



**PPEA Subcommittee
of the
Virginia Freedom of Information Advisory Council
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AVAILABILITY OF PROCUREMENT RECORDS UNDER THE VPPA AND THE PPEA

To provide context for those unfamiliar with the laws governing procurement by state and local government, whether under the Virginia Public Procurement Act (VPPA) or the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA), the table below provides a comparison between these two acts as it relates to the stages of required public notice and/or availability of procurement records. Underscored language used in Appendix C of this document denotes draft language under consideration by the PPEA Model Guidelines Workgroup created pursuant to Chapter 865 of the 2005 Acts of Assembly (SB 1107).

RELATING TO:	VPPA	PPEA/PPTA
Statutory Authority	§ 2.2-4300 et seq.	§ 56-575.1 et seq. / § 56-556 et seq.
General provisions governing access to records	§ 2.2-4342 A	§ 56-575.16/ § 56-573.1. See also PPEA Model Guidelines
Solicited bids/proposals	§ 2.2-4301 Definition of "competitive negotiation and "competitive sealed bidding	Section III of PPEA Model Guidelines
Unsolicited proposals	n/a	See Section IV of PPEA Model Guidelines
Competitive sealed bidding	§ 2.2-4342 C	§ 56-575.16/ 55-573.1
Competitive negotiation	§ 2.2-4342 D	§ 56-575.16/ 55-573.1
Types of records: 1. Cost estimates 2. Proprietary records 3. Other records	1. § 2.2-4342 B 2. § 2.2-4342 F	1. § 2.2-3705.6 (11) 2. § 2.2-3705.6 (11)
Status of records if no agreement is entered into	§ 2.2-4342	Not specifically addressed.

APPENDIX A

Relevant Provisions of the Virginia Public Procurement Act (VPPA) (§ 2.2-4300 et seq.)

§ 2.2-4301 Definition of:

"Competitive negotiation"--...

Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of proposals by posting in a public area normally used for posting of public notices and by publication in a newspaper or newspapers of general circulation in the area in which the contract is to be performed so as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit proposals in response to the particular request. Public notice may also be published on the Department of General Services' central electronic procurement website and other appropriate websites. Effective July 1, 2002, publishing by state agencies, departments and institutions on the public Internet procurement website designated by the Department of General Services shall be required. In addition, proposals may be solicited directly from potential contractors.

"Competitive sealed bidding"--...

- Public notice of the Invitation to Bid at least 10 days prior to the date set for receipt of bids by posting in a designated public area, or publication in a newspaper of general circulation, or both. Public notice may also be published on the Department of General Services' central electronic procurement website and other appropriate websites. Effective July 1, 2002, posting by state agencies, departments and institutions on the public Internet procurement website designated by the Department of General Services shall be required. In addition, bids may be solicited directly from potential contractors. Any additional solicitations shall include businesses selected from a list made available by the Department of Minority Business Enterprise.
- Public opening and announcement of all bids received.
- Evaluation of bids based upon the requirements set forth in the invitation, which may include special qualifications of potential contractors, life-cycle costing, value analysis, and any other criteria such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose, which are helpful in determining acceptability.
- Award to the lowest responsive and responsible bidder. When the terms and conditions of multiple awards are so provided in the Invitation to Bid, awards may be made to more than one bidder.

§ 2.2-4342 A. Except as provided in this section, all proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection of any citizen,

or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

B. Cost estimates relating to a proposed procurement transaction prepared by or for a public body shall not be open to public inspection.

C. Any competitive sealed bidding bidder, upon request, shall be afforded the opportunity to inspect bid records within a reasonable time after the opening of all bids but prior to award, except in the event that the public body decides not to accept any of the bids and to reopen the contract. Otherwise, bid records shall be open to public inspection only after award of the contract.

D. Any competitive negotiation offeror, upon request, shall be afforded the opportunity to inspect proposal records within a reasonable time after the evaluation and negotiations of proposals are completed but prior to award, except in the event that the public body decides not to accept any of the proposals and to reopen the contract. Otherwise, proposal records shall be open to public inspection only after award of the contract.

E. Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records.

F. Trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a procurement transaction or prequalification application submitted pursuant to subsection B of § 2.2-4317 shall not be subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.); however, the bidder, offeror or contractor shall (i) invoke the protections of this section prior to or upon submission of the data or other materials, (ii) identify the data or other materials to be protected, and (iii) state the reasons why protection is necessary.

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APPENDIX B

Relevant Provisions of the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA) (§ 56-575.1 et seq.)

§ 56-575.16. Procurement.

The Virginia Public Procurement Act (§ 2.2-4300 et seq.) and any interpretations, regulations, or guidelines of the Division of Engineering and Buildings of the Department of General Services or the Virginia Information Technologies Agency, including the Capital Outlay Manual and those interpretations, regulations or guidelines ... shall not apply to this chapter. However, a responsible public entity may enter into a comprehensive agreement only in accordance with procedures adopted by it as follows:

1. A responsible public entity may enter into a comprehensive agreement in accordance with procedures adopted by it that are consistent with procurement through competitive sealed bidding as defined in § 2.2-4301 and subsection B of § 2.2-4310.

2. A responsible public entity may enter into a comprehensive agreement in accordance with procedures adopted by it that are consistent with the procurement of "other than professional services" through competitive negotiation as defined in § 2.2-4301 and subsection B of § 2.2-4310.
...

4. **A responsible public entity shall not proceed to consider any request by a private entity for approval of a qualifying project pursuant to subsection A of § 56-575.4 until the responsible public entity has adopted and made publicly available procedures that are sufficient to enable the responsible public entity to comply with this chapter. Such procedures shall: ...**

b. Provide for the posting and publishing of public notice of a private entity's request for approval of a qualifying project pursuant to subsection A of § 56-575.4 and a reasonable time period, determined by the responsible public entity to be appropriate to encourage competition and public-private partnerships pursuant to the goals of this chapter, such reasonable period not to be less than 45 days, during which the responsible public entity will receive competing proposals pursuant to that subsection.

Such procedures shall also require advertising the public notice in the Virginia Business Opportunities publication and posting a notice on the Commonwealth's electronic procurement website.

5. Once a comprehensive agreement has been entered into, and the process of bargaining of all phases or aspects of the comprehensive agreement is complete, a responsible public entity shall make available, upon request, procurement records in accordance with § 2.2-4342.

6. A responsible public entity that is a school board or a county, city or town may enter into a comprehensive agreement under this chapter only with the approval of the local governing body.

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Relevant Provisions of the PPEA Model Guidelines

Section II D. Freedom of Information:

Generally, proposal documents submitted by private entities are subject to the Virginia Freedom of Information Act (“FOIA”). In accordance with § 2.2-3705 A 56 of FOIA, such documents are releasable if requested, except to the extent that they relate to (i) confidential proprietary information submitted to the responsible public entity under a promise of confidentiality or (ii) memoranda, working papers or other records related to proposals if making public such records would adversely affect the financial interest of the public or private entity or the bargaining position of either party.

Subsection 56-575.4 G of the PPEA imposes an obligation on a public entity and any affected local jurisdiction to protect confidential proprietary information submitted by a private entity or operator. When the private entity requests that the public entity not disclose information, the private entity must (i) invoke the exclusion when the data or materials are submitted to the public entity or before such submission, (ii) identify the data and materials for which protection from disclosure is sought, and (iii) state why the exclusion from disclosure is necessary. A private entity may request and receive a determination from the public entity as to the anticipated scope of protection prior to submitting the proposal. The public entity is authorized and obligated to protect only confidential proprietary information, and thus will not protect any portion of a proposal from disclosure if the entire proposal has been designated confidential by the proposer without reasonably differentiating between the proprietary and non-proprietary information contained therein.

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

Once a comprehensive agreement has been entered into, and the process of bargaining of all phases or aspects of the comprehensive agreement is complete, a responsible public entity shall make available, upon request, procurement records in accordance with Section 2.2-434

Section III: The RFP should specify, but not necessarily be limited to, information and documents that must accompany each proposal and the factors that will be used in evaluating the submitted proposals. The RFP should be posted in such public areas as are normally used for posting of the public entity's notices, including the public entity's website. Notices should also be published in a newspaper or other publications of general circulation and advertised in *Virginia Business Opportunities* and posted on the Commonwealth's electronic procurement site.

The RFP should also contain or incorporate by reference other applicable terms and conditions, including any unique capabilities or qualifications that will be required of the private entities submitting proposals.

Section IV: A responsible public entity may publicize its needs and may encourage interested parties to submit unsolicited proposals subject to the terms and conditions of the PPEA. If the responsible public entity chooses to accept an unsolicited proposal for conceptual-phase consideration, it shall post a notice in a public area regularly used by the public entity for posting of public notices for a period of not less than 45 days. The responsible public entity shall also publish the same notice for a period of not less than 45 days in one or more newspapers or periodicals of general circulation in the jurisdiction to notify any parties that may be interested in submitting competing unsolicited proposals. In addition, the notice should also be advertised in *Virginia Business Opportunities* and on the Commonwealth's electronic procurement website.

The notice shall state that the public entity (i) has received and accepted an unsolicited proposal under the PPEA, (ii) intends to evaluate the proposal, (iii) may negotiate a an interim or comprehensive agreement with the proposer based on the proposal, and (iv) will accept for simultaneous consideration any competing proposals that comply with the procedures adopted by the public entity and the PPEA. The notice also shall summarize the proposed qualifying project or projects, and identify their proposed locations. Copies of unsolicited proposals shall be available upon request, subject to the provisions of FOIA and § 56-575.4 G of the PPEA.

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Source: *Virginia Freedom of Information Advisory Council, June 2005.*