

## **BUSINESS AND NONINSTRUCTIONAL OPERATIONS**

### **Public-Private Education Facilities and Infrastructure Act Projects**

#### **I. Background and scope**

The Public-Private Education Facilities and Infrastructure Act of 2002, Virginia Code § 56-575.1, *et. seq.* (the "PPEA") as amended, grants a public entity the authority to create public-private partnerships for the development of a wide range of projects for public use if the public entity determines that there is a need for a project and that private involvement may provide the project to the public in a timely or cost-effective fashion. The definition of "public entity" in the PPEA includes, *inter alia*, any political subdivision of the Commonwealth including the Virginia Beach City Public Schools ("VBCPS") through its School Board.

The PPEA is a method of project delivery, and as such, it should be viewed in the context of other methods by which the School Board procures items that are defined as "qualifying project" by the PPEA. For reference, a complete list of the PPEA Guidelines and/or supporting documents can be found at the links below. The PPEA incorporates certain requirements from the Virginia Public Procurement Act (the "VPPA"), and for items not incorporated or referenced, the PPEA is exempted from the requirements of the VPPA.

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 any education facility.

#### **A. Responsible public entity**

Either the School Board or the City of Virginia Beach ("City") can be the "responsible public entity" for a project in the City, depending upon the nature of the project. The PPEA defines "responsible public entity" as "a public entity that has the power to develop or operate the applicable qualifying project." Typically, the School Board will be the "responsible public entity" under the PPEA for any project involving only the public schools, and the City will be the "affected local jurisdiction" under the PPEA. However, the special relationship, both financial and otherwise, that exists between the School Board and the City makes close coordination and cooperation between the School Board and City desirable for proposals tendered to the School Board under the PPEA. Also, proposals may be made that are for a "mixed" project (for example, projects including both schools and public parks), where, for certain components, the School Board may be the responsible public entity, and for certain components, the City may be the responsible public entity.

The Superintendent and all officers and employees of the School Board shall follow the PPEA and this Policy in any PPEA procurement in which they are involved. The Superintendent may delegate duties under this Policy to members of staff or other designees. The Superintendent may designate a working group to review and evaluate any proposal submitted pursuant to these guidelines.

The Superintendent shall require as a condition of accepting any proposal for consideration that its proposer agree to be bound by all the terms and conditions of these Guidelines.

## **II. Project Delivery**

The PPEA allows receipt of unsolicited proposals for a qualifying project. The PPEA also allows solicited proposals. For purposes of outlining project delivery steps, a process initiated by an unsolicited proposal will have an additional step at the beginning. Accordingly, the below listed steps shall apply for any PPEA project.

### **A. Unsolicited Proposal an Initiating Step**

The PPEA permits the School Board to receive and evaluate unsolicited proposals from private entities to acquire, design, construct, improve, renovate, expand, equip, maintain, or operate a qualifying project. The School Board's general policy is to reserve acceptance of unsolicited proposals for cases of truly innovative ideas, because, in other cases, traditional procurement process are generally viewed as more likely to achieve full and open competition from the bidding community.

To be considered, one original and eleven (11) copies of any unsolicited proposal must be submitted to Executive Director, Facilities Services, 1568 Corporate Landing Parkway, Suite 200, Virginia Beach, VA 23454. While the School Board reserves the right to charge a review fee as permitted by the PPEA, fees are not required at this time. The unsolicited proposal shall take the form of a conceptual proposal and in a format consistent with the guidelines and supporting documentation.

The Superintendent, after consultation with the School Board, may accept an unsolicited proposal. If the Superintendent determines not to accept the proposal, the Superintendent will return the proposal, together with accompanying documentation, to the proposer. For an unsolicited proposal that purports to develop specific cost savings, the Superintendent shall specify the basis for the rejection in writing.

If the Superintendent accepts the proposal, the Superintendent shall proceed to post the proposal and publish the notice requesting competing proposals. Prior to posting, the Superintendent and the School Board Attorney or designee ~~Office of the City Attorney~~ (or other retained legal counsel) shall review any request to protect information in the proposal that the proposer sought to withhold from posting. The posting shall occur within ten (10) business days of the decision to accept the unsolicited proposal. The posting shall include a contact person to receive public input on the concept. Additionally, at least one copy of the unsolicited proposal will be made available for public inspection.

### **B. Solicitation of Conceptual Proposals or Notice of Acceptance of Unsolicited Proposal**

The School Board may solicit proposals for any qualifying project by means of a Solicited PPEA, which usually is initiated by a Request for Proposals (the "RFP"). Alternatively, if the Superintendent has accepted an unsolicited proposal, the Superintendent will publish a notice requesting competing proposals.

The notice or the RFP shall:

- Identify the qualifying project specifically or conceptually;
- Provide a deadline for the submission of competing proposals, which shall be at least 45 days from the notice or solicitation;

- Identify whether the proposals will be reviewed using procedures for competitive sealed bidding or competitive negotiation for nonprofessional services;
- Provide any other conditions for the submission of competing proposals;
- Provide additional information regarding the project, as needed, and to whom questions regarding the notice or solicitation may be directed.

The notice or RFP shall be posted on the VBCPS website and in a manner consistent with the posting of other VBCPS procurement solicitations. The costs of completion of such proposal shall be the sole responsibility of the proposer(s).

Contemporaneous with the notice or solicitation, the Superintendent shall document in writing the decision to proceed with either competitive sealed bidding or competitive negotiation as described by the VPPA. The use of competitive negotiation requires a determination, in writing, that doing so is likely to be advantageous to the Public Schools and the public based upon either: i) the probable scope, complexity or priority of the project; ii) the risk sharing including guaranteed cost or completion guarantees, added value or debt or equity investments proposed by the private entity; or iii) an increase in funding, dedicated revenue source or other economic benefit from the project would not otherwise be available.

### **C. Conceptual Proposal Stage**

Only proposals complying with the requirements of the PPEA and this Policy and supporting Guidelines and documents that contain sufficient information for a meaningful evaluation and that are provided in an appropriate format, as described below, will be considered by the Superintendent for further review at the conceptual stage. At least one copy of each of the proposals shall be made available for public inspection. A scan of the nonproprietary portions of the conceptual proposals will be posted on the VBCPS website within ten (10) business days of initiation of review. The posting shall include a contact person to receive public input on the concept.

After reviewing an unsolicited proposal and any competing proposals submitted, the Superintendent may determine:

- not to proceed further with any proposal,
- to proceed to the detailed phase of review one or more of the proposers, or
- to request modifications or amendments to any proposals.

However, the Superintendent may not proceed to the detailed phase with only one proposer unless it has determined in writing that only one proposer is qualified or that the only proposer to be considered is clearly more highly qualified than any other proposer.

### **D. Detailed Proposal Stage**

The decision to proceed to the detailed phase shall include sending a request for detailed proposals to the chosen proposers. The costs of completion of such proposal shall be the sole responsibility of the proposer(s).

If expressly approved by the School Board, the Superintendent may include a proposal payment in a fixed amount as an enticement for proposers to submit a detailed proposal. Such proposal payment would be paid to unsuccessful proposers that submit a detailed proposal, and the payment is conditioned upon VBCPS retaining the right to use technical solutions, design concepts, and any other proprietary information contained in the unsuccessful detailed proposal.

Unless otherwise provided in this request, the required components of a detailed proposal will be provided in the Guidelines and supporting documents. The complexity of the request will vary substantially depending on the nature of the project and whether the project includes financing, long-term operations, acquisition of real property, or other complicated components. The decision as to whether to use the financing plan contained in any proposal (whether solicited or unsolicited) is at the School Board's sole discretion.

If the project is principally the design and construction of a facility, the Superintendent may include the form contract utilized in other VBCPS projects.

Only detailed proposals complying with the request for detailed proposals will be considered by the Superintendent. The request for detailed proposals shall provide the method of evaluation, including specifying the factors that will be used in evaluating the proposals and whether numerical scoring will be used in evaluating the proposals.

#### **E. Agreement Negotiation Stage**

If the review of the detailed proposals provides a preferred proposer, the Superintendent may begin negotiation of a comprehensive agreement. However, if there are work items required before a determination of the preferred proposer, the Superintendent may negotiate an Interim Agreement. The work items in an Interim Agreement include: project planning and development; design and engineering; environmental analysis and mitigation; survey; ascertainment of financing through financial and revenue analysis; establishment of a process and timing of the negotiation of a comprehensive agreement. Because of the required approvals and its tendency to limit competition, the use of an Interim Agreement is disfavored.

The PPEA legislation includes items provided for in a comprehensive agreement in §56-575.9. This list is reproduced in the Guidelines.

Once an interim or comprehensive agreement's material terms have been identified and agreed to in principal between VBCPS and the private entity, the Superintendent shall brief the School Board and provide a recommendation. Using this briefing, the posted conceptual proposals, and any other relevant materials, the School Board shall schedule a public hearing to receive input regarding the proposed project. This public hearing must be at least thirty (30) days prior to any vote to execute either an interim or comprehensive agreement.

After an interim or comprehensive agreement has been negotiated in substantially completed form, a copy of the agreement shall be posted on the VBCPS website. This posting of the agreement should occur at least thirty (30) days prior to any vote to execute the agreement. The posting shall include a contact person for submission of public input. The public input shall be gathered and transmitted to the School Board prior to the requested action to approval an interim or comprehensive agreement.

## **F. Required Approvals**

After the briefing of the School Board regarding the material terms of an interim or comprehensive agreement, the Superintendent shall request that the City Council take action to approve the proposed interim or comprehensive agreement.

Upon receipt of the City Council approval, the Superintendent shall request the School Board authorize the execution of the interim or comprehensive agreement. The scheduling of this action shall be after the required public hearing and any posting requirements have been completed. An example of the form of an authorizing resolution is provided in the Guidelines and supporting documentation.

As required by Virginia Code § 56-575.9 (F), as amended, when the School Board enters into an agreement pursuant to the PPEA, a copy should be submitted to the Auditor of Public Accounts within thirty (30) days.

## **III. Additional Considerations**

### **A. Protests**

A protest of any PPEA decision may be initiated after the School Board authorizes the execution of a comprehensive agreement. Prior to such authorization, there is no award from which a protest may be made. The timelines for such protest shall follow the VPPA.

### **B. Governing Provisions**

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

### **C. Participation of Small and Minority-Owned Business**

The School Board's policy is to facilitate participation of small businesses and businesses owned by women and minorities in its procurement transactions, including procurement transactions under the PPEA. Private entities making proposals to the School Board 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.

### **D. Use of Public Funds**

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

### **E. The Virginia Freedom of Information Act.**

However, to the extent that access to any procurement record or other document or information is compelled or protected as required by law, then VBCPS shall comply with such order.

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

- To prevent the release of any confidential and proprietary information that otherwise could be held in confidence pursuant to the PPEA, the private entity submitting the information must: a) invoke the exclusion from FOIA when the data or materials are submitted to VBCPS or before such submission; b) identify the data and materials for which protection from disclosure is sought; and c) state why the exclusion from disclosure is necessary. A private entity may request and receive a determination from the School Board Attorney or designee or other retained legal counsel~~Office of the City Attorney ("City Attorney") ("School Board Attorney")~~ as to the anticipated scope of protection prior to submitting the proposal in accordance with Virginia Code § 2.2-3705.6(11), as amended. If a private entity fails to designate trade secrets, financial records, or other confidential or proprietary information for protection from disclosure, such information, records or documents may be subject to disclosure under FOIA.
- Upon receipt of a request from a private entity that designated portions of a proposal be protected from disclosure as confidential and proprietary, the School Board City Attorney will determine whether such protection is appropriate under applicable law and, if appropriate, the scope of such appropriate protection, and shall communicate its determination to the private entity. If the determination regarding protection or the scope thereof differs from the private entity's request, then VBCPS will afford the private entity a reasonable opportunity to clarify and justify its request. Upon a final determination by the School Board City Attorney to provide less protection than requested by the private entity, the private entity will be given an opportunity to withdraw its proposal. A proposal so withdrawn will be treated in the same manner as a proposal not accepted.
- VBCPS may withhold from disclosure memoranda, staff evaluations, or other records prepared by VBCPS, 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 VBCPS would be adversely affected, and (ii) the basis for the determination is documented in writing by VBCPS. Cost estimates relating to a proposed procurement transaction prepared by or for VBCPS shall not be open to public inspection.
- VBCPS may not withhold from public access:
  - a. procurement records other than those subject to the written determination of the VBCPS;
  - 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 VBCPS 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.

**F. Timelines for Selecting Proposals and Negotiating Agreements and Accelerated Timelines for Priority Qualifying Facilities.**

Normal expected timelines for selecting proposals and negotiating an interim agreement or comprehensive agreement are set out in the Guidelines and supporting documents. There is a separate timeline for unsolicited proposals that takes into account the additional time required by that process.

For projects deemed a priority by the School Board, the portion of timelines related to selection, review, and documentation may be accelerated. The School Board should generally adhere to these timelines in PPEA procurements, but the School Board may deviate from them when it is in its interests to do so.

**Editor's Note**

*Please see the PPEA Guidelines and Supporting Documents*

**Legal Reference**

Virginia Code § 56-575.1, et. seq., as amended. The Public-Private Education Facilities and Infrastructure Act of 2002.

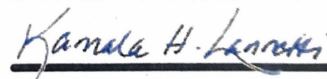
**Related Links**

[PPEA Guidelines and Supporting Documents](#)

Adopted by School Board: September 6, 2017

[Amended by School Board: 2023](#)

APPROVED AS TO  
LEGAL SUFFICIENCY

  
\_\_\_\_\_