TOWN OF HERNDON, VIRGINIA

ORDINANCE

AUGUST 11, 2015

Ordinance- Adopting the Public-Private Education Facilities and Infrastructure Act of 2002 updated Guidelines.

BE IT ORDAINED by the Council of the Town of Herndon that:

1. Section 30-330 In general, Herndon Town Code (2000), as amended, is amended and re-ordained as follow:

Sec. 30-330. In general.

(a) The town council adopts as its guidelines for implementation of the Public-Private Education Facilities and Infrastructure Act of 2002, VA. Code § 56-575.1, et seq. ("PPEA") those presented to the town council on August 11, 2015 and entitled "Town of Herndon Guidelines for Implementation of the Public-Private Education Facilities and Infrastructure Act of 2002, as amended – August 11, 2015". The guidelines are on file in the office of the town attorney.

(b) The town will follow these guidelines for any procurements under the PPEA that are initiated after August 11, 2015.

(c) The town council designates the town manager to serve as the point of contact to receive proposals submitted under the PPEA and to respond to inquiries regarding the PPEA.

2. This ordinance shall be effective on and after the date of its adoption.

This is certified to be a true and accurate copy of Ordinance 15-O-26 adopted at a legally convened meeting of the Town Council of the Town of Herndon on August 11, 2015.

Amanda Kertz

Amanda M. Kertz, Deputy Town Clerk

Attached for reference is a document titled the "Town of Herndon Guidelines for Implementation of the Public-Private Education Facilities and Infrastructure Act of 2002, as amended – August 11, 2015."

Town of Herndon

Guidelines for Implementation
of the
Public-Private Education Facilities and Infrastructure
Act of 2002, as amended

August 11, 2015

Attachment
15-O-26

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1. Guideline's Applicability

1.1 The Town of Herndon, Virginia, ("town") has adopted these guidelines to implement the Public-Private Education Facilities and Infrastructure Act of 2002, Va. Code §§ 56-575.1, et seq., as amended ("PPEA"). These Guidelines apply to all procurements under the PPEA conducted after the date of their adoption where the town is the "responsible public entity" within the meaning of Virginia Code §56-575.1.

1.2 The town manager and all employees of the town shall follow the PPEA and these guidelines in any PPEA procurement in which they are involved.

1.3 Any reference in these guidelines to actions to be taken by the "town", unless the reference is specifically to the "town council", includes actions by the town manager. The town manager may delegate his or her duties under these guidelines to members of town staff.

1.4 Any reference in these guidelines to "Agreement" means an agreement entered into between the town and a private entity pursuant to the PPEA and these guidelines.

2. Overview

2.1 The PPEA grants "responsible public entities" the authority to enter into public-private partnerships with private entities for the development of certain "qualifying projects" if the public entity determines, under criteria established by the PPEA, that such a project serves the public purpose. PPEA proposals are also subject to review by any "affected local jurisdiction" in which the "qualifying project" will be located.

2.2 Proposals for qualifying projects may either be solicited or unsolicited. PPEA procurements typically will be conducted as a two-phase process, first involving submission and evaluation of conceptual-phase proposals resulting in selection of certain proposers to submit detailed-phase proposals, and then submission and evaluation of detailed-phase proposals. If the purposes and requirements of the PPEA are met and the town council so elects, in its discretion, it will then select a detailed-phase proposal or proposals and enter into a "Agreement" for the project.

2.3 Individually-negotiated Agreements between private entities and the town, along with the PPEA and these guidelines, ultimately will define the respective rights and obligations of the parties for PPEA projects involving the town.

2.4 Although these guidelines provide guidance for application of the PPEA, the version of the PPEA that is in effect at the time the Agreement is executed is controlling in the event of any conflict.

3. Eligible Projects

3.1 A PPEA procurement may only be for a "qualifying project". The PPEA contains a broad definition of "qualifying project" that includes for example;

3.1.1 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;

3.1.2 A building or facility that meets a public purpose and is developed or operated by or for any public entity;

3.1.3 Improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity;

3.1.4 Utility and telecommunications and other communications infrastructure;

3.1.5 A recreational facility;

3.1.6 Technology infrastructure, including, but not limited to, telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services;

3.1.7 Any services designed to increase the productivity or efficiency of the responsible public entity through the use of technology or other means.

3.1.8 Any technology, equipment, or infrastructure designed to deploy wireless broadband services to schools, businesses, or residential areas;

3.1.9 Any improvements necessary or desirable to any unimproved locally- or state-owned real estate; or

3.1.10 Any solid waste management facility as defined in Virginia Code § 10.1-1400 that produces electric energy derived from solid waste.

3.2 The examples set forth herein are merely provided here for convenience. The definition of "qualifying project" in the PPEA as of the time in which the procurement is concluded by execution of an Agreement is controlling, and the version of the PPEA then in effect should be consulted to determine what is a "qualifying project."

4. General Provisions

4.1 Proposal Submission

4.1.1 A proposal for a PPEA "qualifying project" may be either solicited by the town or submitted by a private entity on an unsolicited basis. In either case, the proposal shall be clearly identified as a "PPEA Proposal". To be considered, one original and nine (9) copies of any unsolicited proposal must be submitted, along with the applicable fee, to Town Manager, Town of Herndon, 777 Lynn Street, Herndon, Virginia 20170-4602. Solicited proposals shall be submitted in accordance with the instructions in the applicable solicitation.

4.1.2 Proposers will be required to follow a two-part proposal submission process consisting of a conceptual phase and a detailed phase, as described herein. For unsolicited proposals, the conceptual phase of the proposal shall contain the information specified by paragraph 7.1 of these guidelines, and the detailed phase of the proposal shall contain the information specified at paragraph 7.2 of these guidelines. For solicited proposals, the solicitation and subsequent instructions by the town manager will prescribe the information that proposals shall contain.

4.1.3 Proposals should be prepared simply and economically. Solicited proposals should contain all information requested by the solicitation or subsequent instructions by the town manager. Unsolicited proposals should contain information specified by these guidelines and also should include a comprehensive scope of work and, if applicable, a financial plan for the project, containing enough detail to allow an analysis by the town manager of the feasibility of the proposed project. Any facility, building, infrastructure, or improvement included in a proposal shall be identified specifically or conceptually. The town manager may request, in writing, clarification of any submission.

4.1.4 Representations, information and data supplied in, or in connection with, proposals play a critical role in the competitive evaluation process and in the ultimate selection of a proposal by the town. Accordingly, as part of any proposal, the proposer shall certify that all representations, information and data provided in support of, or in connection with, its proposal are true and correct. Such certification shall be made by authorized individuals who are principals of the proposer and who have knowledge of the information provided in the proposal. In the event that material changes occur with respect to any representations, information or data provided for a proposal, the proposer shall immediately notify the town manager of the same.

4.2 Affected Jurisdictions

Under the PPEA, an "affected jurisdiction" is any county, city or town in which all or a portion of a qualifying project is located. Any private entity submitting a conceptual or detailed proposal to the town must provide any affected jurisdiction with a copy of the private entity's proposal by certified mail, express delivery or hand delivery. In the case of solicited proposals, such copy should be submitted to any affected jurisdiction to ensure its receipt at the time proposals are due to be submitted to the town. In the case of unsolicited proposals, such copy should be submitted to any affected jurisdiction to ensure its receipt within 5 business days after receiving notice from the town that the town has decided to accept the proposal pursuant to Section 6.1.1 hereof. Any affected jurisdiction shall have 60 days from the receipt of the proposal to submit written comments to the town and to indicate whether the proposed qualifying project is compatible with the jurisdiction's (i) comprehensive plan, (ii) infrastructure development plans, and (iii) capital improvements budget or other government spending plan. The town shall give consideration to comments received in writing within the 60-day period, and no negative inference shall be drawn from the absence of comment by an affected jurisdiction. The town may begin or continue its evaluation of any such proposal during the 60-day period for affected jurisdictions to submit comments.

4.3 Proposal Review Fees

4.3.1 The town manager will require payment of a review fee by a private entity submitting an unsolicited proposal to the town and by any private entities submitting competing proposals in response to the unsolicited proposal. Also, if the solicitation so indicates, the town manager may require payment of a review fee by any private entities submitting solicited proposals. Review fees are to cover the costs of processing, reviewing, and evaluating proposals, including the cost to compare a proposal to any competing proposals. Such costs include, but are not limited to, town staff time, the cost of any materials or supplies expended, the cost of meals and travel related to the review process, and the cost of any outside advisors or consultants, including but not limited to attorneys, design consultants, construction consultants, and financial advisors used by town in its sole discretion, to assist in processing, reviewing, or evaluating the proposal. Such fees generally will be in the amount necessary to completely cover all of the town's costs. All fees and additional fees shall be submitted in the form of a cashier's check payable to the Town of Herndon, Virginia.

4.3.2 Such fees should be imposed as follows:

4.3.2.1 Initial fee. Unless waived or otherwise directed by the town manager, payment of an initial fee must accompany the submission of the proposal to the town in order for the town to proceed with its review. The initial fee shall be one and one-

quarter percent (1.25%) of the reasonably anticipated total cost of the proposed qualifying project, but shall be no less than $2,000 nor more than $25,000, regardless of the anticipated total cost; provided, however, that the town manager, in his or her discretion, may specify a different initial fee amount in a Receipt of Unsolicited PPEA Proposal and Solicitation of Competing Proposals prepared under paragraph 6.1.2 of this policy or no fee or a different fee in a solicitation issued under paragraph 5 of this policy.

4.3.2.2 Additional fees. Additional fees shall be paid by proposers throughout the processing, review, and evaluation of the proposals, if and as the town manager requires, based upon costs in excess of initial review fees assessed that the town manager reasonably anticipates incurring. The town manager may impose additional fees on proposers selected for detailed-phase consideration as a condition of consideration of their detailed-phase proposals. The town manager will notify the proposers concerned of the amount of such additional fees. Proposers must promptly pay such additional fees before the town will continue to process, review, and evaluate the proposer's proposal. Unless otherwise specified by the town manager, additional fees for detailed-phase review will be one and one-quarter percent (1.25%) of the total cost of the proposed qualifying project, but will be no less than $5,000 nor more than $50,000. The town manager, in his or her discretion, may waive additional fees or require lower additional fees.

4.3.2.3 Reimbursement of excess fees paid. If the total fees paid by proposers for a phase of a PPEA procurement exceed the total costs incurred in processing, reviewing, and evaluating proposals for that phase, then the town shall reimburse the proposers the difference on a reasonable, pro rata basis. Otherwise, the town may retain all fees paid

4.4 Virginia Freedom of Information Act

4.4.1 Generally, proposal documents submitted by private entities to the town are subject to the Virginia Freedom of Information Act ("VFOIA"). In accordance with VFOIA, such documents are releasable if requested, except to the extent that they contain (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336, *et seq.*); (ii) financial records of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (iii) other information submitted by the private entity, where, if the records were made public prior to the execution of an Agreement, the financial interest or bargaining position of

the town or private entity would be adversely affected. Once an Agreement has been entered into, and the process of bargaining of all phases or aspects of the Agreement is complete, the town shall make the procurement records available upon request, in accordance with Virginia Code §§ 2.2-4342 and § 56.575.17.D-F.

4.4.2 In order for the records specified in clauses (i), (ii) and (iii) of 4.4.1 to be excluded from release pursuant to the Virginia Freedom of Information Act, the private entity shall make a written request to the town that (a) invokes such exclusion upon submission of the data or other materials for which protection from disclosure is sought; (b) identifies with specificity the data or other materials for which protection is sought; and (c) states the reasons why protection is necessary. In addition, the proposer must clearly mark each page of its proposal that it contends is not subject to disclosure under the VFOIA with the legend "Confidential – Not Releasable under VFOIA." The town may only protect information excluded from release by Va. Code § 2.2-3705.6.11 and 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.

4.4.3 The town manager shall determine whether a private entity's request to exclude documents from disclosure pursuant to 4.4.2 is necessary to protect the trade secrets or financial records of the private entity. To protect other records submitted by the private entity from disclosure, the town manager shall determine whether public disclosure prior to the execution of an Agreement would adversely affect the financial interest or bargaining position of the town or private entity. The town manager shall make a written determination of the nature and scope of the protection to be afforded under these guidelines and the PPEA. Once a written determination is made by the town manager, the records afforded protection under 4.4.1 through 4.4.3 shall continue to be protected from disclosure when in the possession of the town and any affected jurisdiction to which such records are provided by the town.

4.4.4 Nothing in this 4.4 shall be construed to authorize the withholding of (a) procurement records as required to be made available by Va. Code §56-575.17; (b) information concerning the terms and conditions of any Agreement, service contract, lease, partnership, or any agreement of any kind entered into by the town 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 project.

4.4.5 Once an Agreement has been entered into, the town shall make the procurement records available upon request, in accordance with Virginia Code § 56-575.17. However, the following, if properly designated by the private entity under this Section 4.4 as "Confidential-Not Releasable under VFOIA" are not considered procurement records: (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act, Va. Code §§ 59.1-336, et. seq.; and (ii) financial records, including balance sheets or financial statements of the private entity that are not generally available to the public through regulatory disclosure or otherwise. Further, costs estimates relating to a proposed procurement transaction prepared by or for the town shall not be made available for public inspection.

4.4.6 Any inspection of procurement records under these guidelines will be subject to reasonable restrictions to ensure the security and integrity of the records.

4.4.7 Except as reasonably necessary for the town, staff and consultants to review proposals, the town promises to maintain the confidentiality of confidential proprietary information that is provided to it by a private entity pursuant to a proposal for procurement under these guidelines if the private entity follows all the steps required by paragraph 4.4. of these guidelines to designate the information as confidential proprietary information excluded from disclosure under VFOIA, and if the information is, in fact, information that is properly exempt from release under VFOIA. The town manager shall take appropriate action to protect the confidentiality of such information from any disclosure beyond whatever disclosure is reasonably necessary for the town, affected jurisdictions, staff, and outside consultants having a need to know the information to carry out the procurement. Despite the town's sincere intent to honor this promise of confidentiality, nothing contained herein shall constitute a waiver of sovereign immunity, a consent to suit, or a contractual undertaking, and it is a condition of submitting proposals that no cause of action, in contract or otherwise, shall arise against the town for any failure to maintain confidentiality of information.

4.4.8 Any information in a proposal that becomes incorporated into an Agreement with the proposer submitting it, such as by becoming an exhibit, shall become a public record releasable under VFOIA upon execution of the Agreement.

4.5 Use of Public Funds

Virginia constitutional and statutory requirements as they apply to appropriation and expenditure of public funds apply to any Agreement entered into under the PPEA. Accordingly, the processes and procedural requirements associated with the expenditure or obligation of public funds should be incorporated into planning for any PPEA project, and any PPEA

procurement should comply with town fiscal policies. Virginia constitutional and statutory restrictions that apply to the town regarding expenditures of public funds shall be deemed to be incorporated into any Agreement into which the town enters pursuant to the PPEA and to condition the town's obligations thereunder.

4.6 Applicability of Other Laws

Nothing in the PPEA shall affect the duty of the town or any of its employees, or agents to comply with all other applicable law; provided, however, that the applicability of the Virginia Public Procurement Act (the "VPPA") is as set forth in paragraph 10 of these guidelines.

5. Solicited Bids/Proposals

5.1 The town manager may invite bids or proposals from private entities to acquire, design, construct, improve, renovate, expand, equip, maintain or operate qualifying projects. The town manager may use a two-part process consisting of an initial conceptual phase and a detailed phase. The town manager will set forth in the solicitation the format and supporting information that is required to be submitted, consistent with the provisions of the PPEA and these guidelines. Notwithstanding any provision in these guidelines to the contrary, the town manager may vary the requirements for proposal format and content from those in Section 7.

5.2 Prior to inviting any bids or proposals, the town shall determine pursuant to paragraph 10 of these guidelines whether to use procedures consistent with competitive sealed bidding or competitive negotiation of other than professional services, and if using competitive negotiation, indicate the justification, consistent with the PPEA and paragraph 10 of these guidelines, for proceeding in that manner, and the evaluation criteria to be used to evaluate proposals.

5.3 The solicitation will 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 solicitation will be posted on the town's website or posted on the Commonwealth electronic procurement website. The solicitation will also contain or incorporate by reference other applicable terms and conditions, including any unique capabilities or qualifications that will be required of the private entities submitting proposals. Pre-proposal conferences may be held as deemed appropriate by the town manager.

5.4 Initial (conceptual) proposals received in response to a solicitation by the town shall be posted by the town within 10 days after their acceptance by posting them or of a summary of them and the location where copies of the proposals are available for public inspection on the town's website or

on the Virginia Department of General Service's web-based electronic procurement site, commonly known as eVa, or both. The town may also publish in a newspaper of general circulation where the qualifying project will be performed a summary of the proposals and the location where copies of the proposals are available for public inspection. The town may, in its discretion, post proposals by other means as well.

5.5 Subject to exclusions from disclosure in 4.4., at least one copy of each of the proposals shall be made available for public inspection. Unless otherwise agreed by the town and the private entity submitting a proposal, portions of the proposal properly designated pursuant to 4.4 and containing trade secrets, financial records, or other records excluded from disclosure by Va. Code § 2.2-3705.6.11 and these guidelines shall not be made available for public inspection.

5.6 The town will receive comments from the public on any proposals. Comments should be in writing and directed to the town manager's designee. Comments will be accepted after the proposals have been received, and a public comment period of at least 30 days will be allowed before entry into any Agreement. The town shall hold a public hearing or hearings on proposals at least 30 days prior to entering into an Agreement.

5.7 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.

5.8 After reviewing conceptual proposals, the town may determine:

5.8.1 Not to proceed further with any proposal,

5.8.2 To proceed to the detailed phase of review with multiple proposals, or

5.8.3 To proceed to the detailed phase with a single proposal if a finding is made that the proposer submitting it is the only fully qualified proposer or is clearly more highly qualified than the other proposers.

5.9 Receipt of Public Comments/Hearings

The town will receive comments from the public on any proposals. Comments should be in writing and directed to the town manager. Comments will be accepted after the proposals have been received and a public comment period of at least 30 days will be allowed before entry into any Agreement. the town shall hold a public hearing or hearings on proposals at least 30 days prior to entering into an Agreement.

6. Unsolicited Proposals

The PPEA permits the town to receive and evaluate unsolicited proposals from private entities to acquire, design, construct, improve, renovate, expand, equip, maintain, or operate a qualifying project.

The town may publicize its needs and may encourage or notify interested parties to submit 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. Proposals received as a result of the town receiving an unsolicited proposal and then publishing a Notice of Receipt of Unsolicited Proposal will also be treated as unsolicited proposals.

To ensure that the town receives the best value for any qualifying project, the town will seek and encourage competing unsolicited proposals.

6.1 Decision to Accept and Consider Unsolicited Proposal; Notice

6.1.1 Upon receipt of any unsolicited proposal or group of proposals and payment of any required fee by the proposer or proposers, the town will determine whether to accept the unsolicited proposal for publication of notice and conceptual-phase consideration. If the town determines not to accept the proposal and not to proceed to publication of notice and conceptual-phase consideration, the town will return the proposal, together with all fees and accompanying documentation, to the proposer.

6.1.2 If the town chooses to accept an unsolicited proposal for conceptual-phase consideration, the town shall:

6.1.2.1 Determine pursuant to paragraph 10 of these guidelines whether to use procedures consistent with competitive sealed bidding or competitive negotiation of other than professional services, and if using competitive negotiation, indicate the justification, consistent with the PPEA and paragraph 10 of these guidelines, for proceeding in that manner, and the evaluation criteria to be used to evaluate the unsolicited proposal and competing unsolicited proposals;

6.1.2.2 Determine what if any conditions that the town will authorize the town manager to place upon the proposer and any competing proposers beyond those contained in these guidelines for going forward with the unsolicited proposal and for receiving competing unsolicited proposals;

6.1.2.3 Have the town manager (i) prepare a short document entitled "Notice of Receipt of Unsolicited Proposal" for purposes of publication, and (ii) prepare a lengthier document entitled

"Receipt of Unsolicited PPEA Proposal and Solicitation of Competing Proposals" that will not be published but will be available upon request.

a. The Notice of the Receipt of Unsolicited Proposal shall state that the town (i) has received and accepted an unsolicited proposal under the PPEA, (ii) intends to evaluate the proposal, (iii) may negotiate an Agreement with the proposer based on the proposal, and (iv) will accept for simultaneous consideration any competing proposals that comply with these guidelines and the PPEA. The notice shall include a summary of the proposal and state the location where the proposal is available for public inspection. The notice shall indicate that conditions have been imposed upon proposers for proceeding to the initial conceptual phase and inform them how to obtain the Receipt of Unsolicited PPEA Proposal and Solicitation of Competing Proposals containing the conditions and evaluation criteria for the procurement.

b. Within 10 days of acceptance of the unsolicited proposal, the town manager shall post the Notice of Receipt of Unsolicited Proposal on the town's web site or on the Virginia Department of General Service's web-based electronic procurement site, commonly known as eVa, or both, for a period of not less than 45 days. The town manager may also publish the same notice at least once in one or more newspapers or periodicals of general circulation in the County of Fairfax, Virginia, to notify the public and any persons that may be interested in submitting competing unsolicited proposals, with the first such publication to occur at least 45 days before competing proposals are due. Competing proposals may be submitted to the town manager during the period specified in the notice following the publication required above.

c. The Receipt of Unsolicited PPEA Proposal and Solicitation of Competing Proposals shall contain the following information and shall be provided to prospective competing proposers and members of the public on request:

   (i) The instructions, terms and conditions applicable to the procurement;

(ii) A summary of the project proposed in the unsolicited proposal that is more detailed than the summary in the Notice of Receipt of unsolicited proposals.

(iii) The evaluation criteria to be used for the procurement (which should be approved by the town);

(iv) Instructions for obtaining any portions of the unsolicited proposal that are releasable; and

(v) Such other instructions and information as the town manager deems reasonable and desirable.

d. Copies of unsolicited proposals are available to the public, upon request, pursuant to the Virginia Freedom of Information Act ("VFOIA"), except as exempted from release under the PPEA and VFOIA.

6.2 Competing Proposals

Competing proposals shall be posted by the town within 10 days after their receipt by posting on the town's website or on the Virginia Department of General Services central electronic website of a summary of the proposals and the location where copies of the proposals are available for public inspection. The town may also publish in a newspaper of general circulation where the qualifying project will be performed a summary of the proposals and the location where copies of the proposals are available for public inspection. In addition, the town may, in its discretion, post proposals by other means deemed appropriate by the town.

6.3 Availability of Proposals for Public Inspection

Subject to exclusions from disclosure in 4.4., at least one copy of each of the proposals shall be made available for public inspection. Unless otherwise agreed by the town and the private entity submitting a proposal, portions of the proposal properly designated pursuant to 4.4 and containing trade secrets, financial records, or other records excluded from disclosure by Va. Code 2.2-3705.6.11 shall not be made available for public inspection.

6.4 Initial Review at the Conceptual Stage

6.4.1 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. Content and format requirements for proposals at the conceptual stage are found at Section 7.1.

6.4.2 After reviewing the original proposal and any competing unsolicited proposals submitted during the notice period, the town may determine:

6.4.2.1 Not to proceed further with any proposal,

6.4.2.2 To proceed to the detailed phase of review with the original proposal,

6.4.2.3 To proceed to the detailed phase with a competing proposal, or

6.4.2.4 To proceed to the detailed phase with multiple proposals.

However, the town may not proceed to the detailed phase with only one proposal 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.

6.5 Receipt of Public Comments/Hearings

The town will receive comments from the public on any proposals, both unsolicited and competing. Comments should be in writing and directed to the town manager. Comments will be accepted after the proposals have been received and a public comment period of at least 30 days will be allowed before entry into any Agreement. The town shall hold a public hearing or hearings on proposals at least 30 days prior to entering into an Agreement.

7. Proposal Preparation and Submission

7.1 Proposal Content and Format for Submissions at the Conceptual Stage

The town manager may generally require that proposals at the conceptual stage contain information in the following areas: (1) qualifications and experience, (2) project characteristics, (3) project financing, but only if public financing is unavailable or potentially less advantageous, (4) project benefit and compatibility, and (5) any additional information as the town manager may reasonably request. Conceptual-phase proposals should include an executive summary of the proposal at the beginning of the proposal. An unsolicited proposal shall include an executive summary not designated as "Confidential-Not Releasable under VFOIA" that describes the proposed qualifying project sufficiently so that potential competitors can reasonably formulate meaningful competing proposals from a review of the summary and publicly-available information. Unless otherwise indicated in the solicitation or Receipt of Unsolicited PPEA Proposal and Solicitation of Competing Proposals, as applicable, conceptual-phase proposals should contain the information indicated

below in the format indicated below unless otherwise indicated by the town manager:

7.1.1 Qualifications and Experience

7.1.1.1 Identify the legal structure of the private entity making the proposal. Identify the organizational structure for the project, the management approach, and how each participant in the structure fits into the overall team. If the private entity that would be signing any Agreement would be a corporation, limited liability company, limited partnership, or an entity formed especially for the project, and if the proposer is relying at all on the past experience, name, or financial statements of any other person or entity to show the private entities' capabilities and responsibility, state what guaranty of performance will be provided by such other persons or entities.

7.1.1.2 Describe the experience of the entities making the proposal, the key principals and project managers involved in the proposed project including experience with projects of comparable size and complexity, including prior experience bringing similar projects to completion on budget and in compliance with design, land use, service and other standards. Describe past safety performance and current safety capabilities. Describe the past technical performance history on recent projects of comparable size and complexity, including disclosure of any legal claims relating to such projects. Describe the length of time in business, business experience, public sector experience, and other engagements. Include the identity of any firms that will provide design, construction and completion guarantees and warranties, and a description of such guarantees and warranties.

7.1.1.3 For each firm or major subcontractor that will be utilized in the project, provide a statement listing the firm's prior projects and clients for the past 3 years and contact information for same (name, address, telephone number, e-mail address). If a firm has worked on more than ten (10) projects during this period, it may limit its prior project list to ten (10), but shall first include all projects similar in scope and size to the proposed project and, second, it shall include as many of its most recent projects as possible. Each firm or major subcontractor shall be required to submit all performance evaluation reports or other documents, which are in its possession evaluating the firm's performance during the preceding three years in terms of cost, quality, schedule maintenance, claims, change orders, lawsuits, safety and other matters relevant to the successful project development, operation, and completion.

7.1.1.4 Provide the names, prior experience, addresses, telephone numbers and e-mail addresses of persons within the firm or who will be directly involved in the project or who may be contacted for further information.

7.1.1.5 Provide the current or most recent financial statements of the firm (audited financial statements to the extent available), and if the firm is a joint venture, limited liability company, partnership or entity formed specifically for this project, provide financial statements (audited if available) for the firm's principal venturers, members, partners, or stockholders that show that the firm or its constituents have appropriate financial resources and operating histories for the project.

7.1.1.6 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 (Va. Code § 2.2-3100, et seq.).

7.1.1.7 Identify the proposed plan for obtaining sufficient numbers of qualified workers in all trades or crafts required for the project.

7.1.1.8 For each firm or major subcontractor that will perform construction and/or design activities, provide an accurately completed Commonwealth of Virginia Department of General Services (DGS) Form 30-168.

7.1.2 Project Characteristics

7.1.2.1 Provide a description of the project, including the conceptual design. Describe the proposed project in sufficient detail so that type and intent of the project, the location, and the communities that may be affected are clearly identified.

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

7.1.2.3 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.

7.1.2.4 Identify any anticipated adverse social, economic, environmental and transportation impacts of the project measured against the Town's, County's or other affected jurisdiction's comprehensive land use plan and applicable ordinances and design standards. Specify the strategies or actions to mitigate known impacts of the

project. Indicate if an environmental and archaeological assessment has been completed.

7.1.2.5 Identify the projected positive social, economic, environmental and transportation impacts of the project measured against the town's, County's or other affected jurisdiction's comprehensive land use plan and applicable ordinances and design standards.

7.1.2.6 Identify the proposed schedule for the work on the project, including sufficient time for the town's review and the estimated time for completion.

7.1.2.7 Identify contingency plans for addressing public needs in the event that all or some of the project is not completed according to projected schedule.

7.1.2.8 Propose allocation of risk and liability, and assurances for timely completion of the project.

7.1.2.9 State assumptions related to ownership, legal liability, law enforcement and operation of the project and the existence of any restrictions on the town's use of the project.

7.1.2.10 Provide information relative to phased openings of the proposed project.

7.1.2.11 Describe any architectural, building, engineering, or other applicable standards that the proposed project will meet.

7.1.3 Project Financing

7.1.3.1 Provide a preliminary estimate and estimating methodology of the cost of the work by phase, segment (e.g., design, construction, and operation), or both.

7.1.3.2 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, including any anticipated debt service costs. The operational plan should include appropriate staffing levels and associated costs based upon the town's adopted operational standards. Include any supporting due diligence studies, analyses, or reports.

7.1.3.3 Include a list and discussion of assumptions underlying all major elements of the plan. Assumptions should include all fees associated with financing given the recommended financing approach, including but not limited to, underwriter's discount,

placement agent, legal, rating agency, consultants, feasibility study and other related fees. A complete discussion or interest rate assumptions should be included given current market conditions. Any ongoing operational fees should also be disclosed, as well as any assumptions with regard to increases in such fees and escalator provision to be required in the Agreement.

7.1.3.4 Identify the risk factors and methods for dealing with these factors. Describe methods and remedies associated with any financial default.

7.1.3.5 Identify any local, state or federal resources that the proposer contemplates requesting for the project along with an anticipated schedule of resource requirements. Describe the total commitment, if any, expected from governmental sources and the timing of any anticipated commitment, both one-time and on-going.

7.1.3.6 Clearly describe the underlying support and commitment required by the town under your recommended plan of finance. Include your expectation with regard to the town providing its general obligation or moral obligation backing.

7.1.3.7 Identify any dedicated revenue, source or proposed debt or equity investment on behalf of the private entity submitting the proposal.

7.1.4 Project Benefit and Compatibility

7.1.4.1 Identify community benefits, including the economic impact the project will have on the local community in terms of amount of tax revenue to be generated for the town or other affected jurisdiction, the number jobs generated for area residents and level of pay and fringe benefits of such jobs, and the number and value of subcontracts generated for area subcontractors.

7.1.4.2 Identify any anticipated public support, as well as any anticipated government support (including that in any affected jurisdiction), for the project.

7.1.4.3 Explain the strategy and plans, including the anticipated timeline that will be carried out to involve and inform the general public, business community, and governmental agencies in areas affected by the project.

7.1.4.4 Describe any anticipated significant benefits to the community, including anticipated benefits to the economic, social,

environmental, transportation, Comprehensive Plan, etc., and whether the project is critical to attracting or maintaining competitive industries and businesses to the town or other affected jurisdiction.

7.1.4.5 Describe the project's compatibility with the comprehensive plan applicable to the town (including related environmental, land use and facility standards ordinances, where applicable), infrastructure development plans, transportation plans, the capital improvements plan and capital budget or other government spending plan.

7.1.5 Any additional information as the town manager may reasonably request

7.2 Proposal Content and 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, along with an executive summary of the proposal at its beginning, should be provided by the private entity unless waived by the town manager:

7.2.1 A topographical map (1:2,000 or other appropriate scale) depicting the location of the proposed project.

7.2.2 Conceptual site plan indicating proposed location and configuration of the project on the proposed site;

7.2.3 Conceptual (single line) plans and elevations depicting the general scope, appearance and configuration of the proposed project;

7.2.4 Detailed description of the proposed participation, use and financial involvement of the town. Include the proposed terms and conditions for the project,

7.2.5 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.

7.2.6 Information relating to the current plans for development of facilities that are similar to the qualifying project being proposed by the private entity in any affected jurisdiction;

7.2.7 A statement and strategy setting out the plans for securing all necessary property and/or easements. 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 proposer intends to request the town or affected jurisdiction to condemn.

7.2.8 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 along with a record of any prior defaults for performance.

7.2.9 A total life-cycle cost, including maintenance, specifying methodology and assumptions of the project or projects including major building systems (e.g., electrical, mechanical, etc.), 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 using town adopted service levels and standards.

7.2.10 A detailed discussion of assumptions about user fees or rates, lease payments and other service payments, and the methodology and circumstances for changes, and usage of the projects over the useful life of the projects.

7.2.11 Identification of any known government support or general public support for the project or financing thereof. Government or public support should be demonstrated through resolution of official bodies, minutes of meetings, letters, or other official communications.

7.2.12 Demonstration of consistency with appropriate town and/or affected jurisdiction comprehensive plans (including related environmental, land use and facility standards ordinances, where applicable), applicable zoning ordinances or regulations, infrastructure development plans, transportation plans, the capital improvement plan and capital budget, or indication of the steps required for acceptance into such plans, ordinances, or regulations.

7.2.13 Explanation of how the proposed project would impact the town's or affected jurisdictions' development plans.

7.2.14 Description of an ongoing performance evaluation system or database to track key performance criteria, including but not limited to, schedule, cash management, quality, worker safety, change orders, and legal compliance.

7.2.15 Identification of any known conflicts of interest or other factors 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 (Va. Code § 2.2-3100, et seq.).

7.2.16 Acknowledgement of conformance with Sections 2.2–4367 through 2.2-4377 of the Code of Virginia, the Ethics in Public Contracting Act.

7.2.17 Additional material and information as the town manager may reasonably request.

8. Proposal Evaluation And Selection Criteria

8.1 Manner of Evaluation and Use of Outside Professionals

Unless the town council directs a different manner of evaluation in writing, evaluations of proposals shall be by such persons or group or committee of persons as the town manager may designate, subject to such review as the town council may direct. Evaluations of proposals shall include, without limitation, analysis of the proposals' specifics, advantages, disadvantages, long-term costs, and short-term costs, using the evaluation criteria specified for the procurement. The town shall engage the services of qualified professionals not employed by the town, which may include an architect, professional engineer, certified public accountant, or other consultant, to provide an independent analysis as part of the evaluation. Notwithstanding the preceding sentence, if the town determines that such analysis of proposals will be performed by town staff, the town need not engage such an outside professional.

8.2 Evaluation Criteria

Evaluation criteria for proposals and their relative importance should be specified in the solicitation, or Receipt of Unsolicited PPEA Proposal and Solicitation of Competing Proposals, as applicable, for the procurement concerned. Evaluation criteria may include the following factors, among others: (1) price; (2) the proposed cost of the qualifying facility; (3) the general reputation, industry experience and capability of the private entity; (4) the proposed design of the qualifying project; (5) the eligibility of the facility for accelerated selection, review, and documentation timelines under these guidelines; (6) local citizen and government comments; and (7) benefits to the public. If the evaluation criteria are not specified in the solicitation or Receipt of Unsolicited PPEA Proposal and Solicitation of Competing Proposals, then the criteria in the preceding sentence along with following items, and the specified information required under 7.1 and 7.2 above, should be considered in the evaluation and selection of such PPEA proposals:

8.3 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 include, the following:

8.3.1 Experience, training, and preparation with similar projects;

8.3.2 Demonstration of ability to perform work;

8.3.3 Demonstrated record of successful past performance, including timeliness of project delivery, compliance with plans and specifications, quality of workmanship, cost-control, lack of excessive claims, change orders, and litigation, and project safety;

8.3.4 Demonstrated conformance with applicable laws, codes, standards, regulations, and agreements on past projects;

8.3.5 Leadership structure;

8.3.6 Project manager's experience;

8.3.7 Management approach;

8.3.8 Project staffing plans, the skill levels of the proposed workforce, and the proposed safety plans for the project;

8.3.9 Financial condition;

8.3.10 Project ownership; and

8.3.11 Efforts to facilitate participation of small businesses and businesses owned by women and minorities in the project.

8.3.12 Willingness to assume full responsibility for design and intent of project design, including but not limited to, willingness to use design-build method of project delivery.

8.4 Project Characteristics

Factors to be considered in determining the project characteristics include, along with the specified information required under 7.1 and 7.2 above, the following:

8.4.1 Project definition;

8.4.2 Proposed project schedule;

8.4.3 Operation of the project;

8.4.4 Technology; technical feasibility;

8.4.5 Conformity to State, County, town, or affected jurisdiction laws, regulations, and standards;

8.4.6 Environmental impacts;

8.4.7 Condemnation impacts;

8.4.8 State and local permits; and

8.4.9 Maintenance of the project.

8.5 Project Financing

The town reserves the right to select its own finance team, source and financing vehicle in the event any project is financed through the issuance of obligations that are deemed to be tax-supported debt, or if financing such project may impact debt rating or financial position. The decision as to whether to use the financing plan contained in any proposal (whether solicited or unsolicited) is at the town's sole discretion.

Factors to be considered in determining whether the proposed project financing allows access to the necessary capital, at the lowest practical cost include, along with the specified information required under 7.1 and 7.2 above, the following:

8.5.1 Cost and cost benefit to the town;

8.5.2 Financing and the impact on the debt or debt burden of the town;

8.5.3 Financial plan including overall feasibility and reliability of plan; default implications; operator's past performance with similar plans and similar projects; degree to which operator has conducted due diligence investigation and analysis of proposed financial plan and results of any such inquiries or studies.

8.5.4 Estimated cost; including financing source, operating costs, etc., and

8.5.5 Life-cycle cost analysis.

8.6 Project Benefit and Compatibility

Factors to be considered in determining the proposed project's compatibility with the town's, affected jurisdiction's or regional comprehensive or development plans include, along with the specified information required under 7.1 and 7.2 above, the following:

8.6.1 Community benefits; including the economic impact the project will have on the town in terms of amount of tax revenue to be generated for the town, the number jobs generated for area residents and level of pay and fringe benefits of such jobs, and the number and value of subcontracts generated for area subcontractors.

8.6.2 Community support or opposition, or both;

8.6.3 Public involvement strategy;

8.6.4 Compatibility with existing and planned facilities;

8.6.5 Compatibility with town, County, regional, and state economic development efforts; and

8.6.6 Compatibility with the town's, County's and affected jurisdiction's land use, environmental and transportation plans.

9. Agreement

9.1 Prior to acquiring, designing, constructing, improving, renovating, expanding, equipping, maintaining, or operating the qualifying project, the selected proposer shall enter into an Agreement with the town. **The town will only enter into an Agreement if the town council determines that the qualifying project to be done pursuant to the agreement serves the public purpose of the PPEA under the criteria of Va. Code § 56-575.4C.** Each Agreement shall define the rights and obligations of the town and the selected proposer(s) with regard to the project.

9.2 The terms of the Agreement shall be tailored to address the specifics of the project and shall include, if applicable, but not be limited to:

9.2.1 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, including, without limitation, bonds or letters of credit that comply with Virginia Code § 2.2-4337 for components of the qualifying project that include construction;

9.2.2 The review and approval of plans and specifications for the qualifying project by the town;

9.2.3 The rights of the town to inspect the qualifying project to ensure compliance with the Agreement;

9.2.4 The maintenance of a policy or policies of liability insurance or self-insurance reasonably sufficient to insure coverage of the project and the tort liability to the public and employees and to enable the continued operation of the qualifying project;

9.2.5 The monitoring of the practices of the private entity by the town to ensure proper maintenance, safety, use and management of the qualifying project;

9.2.6 The terms under which the private entity will reimburse the town for services provided;

9.2.7 The policy and procedures that will govern the rights and responsibilities of the town and the private entity in the event that the Agreement is terminated or there is a material default by the private entity, including without limitation, the conditions governing assumption of the duties and responsibilities of the private entity by the town and the transfer or purchase of property or other interests of the private entity by the town;

9.2.8 The terms under which the private entity will file appropriate financial statements on a periodic basis.

9.2.9 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 the same for persons using the facility under like conditions and that will not materially discourage use of the qualifying project;

9.2.9.1 A copy of any service contract shall be filed with the town.

9.2.9.2 A schedule of the current user fees or lease payments shall be made available by the private entity to any member of the public upon request.

9.2.9.3 Classifications according to reasonable categories for assessment of user fees may be made.

9.2.10 The terms and conditions under which the town will contribute financial resources, if any, for the qualifying project;

9.2.11 If the private entity is a limited purpose or "shell" entity, such as a limited liability company, limited partnership, or corporation, that lacks its own substantial resources and operating history and that will depend on its members, partners, shareholders or others for resources to perform, then guarantees of performance by such entity's principal members, etc., or other similar arrangements that adequately assure performance.

9.2.12 The procedures at paragraph 12 of these guidelines; and

9.2.13 Other requirements of the PPEA or provisions that the town determines serve the public purpose of the PPEA.

9.3 After the town has negotiated an Agreement with a private entity and decided to make award to the private entity, but prior to entry into such Agreement, the town shall:

9.3.1 Post a summary of the Agreement and the location where a copy of the Agreement is available for public inspection. Posting shall be in the same manner as the posting of initial (conceptual) proposals specified by 5.4. A copy of the Agreement shall be made available for public inspection.

9.4 Any Agreement, and any amendments thereto shall first be approved by the town council and then executed in writing by persons having the authority to do so. Entry into any Agreement shall, as a condition precedent to its effectiveness, be approved by the town council.

9.5 Parties submitting proposals understand that representations, information and data supplied in support of, or in connection with proposals play a critical role in the competitive evaluation process and in the ultimate selection of a proposal by the town. Accordingly, as part of the agreement, the proposing private entity shall certify that all representations, information and data provided in support of, or in connection with, a proposal are true and correct. Such certification shall be made by an authorized individual who is a principal of the private entity and who has knowledge of the information provided in the proposal. In the event that material changes occur with respect to any representations, information or data provided for a proposal, the proposing private entity shall immediately notify the town of same. Any violation of this section shall give the town the right to terminate the Agreement, withhold payment or other consideration due, and seek any other remedy available at law or in equity.

9.6 As required by Va. Code § 56-575.9.F. and 56-575.18, when the town enters into an Agreement pursuant to the PPEA, a copy should be filed with the Auditor of Public Accounts electronically within 30 days thereafter. A record reflecting this filing should be kept in the procurement file.

10. Adoption of Certain Portions of the Virginia Public Procurement Act and Use of Competitive Negotiation and Competitive Sealed Bidding Procedures.

10.1 The provisions of the Virginia Public Procurement Act, Va. Code § 2.2-4300, et seq., shall not apply to procurements by the town under the PPEA except as follows:

10.1.1 The definitions of and procedures for "competitive sealed bidding" and "competitive negotiation" of other than professional services in Va. Code §§ 2.2-4301, 2.2-4302.1 and 2.2-4302.2 are hereby adopted.

10.1.2 The provisions of Va. Code §2.2-4310 shall apply to all PPEA procurements.

10.1.3 The provisions from the Ethics in Public Contracting Act, Va. Code § 2.2-4367 through 2.2-4377, shall apply to all PPEA procurements.

10.1.4 The provisions of Va. Code §2.2-4343 are adopted as additional authority for parts of this policy.

10.2 Before accepting any unsolicited proposal or before issuing any solicitation for proposals, the town will determine whether it will proceed to evaluate proposals using either:

10.2.1 "Competitive sealed bidding", as defined in Va. Code § 2.2-4301 and described in Va. Code § 2.2-4302.1; or

10.2.2 "Competitive negotiation" of other than professional services as defined in Va. Code § 2.2-4301 and described in Va. Code § 2.2-4302.2 .

10.3 The town may proceed using competitive negotiation procedures described in 10.2.2 above only if it first 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 would otherwise not be available.

11. Terms and Conditions on Proposal Submission

11.1 The following terms and conditions apply to 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 to them:

11.1.1 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 an 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 Agreement(s) into which it enters should it choose to enter into any such Agreement(s).

11.1.2 The town will not be responsible for any expenses whatsoever incurred by a proposer, including without limitation, in preparing and submitting a proposal in any form, or in engaging in presentations, discussions, or negotiations in any manner.

11.1.3 Proposers may be required to make an oral presentation or oral presentations of their proposal in Herndon, Virginia, at their own expense. The town manager may request the presence of proposers' representatives

from their development, financial, architectural, engineering and construction teams at these presentations. The town manager will schedule the time and location for these presentations. By submitting its proposal, the proposer agrees to make these representatives reasonably available in Herndon, Virginia.

11.1.4 The town reserves the right of the town manager to waive any informalities with respect to any proposal submitted.

11.1.5 The town reserves the right to accept or reject any and all proposals received, in whole or in part, without explanation, 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 proposers.

11.2 The provisions of this paragraph 11 of these guidelines shall apply automatically to all PPEA procurements by the town.

11.3 The town will not discriminate against a proposer because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment.

12. Disputes, Claims, and Other Matters Arising Under or Relating to any Agreement

12.1 The following provisions apply to any disputes, claims or other matters (collectively "Claim" or "Claims") arising under or relating to any Agreement entered into pursuant to the PPEA by the town, on the one hand ("Owner"), and any private entity ("Contractor"), on the other hand. Claims between the parties arising under or relating to an Agreement shall only be resolved as follows:

12.1.1 The Contractor shall give Owner written notice of any Claim for any additional compensation, damages, or delay within ten (10) days of the beginning of the occurrence of the event leading to the Claim being made and shall submit the actual Claim and any supporting data within thirty (30) days after the occurrence giving rise to the Claim ends. The written notice shall be a document addressed to the Owner that clearly states Contractor's intention to make a Claim and the occurrence involved and shall be transmitted in a manner to ensure prompt receipt by Owner. The Claim must be certified under oath as true and correct by a principal of Contractor. The "occurrence" means the condition encountered in the field giving rise to the Claim and not a later dispute about payment for that condition. Claims of time impacts will be resolved as they occur, and no claims of cumulative impacts or deferral of claimed impacts will be allowed. Complete satisfaction of subparagraph 12.1 of these guidelines is an absolute prerequisite for Contractor to pursue a Claim arising under or

relating to an agreement. Failure by Contractor to satisfy this paragraph 12.1 shall constitute a waiver by Contractor of the Claim for which such failure occurs. A Claim by Owner is not subject to the requirements of this 12.1.1.

12.1.2 The parties shall first endeavor to resolve any Claims between them through direct negotiations, and if such direct negotiations fail, by non-binding mediation conducted pursuant to the Rules of the American Arbitration Association, with the site of the mediation being Herndon, Virginia. Should the Claim remain unresolved for the shorter of (i) following negotiation and mediation, or (ii) more than 90 days after mediation is requested by a party, either party may proceed in accordance with 12.1.3 below. However, nothing in this paragraph 12.1.2 excuses Contractor from compliance with all the provisions of 12.1.1.

12.1.3 If the procedures of 12.1.2 have been followed, but, more than 90 days have passed since a party has invoked mediation, and the Claim remains unresolved, then either party may institute an action in the Circuit Court of the County of Fairfax, Virginia, or if the subject or amount in controversy is within its jurisdiction, the General District Court of the County of Fairfax, Virginia, and may thereafter pursue all available appeals in Virginia state courts, to the extent they have jurisdiction.

12.1.4 Nothing in paragraphs 12.1.2 and 12.1.3 shall prevent a party from seeking temporary injunctive or other temporary equitable relief in the Circuit Court of the County of Fairfax if circumstances so warrant.

12.1.5 In the event of any Claim arising, Contractor shall continue its performance diligently during its pendency as if no Claim had arisen. During the pendency of any Claim, Contractor shall be entitled to receive payments for non-disputed items, subject to any right of set-off by Owner.

12.1.6 Paragraph 12 of these guidelines and the provisions of the applicable Agreement supersede any right at common law by Contractor for a claim of material breach or for rescission of any Agreement.

12.1.7 Paragraph 12 of these guidelines shall be deemed automatically incorporated by reference into any Agreement entered into by the town pursuant to the PPEA.

12.1.8 For purposes of this Paragraph 12, "Owner" means the town, and "Contractor" means the private entity or entities entering into the Agreement, as well as Contractor's successors, assigns, or others claiming through Contractor.

12.2 The town manager may further supplement this Paragraph 12 of these guidelines with the terms and conditions of any Agreements.

13. Protests of PPEA Procurements

The following are the exclusive procedures for contesting or challenging (protesting) (a) the terms or conditions of any solicitation of proposals by the town pursuant to the PPEA, (b) nonselection of a PPEA proposal for further consideration, and (c) the selection of any PPEA proposal for entry into an Agreement or the entry into an Agreement under the PPEA:

13.1 Any protest to any term or condition of a solicitation must be made in writing and delivered to the town manager so it is received by the town manager before proposals are due under the solicitation. Otherwise, any such protest shall be deemed to be waived.

13.2 A protest of a town decision not to select a PPEA proposal for further consideration may only be made by the entity who submitted the proposal at issue. A protest of a town decision to select a PPEA proposal for entry into an Agreement or to enter into an Agreement may only be made by an entity who submitted a proposal for the procurement at issue and who was reasonably likely to have its proposal accepted but for the town's decision. Protests shall only be granted if (1) the protester has complied fully with this paragraph 13 and there has been a clear violation of law, this policy, or mandatory terms of the solicitation that clearly prejudiced the protestor in a material way, or (2) a statute requires voiding of the decision.

13.3 Any entity desiring to protest a town decision not to select a PPEA proposal for further consideration, to select a PPEA proposal for entry into an Agreement, or to enter into an agreement shall submit the protest in writing and deliver it so that it is received by the town manager not later than 5 business days after announcement of the decision. Otherwise any such protest shall be deemed to be waived.

13.4 The town manager shall issue a written decision on a protest within 10 days of its receipt by the town manager.

13.5 If the protest is denied, the protester may only appeal the denial or otherwise contest or challenge the procurement by then filing suit in the Circuit Court for the County of Fairfax and serving the town with such suit within 10 days of such denial. Otherwise, the protester's right to appeal the denial or to otherwise contest or challenge the procurement shall be deemed to be waived.

13.6 The exclusive relief allowed if a protest is granted is to void the decision being protested. Under no circumstances will any monetary relief or directed award of an Agreement be allowed.

13.7 Strictly following these procedures shall be a mandatory prerequisite for any challenge of any nature to a decision by the town relating to terms and

conditions of a PPEA solicitation, nonselection of a PPEA proposal for further consideration, selection of a PPEA proposal, or entry into an agreement. A failure to follow all these procedures strictly shall constitute a waiver of any right to challenge judicially a town decision (a) as to terms or conditions in a PPEA solicitation, (b) not to select a PPEA proposal for further consideration, (c) to select a PPEA proposal, or (d) to enter into an Agreement.

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

14.1 Normal expected timelines for selecting proposals and negotiating an Agreement are set out at Appendices A and B hereto. Appendix A sets out the normal expected timeline for a PPEA procurement solicited by the town. Appendix B sets out the normal expected timeline for a PPEA procurement initiated by an unsolicited proposal.

14.2 For projects deemed a priority by the town, the portion of timelines related to selection, review, and documentation may be accelerated.

14.3 The town should generally adhere to these timelines in PPEA procurements, but the town may deviate from them when it is in its interests to do so.

15. Proposers' Agreement to Terms and Conditions of This Policy

The town manager 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. Proposers shall submit with any proposal the certification that is set out in Appendix C hereto.

APPENDIX A

Projected Procurement Timeline for town PPEA Procurement Solicited By Request for Proposals ("RFP")

Activity Number	Date	Activity	Guidelines Reference
1	D	Initiate procurement under PPEA. Decide whether to use competitive negotiation and issue RFP.	5.1 & 5.2
2	D+45	Receive Conceptual-Phase Proposals	
3	D+50	Determine whether proposers' requests to exclude information from disclosure are necessary	4.4.3
4	D+55	Post Conceptual-Phase Proposals. Receive public comments	
5	D+105	Evaluate Conceptual-Phase Proposals and decide whether to proceed. If proceeding under PPEA, select proposers to invite to submit, and invite submission of Detailed-Phase Proposals	
6	D+135	Receive Detailed-Phase Proposals	
7	D+140	Determine whether proposers' requests to exclude information from disclosure are necessary	4.4.3
8	D+180	Evaluate Detailed-Phase Proposals, conduct interviews, and select proposers for negotiation of	

Activity Number	Date	Activity	Guidelines Reference
		Agreement	
9	D+225	Negotiate Agreement. Select awardee	
10	D+245	Post Agreement for public	
11	D+280	Obtain approvals by Town Council	

Note: Considerable planning before Step 1 is required to determine the town's needs for a project and to state them in an RFP.

APPENDIX B

Projected Procurement Timeline for town PPEA Procurement Initiated By Unsolicited Proposal

Activity Number	Date	Activity	Guidelines Reference
1	D	Receipt of Unsolicited Proposal	6.1.1
2	D+45	Decide whether to accept Unsolicited Proposal, whether to use competitive negotiation, what conditions to impose, and whether the proposer's request to exclude information from disclosure is necessary	6.1.2.1 and 6.1.2.2, 4.4.3
3	D+55	Prepare Notice of Unsolicited Proposal, Receipt of Unsolicited Proposal, and Post and Publish	6.1.2.3
4	D+115	Receive Competing Conceptual-Phase Proposals	6.2
5	D+120	Determine whether proposers' requests to exclude information from disclosure are necessary	4.4.3
6	D+125	Post Competing Conceptual-Phase Proposals. Receive public comments on unsolicited and competing Conceptual-Phase Proposals.	
7	D+175	Evaluate Conceptual-Phase Proposals, decide whether to proceed. If proceeding, select proposers to invite to submit, and invite	6.2.2

Activity Number	Date	Activity	Guidelines Reference
		submission of Detailed-Phase Proposals	
8	D+205	Receive Detailed-Phase Proposals	
9	D+220	Determine whether proposers' requests to exclude information from disclosure are necessary	4.4.3
10	D+250	Evaluate Detailed-Phase Proposals, conduct interviews, and select proposers for negotiation of Agreement	
11	D+295	Negotiate Agreement, select awardee	
12	D+315	Post Agreement for public	
13	D+350	Obtain approval from town council	

APPENDIX C

Proposer's Certification

Proposer's Name: _____

_____

Proposer's Address

_____

_____

_____

Proposer's:

Telephone No.: _____

Facsimile No.: _____

E-mail Address: _____

Proposer's or Proposer's Contractor's Virginia Class A General Contractor's License Number (if applicable): _____

Proposer's or Proposer's Architect's and Engineer's Virginia Registration Numbers (if applicable): _____

After first being placed under oath, I hereby certify that I have authority to submit this proposal on behalf of the proposer whose name appears above, that I am a principal of the proposer, that the proposer hereby agrees to all of the terms and conditions in the Town of Herndon Guidelines for Implementation of the Public-Private Education Facilities and Infrastructure Act of 2002, as amended, that neither the proposer nor any member of its team or their principals is currently suspended or debarred from public contracting by any federal, state or local government entity, that I have taken reasonable steps to ascertain the accuracy of all the information contained in this proposal and this certification, and that the information in this proposal and certification is accurate to the best of my knowledge or information and belief.

_____
Signature

_____
Printed/Typed Name

_____
Title (Principal of Proposer)

Commonwealth of Virginia :
: to wit
County/City of _____ :

On _____, 20__, _____, (same name as above) appeared before me, and after satisfying me of his/her identity and after being placed under oath, swore to the truthfulness of the above statement.

_____
Notary Public

My commission expires: _____

(If applicable) the proposer acknowledges receipt of the following agenda:

Addendum No.: _____ Dated: _____
Addendum No.: _____ Dated: _____
Addendum No.: _____ Dated: _____
Addendum No.: _____ Dated: _____