competing unsolicited proposal, including reasonable attorney's fees and fees for financial, technical and other necessary advisors or consultants. Fees charged for such review of a proposal are set forth in Article III.B.3 and are intended to be reasonable in comparison to the level of expertise required to review the proposal and should not be greater than the direct costs associated with evaluating the proposed qualifying project. "Direct costs" may include (i) the cost of materials, supplies and internal staff time required to process, evaluate, review and respond to the proposal; and (ii) the out-of-pocket costs for attorneys, consultants and financial advisors engaged by the Town in its sole discretion to assist in such review.
2. No proposal fee shall be charged for the review of proposals solicited by a Request for Proposal or Invitation for Bid.

3. Review fees shall be charged to any applicant whose Unsolicited Proposal has been accepted by the Town for Conceptual Phase review. Such review fees shall be based on the reasonably anticipated costs of the Town in accordance with the following schedule:
 - (i) Initial or Conceptual Phase Review Fee: The Initial or Conceptual Review Fee shall be Five Thousand Dollars (\$5000) and must be submitted with the Unsolicited Proposal.
 - (ii) Detailed Phase Review Fees. Upon the Town's decision to proceed with a Detailed Phase Proposal, the proposer shall pay an additional review fee calculated at the rate of two and one half percent (2.5%) of the reasonably anticipated total cost of the proposed project, but not more than \$50,000 at the time of the submittal of the Detailed Phase Proposal. Additional fees may be imposed on and paid by the proposer throughout the processing, review, and evaluation of the unsolicited proposal if and as the Town reasonably anticipates incurring costs in excess of the initial Detailed Phase Review Fee. The Town shall notify the applicant of the amount of such additional fees as and when it anticipates incurring such costs. Prompt payment of such additional fees is required before the Town will continue the process, review, and evaluation of the proposal.
4. The Town may at its sole discretion at any time before or during the Detailed Phase Review enter into an Interim Agreement with the proposer in accordance with Article VII.A under which the Town may compensate the proposer for Detailed Phase Proposal activities described therein.
5. Reimbursement of excess fees paid. In the event the total fees paid by the proposer exceed the Town's reasonably estimated total costs incurred in processing, reviewing, and evaluating the proposal, the Town shall reimburse the difference. Otherwise, the Town shall retain all fees paid.

D. Virginia Freedom of Information Act

1. General Provisions Relating to Disclosure:

Proposal documents submitted by private entities are generally subject to the Virginia Freedom of Information Act (Va. Code § 2.2-3700 et seq.) ("FOIA"), except as provided by Va. Code §§ 56-575.4(G) (PPEA) and 56-560(G) (PPTA), and the provisions of the FOIA (§ 2.2-3705.6) that exempt certain documents from public disclosure. Proposers are advised to familiarize themselves with the FOIA provisions applicable to these Guidelines. FOIA exemptions, however, are discretionary and the Town may elect to release some or all of documents except to the extent the documents are:

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

At no time shall the Town be liable to a proposer for the disclosure of all or a portion of a proposal submitted under these guidelines.

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 Town at the time the documents are submitted by identifying with specificity the trade secret or other proprietary documents for which protection is being sought and providing a clear statement of the reasons for invoking the protection with reference to one or more of the three classes of records listed in Article III.D.1.

Upon the receipt of a written request for document protection, the Town 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 Town or private entity in accordance with Article III.D.1. The Town shall make a written determination of the nature and scope of the protection to be afforded by the Town under this subdivision. If the written determination provides less protection than requested by the private entity, the private entity shall 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 is limited to the categories of records identified in Article III.D.1. A proposal withdrawn under this Article will be treated in the same manner as a proposal not accepted for publication and conceptual phase consideration as provided below in Article V.B.2, except that all or a portion of the proposal review fee may be retained by the Town at its sole discretion to cover the costs of processing the proposal, including determinations regarding disclosure pursuant to this Article.

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

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

3. In accordance with Va. Code § 2.2-3705.11, the Town and a private entity may enter a written confidentiality agreement upon mutually acceptable terms regarding the treatment of confidential and proprietary data or materials included in a proposal submitted under these guidelines.
4. Protection From Mandatory Disclosure for Certain Documents Produced by the Town.

Memoranda, staff evaluations, or other records prepared by or for the Town for the evaluation and negotiation of proposals may be withheld from disclosure if the disclosure of such records required by the PPEA or PPTA would adversely affect the financial interest or bargaining position of the Town or private entity and the basis for the determination of adverse affect is documented in writing by the Town.

5. If a private entity fails to earmark confidential or proprietary information, records or documents for protection from disclosure, such information, records or documents shall be subject to disclosure under the FOIA.
6. The Town may not withhold from public access: (i) procurement records other than those subject to the written determination of the Town; (ii) information concerning the terms and conditions of any interim or comprehensive agreement, service contract, lease, partnership, or any agreement of any kind entered into by the Town and the private entity; (iii) information concerning the terms and conditions of any financing arrangement that involves the use of public funds; or, (iv) information concerning the performance of any private entity developing or operating a qualifying transportation facility or a qualifying project.
7. Once a comprehensive agreement has been entered into, and the process of bargaining of all phases or aspects of the comprehensive agreement is complete, the Town shall make available, upon request, procurement records in accordance with Va. Code § 2.2-4342.

E. Use of Public Funds

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

F. Applicability of Other Laws

Nothing in the PPEA or PPTA shall affect the duty of the Town to comply with all other federal, state, and local laws including provisions of the Town's ordinances and resolutions not in conflict therewith. In particular, the applicability of the Virginia Public Procurement Act shall be as set forth in the PPEA and PPTA.

IV. Solicited Proposals

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

The RFP or IFB should specify, but not necessarily be limited to, information and documents that must accompany each proposal and the factors that will be used in evaluating the submitted proposals. The RFP should be posted in such public areas as are normally used for posting of the Town's notices, including the Town's website. Notices may be advertised in *Virginia Business Opportunities* on the Commonwealth's electronic procurement site commonly known as "eVA". Notices should also be published in a newspaper or other publications of general circulation. The RFP or IFB should also contain or incorporate by reference other applicable terms and conditions, including any unique capabilities or qualifications that will be required of the private entities submitting proposals. Pre-proposal conferences may be held as deemed appropriate by the Town.

Conceptual Solicited Proposals shall be posted in the manner described for the posting of Unsolicited Proposals set forth in Article V.B.3.

V. Unsolicited Proposals

The Town may publicize its needs and may encourage interested parties to submit unsolicited proposals subject to the terms and conditions of the PPEA or PPTA. When such proposals are received without issuance of an RFP, the proposal shall be treated as an Unsolicited Proposal.

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

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

1. Delivery of Initial Submission

Any private entity seeking to submit an Unsolicited Proposal under the PPEA or PPTA to the Town shall deliver six (6) complete copies, as provided below, to the Town Manager, P.O. Box 88, Leesburg, Virginia 20178. The term "Public Private Education Facilities and Infrastructure Proposal" or "Public Private Transportation Proposal" must be clearly labeled on the outside of the envelope or package. A working group may be designated by the Town Manger to review and evaluate any such proposal. A list of all local jurisdictions being provided a copy of the proposal must accompany the conceptual proposal with the name and address of recipient and date delivered.

Upon receipt of any Unsolicited Proposal, accompanied by the required fee, the Town Manager shall determine whether to accept the Unsolicited Proposal for publication and conceptual phase consideration, as described below. If the Town Manager determines not to accept the proposal at this phase, he shall notify the proposer and Town Council, with an explanation of why no further consideration is warranted. Fees and accompanying documentation will be returned to the proposer.

2. Contents of Initial Submission

- (i) An Unsolicited Proposal must contain information on the proposer's qualifications and experience, project characteristics, project financing, anticipated public reaction, and project benefit and compatibility. Required format and information to satisfy these requirements are included in Article V.C.5. The information should be adequate to enable the Town to evaluate the practicality and sufficiency of the proposal. The private entity may request that the Town consider a two part proposal process consisting of an initial conceptual submission (Step Three below, Article V.C.) to be followed by a more detailed submission (Step Four below, Article V.D.).
- (ii) Unsolicited Proposals shall provide a concise description of the applicant's capability to complete the proposed qualifying project and the benefits to be derived from the project by the Town. Project benefits to be considered may include benefits to be realized during the construction, renovation, expansion or improvement phase as well as during the life cycle of the project. Proposals also shall include a comprehensive scope of work and a financial plan for the project containing enough detail to allow an analysis by the Town of the financial feasibility of the proposed project, including but not limited to: (a) identity of any parties expected or provide financing for the project; and (b) a statement indicating whether the applicant

intends to request the Town to provide resources for financing the project and the nature and extent of any such resources.

- (iii) To become subject to the evaluation and selection process under the PPTA, the proposal must comply with the following additional criteria. First, the proposal must seek approval for a private entity to acquire, construct, improve, maintain, finance, and/or operate specified transportation facilities. Second, the transportation facilities so specified must be one or a combination of the following: a road, bridge, tunnel, overpass, ferry, airport, mass transit facility, vehicle parking facility, port facility or similar commercial facility used for the transportation of persons or goods. The Town must currently have either the power itself, or the ability to assert the power, to perform the functions the proposer seeks to perform with respect to at least a portion of the specified transportation facilities.
- (iv) The Town may require additional submissions to clarify information previously provided or to address other areas of concern to the Town.

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

1. Upon review of the applicant's initial submission, the Town may choose to accept an Unsolicited Proposal for Conceptual Phase consideration and will so notify the applicant of his decision.
2. If the Town chooses not to accept an Unsolicited Proposal for Conceptual Phase consideration, the Initial Review Fee shall be promptly returned to the proposer.
3. Within ten (10) days of a determination to accept an Unsolicited Proposal for Conceptual Phase consideration, the Town shall post and publish a notice of the Town's decision to accept the proposal for Conceptual Phase consideration. Such notice is intended to encourage competition and must be posted in a public area regularly used by the Town for the posting of public notices for a period of not less than forty-five (45) days. In addition, the Town shall also publish the same notice once a week for four (4) successive weeks in one or more newspapers of general circulation in the Town to notify any parties that may be interested in submitting competing Unsolicited Proposals. If the Town accepts the proposal for consideration under the PPEA, the Town shall also publish such notice in *Virginia Business Opportunities* on the eVA site. Said notices shall state that the Town: (i) has received and accepted an Unsolicited Proposal under the Act; (ii) intends to evaluate proposal; (iii) may negotiate an interim and/or comprehensive agreement with the proposer; and (iv) will accept for simultaneous consideration, within a specific period of time of not less than forty-five (45) days, any competing proposals that comply with Town regulations. The notice shall also summarize the proposed qualifying project and identify its proposed location.

4. During the forty-five (45) day period for receiving competing Unsolicited Proposals, the Town may continue to evaluate the original Unsolicited Proposal. Representatives of the Town are encouraged to answer question from private entities that are contemplating submission of a competing unsolicited proposal.
5. Posting Requirements:
 - a. Conceptual proposals, whether solicited or unsolicited, shall be posted by the Town within 10 working days after the acceptance of such proposals. Posting shall be on the Town's website or by publication, in a newspaper of general circulation in the area in which the contract is to be performed. The posting shall summarize the proposal(s) and identify the location where copies of the proposal(s) are available for public inspection. At its discretion, the Town may also post on the VBO site.
 - b. Nothing shall be construed to prohibit the posting of the conceptual proposals by additional means deemed appropriate by the Town so as to provide maximum notice to the public of the opportunity to inspect the proposals
 - c. In addition to the posting requirements, at least one copy of the proposal(s) shall be made available for public inspection. Trade secrets, financial records, or other records of the private entity excluded from disclosure under the provisions of subdivision 11 of § 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the Town and the private entity. Any inspection of procurement transaction records shall be subject to reasonable restrictions to ensure the security and integrity of the records.

C. Step Three: Conceptual Phase Review

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

or (3) an increase in funding, dedicated revenue or economic benefit from the project that would not otherwise be available.

3. After reviewing the Unsolicited Proposal and any competing Unsolicited Proposals submitted during the notice period, the Town may determine: (i) not to proceed further with any proposal; (ii) to proceed to the detailed review phase with the original proposal; (iii) to proceed to the detailed review phase with a competing proposal; or (iv) to proceed to the detailed review phase with multiple proposals.
4. Discussions between the Town and private entity about the need for infrastructure improvements shall not limit the ability of a public entity to later determine to use standard procurement procedures to meet its infrastructure needs. The Town retains the right to reject any proposal at any time for any reason prior to the execution of an interim or comprehensive agreement.
5. Format for Submissions at the Conceptual Phase: Unsolicited Proposals at the Conceptual Phase shall contain as a minimum information in the following areas: (i) qualifications and experience; (ii) project characteristics; (iii) project financing; and (iv) anticipated public support and/or opposition. The following format and content are required in the proposal at this phase. The Town may request such additional information as it deems appropriate.

(i) Qualification and Experience

- a. Identify the legal structure of the firm or consortium of firms making the proposal (i.e. corporation, partnership, joint venture, limited liability corporation.). Identify the organizational structure for the project, the management approach, and how each principal (i.e. major shareholder, member, partner) and major subcontractor in the structure fit into the overall team.
- b. Describe the experience of the firm or consortium of firms making the proposal and the key principals involved in the proposed project, including experience with projects of comparable size and complexity. Describe the length of time in business, business experience, public sector experience, and other engagements of the firm or consortium of firms. Include the identity of any firms that will provide design, construction and completion guarantees and warranties, and a description of such guarantees and warranties. Provide resumes of the key individuals who will be involved in the project.
- c. Provide the names, addresses, e-mail and telephone numbers of persons who may be contacted for further information.

- d. Provide a current or most recently audited financial statement of the firm or firms and each partner with an equity interest of five percent (5%) or greater.
- e. Identify any persons known to the applicant who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to Virginia State and Local Government Conflict of Interest Act (Va. Code §§ 2.2-3100 *et seq.*).

(ii) Project Characteristics

- a. Provide a description of the project, including the conceptual design. Describe the proposed project in sufficient detail so that type and intent of the project, the location, and the communities that may be affected are clearly identified.
- b. Identify and fully describe any work to be performed by the Town or any other private entity.
- c. Include a list of all federal, state, and local permits and approvals required for the project and a schedule for obtaining such permits and approvals.
- d. Identify any anticipated adverse social, economic, and environmental impacts of the project. Specify the strategies or actions to mitigate such impacts of the project.
- e. Identify the projected positive social, economic and environmental impacts of the project.
- f. Identify the proposed schedule for the work on the project, including the estimated time for completion.
- g. Propose allocation of risk and liability for work completed beyond the project completion date, and assurances for timely completion of the project.
- h. State assumptions related to ownership, legal liability, law enforcement and operation of the project and the existence of any restrictions on the Town's use of the project.
- i. Provide information relative to phased or partial openings of the proposed project prior to completion of the entire work.
- j. Describe any architectural (including, where appropriate, historic district considerations), building, engineering, or other applicable standards that the proposed project will meet or exceed.

- k. Describe the method by which all necessary property interests, including rights-of-way or easements, are to be secured. Include the names and addresses of current property owners, if known, the nature of property to be acquired, and a description of any property that the Town is expected to condemn.

(iii) Project Financing

- a. Provide a preliminary estimate and describe the estimating methodology of the cost of the work by phase, segment, or both.
- b. Submit a plan for the development, financing, and operation of the project showing the anticipated schedule on which funds will be required. Describe the anticipated costs of and proposed sources and uses for such funds.
- c. Include a list and discussion of assumptions underlying all major elements of the plan.
- d. Identify the proposed risk factors and methods for dealing with these factors.
- e. Identify any local, state or federal resources that the proposer contemplates requesting for the project. Describe the total commitment, if any, expected from governmental sources (and identify of each such source) and the timing of any anticipated commitment.
- f. Identify the amounts and the terms and conditions for any revenue sources, including any third parties that the applicant contemplates will provide financing for the project, and describe the nature and timing of each such commitment.
- g. Identify any aspect of the project that could disqualify the project from eligibility for tax-exempt financing.

(iv) Project Benefit and Compatibility

- a. Describe the anticipated benefits to the community, region, or state, including anticipated benefits to the economic condition of the Town, and identify who will benefit from the project and how they will benefit.
- b. Identify any anticipated public support or opposition as well as any anticipated government support or opposition, for the project.

- c. Explain the strategy and plans that will be carried out to involve and inform the general public, business community, and governmental agencies in areas affected by the project.
- d. Explain whether the project is likely to attract or maintain industries and businesses to the Town or the surrounding region and, if so, explain how.
- e. Explain whether the project is compatible with the Town's comprehensive plan, infrastructure development plans, capital improvements budget, or other government spending plan and, if so, explain how.
- f. For PPTA projects, explain whether the proposed improvements are compatible with present and planned transportation systems and whether the project will provide continuity with existing local and state facilities.

D. Step Four: The Detailed Review Phase

- 1. If the Town decides to proceed to the detailed review phase with one or more Unsolicited Proposals, then the following information shall be provided by the proposer unless included in the conceptual phase proposal or expressly waived by the Town:
 - (i) A topographical map (1:2000 or other appropriate scale) depicting the location of the proposed project.
 - (ii) A list of public utility facilities, if any, that will be crossed by the qualifying project and a statement of the plans of the proposer to accommodate such crossings.
 - (iii) A statement and strategy setting out the plans for securing all necessary property. The statement shall include the names and addresses, if known, of the current owners of the subject property as well as a list of any property the proposer intends to request the Town to condemn.
 - (iv) A detailed listing of all firms that will provide specific design, construction and completion guarantees and warranties, and a brief description of such guarantees and warranties.
 - (v) A total life-cycle cost specifying methodology and assumptions of the project or projects and the proposed project start date. Include anticipated commitment of all parties; equity, debt, and other financing mechanisms; and a schedule of project revenues and project costs. The life-cycle cost analysis should include, but not be limited to, a detailed analysis of the projected return, rate of return, or both, expected useful life of facility and estimated annual operating expenses.

- (vi) A detailed discussion of assumptions about user fees or rates, and usage of the projects.
- (vii) Identification of any known government support or opposition, or general public support or opposition for the project. Government or public support should be demonstrated through resolution of official bodies, minutes of meetings, letters, or other official communications.
- (viii) Demonstration of consistency with appropriate local comprehensive or infrastructure development plans or indication of the steps required for acceptance into such plans.
- (ix) Explanation of how the proposed project would impact local development plans of each affected local jurisdiction.
- (x) Identification of any known conflicts of interest or other disabilities that may impact the Town's consideration of the proposal, including the identification of any persons known to the proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 *et seq.*).
- (xi) Detailed analysis of the financial feasibility of the proposed project, including its impact on similar facilities operated or planned by the Town. Include a detailed description of any financial plan proposed for the project, a comparison of that plan with financing alternatives that may be available to the Town, and all underlying data supporting any conclusions reached in the analysis or the selection by the applicant of the financing plan proposed for the project.
- (xii) Additional material and information as the Town may request.

VI. Proposal Evaluation and Selection Criteria

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

A. Qualifications and Experience

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

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

B. Project Characteristics

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

1. Project definition.
2. Proposed project schedule.
3. Operation of the project.
4. Technology, technical feasibility.
5. Conformity to laws, regulations, and standards.
6. Environmental impacts.
7. Condemnation impacts.
8. State and local permits.
9. Maintenance of the project.

C. Project Financing

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

1. Cost and cost benefit to the Town.
2. Financing and the impact on the debt or debt burden of the Town.
3. Financial plan, including the degree to which the proposer has conducted due diligence investigation and analysis of the proposed financial plan and the results of any such inquiries or studies.
4. Estimated cost.
5. Life-cycle cost analysis.
6. The identity, credit history, past performance of any third party that will provide financing or performance guaranties for the project and the nature and timing of their commitment.

D. Project Benefit and Compatibility

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

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

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

E. Other Factors

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

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

VII. Interim and Comprehensive Agreements

Prior to developing or operating the qualifying project or qualifying transportation facility, the selected private entity shall enter into a comprehensive agreement with the Town and may enter into an interim agreement as described in Article VII.A. The Town may designate a working group to be responsible for negotiating any interim or comprehensive agreement. Any interim or comprehensive agreement shall define the rights and obligations of the Town and the selected proposer with regard to the project. Any such interim or comprehensive agreement, and any amendment thereto, shall be approved by the Town Council.

A. Interim Agreement Terms

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

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

1. Project planning and development.
2. Design and engineering.

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

B. Comprehensive Agreement Terms

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

1. Delivery of maintenance, performance, and payment bonds or letters of credit or guaranties in connection with any acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project or qualifying transportation facility, in the forms and amounts satisfactory to the Town;
2. Review and approval of plans and specifications for the qualifying project or qualifying transportation facility by the Town;
3. The right of the Town to inspect the qualifying project or qualifying transportation facility to ensure compliance with the comprehensive agreement;
4. Maintenance of a policy or policies of liability insurance or self-insurance in form and amount satisfactory to the Town and reasonably sufficient to insure coverage of the project and the tort liability to the public and employees and to enable the continued operation of the qualifying project or qualifying transportation facility;
5. Monitoring and acting upon the practices of the operator by the Town to ensure proper maintenance;
6. The terms under which the private entity will reimburse the Town for services provided;
7. Policies and procedures governing the rights and responsibilities of the Town and the private entity in the event that the comprehensive agreement is terminated or there is a material default by the operator, including the conditions governing

assumption of the duties and responsibilities of the private entity by the Town and the transfer or purchase of property or other interests of the private entity by the Town;

8. Filing by the private entity of appropriate financial statements on a periodic basis;
9. The mechanism by which user fees, lease payments, or service payments, if any, may be established from time to time upon agreement of the parties. Any payments or fees shall be set at a level that are the same for persons using the facility under like conditions and that will not materially discourage use for the qualifying project. In addition:
 - (i) A copy of any service contract shall be filed with the Town.
 - (ii) A schedule of the current user fees or lease payments shall be made available by the private entity to any member of the public upon request.
 - (iii) Classifications according to reasonable categories for assessment of user fees may be made.
10. The terms and conditions under which the Town may contribute financial resources, if any, for the qualifying project or qualifying transportation facility;
11. The terms and conditions under which existing site conditions will be assessed and addressed, including indemnification of the Town for conducting the assessment and taking necessary remedial action;
12. Provisions for the development or operation of phases or segments of a qualifying project;
13. Other requirements of the PPEA, PPTA, and other applicable law.

In the case of construction or design-build agreements under either the PPEA or PPTA, the Town is likely to require the following additional provisions: liquidated damages for delayed completion; warranties regarding workmanship, materials, guarantees that the project will be fully operational and suitable for the Town's intended purposes; retainage of progress payments; disputes resolution; mutual waivers of subrogation and of consequential damages. Private entities are urged to address such risk allocation provisions in the preparation of conceptual and/or detailed proposals.

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

C. Comprehensive Agreement Provisions Relating to Construction Projects

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

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

D. Comprehensive Agreement Provisions Relating to Private Entity Legal Structure

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

E. PPEA Notice and Posting Requirements

1. In addition to the posting requirements of Article V, 30 days prior to entering into an interim or comprehensive agreement, the Town shall provide an opportunity for public comment of the proposals. Such public comment period may include a public hearing in the sole discretion of the

Town. 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 and a decision to award has been made by the Town, the Town shall post the proposed agreement in the following manner:
 - a. Posting shall be on the Town's website or by publication, in a newspaper of general circulation in the area in which the contract is to be performed, of a summary of the proposals and the location where copies of the proposals are available for public inspection. At its discretion, the Town may also post on the VBO site and eVA
 - 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 § 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the Town 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.

Interim and comprehensive agreements under the PPTA are not subject to the posting requirements set forth above, but the Town may do so at its discretion. Prior to entering either an interim and comprehensive agreements under the PPTA, the major business points of such agreements shall be presented to the Town Council at a meeting open to the public.

3. Once an interim or a comprehensive agreement has been entered into, the Town shall make procurement records available for public inspection, upon request.
 - a. Such procurement records shall include documents protected from disclosure during the negotiation phase on the basis that the release of such documents would have adversely affected the financial interest or bargaining position of the Town or private entity in accordance with Section II.D.2.
 - b. Such procurement records shall not include (i) Trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336, *et seq.*); or 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.

F. Filing of Comprehensive Agreement With Auditor of Public Accounts

In compliance with Va. Code § 56-575.9.F, the Town shall, within thirty (30) days of entering into a comprehensive agreement, submit a copy of the agreement to the Auditor of Public Accounts.

Town of Leesburg

Checklist and Recommended Practices

For

Implementation of PPEA/PPTA Guidelines

The Town's PPEA/PPTA Guidelines contain requirements, procedures and suggestions applicable to both the Town and private entities. This checklist is intended for internal use by Town staff. It sets forth practical information from the Guidelines and underlying statutes relevant only to the Town's processing and administration of the procurement phase of PPEA/PPTA projects. For ease of reference, detailed excerpts and/or paraphrasals of relevant Guideline provisions are included in endnotes.

I. Preliminary Considerations

- a. Prepare a written determination that a public-private partnership is appropriate on the basis of statutory requirements.¹ This requirement is applicable to projects based on either solicited or unsolicited proposals.
- b. Prepare a written determination that the planned facility is a "qualifying project" under either the PPEA² or PPTA³. This requirement is applicable to projects based on either solicited or unsolicited proposals.
- c. Determine whether to proceed on basis of:
 - i. Formal solicitation by issuing either a Request For Proposals (RFP) or Invitation For Bid (IFB); or,
 - ii. Informal notification that the Town will entertain unsolicited proposals subject to the terms and conditions of the PPEA or PPTA.⁴
- d. If the Town determines to use a formal solicitation, decide whether to use an IFB or RFP. Note that an RFP is more compatible with the PPEA/PPTA advantages of design-build contracting and competitive negotiation.

II. Preparation of Request for Proposals (RFP) or Invitation for Bids (IFB)

The following are applicable to projects for which the Town solicits proposals or bids.

- a. **Requirements:**

- i. Specify the information and documents that must accompany the proposal.⁵
- ii. Specify the factors that will be used in evaluating the submitted proposals.⁶
- iii. Post the RFP or IFB in public areas normally used for posting Town notices including the Town's website and newspapers or other publications of general circulation.⁷
- iv. The RFP or IFB should contain or incorporate by reference any other applicable terms and conditions, such as unique capabilities or qualifications that will be required of the private entities submitting proposals.⁸
- v. Comply with applicable Town procurement requirements.⁹
- vi. Include procedures and requirements consistent with PPEA, PPTA and other applicable law.¹⁰

b. **Recommended Practices.** In addition to the foregoing requirements imposed by the implementing statutes, the Town should consider the following options available under its Guidelines in preparing an RFP:

- i. The suggested evaluation criteria for *unsolicited* proposals in Art.VI of the Guidelines may be a helpful checklist in preparing the RFP.
- ii. Pre-proposal conferences are permitted and may help generate proposals more responsive to the Town's needs.¹¹
- iii. Consider the engagement of a consultant for RFP preparation and proposal evaluation.¹²
- iv. Include as much detail on the desired project as possible.
- v. Consider site issues: will the Town provide the site or is the private entity to identify potential sites.
- vi. Make a determination regarding use of a two-phase (conceptual and detailed) negotiation process. The Guideline provisions regarding two-phase consideration of *unsolicited* proposals (Art.V) should be consulted as a possible template for processing solicited proposals.
- vii. Include in the RFP (or IFB) a draft Comprehensive Agreement or at least key commercial terms anticipated for inclusion (schedule constraints, liquidated damages, subsurface risk allocation, etc.)
- viii. In design-build projects include or incorporate by reference the Town's requirements regarding single-point liability, geotechnical risk allocation, sharing of savings and LLC performance guarantees described in Guideline Arts. VII C and D.

III. Upon Receipt of Any Proposal – Solicited or Unsolicited

The following requirements are applicable to both solicited and unsolicited proposals:

- a. An analysis of all proposals is required. Determine whether to obtain the required analysis¹³ of the proposal from the Town's internal staff or outside advisors or consultants. This decision should be confirmed in writing.
- b. Freedom of Information Act Considerations:
 - i. Examine the proposal to identify any designations of confidential or proprietary information.¹⁴
 - ii. If the entire proposal has been designated confidential, advise the private entity that the Town is authorized and obligated to protect only confidential and proprietary information and will *not* protect the entire proposal.¹⁵
 - iii. If only portions of the proposal have been designated confidential or proprietary, then:
 1. prepare a written determination as to 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 Town or private entity;
 2. so advise the private entity of the determination.¹⁶
 - iv. If the Town disagrees with the scope of the private entity's designation, provide the private entity with a reasonable opportunity to clarify and justify its request.¹⁷ This should be done in writing.
 - v. If after such clarification and justification, the Town remains in disagreement with the private entity's proposed scope of confidential protection, provide the private entity with a description of those portions of the proposal the Town is prepared to protect and give the private entity an opportunity to withdraw its proposal.¹⁸ This should be done in writing.
 - vi. If the private entity withdraws the proposal, the Town must treat the proposal in the same manner as a proposal not accepted for publication and conceptual phase consideration. In such a case any proposal review fee received by the Town must be returned, except that the Town may retain, at its sole discretion, all or a portion of an unsolicited proposal review fee to cover the costs of processing the proposal. This can include any costs associated with making FOIA determinations as described above.¹⁹
 - vii. If the Town and the private entity agree upon the applicable scope of protection of confidential and proprietary information, consider whether to enter into a formal confidentiality agreement.²⁰

IV. Upon Receipt of an Unsolicited Proposal

- a. Check for preliminary Guideline compliance as follows:
 - i. Confirm that six (6) copies were received by the office of the Procurement Officer.²¹
 - ii. Confirm that the proposal envelope or package specified applicability of the PPEA or PPTA.²²
 - iii. Determine whether the proposal lists any “Affected Jurisdiction” (PPTA) or “Affected Local Jurisdiction” (PPEA).²³ If so, verify that notice has (or will) been provided by the private entity to the affected jurisdiction.
 - iv. If the proposal does not identify localities that the Town believes should have been notified as “Affected Jurisdiction” (PPTA) or “Affected Local Jurisdiction” (PPEA), the Town should instruct the proposer to provide the required notice before the Town will further consider the proposal.
 - v. Confirm that the Initial or Conceptual Phase Review Fee (currently \$5000) was submitted with the proposal.²⁴
 - vi. Determine whether the Town would prefer to consider a PPTA proposal under the PPEA, or vice versa.²⁵
- b. Determine whether the proposal content meets minimum Guideline requirements²⁶ by including adequate information for the Town to evaluate the practicality and sufficiency of the proposal with regard to:
 - i. Proposer's qualifications and experience;
 - ii. Project characteristics;
 - iii. Project financing;
 - iv. Anticipated public reaction; and,
 - v. Project benefit and compatibility.
- c. If the proposal does not contain sufficient information for the Town to evaluate the practicality and sufficiency of the proposal, make a written request to the proposer for clarifying information.²⁷
- d. If the proposal requests a two phase evaluation process (conceptual and detailed), determine whether the Town wishes to proceed in that manner.²⁸
- e. If the Proposal is submitted – or will be considered by the Town – under the PPTA, an unsolicited proposal must additionally be examined to determine whether the following criteria²⁹ have been satisfied:

- i. The proposal must seek approval for a private entity to acquire, construct, improve, maintain, finance, and/or operate specified transportation facilities.
 - ii. The proposed transportation facility must be one or a combination of the following: a road, bridge, tunnel, overpass, ferry, airport, mass transit facility, vehicle parking facility, port facility or similar commercial facility used for the transportation of persons or goods.
 - iii. The Town must either have, or be able to assert, the power to perform the functions the proposer seeks to perform with respect to at least a portion of the specified transportation facilities.

- f. Upon the basis of the proposal and any supplemental information provided to the Town, the Town Manager must determine whether to accept the unsolicited proposal for conceptual phase consideration:
 - i. If Yes, so notify the private entity.³⁰
 - ii. If No, promptly return the proposal and the Initial Review Fee (less any costs incurred in conjunction with FOIA consideration).³¹

- g. Notice. If an unsolicited proposal is accepted for further or conceptual phase consideration, the Procurement Officer must post and publish a notice of the Town's decision to accept the proposal for conceptual phase consideration for the purpose of encouraging competition.³² The notice requirements are:
 - i. Post the notice for no less than forty-five (45) days in a public area regularly used by the Town for the posting of public notices.
 - ii. Publish the same notice once a week for four (4) successive weeks in one or more newspapers of general circulation in the Town.
 - iii. If the Town accepts the proposal for consideration under the PPEA, the Procurement Officer must also publish such notice in *Virginia Business Opportunities* and on the Commonwealth's electronic procurement website.
 - iv. The notice must summarize the proposed qualifying project, identify its proposed location and state that the Town:
 - 1. has received and accepted an unsolicited proposal under the Act;
 - 2. intends to evaluate the proposal;
 - 3. may negotiate an interim and/or comprehensive agreement with the proposer; and
 - 4. will accept for simultaneous consideration, within a specific period of time of not less than forty-five (45) days, any competing proposals that comply with Town regulations.

- h. Procurement Model. During the Conceptual Phase Review, the Town must determine whether to proceed using competitive sealed bidding or competitive negotiation. Competitive negotiation is generally more consistent with the intended advantages of PPEA/PPTA procurement. To use competitive negotiation, the Town Manager must make a written determination that doing so will likely be advantageous to the Town and the public based upon either:
 - i. the probable scope, complexity, or priority of need;
 - ii. risk sharing, including guaranteed cost of completion guarantees, added value or debt or equity investments proposed by the private entity; or
 - iii. an increase in funding, dedicated revenue or economic benefit from the project that would not otherwise be available.³³
- i. After reviewing the unsolicited proposal and any competing unsolicited proposals submitted during the notice period, the Town should select one of the following options and notify all interested parties:
 - i. Determine not to proceed further with any proposal;
 - ii. Proceed to the detailed review phase with the original proposal;
 - iii. Proceed to the detailed review phase with a competing proposal; or
 - iv. Proceed to the detailed review phase with multiple proposals.³⁴
- j. If the Town proceeds to the detailed review phase with one or more proposal:
 - i. Within 10 working days after the acceptance of such proposal, post the proposal on the Town's website or by publication in a newspaper of general circulation in the area in which the contract is to be performed. The posting shall summarize the proposal(s) and identify the location where copies of the proposal(s) are available for public inspection. At its discretion, the Town may also post on "eVA". In addition to the posting requirements, at least one copy of the proposal(s) shall be made available for public inspection.³⁵
 - ii. The Town must determine whether to require all the information set forth in the Guidelines, Art. V.D.1 or – unless the information was included in the conceptual phase proposal – expressly waive specific requirements.³⁶
 - iii. The Town should review and consider the detailed evaluation criteria listed in Guidelines, Art.VI.

V. Interim and Comprehensive Agreements

- a. **Interim Agreement.** The statutes permit the Town and the private entity to enter into interim agreements for a variety of purposes.³⁷ The Town

may use an interim agreement to reimburse the proposer for on-going proposal preparation costs prior to entering a comprehensive agreement. An interim agreement is most appropriate when discussions between the Town and private entity representatives lead to conceptual and/or detailed design characteristics that materially differ from the initial proposal. Under such circumstances, it may be appropriate to reimburse the private entity for some or all of such unanticipated design development costs.

- b. **Comprehensive Agreement.** Upon the conclusion of the detailed phase proposal consideration, the Town and the private entity must enter into a comprehensive agreement setting forth the terms and conditions for completing the project. The statutes and Guidelines contain a list of minimum requirements to be included in the comprehensive agreement.³⁸ The statutory requirements contain far less than the broad range of commercial terms and conditions that should be included in the contract documents for any PPEA or PPTA project. For design-build projects, the Town should consider the use of a standard form design-build agreement. (Such forms are available from the Design Build Institute of America, the American Institute of Architects, and similar construction industry organizations.) When standard forms *are* utilized, they must be modified to accommodate statutory requirements, project specific needs and risk allocation mechanisms necessary to protect the public interest.
- c. Upon execution of the comprehensive agreement, the Town must file a copy with the Virginia Auditor of Public Accounts³⁹

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- ¹ The determination must include findings: (i) that there is a need for the facility or project; (ii) that the estimated cost of the facility or project is reasonable in relation to similar facilities or projects; (iii) that the public-private partnership's plans will result in the timely development or operation of the project. In the case of transportation facilities under the PPTA, the following additional determinations are required: (i) that the proposed public-private partnership will result in the more efficient operation of a transportation facility; and, (ii) that the proposed development and/or operation of the facility or facilities and the proposed interconnection with existing transportation facilities are reasonable and will address the needs identified in an appropriate state, regional, or local transportation plan by improving safety, reducing congestion, increasing capacity, and/or enhancing economic efficiency. (Guidelines Art. I)
- ² Under the PPEA, a "qualifying project" includes: (i) Any education facility, including, but not limited to, a school building, any functionally-related and subordinate facility and land to a school building (including any stadium or other facility primarily used for school events), and any depreciable property provided for use in a school facility that is operated as part of the public school system or as an institution of higher education; (ii) Any building or facility that meets a public purpose and is developed or operated by or for any public entity; (iii) Any improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity; (iv) Utility and telecommunications and other communications infrastructure; (v) A recreational facility; (vi) Technology infrastructure, including, but not limited to, telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services; and (vii) Any improvements necessary or desirable to any unimproved locally- or state-owned real estate. (Guidelines, Art. I.B.)
- ³ Under the PPTA, a "qualifying transportation facility" means: one or more transportation facilities developed and/or operated by a private entity pursuant to the PPTA. (Guidelines, Art. I.B.)
- ⁴ Guidelines, Arts. IV (first paragraph) and V (first paragraph).
- ⁵ Guidelines, Art. IV.
- ⁶ Guidelines, Art. IV.
- ⁷ Guidelines, Art. IV. Notices may also be advertised in *Virginia Business Opportunities* and posted on the Commonwealth's electronic procurement site.
- ⁸ Guidelines, Art. IV.
- ⁹ Guidelines, Art. IV.
- ¹⁰ Guidelines, Art. IV.
- ¹¹ Guidelines, Art. IV.
- ¹² The PPEA and PPTA permit the assessment of fees for the review of unsolicited proposals. The Town's Guidelines expressly prohibit the assessment of fees for the review of solicited proposals. As a result, the Town must absorb the cost of engaging consultants for the preparation of an RFP or IFB under either Act.
- ¹³ Guidelines, Art. III.C.
- ¹⁴ The private entity submitting the information must (i) invoke the exclusion from FOIA when the data or materials are submitted to the Town or before such submission; (ii) identify the data and materials for which protection from disclosure is sought, and (iii) state why the exclusion from disclosure is necessary. Guidelines, Art. III.D.1.
- ¹⁵ Guidelines, Art. III.D.2.
- ¹⁶ Guidelines, Art. III.D.3.

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- ¹⁷ Guidelines, Art. III.D.3.
- ¹⁸ Guidelines, Art. III.D.3.
- ¹⁹ Guidelines, Art. III.D.3.
- ²⁰ Guidelines, Art. III.D.4.
- ²¹ Guidelines, Art. V.A.1.
- ²² Guidelines, Art. V.A.1.
- ²³ Guidelines, Art. V.A.1. The quoted terms are defined in Guidelines, Art. II.
- ²⁴ Guidelines, Arts. III.C.3(i), V.A.1.
- ²⁵ Guidelines Art. I.A.
- ²⁶ Guidelines, Art. V.A.2(i). Note: Suggested format and information to satisfy these requirements are included in Art.V.C.5 of the Guidelines. In addition, Art. V.A.2(ii) of the Guidelines suggests an unsolicited proposal should provide a concise description of the applicant's capability to complete the proposed project and the benefits to be derived from the project by the Town. Such project benefits may include "benefits to be realized during the construction, renovation, expansion or improvement phase as well as during the life cycle of the project." The Guidelines further suggest proposals include a comprehensive scope of work and a financial plan for the project with sufficient detail to allow the Town to analyze the financial feasibility of the proposed project, "including but not limited to: (a) identity of any parties expected or provide financing for the project; and (b) a statement indicating whether the applicant intends to request the Town to provide resources for financing the project and the nature and extent of any such resources."
- ²⁷ Guidelines, Art. III.A.2.
- ²⁸ Guidelines, Art. V.A.2(i).
- ²⁹ Guidelines, Art. V.A.2(iii).
- ³⁰ Guidelines, V.B.1.
- ³¹ Guidelines, V.B.2 and III.D.3.
- ³² Guidelines, V.B.3.
- ³³ Guidelines, V.C.2.
- ³⁴ Guidelines V.C.3.
- ³⁵ Guidelines V.B.5.
- ³⁶ Unless waived by the Town or included in the conceptual phase proposal, the Guidelines, Art. V.D.1, require the following additional information: (i) a topographical map (1:2000 or other appropriate scale) depicting the location of the proposed project; (ii) a list of public utility facilities, if any, that will be crossed by the qualifying project and a statement of the plans of the proposer to accommodate such crossings; (iii) a statement and strategy setting out the plans for securing all necessary property. The statement shall include the names and addresses, if known, of the current owners of the subject property as well as a list of any property the proposer intends to request the Town to condemn; (iv) a detailed listing of all firms that will provide specific design, construction and completion guarantees and warranties, and a brief description of such guarantees and warranties; (v) a total life-cycle cost specifying methodology and assumptions of the project or projects and the proposed project start date. Include anticipated commitment of all parties; equity, debt, and other financing mechanisms; and a schedule of project revenues and project costs. The life-cycle cost analysis should include, but not be limited to, a detailed analysis of the projected return, rate of return, or both, expected useful life of facility and estimated annual operating expenses; (vi) a detailed discussion of assumptions about user fees or rates, and usage of the projects; (vii) identification of any known government support or opposition, or general public support or opposition for the project. Government or public support should be demonstrated through resolution of official bodies, minutes of meetings, letters, or other official communications; (viii) demonstration of consistency with appropriate local comprehensive or infrastructure development plans or indication of the steps required for acceptance into such plans; (ix) explanation of how the proposed project would impact local development plans of each affected local jurisdiction; (x) identification of any known conflicts of interest or other disabilities that may impact the Town's consideration of the proposal, including the identification of any persons known to the proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in

connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 *et seq.*); (xi) a detailed analysis of the financial feasibility of the proposed project, including its impact on similar facilities operated or planned by the Town. Include a detailed description of any financial plan proposed for the project, a comparison of that plan with financing alternatives that may be available to the Town, and all underlying data supporting any conclusions reached in the analysis or the selection by the applicant of the financing plan proposed for the project; and, (xii) additional material and information as the Town may request.

- ³⁷ The statutes and Guideline suggest that an interim agreement may address any of the following matters: (i) project planning and development; (ii) design and engineering; (iii) environmental analysis and mitigation; (iv) site planning and survey; (v) ascertaining the availability of financing for the proposed facility through financial and revenue analysis; (vi) establishing a process for and timing of the negotiation of the comprehensive agreement; and (vii) any other provisions related to any aspect of the development or operation of a qualifying project or qualifying transportation facility that the parties deem appropriate prior to the execution of a comprehensive agreement. Guidelines, Art. VII.A.
- ³⁸ The following is a list of the minimum requirements for the comprehensive agreement: (i) 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 or qualifying transportation facility, in the forms and amounts satisfactory to the Town; (ii) review and approval of plans and specifications for the qualifying project or qualifying transportation facility by the Town; (iii) the right of the Town to inspect the qualifying project or qualifying transportation facility to ensure compliance with the comprehensive agreement; (iv) maintenance of a policy or policies of liability insurance or self-insurance in form and amount satisfactory to the Town and reasonably sufficient to insure coverage of the project and the tort liability to the public and employees and to enable the continued operation of the qualifying project or qualifying transportation facility; (v) monitoring and acting upon the practices of the operator by the Town to ensure proper maintenance; (vi) the terms under which the private entity will reimburse the Town for services provided; (vii) policies and procedures governing the rights and responsibilities of the Town and the private entity in the event that the comprehensive agreement is terminated or there is a material default by the operator, including the conditions governing assumption of the duties and responsibilities of the private entity by the Town and the transfer or purchase of property or other interests of the private entity by the Town; (viii) filing by the private entity of appropriate financial statements on a periodic basis; (ix) the mechanism by which user fees, lease payments, or service payments, if any, may be established from time to time upon agreement of the parties. Any payments or fees shall be set at a level that are the same for persons using the facility under like conditions and that will not materially discourage use for the qualifying project. In addition: (1) a copy of any service contract shall be filed with the Town. (2) 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. (3) classifications according to reasonable categories for assessment of user fees may be made. (x) the terms and conditions under which the Town may contribute financial resources, if any, for the qualifying project or qualifying transportation facility; (xi) the terms and conditions under which existing site conditions will be assessed and addressed, including indemnification of the Town for conducting the assessment and taking necessary remedial action; (xii) any changes to the terms of the interim or comprehensive agreement may be agreed upon by the parties from time to time shall be added to the interim or comprehensive agreement only by written amendment; (xiii) the comprehensive agreement may provide for the development or operation of phases or segments of a qualifying project; and (xiv) other requirements of the PPEA, PPTA, and other applicable law.
- ³⁹ Required by Va. Code §56-575.9(F).