



City of Winchester, Virginia
Guidelines Regarding Requests Made Pursuant
to
the Public-Private Education Facilities and
Infrastructure Act of 2002



Adopted by the Common Council for the City of Winchester on May 13, 2003

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I. INTRODUCTION

The Public-Private Education Facilities and Infrastructure Act of 2002, Va. Code §§ 56-575.1 *et seq.* (the "PPEA"), grants to public entities, including the City of Winchester, Virginia, the authority to develop and/or operate public-private partnerships for a wide range of qualifying projects if the public entity determines that there is a need for a qualifying project and that private involvement may provide the project to the public in a more timely or cost-effective fashion.

The PPEA provides that a public entity may not consider any proposal by a private entity for approval of the qualifying project pursuant to the PPEA until the responsible public entity has adopted and made publicly available reasonable guidelines that (i) are sufficient to enable the responsible public entity to comply with the PPEA, and (ii) which encourage competition and guide the selection of projects. Accordingly, these guidelines (the "Guidelines") are adopted by the City and shall apply to the submittal, review, and selection of qualifying projects under the PPEA.

II. GENERAL PROVISIONS

A. Definitions

1. The definitions set forth in Section 56-575.1 of the PPEA are incorporated herein by reference, as the same may be updated from time to time.

B. Proposals

1. Pursuant to Section 56-575.4 of the PPEA, a proposal to provide a qualifying project to the City may be either solicited from private entities by the City (a "Solicited Bid/Proposal") or delivered to the City by a private entity on an unsolicited basis (an "Unsolicited Proposal"). In either case, any such proposal submitted to the City shall be clearly identified by the private entity as a "PPEA Proposal."

2. The requirements for any particular Solicited Bid/Proposal shall be as specified in the solicitation by the City for that particular proposal and shall be consistent with all applicable provisions of the PPEA and these Guidelines.

3. Any Unsolicited Proposal may be submitted to the City by delivering six complete copies, together with the required initial review fee as provided below in § IV(F), to the City of Winchester, Virginia, Purchasing Department, Attention: Purchasing Agent, Rouss City Hall, 15 North Cameron Street, Winchester, Virginia 22601. Other requirements for an Unsolicited Proposal are set forth below in § IV of these Guidelines. A working group may be designated by the City Manager to review and evaluate all unsolicited proposals.

4. The City may require that any Unsolicited Proposal or Solicited Bid/Proposal be clarified at any time during the review process. Such clarification may include but is not limited to submission of additional documentation, responses to specific questions, and interviews with potential project participants.

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C. Affected Local Jurisdictions

1. Any private entity submitting a Solicited Bid/Proposal or an Unsolicited Proposal to the City for a qualifying project must provide any other affected jurisdiction with a copy of such proposal by certified mail, express delivery, or hand delivery within five (5) business days of submission of the proposal to the City. Any such other affected jurisdiction shall have 60 days from the date it receives its copy of the proposal to submit written comments to the City and to indicate whether the proposed qualifying project is compatible with the affected jurisdiction's local comprehensive plan, local infrastructure development plans, capital improvements budget, or other government spending plan. The City will consider comments received within the 60-day period prior to entering into a comprehensive agreement pursuant to the PPEA regarding the proposal. However, the City may begin or continue its evaluation of any such proposal during the 60-day period for the receipt of comments from affected jurisdictions.

D. Virginia Freedom of Information Act

1. Any proposal provided to the City shall be subject to disclosure under the Virginia Freedom of Information Act ("FOIA"), with the exception that confidential and proprietary information may be protected pursuant to § 56-575.4(G) of the PPEA provided that (i) the protection of § 56-575.4(G) is requested by the submitting party, (ii) such confidential and proprietary information is clearly identified in the proposal, and (iii) the reasons why such protection is necessary are stated. A private entity may request and receive a determination from the City as to the anticipated scope of protection prior to submitting the proposal. The City is authorized and obligated to protect only proprietary information, and thus will not protect any portion of a proposal from disclosure if the entire proposal has been designated as proprietary by the private entity without reasonably differentiating between the proprietary and non-proprietary information contained therein.

E. Use of Public Funds

Virginia constitutional and statutory requirements 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 or projects.

F. Applicability of Other Laws

Nothing in the PPEA shall affect the duty of the City to comply with all other applicable law 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 BID/PROPOSALS

The procedures applicable to any particular Solicited Bid/Proposal shall be specified in the solicitation for that proposal and shall be consistent with the requirements of the PPEA and any other applicable law. All such solicitations shall be by issuance of a written Invitation to Bid ("IFB") or Request

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for Proposal ("RFP"). Any proposal submitted pursuant to the PPEA that is not received in response to an IFB or RFP shall be an Unsolicited Proposal under these Guidelines, including but not limited to (a) proposals received in response to a notice of the prior receipt of another Unsolicited Proposal as required by the PPEA and provided for below in § IV(A)(2) and (b) proposals received in response to publicity by the City concerning particular needs when the City has not issued a corresponding IFB or RFP, even if the City otherwise has encouraged the submission of proposals pursuant to the PPEA that address those needs.

IV. UNSOLICITED PROPOSALS

The process for evaluating an Unsolicited Proposal, which is described in detail below, consists of four steps. Briefly summarized, upon receipt of an Unsolicited Proposal the City's first step will be to determine whether to accept it for consideration at the conceptual stage. If so, then in step two the City will give public notice of the Unsolicited Proposal. In step three the City will proceed with a review at the conceptual stage of the original Unsolicited Proposal and/or any proposal received in response to the public notice and accepted for consideration at the conceptual stage. Step four is an in-depth review at the detailed stage of the original Unsolicited Proposal and/or any proposal received in response to the public notice and accepted for consideration at the detailed stage. However, the City may discontinue its evaluation of any proposal at any time. Furthermore, if the City determines that it is in the City's interest to do so with respect to any Unsolicited Proposal, the City may eliminate review at the conceptual stage and proceed directly to a review at the detailed stage.

A. Decision to Accept and Consider Unsolicited Proposal; Notice

1. Upon receipt from a private entity of any Unsolicited Proposal accompanied by payment of any required fees, the City will determine whether to accept the Unsolicited Proposal for publication and conceptual-phase consideration, as described below. If the City determines not to accept the proposal at this stage it will return the proposal and the accompanying initial review fee to the private entity.

2. If the City chooses to accept an Unsolicited Proposal for conceptual-phase consideration, it shall give public notice of the proposal in accordance with § 56-575.17 of the PPEA and in such notice shall specify a period of time not less than 45 days during which it will receive competing Unsolicited Proposals. Although not required by the PPEA, at the discretion of the City such notice may be given consistent with any requirements for public notice as set forth by the Purchasing Department. During the 45-day period for receiving competing Unsolicited Proposals, the City may continue to evaluate the original Unsolicited Proposal.

B. Contents of an Unsolicited Proposal

1. An Unsolicited Proposal must contain the information listed in Section IV(C) and Section IV(E). However, the private entity may request that the City consider a two-step proposal submission, with an initial, more general proposal to be followed by a more detailed submission. In the event that a two-step proposal submission is proposed, the private entity may include only the information

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listed in Section IV(C) with its initial submission, and the City will request the information listed in Section IV(E) during the second stage.

2. In the event that an Unsolicited Proposal does not contain the required information, the City may request a supplemental submission pursuant to § II(B)(4) of these Guidelines, or may waive the information not provided. If waived, the City reserves the right to request the additional information, or any other information, at any time during consideration.

C. Content and Format for Submissions at the Conceptual Stage

Unsolicited Proposals at the conceptual stage shall contain the following information in the following format, plus such additional information as the City may request:

1. Qualifications and Experience

i. 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.

ii. 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.

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

iv. Provide a current or most recently audited financial statement of the firm or firms and the names of each partner with an equity interest of three percent or greater.

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

2. Project Characteristics

i. Provide a description of the project, including the conceptual design, a scope of work, and a schedule for the initiation of and completion of the project to include the proposed major responsibilities and timeline for activities to be performed by both the City and the private entity. 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.

ii. Identify and fully describe any work to be performed by the City or any other public entity.

iii. Identify any affected jurisdictions (jurisdictions in which all or a portion of the project is located).

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- iv. 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.
- v. Identify any anticipated adverse social, economic and environmental impacts of the project. Specify the strategies or actions to mitigate known impacts of the project.
- vi. A statement describing the anticipated social, economic, environmental, or other benefits of the project to the public and the City. Project benefits to be considered may occur during the construction, renovation, expansion or improvement phase and during the life cycle of the project.
- vii. Identify the proposed schedule for the work on the project, including the estimated time for completion.
- viii. Propose allocation of risk and liability for work completed beyond the agreement's completion date, and assurances for timely completion of the project.
- ix. State assumptions related to ownership, legal liability, law enforcement and operation of the project and the existence of any restrictions on the public entity's use of the project.
- x. A statement setting forth the method by which the private entity proposes to secure necessary property interests required for the qualifying project.
- xi. Provide information relative to phased or partial openings of the proposed project prior to completion of the entire work.
- xii. Describe any architectural, building, engineering, or other applicable standards that the proposed project will meet.

3. Project Financing

- i. Provide a preliminary estimate and estimating methodology of the cost of the work by phase, segment, or both.
- ii. 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, and identify any dedicated revenue source or proposed debt or equity investment on the behalf of the private entity.
- iii. Include a list and discussion of assumptions underlying all major elements of the plan.
- iv. Identify all anticipated risk factors and methods for dealing with these factors.
- v. Identify any local, state or federal resources that the private entity contemplates requesting for the project. Describe the total commitment, if any, expected from governmental sources (and identify each such source) and the timing of any anticipated commitment.
- vi. Identify any third parties that the private entity contemplates will provide financing for the project and describe the nature and timing of each such commitment.
- vii. A statement indicating whether the private entity intends to request the City to provide resources for financing the project and the nature and extent of any such resources.

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4. Project Benefit and Compatibility

i. Describe the anticipated benefits to the community, region or state, including anticipated benefits to the economic condition of the City, and identify who will benefit from the project and how they will benefit.

ii. Identify any anticipated public support or opposition, as well as any anticipated government support or opposition, for the project.

iii. 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.

iv. Explain whether and, if so, how the project is critical to attracting or maintaining competitive industries and businesses to the City of Winchester or the surrounding region.

v. Explain whether and, if so, how the project is compatible with the City's comprehensive plan, infrastructure development plans, capital improvements budget, or other government spending plan.

D. Initial Review at the Conceptual Stage

1. Only proposals for qualifying projects, as defined in the PPEA, and those proposals that contain sufficient information for a meaningful evaluation and that are provided in an appropriate format, as described in these Guidelines, will be considered by the City for further review at the conceptual stage.

2. The City may stop review and evaluation of a proposal at any time at the City's sole discretion and may reject an Unsolicited Proposal at any time for any reason whatsoever.

3. The City will determine at this initial stage of review whether it will proceed using procurement through competitive sealed bidding as defined in the VPPA or procedures developed by the City that are consistent with procurement of other than professional services through competitive negotiation as defined in the VPPA. Following this determination, the City will issue a public notice that solicits competing Unsolicited Proposals.

4. After reviewing an Unsolicited Proposal and any competing Unsolicited Proposals submitted during the notice period, the City may determine (a) not to proceed further with any proposal, (b) to proceed to the detailed phase of review with the original proposal, (c) to proceed to the detailed phase with a competing proposal, or (d) to proceed to the detailed phase with multiple proposals.

E. Format for Submissions at the Detailed Stage

1. If the City decides to proceed to the detailed phase of review with one or more Unsolicited Proposals, then the following information must be provided by the private entity unless waived by the City:

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- i. A topographical map (1:2,000 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 private entity to accommodate such crossings.
- iii. A statement and strategy setting out the plans for securing all necessary property. The statement must include the names and addresses, if known, of the current owners of the subject property as well as a list of any property the private entity intends to request the public entity 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 usage of the project, and assumptions about user fees, lease payments, and other service payments over the term of the interim or comprehensive agreement pursuant to Virginia Code § 56-575.9 or Virginia Code § 56-575.9:1 and the methodology and circumstances for changes to such user fees, lease payments, and other service payments over time.
- 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. A statement regarding the anticipated public reaction.
- ix. Demonstration of consistency with appropriate local comprehensive or infrastructure development plans or indication of the steps required for acceptance into such plans.
- x. Explanation of how the proposed project would impact local development plans of each affected jurisdiction.
- xi. Detailed analysis of the financial feasibility of the proposed project, including its impact on similar facilities operated or planned by the City. Include a detailed description of any financing plan proposed for the project, a comparison of that plan with financing alternatives that may be available to the City, and all underlying data supporting any conclusions reached in the analysis or the selection by the private entity of the financing plan proposed for the project.
- xii. Additional material and information as the City may request.

F. Review Fees

1. A review fee will be charged a private entity submitting an Unsolicited Proposal to the City, to cover the City's costs of processing, reviewing, and evaluating the proposal, including the cost to compare it to any competing proposals. Such costs include but are not limited to City staff time, the cost of any materials or supplies expended, and the cost of any outside advisors or consultants, including but not limited to attorneys, consultants, and financial advisors, used by the City in its sole discretion to

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assist in processing, reviewing, or evaluating the proposal. Such fees are intended to be in the amount necessary to cover the City's costs.

2. Such fees shall be imposed based on the reasonably anticipated costs to the City in accordance with the following schedule:

vi. *Initial fee.* Payment of an initial fee must accompany the submission of the Unsolicited Proposal to the City in order for the City to proceed with its review. The initial fee shall be no less than \$2,500 regardless of the anticipated total cost.

vii. *Additional fees.* Additional fees shall be imposed on and paid by the private entity throughout the processing, review, and evaluation of the Unsolicited Proposal if and as the City reasonably anticipates incurring costs in excess of the initial fee paid by the private entity. The City will notify the private entity 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 City will continue to process, review, and evaluate the proposal.

viii. *Reimbursement of excess fees paid.* In the event the total fees paid by the private entity exceed the City's total costs incurred in processing, reviewing, and evaluating the proposal, the City shall reimburse the difference. Otherwise, the City shall retain all fees paid.

V. PROPOSAL EVALUATION AND SELECTION CRITERIA

A. Analysis of costs and benefits.

1. Analysis regarding the specifics, advantages, disadvantages, and the long- and short-term costs of a request by a private entity for approval of a qualifying project shall be performed by employees of the City.

2. As an alternative or supplement to analysis by City employees under § V(A)(1), the City may engage the services of qualified professionals, which may include an architect, professional engineer, or certified public accountant, not otherwise employed by the responsible public entity, to provide independent analysis regarding the specifics, advantages, disadvantages, and the long- and short-term costs of any request by a private entity for approval of a qualifying project.

B. Procedure for Evaluation and Selection

The procedure for evaluation of proposals and selection of a proposal, if any, shall be (i) consistent with the PPEA and these Guidelines, and (ii) in accordance with the City's procurement procedures for review and selection of competitive sealed bids or competitive negotiation.

C. Public Hearing

The City shall hold a public hearing on the proposals during the proposal review process at least 30 days prior to entering into an interim or comprehensive agreement pursuant to Section VI of these Guidelines.

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D. Evaluation and Selection Factors

Some or all of the following matters may be considered in the evaluation and selection of PPEA proposals. However, the City retains the right at all times to reject any proposal at any time for any reason whatsoever.

1. *Qualifications and Experience.* Factors to be considered in either phase of the City's review to determine whether the private entity possesses the requisite qualifications and experience may include but are not necessarily limited to:

- i. Experience with similar projects.
- ii. Demonstration of ability to perform work.
- iii. Leadership structure.
- iv. Project manager's experience.
- v. Management approach.
- vi. Financial condition.
- vii. Project ownership.

2. *Project Characteristics.* Factors to be considered in determining the project characteristics may include but are not necessarily limited to:

- i. Project definition.
- ii. Proposed project schedule.
- iii. Operation of the project.
- iv. Technology; technical feasibility.
- v. Conformity to laws, regulations, and standards.
- vi. Environmental impacts.
- vii. Condemnation impacts.
- viii. State and local permits.
- ix. Maintenance of the project.

3. *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 are not necessarily limited to:

- i. Cost and cost benefit to the City.
- ii. Financing and the impact on the debt or debt burden of the City.
- iii. Financial plan.
- iv. Estimated cost.
- v. Life-cycle cost analysis.
- vi. The identity of any third party that will provide financing for the project and the nature and timing of their commitment.

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4. *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 are not necessarily limited to:

- i. Community benefits.
- ii. Community support or opposition, or both.
- iii. Public involvement strategy.
- iv. Compatibility with existing and planned facilities.
- v. Compatibility with local, regional, and state economic development efforts.

VI. COMPREHENSIVE AGREEMENT

A. Review and Approval of Comprehensive Agreement by Common Council

Prior to acquiring, designing, constructing, improving, renovating, expanding, equipping, maintaining, or operating any qualifying project, a selected private entity shall enter into a comprehensive agreement with the City as provided by the PPEA. Any such comprehensive agreement, and any amendment thereto, must be approved by the Common Council for the City of Winchester before it is entered into on behalf of the City.

In considering any comprehensive agreement, the Common Council shall determine whether the project serves the public purpose of the PPEA, and whether (i) there is a public need for or benefit derived from the qualifying project of the type the private entity proposes as a qualifying project, (ii) the estimated cost of the qualifying project is reasonable in relation to similar facilities; and (iii) the private entity's plans will result in the timely development or operation of the qualifying project.

B. Interim Agreement.

Prior to or in connection with the negotiation of the comprehensive agreement, the City may enter into an interim agreement, upon approval by the Common Council for the City of Winchester, with the private entity proposing the development or operation of the qualifying project. Such interim agreement may (i) permit the private entity to commence activities for which it may be compensated relating to the proposed qualifying project, including, but not limited to, project planning and development, design and engineering, environmental analysis and mitigation, survey, and ascertaining the availability of financing for the proposed facility or facilities; (ii) establish the process and timing of the negotiation of the comprehensive agreement; and (iii) contain any other provisions related to any aspect of the development or operation of a qualifying project that the parties may deem appropriate.

C. Contents of Comprehensive Agreement.

As provided by the PPEA, the terms of the comprehensive agreement shall include but not be limited to:

1. Delivery of maintenance, performance and payment bonds or letters of credit in connection with any acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project, in the forms and amounts satisfactory to the City.

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2. Review and approval of plans and specifications for the qualifying project by the City. This shall not be construed as requiring the private entity to complete design of a qualifying project prior to execution of a comprehensive agreement.
3. The right of the City to inspect the qualifying project to ensure that the private entity's activities are acceptable to the City and in accordance with the provisions of the comprehensive agreement.
4. Maintenance of a policy or policies of liability insurance or self-insurance in from and amount satisfactory to the City and reasonably sufficient to insure coverage of tort liability to the public and employees and to enable the continued operation of the qualifying project.
5. Monitoring of the practices of the operator by the City to ensure proper maintenance.
6. Reimbursement to be paid to the City for services provided by the City;
7. Filing by the private entity of appropriate financial statements on a periodic basis.
8. Policies and procedures governing the rights and responsibilities of the City 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 City and the transfer or purchase of property or other interests of the operator by the City;
9. Providing for such user fees, lease payments, or service payments, if any, as may be established from time to time by agreement of the parties, which shall be the same for persons using the facilities under like conditions and shall not materially discourage use of the qualifying project. Classifications according to reasonable categories for assessment of user fees may be made.
10. Requiring a copy of any service contract to be filed with the City and providing that a schedule of the current user fees or lease payments shall be made available by the operator to any member of the public upon request.
11. The terms and conditions under which the City may contribute financial resources, if any, for the qualifying project.
12. Any other provisions required by applicable law or agreed to by the parties.