

PUBLIC NOTICE AND ACCESS TO PROCUREMENT RECORDS UNDER THE VPPA, PPTA, AND 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), the Public-Private Transportation Act of 1995 (PPTA) or the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA), the table below provides a comparison between these acts as they relate to the stages of required public notice and/or availability of procurement records. Relevant provisions of the VPPA, PPTA, and PPEA are appended hereto.

Public Notice of, and Public Access to Procurement Records	VPPA	PPTA	PPEA
1. Public notice of proposed procurement action:	Yes	Yes	Yes
<u>Solicited bids/proposals:</u>			
When notice required--	<i>CSB</i> --10 days prior to date set for receipt of bids <i>CN</i> --10 days prior to date set for receipt of proposals	<i>CSB</i> --10 days prior to date set for receipt of bids <i>CN</i> --10 days prior to date set for receipt of proposals	<i>CSB</i> --10 days prior to date set for receipt of bids <i>CN</i> --10 days prior to date set for receipt of proposals
Method of notice--	<i>CSB</i> --Posting in public area OR in newspaper, or both. <i>CN</i> --Posting in a designated public area AND newspaper. State public bodies must also post on	<i>CSB</i> --Posting in public area OR in newspaper, or both. <i>CN</i> --Posting in a designated public area AND newspaper. State public bodies must also post on	<i>CSB</i> --Posting in public area OR in newspaper, or both. <i>CN</i> --Posting in a designated public area AND newspaper. State public bodies must also

<p><u>Unsolicited proposals:</u></p> <p>When notice required--</p> <p>Method of notice--</p>	<p>DGS website.</p> <p>Not applicable</p> <p>Not applicable</p>	<p>DGS website.</p> <p>90 days if no federal oversight; 120 days if federal oversight</p> <p>eVA</p>	<p>post on DGS website.</p> <p>Within a reasonable time after acceptance of unsolicited proposal, but not less than 45 days.</p> <p>Advertise in "VA Business Opportunities" and eVA</p>
<p>2. Exclusion for trade secret and proprietary records?</p>	<p>Yes, if "earmarked" upon submission.</p>	<p>Same. (Requirement for earmarking found in applicable FOIA exemption)</p>	<p>Same. (Requirement for earmarking found in applicable FOIA exemption)</p>
<p>3. Exclusion for cost estimates relating to a proposed procurement transaction prepared by or for a public body?</p>	<p>Yes</p>	<p>Yes</p>	<p>Yes</p>
<p>4. Preview rights by competitors?</p>	<p>Yes</p>	<p>No</p>	<p>No</p>
<p>5. Public access to procurement records (minus trade secrets and proprietary information).</p>	<p>After award of contract</p>	<p>After agreement entered into</p>	<p>After agreement entered into</p>
<p>6. Status of procurement records if no award</p>	<p>Closed</p>	<p>Closed</p>	<p>Closed</p>

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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APPENDIX C

Relevant Provisions of the Public-Private Transportation Act Of 1995 (PPTA) (§ 56-556 et seq.)

§ 56-573.1. Procurement.

The Virginia Public Procurement Act (§ 2.2-4300 et seq.) shall not apply to this chapter; however, a responsible public entity may enter into an interim or a comprehensive agreement only in accordance with guidelines adopted by it as follows:

1. A responsible public entity may enter into an interim or a comprehensive agreement in accordance with guidelines 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 an interim or a comprehensive agreement in accordance with guidelines 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. Such responsible public entity shall not be required to select the proposal with the lowest price offer, but may consider price as one factor in evaluating the proposals received. Other factors that may be considered include (i) the proposed cost of the qualifying transportation facility; (ii) the general reputation, qualifications, industry experience, and financial capacity of the private entity; (iii) the proposed design, operation, and feasibility of the qualifying transportation facility; (iv) the eligibility of the facility for priority selection, review, and documentation timelines under the responsible public entity's guidelines; (v) local citizen and public entity comments; (vi) benefits to the public; (vii) the private entity's compliance with a minority business enterprise participation plan or good faith effort to comply with the goals of such plan; (viii) the private entity's plans to employ local contractors and residents; (ix) the safety record of the private entity; (x) the ability of the facility to address the needs identified in the appropriate state, regional or local transportation plan by improving safety, reducing congestion, increasing capacity, and/or enhancing economic efficiency; and (xi) other criteria that the responsible public entity deems appropriate.

A responsible public entity shall proceed in accordance with the guidelines adopted by it pursuant to subdivision 1 unless it determines that proceeding in accordance with the guidelines adopted by it pursuant to this subdivision is likely to be

advantageous to the responsible public entity and the public, based on (i) the probable scope, complexity, or urgency of a project; (ii) risk sharing including guaranteed cost or completion guarantees, added value, or debt or equity investments proposed by the private entity; or (iii) an increase in funding, dedicated revenue source or other economic benefit that would not otherwise be available.

When the responsible public entity determines to proceed according to the guidelines adopted by it pursuant to this subdivision, it shall state the reasons for its determination in writing. If a state agency is the responsible public entity, the approval of the Secretary of Transportation shall be required as more specifically set forth in the guidelines before the comprehensive agreement is signed.

3. Interim or comprehensive agreements for maintenance or asset management services for a transportation facility that is a highway, bridge, tunnel or overpass, and any amendment or change order thereto that increases the highway lane-miles receiving services under such an agreement shall be procured in accordance with guidelines that are consistent with procurement through "competitive sealed bidding" as defined in § 2.2-4301 and subsection B of § 2.2-4310. Furthermore, such contracts shall be of a size and scope to encourage maximum competition and participation by agency prequalified contractors and otherwise qualified contractors.

4. The provisions of subdivision 3 shall not apply to maintenance or asset management services agreed to as part of the initial provisions of any interim or comprehensive agreement entered into for the original construction, reconstruction, or improvement of any highway pursuant to Chapter 22 (§ 56-556 et seq.) of Title 56.

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. Nothing in this section shall require that professional services be procured by any method other than competitive negotiation in accordance with the Virginia Public Procurement Act (§ 2.2-4300 et seq.).

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Source: Virginia Freedom of Information Advisory Council (November, 2005)