

# Thomas Jefferson Planning District Commission

## Guidelines For the Public-Private Education and Infrastructure Act of 2002

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***Guidelines Regarding Requests Made Pursuant to the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA)***

## **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 Thomas Jefferson Planning District Commission ("TJPDC" or "Commission"), 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 a qualifying project pursuant to the PPEA until the responsible public entity has first 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 TJPDC Board.

### **I. GENERAL PROVISIONS**

#### **A. Definitions**

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

#### **B. Proposals**

1. Pursuant to Section Va. Code §56-575.4, a proposal to provide a qualifying project to TJPDC may be either solicited from private entities by TJPDC (a "Solicited Bid/Proposal") or delivered to TJPDC by a private entity on an unsolicited basis (an "Unsolicited Proposal").
2. The requirements for any particular Solicited Bid/Proposal shall be as specified in the solicitation by TJPDC 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 TJPDC by delivery of a complete proposal, together with any required initial review fee to its Executive Director, 401 E. Water Street, Charlottesville, Virginia 22902. Other requirements for an Unsolicited Proposal are set forth below in § IV of these Guidelines. A working group may be designated by the Executive Director to review and evaluate unsolicited proposals.
4. TJPDC 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

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with potential project participants.

**C. Affected Local Jurisdictions**

1. Any private entity requesting approval from, or submitting a proposal to TJPDC shall notify each affected local jurisdiction by furnishing a copy of its request or proposal to each affected local jurisdiction.
2. Each affected local jurisdiction that is not a responsible public entity for the respective qualifying project shall, within sixty days after receiving such notice, submit any comments it may have in writing on the proposed qualifying project to the responsible public entity and indicate whether the facility is compatible with the local comprehensive plan, local infrastructure development plans, the capital improvements budget, or other government spending plan. TJPDC shall give any such comments due consideration prior to entering a comprehensive agreement.

**II. 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 ("ITB") or Request for Proposal ("RFP"). Any proposal submitted pursuant to the PPEA that is not received in response to an ITB 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 and (b) proposals received in response to publicity by TJPDC concerning particular needs when it has not issued a corresponding ITB or RFP, even if TJPDC otherwise has encouraged the submission of proposals pursuant to the PPEA that address those needs.

TJPDC may use a two-part proposal process consisting of an initial conceptual stage (part 1) and a detailed stage (part 2). In such case, it shall set forth in the RFP the format and supporting information that is required to be submitted, consistent with the provisions of the PPEA.

**III. UNSOLICITED PROPOSALS**

The process for evaluating an Unsolicited Proposal consists of four steps. Upon receipt of an Unsolicited Proposal, the following steps will be used:

Step One: TJPDC will determine whether to accept it for consideration at the conceptual stage.

Step Two: If the proposal is accepted for consideration, TJPDC will give public notice of the Unsolicited Proposal.

Step Three: TJPDC 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

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consideration at the conceptual stage.

Step Four: TJPDC will carry out 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, TJPDC may discontinue its evaluation of any proposal at any time. If TJPDC determines that it is in the Commission's interest to do so with respect to any Unsolicited Proposal, it 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, TJPDC will determine whether to accept the Unsolicited Proposal for publication and conceptual-phase consideration, as described below. TJPDC will determine at this initial stage of review whether it will proceed using competitive sealed bidding or competitive negotiation procedures.
2. If TJPDC chooses to accept an Unsolicited Proposal for consideration, TJPDC shall make a copy of the Unsolicited Proposal available for public inspection, subject to any exemptions or confidentiality protections under Virginia law, including without limitation Va. Code §2.2- 3705.6(11), and shall give public notice of the proposal on its website and in such other forums as may be deemed advisable by TJPDC. In its notice, TJPDC shall include specific information regarding the timing, nature, and scope of the qualifying project and specify a reasonable period of time during which it will receive competing Unsolicited Proposals.

**B. Contents of an Unsolicited Proposal**

1. An Unsolicited Proposal must contain the information set forth in Va. Code §56-575.4(A) as amended. TJPDC reserves the right to request additional information and documents and to review proposals using a two-step process, with initial submittal of a more general proposal for conceptual review, to be followed by a more-detailed submission if requested by TJPDC.
2. In the event that an Unsolicited Proposal does not contain the required information, TJPDC may request a supplemental submission or may waive the information not provided. If waived, TJPDC reserves the right to request the additional information, or any other information, at any time during consideration.

**C. Review of Proposals**

1. Only proposals for qualifying projects, as defined in the PPEA, and those proposals that contain sufficient information for a meaningful evaluation, will be considered by the Commission for further review at the conceptual stage.
2. The Commission may stop review and evaluation of a proposal at any time at its sole

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discretion and may reject an Unsolicited Proposal at any time for any reason whatsoever.

3. The Commission may charge a reasonable fee to cover the costs of processing, reviewing and evaluating the request, including without limitation, reasonable attorney's fees and fees for financial, technical, and other necessary advisors or consultants, provided that it shall first provide proposers with notice of such fee and an opportunity to withdraw their proposal before incurring such fee.
4. After reviewing an Unsolicited Proposal and any competing Unsolicited Proposals submitted during the notice period, TJPDC may determine (a) not to proceed further with any proposal, (b) to proceed to a more detailed phase of review with the original proposal, (c) to proceed to a more detailed phase with a competing proposal, or (d) to proceed to negotiate and award a comprehensive agreement. TJPDC may engage in the preliminary discussion and negotiation of terms of a comprehensive agreement with one or more proposers during the notice period.

**IV. PROPOSAL EVALUATION AND SELECTION**

**A. Analysis of costs and benefits.**

1. TJPDC shall engage the services of qualified professionals, which may include an architect, professional engineer, or certified public accountant, not otherwise employed by the Commission, to provide independent analysis regarding the specifics, advantages, disadvantages, and the long and short term costs of any request by a private entity for approval of a qualifying project, unless the Director or her designee determines that such analyses will be carried out pursuant to subsection A.2.
2. As an alternative or supplement to the analysis under §V(A)(1), the Commission may determine that such analysis shall be performed by its employees.

**B. Procedure for Evaluation and Selection**

The procedure for evaluation of proposals and selection of a proposal, if any, shall be consistent with the PPEA and these Guidelines and in accordance with TJPDC's procurement procedures for review and selection of (i) competitive sealed bids or (ii) competitive negotiation for services other than "professional services" in the event that TJPDC determines that it is advantageous to TJPDC and the public based on the probable scope, complexity, or priority of the project; risk sharing including guaranteed cost or completion guarantees, added value or debt or equity investments proposed by the private entity; or an increase in funding, dedicated revenue source or other economic benefit that would not otherwise be available.

**C. Public Hearing**

TJPDC 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 V of

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these Guidelines.

**D. Evaluation and Selection**

In the event that TJPDC decides to utilize a competitive negotiation approach, it shall not be required to select the Proposal with the lowest price offer, and may evaluate Proposals based on such criteria as may be deemed reasonable by the Commission, including without limitation industry reputation, experience, financial capacity, proposed design, public benefits, schedule and timing, and overall project cost and funding sources.

**V. COMPREHENSIVE AGREEMENT**

**A. Review and Approval of Comprehensive Agreement by Commission**

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 TJPDC as provided by the PPEA. Any such comprehensive agreement, and any amendment thereto, must be approved by the Commission Board (the "Board") before it is entered into on behalf of TJPDC.

In considering any comprehensive agreement, the Commission 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, TJPDC may enter into an interim agreement, upon approval by the Commission, 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 such maintenance, performance and payment bonds or letters of credit as

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- may be required by Va. Code §2.2-4337 in connection with the development or operation of the qualifying project, in the forms and amounts satisfactory to TJPDC.
2. Review and approval of plans and specifications for the qualifying project by TJPDC. 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 TJPDC to inspect the qualifying project to ensure that the private entity's activities are acceptable to TJPDC 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 TJPDC 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 TJPDC to ensure proper maintenance.
  6. Reimbursement to be paid to TJPDC for services provided by it, if applicable.
  7. Filing by the private entity of appropriate financial statements on a periodic basis.
  8. Policies and procedures governing the rights and responsibilities of TJPDC 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 TJPDC and the transfer or purchase of property or other interests of the operator by TJPDC.
  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, if any, to be filed with TJPDC 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 TJPDC may contribute financial resources, if any, for the qualifying project.
  12. Any other provisions required by applicable law or agreed to by the parties.

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**VI. General Provisions**

- A. Any changes in the terms of a comprehensive agreement, as may be agreed upon by the parties from time to time, shall be added to the comprehensive agreement by written amendment.
- B. Any comprehensive agreement may provide for the development or operation of phases or segments of the qualifying project.
- C. In the event of a material default by the private entity, the responsible public entity may elect to assume the responsibilities and duties of the private entity of the qualifying project, and in such case, it shall succeed to all of the right, title and interest in such qualifying project, subject to any liens on revenues previously granted by the private entity to any person providing financing thereof.
- D. The responsible public entity may terminate, with cause, the interim or comprehensive agreement and exercise any other rights and remedies that may be available to it at law or in equity.
- E. The responsible public entity may make or cause to be made any appropriate claims under the maintenance, performance, or payment bonds; or lines of credit required by subsection A 1 of Va. Code §56-575.9.
- F. In the event the responsible public entity elects to take over a qualifying project pursuant to subsection A, the responsible public entity may develop or operate the qualifying project, impose user fees, impose and collect lease payments for the use thereof and comply with any service contracts as if it were the private entity. Any revenues that are subject to a lien shall be collected for the benefit of and paid to secured parties, as their interests may appear, to the extent necessary to satisfy the private entity's obligations to secured parties, including the maintenance of reserves. Such liens shall be correspondingly reduced and, when paid off, released. Before any payments to, or for the benefit of, secured parties, the responsible public entity may use revenues to pay current operation and maintenance costs of the qualifying project, including compensation to the responsible public entity for its services in operating and maintaining the qualifying project. The right to receive such payment, if any, shall be considered just compensation for the qualifying project. The full faith and credit of the responsible public entity shall not be pledged to secure any financing of the private entity by the election to take over the qualifying project. Assumption of operation of the qualifying project shall not obligate the responsible public entity to pay any obligation of the private entity from sources other than revenues.

**Adopted: 4-7-22**