



*"The Gateway to
Giles County"*

TOWN OF RICH CREEK, VIRGINIA

GUIDELINES FOR THE IMPLEMENTATION OF THE
PUBLIC-PRIVATE EDUCATION FACILITIES AND
INFRASTRUCTURE ACT OF 2002, AS AMENDED

January 9, 2023

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I. Introduction

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

In order for a project to qualify under the PPEA, it must meet the definition of a "qualifying project." The PPEA contains a broad definition of qualifying projects that include, but are not limited to, public buildings and facilities of all types, such as:

- An education facility, including but not limited to a school building (including any stadium or other facility primarily used for school events), any functionally related and subordinate facility and land to a school building and any depreciable property provided for use in a school facility that is operated as part of the public school system or as an institution of higher education;
- A building or facility that meets a public purpose and is developed or operated by or for any public entity;
- Improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity;
- Utility and telecommunications and other communications infrastructure;
- A recreational facility;
- And other types of facilities, services, infrastructure, or improvements as allowed by the PPEA.

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

The Town must first adopt procedures that it will follow to receive and evaluate any proposal submitted to the Town under the provisions of the PPEA. The procedures adopted by the Town should designate an individual to serve as the point of contact to receive proposals submitted under the PPEA and to respond to inquiries regarding the PPEA or the Town's procedures.

The following model procedures have been developed to assist public entities, like the Town, in adopting procedures to guide the implementation of the PPEA. Although guidance with regard to the application of the PPEA is provided herein, it will be incumbent upon all entities, both the Town and private entities, to comply with the provisions of the PPEA.

II. General Provisions

A. Proposal Submission

A proposal may be either solicited by the Town or delivered by a private entity on an unsolicited basis. Proposers may be required to follow a two-part proposal submission process consisting of an initial conceptual phase and a detailed phase as described herein. The initial phase of the proposal should contain specific information on the proposer's qualifications and experience, project characteristics, project financing, anticipated public support or opposition, or both, and projected benefit and compatibility. The detailed proposal should contain specified deliverables.

The PPEA allows private entities to include innovative financing methods, including the imposition of user fees or service payments, in a proposal. Such financing arrangements may include the issuance of debt instruments, equity or other securities or obligations, including, if applicable, the portion of the tax-exempt private activity bond limitation amount to be allocated annually to the Commonwealth of Virginia pursuant to the Economic Growth and Tax Relief Reconciliation Act of 2001 for the development of education facilities using public-private partnerships, and to provide for carryovers of any unused limitation amount.

Proposals should be prepared simply and economically, providing a concise description of the proposer's capabilities to complete the proposed qualifying project and the benefits to be derived from the project by the Town. Project benefits to be considered are those occurring before and during the construction, renovation, expansion, or improvement phase and during the life cycle of the project. Proposals also should include a scope of work and a financial plan for the project, containing enough detail to allow an analysis by the Town of the financial feasibility of the proposed project. The Town may establish criteria by which the proposer may provide clarification to the submission.

B. Affected Local Jurisdictions

Any private entity requesting approval from or submitting a conceptual or detailed proposal to the Town must provide the Town with a copy of the private entity's request or proposal by certified mail, express delivery, or hand delivery.

C. Proposal Review Fee

The Town may seek the advice of internal staff or outside advisors or consultants with relevant experience in determining whether to enter into an agreement with the private entity. No fee may be charged by the Town to process, review or evaluate any solicited proposal submitted under the PPEA. The Town may charge a fee to the private entity to cover the costs of processing, reviewing, and evaluating any unsolicited proposal or competing unsolicited proposal submitted under the PPEA, including a fee to cover the cost of outside attorneys, consultants, and financial advisors. Any fee charged for such review of a proposal should 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 staff time required to process, evaluate, review, and respond to the proposal and (ii) the out-of-pocket costs of attorneys, consultants, and financial advisors.

The proposal fee may cover all or part of the initial review process. For example, the Town may require a proposal fee in an amount sufficient to cover all anticipated direct costs associated with evaluating the proposal, or the Town may require a smaller initial fee with an additional proposal fee to be charged should the project proceed beyond the initial review.

The Town may establish a fee schedule for the cost of the proposal review. The Town shall set forth in the procedures it has established for the implementation of the PPEA the methodology used to calculate proposal fees. If the cost of reviewing the proposal exceeds the initially established proposal fee, the Town may assess the proposer the additional costs deemed necessary to evaluate the proposal.

For rejected proposals, the Town may establish a schedule for refunding any portion of fees paid in excess of its direct costs associated with evaluating the proposal. If the cost of reviewing the proposal is less than the initially established proposal fee, the Town may refund to the proposer the excess fee. As noted in Section IV(A)(1) below, fees should be refunded entirely if the Town decides not to proceed to publication and conceptual-phase review of an unsolicited proposal.

D. Freedom of Information Act

Generally, proposal documents submitted by private entities are subject to the Virginia Freedom of Information Act ("FOIA"). In accordance with § 2.2-3705.1., et. seq., of FOIA, such documents are releasable if requested, except to the extent that they relate to (i) confidential proprietary information submitted to the Town under a promise of confidentiality or (ii) memoranda, working papers, or other

records related to proposals if making public such records good adversely affect the financial interests of the public or private entity or the bargaining position of either party.

Subsection 56.575.4(G) of the PPEA imposes an obligation on a public entity and any affected local jurisdiction to protect confidential proprietary information submitted by a private entity or operator. When the private entity requests that the Town not disclose information, the private entity must (i) invoke the exclusion 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. A private entity may request and receive a determination from the Town as to the anticipated scope of protection prior to submitting the proposal. The Town is authorized and obligated to protect only confidential proprietary information, and thus will not protect any portion of a proposal from disclosure if the entire proposal has been designated confidential by the proposer without reasonably differentiating between the proprietary and non-proprietary information contained therein.

Upon receipt of a request that designated portions of a proposal be protected from disclosure as confidential and proprietary, the Town shall 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 proposer. If the determination regarding protection or the scope thereof differs from the proposer's request, then the Town should accord the proposer a reasonable opportunity to clarify and justify its request. Upon the final determination by the Town to accord less protection than requested by the proposer, the proposer should be accorded an opportunity to withdraw its proposal. A proposal so withdrawn should be treated in the same manner as a proposal not accepted for publication and conceptual-phase consideration as provided in Section IV(A)(1) below.

E. Use of Public Funds

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

F. Applicability of Other Laws

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

III. Solicited Proposals

The Town may issue Requests for Proposals (RFPs), inviting proposals from private entities to acquire, construct, improve, renovate, expand, maintain, or operate qualifying projects or to design or equip projects so constructed, improved, renovated, expanded, maintained, or operated. The Town may use a two-part proposal process consisting of an initial conceptual phase and a detailed phase. An RFP may invite proposers to submit proposals on individual projects identified by the Town. In such a case, the Town should set forth in the RFP the format and supporting information that is required to be submitted, consistent with the provisions of the PPEA.

The RFP 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 should also be published in a newspaper or other publications of general circulation and may be advertised in *Virginia Business Opportunities*. The RFP 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. Information meetings and/or pre-proposal conferences may be held as deemed appropriate by the Town.

IV. Unsolicited Proposals

The PPEA permits the Town to receive, evaluate and select for negotiations unsolicited proposals from private entities to acquire, construct, improve, renovate, expand, maintain, or operate a qualifying project or to design or equip projects so constructed, improved, renovated, expanded, maintained, or operated.

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

A. Decision to Accept and Consider Unsolicited Proposals: Notice

1. Upon receipt of any unsolicited proposal or group of proposals and payment of the fee by the proposer or proposers, if required, the Town will determine whether to accept the unsolicited proposal for publication and conceptual-phase consideration. If the Town determines not to accept the proposal and not to proceed to publication and conceptual-phase consideration, it will return the proposal, together with any and all fees and accompanying documentation, to the proposer.
2. If the Town chooses to accept an unsolicited proposal for conceptual-phase consideration, it shall post a notice in a public area regularly used by the Town for posting of public notices for a period of not less than 45 days. The Town shall also publish the same notice, at least once, in one or more

newspapers or periodicals of general circulation in the Town to provide notice of pending or potential action in not less than 45 days. In addition, the notice may also be advertised in *Virginia Business Opportunities*. The notice should state that the Town (i) has received and accepted an unsolicited proposal under the PPEA, (ii) intends to evaluate the proposal, (iii) may negotiate a comprehensive agreement with the proposer based on the proposal, and (iv) will accept for simultaneous consideration any competing proposals that comply with the procedures adopted by the Town and the PPEA. The notice shall also summarize the proposed qualifying project or projects and identify their proposed locations. Copies of unsolicited proposals shall be available upon request, subject to the provisions of FOIA and Subsection 56.575.4(G) of the PPEA. Interested parties shall have at least 45 days from the date the notice is first published by the Town to submit competing unsolicited proposals.

B. Initial Conceptual Stage Review

1. Only proposals complying with the requirements of the PPEA that contain sufficient information for a meaningful evaluation and that are provided in an appropriate format will be considered by the Town for further review at the conceptual stage. Formatting suggestions for proposals at the conceptual stage are found herein below of Section V(A).
2. The Town should determine at this initial stage of review whether it will proceed using:
 - a. Standard procurement procedures consistent with the VPPA; or
 - b. Guidelines developed by the Town that are consistent with procurement of other than professional services through "competitive negotiation" as the term is defined in § 2.2-4301 of the Code of Virginia, as amended. The Town may proceed using competitive negotiation guidelines only if it makes a written determination that doing so is likely to be advantageous to the Town and the public based upon either (i) the probable scope, complexity or urgency of need or (ii) the risk sharing, added value, increase in funding or economic benefit from the project that would otherwise not be available.
3. After reviewing the original proposal and any competing proposals submitted during the notice period, the Town may determine:
 - (i) not to proceed further with any proposal,
 - (ii) to proceed to the detailed phase of review with the original proposal,
 - (iii) to proceed to the detailed phase with a competing proposal, or

- (iv) to proceed to the detailed phase with multiple proposals.

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

V. Proposal Preparation and Submission

A. Format for Submissions at the Conceptual Stage

The Town shall require that proposals at the conceptual stage contain information in the following areas: (i) qualifications and experience, (ii) project characteristics, (iii) project financing, (iv) anticipated public support or opposition, or both, (v) project benefit and compatibility and (vi) any additional information as the Town may reasonably request to comply with the requirements of the PPEA. Suggestions for formatting information to be included in proposals at this stage include:

1. Qualifications and Experience
 - a. Identify the legal structure of the firm or consortium of firms making the proposal. Identify the organizational structure for the project, the management approach, and how each partner and major subcontractor in the structure fits into the overall team.
 - b. Describe the experience of the firm or consortium of firms making the proposal and the key principals involved in the proposed project including experience with projects of comparable size and complexity. Describe the length of time in business, business experience, public sector experience and other engagements of the firm or consortium of firms. Include the identity of any firms that will provide design, construction and completion guarantees and warranties, and a description of such guarantees and warranties.
 - c. Provide the names, addresses, and telephone numbers of persons within the firm or consortium of firms who may be contacted for further information.
 - d. Provide current or most recently audited financial statements of the firm or firms and each partner with an equity interest of twenty percent (20%) or greater.
 - e. Identify any persons known to the proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2, of the 1950 Code of Virginia, as amended.

2. Project Characteristics

- a. Provide a description of the project, including the conceptual design. Describe the proposed project in sufficient detail such that the 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.
- c. Include a list of all federal, state, and local permits and approvals required for the project and a schedule for obtaining such permits and approvals.
- d. Identify any anticipated adverse social, economic, and environmental impacts of the project. Specify the strategies or actions to mitigate known impacts of the project.
- e. Identify the projected positive social, economic, and environmental impacts of the project.
- f. Identify the proposed schedule for the work on the project, including the estimated time for completion.
- g. Propose allocation of risk and liability for work completed beyond the agreement's completion date, and assurances for timely completion of the project.
- h. State assumptions related to ownership, legal liability, law enforcement and operation of the project and the existence of any restrictions for the Town's use of the project.
- i. Provide information relative to phased or partial openings of the project prior to completion of the entire work proposed.

3. Project Financing

- a. Provide a preliminary estimate and estimating methodology of the cost of the work by phase, segment, or both.
- b. Submit a plan for the development, financing, and operation of the project showing the anticipated schedule by 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 the timing of any anticipated commitment.
4. Project Benefit and Compatibility
- a. Identify who will benefit from the project, how they will benefit, and how the project will benefit the overall community, region, or state.
 - b. Identify any anticipated public support or opposition, as well as any anticipated government support or opposition, for the project.
 - c. Explain the strategy and plans that will be carried out to involve and inform the general public, business community, and governmental agencies in areas affected by the project.
 - d. Describe the anticipated significant benefits to the Town, region or state, including anticipated benefits to the economic condition of the Town and whether the project is critical to attracting or maintaining competitive industries and businesses to the Town or surrounding region.
 - e. Describe compatibility with the Town's comprehensive plan, infrastructure development plans, capital improvements budget, or other Town spending plan.
 - f. Provide a statement setting forth participation efforts that are intended to be undertaken in connection with this project with regard to the following types of businesses: (i) minority-owned businesses, (ii) woman-owned businesses, and (iii) small businesses.

B. Format for Submissions at the Detailed Stage

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

1. A topographical map (1:2000' or other appropriate scale) depicting the location of the proposed project;
2. A list of public utility facilities, if any, that will be crossed by the qualifying

project and a statement of the plans of the proposer to accommodate such crossings;

3. A statement and strategy setting out the plans for securing all necessary property and/or easements or other rights implicated or to be affected or created. The statement must include the names and addresses, if known, of the current owners of the subject properties as well as a list of any properties the proposer intends to request the Town to condemn, if any;
4. A detailed listing of all firms, along with their relevant experience and abilities, that will provide specific design, construction and completion guarantees and warranties, and a brief description of such guarantees and warranties;
5. A total life-cycle cost including maintenance, specifying methodology and assumptions of the project or projects including major building systems, and the proposed project start date. Include anticipated commitment of all parties, equity, debt, and other financing mechanisms, and a schedule of project revenues and project costs. The life-cycle cost analysis should include, but not be limited to, a detailed analysis of the projected return, rate of return, or both, expected useful life of facility and estimated annual operating expenses.
6. A detailed discussion of assumptions about user fees or rates and usage of the projects.
7. Identification of any known government support or opposition, or general public support or opposition for the project. Government or public support should be demonstrated through resolution of official bodies, minutes of meetings, letters, or other official communications.
8. Demonstration of consistency with appropriate Town comprehensive plans or infrastructure development plans or indication of the steps required for acceptance into such plans.
9. Explanation of how the proposed project would impact the Town's development plans and the development plans of each affected local jurisdiction.
10. 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.), Title 2.2, of the 1950 Code of Virginia, as amended.
11. Additional material and information as the Town may reasonably request.

C. Additional Terms and Conditions on Proposal Submission

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

1. Neither these guidelines, nor any request or solicitation, nor the Town's receipt or consideration of any proposal shall create any contract, express or implied, any contractual obligation by the Town to any proposer, or any other obligation by the Town to any proposer. The Town makes no promise, express or implied, regarding whether it will enter into a comprehensive agreement with any proposer or regarding the manner in which it will consider proposals. The Town will only be bound by the terms of any comprehensive agreement into which it enters should it choose to enter into any such agreements.
2. The Town will not be responsible for any expenses incurred by a proposer in preparing and submitting a proposal or in engaging in oral presentations, discussions, or negotiations.
3. Proposers may be required to make an oral presentation or oral presentations of their proposal to the Town of Rich Creek, Virginia, at their own expense. The Town will schedule the time and location for these presentations. By submitting its proposal, the proposer agrees to make these representatives reasonably available for such presentations.
4. The Town reserves the right of the Town to waive any informality with respect to any proposal submitted.
5. The Town reserves the right to accept or reject any and all proposals received, in whole or in part, and to negotiate separately in any manner necessary to serve the best interests of the Town. Any procurement under these guidelines may result in multiple awards to multiple offerors.
6. The Town reserves the right to reject any and all proposals without explanation.
7. These provisions of these guidelines shall apply automatically to all PPEA procurements by the Town.
8. The Town will not discriminate against an offeror because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment.

VI. Proposal Evaluation and Selection Criteria

The following items shall be considered in the evaluation and selection of PPEA 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 are not necessarily limited to:

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

B. Project Characteristics

Factors to be considered in determining the project characteristics include:

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

C. Project Financing

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

1. Cost and cost benefit to the Town;
2. Financing and the impact on the debt or debt burden of the Town;
3. Financial plan;
4. Estimated cost; and
5. Life-cycle cost analysis.

D. Project Benefit and Compatibility

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

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

VII. Comprehensive Agreements

Prior to acquiring, designing, constructing, improving, renovating, expanding, equipping, maintaining, or operating the qualifying project, the selected proposer shall enter into a comprehensive agreement with the Town. The Town may designate a working group to be responsible for negotiating the comprehensive agreement. Each comprehensive agreement shall define the rights and obligations of the Town and the selected proposer with regard to the project.

A. Comprehensive Agreement Terms

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

1. The delivery of maintenance, performance, and payment bonds or letters of credit in connection with any acquisition, design, construction,

- improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project;
2. The review of plans and specifications for the qualifying project by the Town;
 3. The rights of the Town to inspect the qualifying project to ensure compliance with the comprehensive agreement;
 4. The maintenance of a policy or policies of liability insurance or self-insurance reasonably sufficient to ensure coverage of the project and the tort liability to the public and private employees and to enable the continued operation of the qualifying project;
 5. The monitoring of the practices of the operator by the Town to ensure proper maintenance of the qualifying project, if applicable;
 6. The terms under which the operator will reimburse the Town for services provided, if applicable;
 7. The policy and procedures that will govern the rights and responsibilities of the Town and the operator in the event that the comprehensive agreement is terminated or there is a material default by the operator including the conditions governing assumption of the duties and responsibilities of the operator by the Town and the transfer or purchase of property or other interests of the operator by the Town, if applicable;
 8. The terms under which the operator will file appropriate financial statements on a periodic basis, if applicable;
 9. The mechanism by which user fees, lease payments, or service payments, if any, may be established from time to time upon agreement of the parties. Any payments or fees shall be set at a level that is the same for persons using the facility under like conditions and that will not materially discourage use for the qualifying project;
 - a. A copy of any service contract shall be filed with the Town.
 - b. A schedule of the current user fees or lease payments shall be made available by the private entity to any member of the public upon request.
 - c. Classifications according to reasonable categories for assessment of user fees may be made.
 10. The terms and conditions under which the Town may contribute financial resources, if any, for the qualifying project; and
 11. Other requirements of the PPEA or other applicable law.

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

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

VIII. Participation of Small, Women-Owned, and Minority-Owned Businesses

1. The Town's policy is to facilitate participation of all qualified proposers, including small businesses and businesses owned by women and minorities in its procurement transactions.
2. Persons making proposals to the Town 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. Reference to lists of such businesses available from the Virginia Department of Minority Enterprise is encouraged.

IX. Governing Provisions

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

APPENDIX I

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