

## DISTRICT OF COLUMBIA OFFICE OF PUBLIC-PRIVATE PARTNERSHIPS

### NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Executive Director of the District of Columbia Office of Public-Private Partnerships (OP3), pursuant to the authority set forth the Public-Private Partnership Act of 2014, approved March 11, 2015 (D.C. Law 20-228, D.C. Official Code § 2-271.01 *et seq.*) (“P3 Act”) and the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*), hereby gives notice of the adoption, on an emergency basis, amendments to Chapter 48 (Public-Private Partnerships) of Title 27 (Contracts and Procurement) of the District of Columbia Municipal Regulations (27 DCMR).

This emergency and proposed rulemaking makes several changes to OP3’s procurement process, including:

- **Qualification Phase for Unsolicited Process:** Amendments to Section 4807 would allow OP3 to include a qualification phase as part of the request for alternative proposals procurement process. This would encourage more bidders, including small and local businesses, to participate by lowering barriers to entry for particularly large or complex projects. OP3 anticipates that higher competition will result in higher quality proposals and more competitive pricing that will benefit the District.
- **Alternative Technical Concepts:** New Section 4813 would give OP3 the ability to allow alternative technical concepts, which are deviations proposed by bidders from the District’s procurement requirements. The allowance of alternative technical concepts encourages innovative solutions to District project goals that can ultimately cost less and deliver equal or better outcomes than if a bidder met the original requirements of a procurement. The emergency and proposed rules include procedures for the submission and review of alternative technical concepts.
- Other changes in Sections 4808, 4810 and 4812 were made to clarify and simplify and make technical changes to the regulations.

This emergency rulemaking is necessary to protect the health, safety, and welfare of the District of Columbia. Without these rule changes, OP3 cannot proceed on several procurements for critical infrastructure assets that are in serious need of replacement or renovation.

The emergency rulemaking was adopted on January 5, 2018 and became effective on that date. Pursuant to Section 6(c) of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1206; D.C. Official Code § 2-505(c) (2012 Repl. & 2016 Supp.)), the emergency rules shall remain in effect for not longer than one hundred and twenty (120) days from the date of adoption, expiring on May 5, 2018, unless earlier superseded by publication of a Notice of Final Rulemaking.

The Executive Director of OP3 also gives notice of the intent to take final rulemaking action to adopt these proposed rules in not less than thirty (30) days after the date of publication of this notice in the *D.C. Register*.

**Chapter 48, PUBLIC-PRIVATE PARTNERSHIPS, in Title 27, CONTRACTS AND PROCUREMENT, of the DCMR is amended as follows:**

**Section 4807, UNSOLICITED PROPOSALS: REQUEST FOR ALTERNATIVE PROPOSALS AND COMPREHENSIVE EVALUATION, is amended to read as follows:**

**4807 UNSOLICITED PROPOSALS: REQUEST FOR ALTERNATIVE PROPOSALS AND COMPREHENSIVE EVALUATION**

4807.1 **Comprehensive Evaluation of Unsolicited Proposal:** If the result of the preliminary evaluation is favorable, the unsolicited proposal will enter the comprehensive evaluation phase.

4807.2 **Unsolicited Proposal Clarification:** During the comprehensive evaluation phase the DC OP3 may communicate with the proposer (hereinafter referred to as the “Original Unsolicited Proposer”) for clarification of the proposal. This process will not be an opportunity for changes to be made to the unsolicited proposal; only for clarification of proposal aspects to allow an evaluation by the DC OP3.

4807.3 **Notification of the Unsolicited Proposer:** The DC OP3 will notify the Original Unsolicited Proposer that the unsolicited proposal has been deemed favorable. The DC OP3 will also notify the proposer of the alternative proposals process outlined in § 4807.4 and of the proposer’s ability to submit a modified proposal as part of the process outlined in § 4807.7.

4807.4 **Public Notice and Alternative Proposal Process:**

- (a) The DC OP3 will publish the executive summary of the Original Unsolicited Proposer’s proposal and any non-proprietary aspects of the unsolicited proposal on the DC OP3 website. The DC OP3 will also publish notice in the DC Register and in any other publication or on any website that the DC OP3 deems appropriate.
- (b) As part of its publication of the unsolicited proposal, the DC OP3 will also publish a request for alternative proposals (“RFAP”) soliciting other private parties to submit alternative proposals. The timeline of the RFAP process, the requirements that alternative proposals must satisfy, the criteria by which proposals will be evaluated, and other relevant guidance for proposers will be included in the RFAP.

- (c) An RFAP may include a qualification phase through the issuance of an RFAP-Q when the DC OP3, in consultation with the Owner Agency(ies), determines that a qualification phase is in the best interests of the District. The qualification phase will determine which prospective alternative proposers will be authorized to submit responses to the RFAP, based on the prospective alternative proposers' qualifications to complete the project contemplated by the RFAP-Q.
- (d) If a qualification phase is utilized:
  - (1) The DC OP3 will invite prospective alternative proposers to respond in writing with a Statement of Qualifications ("SOQ") to complete the project. As part of the RFAP-Q, the DC OP3 will provide, at a minimum: a description of the proposed project; a description of the information and documents that must be included as part of an SOQ; the criteria to be used to evaluate each prospective alternative proposer; and a high-level description of the procurement process, including an indicative schedule.
  - (2) The DC OP3 and the Owner Agency(ies) may communicate with those prospective alternative proposers that submit an SOQ or require them to give one or more oral presentations to clarify their responses and answer questions that will aid in the understanding and evaluation of the responses.
  - (3) The DC OP3 may establish an evaluation committee to conduct the evaluation, or assist DC OP3 in its evaluation, of the responses to the RFAP-Q. The evaluation committee may establish subcommittees, which may include members who are not members of the committee, and engage advisors to provide advisory input in the evaluation process as the evaluation committee deems appropriate.
  - (4) For each prospective alternative proposer that submits an SOQ, the DC OP3 will determine if the prospective alternative proposer possesses qualifications appropriate for the P3 project, according to evaluation criteria established under subsection 4807.4(d)(1). The DC OP3 reserves the right to issue an RFAP to a short list of the prospective alternative proposers that were deemed to possess the qualifications appropriate for the P3 project, rather than issuing the RFAP to all prospective alternative proposers that were deemed to possess the qualifications appropriate for the P3 project.
  - (5) Each prospective alternative proposer that submits an SOQ will be required to pay the preliminary evaluation fee described in § 4806.3.

- (6) The Original Unsolicited Proposer must provide a response to the RFAP-Q in order for its unsolicited proposal (or an amended proposal authorized by § 4807.7) to be considered as part of the RFAP process. Regardless of the other evaluation criteria set forth in the RFAP-Q, the Original Unsolicited Proposer shall be deemed qualified if it meets the minimum requirements criteria set forth in the RFAP-Q, and there are no materially adverse changes to the key personnel, team members, financial condition, or other qualifications elements of its unsolicited proposal. If any qualifications elements of the Original Unsolicited Proposal change prior to the issuance of the RFAP-Q, the Original Unsolicited Proposer must provide notice of such change(s) in writing to DC OP3 according to the procedures described in the RFAP-Q. The DC OP3 shall determine whether (a) the change(s) to the Original Unsolicited Proposer's qualifications are material and (b) the proposed change(s) results in qualifications that are equal to or better than the qualifications of the Original Unsolicited Proposal. If the DC OP3 determines that the change(s) is materially adverse, the Original Unsolicited Proposer must submit an SOQ, which shall be evaluated according to the criteria of the RFAP-Q. The Original Unsolicited Proposer will not be required to pay an additional preliminary evaluation fee with its response to the RFAP-Q, even if it makes a material change to a qualification element of its unsolicited proposal.

4807.5 **Schedule:** The DC OP3 will allow alternative proposals to be submitted in response to the RFAP for at least thirty (30) days after the notice is published in the DC Register. In most cases, the response period will be longer than thirty (30) days in order to increase the competitive environment for the project. The response period will be expressly stated in the RFAP.

4807.6 **Requirements of Alternative Proposals:** All responses to the RFAP must meet all the requirements of an original unsolicited proposal as stated in § 4806. The requirements include the completion of the unsolicited proposal form and any other requirements included in the public notice and RFAP issued under § 4807.4.

Each alternative proposer will be required to pay the comprehensive evaluation fee described in § 4807.13.

4807.7 **Amended Submittals by the Original Unsolicited Proposer:** The Original Unsolicited Proposer must submit a response to the RFAP in order for its proposal to be considered as part of the RFAP process. The Original Unsolicited Proposer may submit its unsolicited proposal or an amended proposal based upon the RFAP. The amended proposal may only update the original proposal to the extent necessary to be responsive to additional or modified requirements or clarifications

about the project that DC OP3 has requested in the RFAP or to respond to project-specific scoring criteria; the amended proposal may not constitute a completely new proposal.

- 4807.8 **Comprehensive Evaluation:** After the end of the RFAP response period, the DC OP3 will evaluate the original unsolicited proposal, or amended original unsolicited proposal if one is submitted, and any alternative proposals.
- 4807.9 **Comprehensive Evaluation Criteria:** The DC OP3 will evaluate the original unsolicited proposal, or amended original unsolicited proposal if one is submitted, and any alternative proposals under the same criteria outlined in the RFAP, including the general criteria stated in § 4807.15.
- 4807.10 **Comprehensive Evaluation Period:** The DC OP3 will establish a time period for the comprehensive evaluation of the original unsolicited proposal, or amended original unsolicited proposal if one is submitted, and any alternative proposals. The time period will be shared with all proposers no more than ten (10) business days after the end of the RFAP response period. The DC OP3 may, at any time, revise the time period for review, as needed.
- 4807.11 **Proposer Presentations:** The DC OP3 and Owner Agency(ies) may communicate with proposers or require them to give one or more oral presentations to clarify their proposal and answer questions that will aid in the understanding and evaluation of the proposal.
- 4807.12 **Evaluation Committees:** The DC OP3 will evaluate all responses to an RFAP that are deemed to be responsive, meet the minimum requirements of the RFAP, and that are pre-qualified under § 4807.4, if applicable. The evaluation of proposals will be based on the criteria stated in the RFAP, including the general criteria stated in § 4807.15.

For most RFAPs, the evaluation of responses to an RFAP will be divided between two committees matching the two required packets outlined in the Guidelines. The two review committees will consist of:

- (a) **Technical Review Committee:** The technical review committee will review all technical aspects of the proposal, including proposed project scope, innovative use of technology, engineering and design, and operation and maintenance of the project. Members of this committee will in most cases include technical staff from the Owner Agency and technical staff from associated District agencies.
- (b) **Financial Review Committee:** The financial review committee will review all financial aspects of each proposal including financing to be provided by the private partner, federal sources, and external sources and any fiscal obligations of the District to the project as proposed. Members

of this committee will in most cases include financial staff from the Owner Agency, financial staff from associated District agencies, a representative from the Office of the Chief Financial Officer, and a representative from the Mayor's Office of Budget and Finance.

In some instances where the DC OP3 deems it appropriate, a single committee will review both technical and financial aspects of each proposal. This will be stated in the RFAP and separate packets for technical and financial aspects of proposals will not be required.

Employees of the DC OP3 and the Owner Agency(ies) may serve on both committees. The evaluation committee may establish subcommittees with members who are not members of the committee and engage advisors to provide input in the evaluation process as they deem appropriate.

4807.13 **Comprehensive Evaluation Review Costs:** The Original Unsolicited Proposer and any alternative proposers will be required to pay a comprehensive evaluation fee with their response to an RFAP. The fee will be set by the DC OP3 based on all direct costs reasonably anticipated by the DC OP3 for the comprehensive evaluation. The amount of the fee will be set forth in the RFAP. The Original Unsolicited Proposer must submit the fee to the DC OP3 by the end of the RFAP period (or with the submission of its amended proposal, if it submits an amended proposal). No unsolicited proposal or alternative proposal will be reviewed without payment of the Comprehensive Evaluation Review fee.

The comprehensive evaluation fees will be used to cover the costs of the comprehensive evaluation. If the fees paid to the DC OP3 exceed the DC OP3's total cost for the unsolicited review process, the DC OP3 will reimburse the remaining funds equally to all proposers at the end of the review period.

If an unsolicited proposer or alternative proposer does not wish to pay the comprehensive evaluation fee, it may withdraw its proposal without penalty.

4807.14 **Use of Unsolicited and Alternative Proposals:** Each unsolicited proposal and alternative proposal shall become the property of the District, and the DC OP3 and the District may use any information or concepts within such proposals for whatever purpose it deems appropriate.

4807.15 **Selection of a Preferred Bidder:** Based on the results of the evaluation committees, the DC OP3 will declare the proposer with the highest overall score the Preferred Bidder. The DC OP3 may also select a secondary bidder to be engaged in the event that an agreement is not reached between the District government and the Preferred Bidder. Unsolicited and alternative proposals will be reviewed under the criteria as stated in the RFAP, which may include:

- (a) Cost;

- (b) Delivery time;
- (c) Financial commitment required of public entities;
- (d) Capabilities, related experience, facilities, or techniques of the proposer or unique combinations of these qualities that are integral factors for achieving the proposal objectives;
- (e) Value-for-money and public sector comparator analysis of the proposal;
- (f) Innovative methods, approaches, or concepts demonstrated by the proposal;
- (g) Scientific, technical or socioeconomic merits of the proposal;
- (h) Potential contribution of the proposal to the mission of the District, including how the proposal benefits the public;
- (i) The proposal must not duplicate an existing infrastructure project or services in a competitive way nor closely resemble a pending competitive proposal for a P3 or other procurement; and
- (j) Other factors as the DC OP3 deems appropriate to obtain the best value for the District.

4807.16 **OCFO Certification:** Prior to commencement of negotiations with the Preferred Bidder, the Chief Financial Officer of the District of Columbia must also certify:

- (a) The availability of any funds, debts, or assets that the District will contribute to the project;
- (b) That no provision of the proposal would violate the District Anti-Deficiency Act of 2002; and
- (c) That the project is not likely to have a significant adverse impact on the District's bond ratings.

4807.17 **OAG Certification:** Prior to commencement of negotiations with the Preferred Bidder, the Attorney General of the District of Columbia must certify that:

- (a) Proper indemnifications, including project insurance and bonding are included in the proposal; and
- (b) There are no interstate compact issues if the project involves multiple jurisdictions.

4807.18 **Notice of Selection of Preferred and Secondary Bidders:** When a Preferred Bidder has been selected, the point of contact provided on the proposal will be notified by the DC OP3. If it has been determined that a secondary bidder will also be selected, that secondary bidder will also be notified. The DC OP3 will provide public notice of this selection and its intent to commence negotiations. Negotiations will only begin with the secondary bidder if negotiations have been terminated with the Preferred Bidder.

4807.19 **Communication during the Procurement Process:** While the DC OP3 encourages communication during the procurement process, the point of contact listed in the procurement documents will serve as the sole official coordinator of communication with the party making the inquiry. All official communication must be written. Communication during the procurement process that violates the communication policies set out in the procurement documents may result in penalties, including disqualification of a proposer.

4807.20 **Confidential Information Included as Part of an Unsolicited or Alternative Proposal:** The DC OP3 and Owner Agency understand the need for some information provided by private entities to remain confidential. In order to protect confidential or proprietary information, the proposer must identify those portions of its proposal, or other submitted materials, that it considers to be confidential or proprietary. For the confidential or proprietary information of a proposer to be exempt from public disclosure, the proposer must do all of the following when the proposal is submitted to the DC OP3:

- (a) Invoke exclusion on submission of the information or other materials for which protection is sought;
- (b) Identify, with conspicuous labeling, the data or other materials for which protection is sought;
- (c) State the reasons why protection is necessary; and
- (d) Fully comply with any applicable District law with respect to information that the proposer contends should be exempt from disclosure.

The DC OP3 will review information that a proposer designates as confidential or proprietary to determine if that designation is proper. Where the proposer cannot justify the protection of information, DC OP3 may ask the proposer to revise its proposal accordingly. If an agreement cannot be reached between the proposer and the DC OP3 regarding the designation of information as confidential or proprietary, the proposer may withdraw its proposal from the procurement and all unused fees paid by the proposer will be returned to the proposer. If an unsolicited proposal is rejected under section 4806.2 and 4806.4 or withdrawn by the proposer prior to the comprehensive evaluation period, the DC OP3 will



return all copies of the unsolicited proposal to the proposer and such proposals shall be confidential to the extent allowed by the Freedom of Information Act, including statutory exclusions that protect proprietary information among other things.

The DC OP3 and Owner Agency will not release or disclose any part of the proposal other than the executive summary and information required to be disclosed under §§ 109(b) and 114(a) of the P3 Act (D.C. Official Code §§ 2-273.04(b) and 2-273.09(a)) before the award of the P3 agreement and at the conclusion of any protest, appeal, or other challenge to the award, absent an administrative or judicial order requiring such a disclosure. After the final award of the P3 agreement the Freedom of Information Act shall apply to the proposal except for statutory exclusions such as proprietary information.

4807.21 **Termination of the Process:** The DC OP3 may terminate the unsolicited proposal procurement process at any time. In the event of such a termination, the DC OP3 will return the unused funds paid by unsolicited or alternative proposers for the comprehensive evaluation process equally to all proposers.

**Section 4808, PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS, is amended as follows:**

Paragraph 4808.13 is amended by striking the phrase “§ 4804.10” and inserting “§ 4804.11” in its place.

**Section 4810, RESERVED RIGHTS, is amended as follows:**

Paragraph 4810.1(g) is amended by striking the phrase “Guidelines” and inserting “rules and the Guidelines” in its place.

**Section 4812, RULES TO ENSURE ETHICAL CONDUCT, is amended as follows:**

Paragraph 4812.5(a) is amended by striking the phrase “guidelines” and inserting “rules” in its place.

Paragraph 4812.5(b) is amended by striking the phrase “guidelines” and inserting “rules” in its place.

Paragraph 4812.5(c) is amended by striking the phrase “guidelines” and inserting “rules” in its place.

**A new section 4813, ALTERNATIVE TECHNICAL CONCEPTS, is added to read as follows:**

**4813 ALTERNATIVE TECHNICAL CONCEPTS**

- 4813.1 The District in its sole discretion may allow proposers to propose one or more alternative technical concepts in response to an RFP or RFAP.
- 4813.2 The allowance of alternative technical concepts and the full details of the content, submission, evaluation criteria, review process, and approval of alternative technical concepts, procedures for confidential meetings and communications (if used), methods for evaluating alternative technical concepts, and any other requirements and procedures of the alternative technical concept process will be stated in an RFP or RFAP.
- 4813.3 In general, approval of an alternative technical concept will only be granted if the District finds that the alternative technical concept will result in performance, safety, durability, quality, and utility of the end product that is equal to or better than the performance, safety, durability, quality, and utility of the end product that would result from full compliance with the requirements of the RFP or RFAP without causing any substantial delay to the schedule of, substantial additional cost to, or substantial reduction to the scope of the project or addition of a separate project.
- 4813.4 A proposer's financial proposal shall reflect any approved alternative technical concepts that are included in the proposer's technical proposal.
- 4813.5 Approval of an alternative technical concept does not imply that a proposal with an approved alternative technical concept will receive a favorable review. All proposals submitted in response to the RFP or RFAP shall be evaluated against the same evaluation factors, regardless of whether or not an approved alternative technical concept is included.
- 4813.6 A proposer may incorporate one or more approved alternative technical concepts into its technical and financial proposal.
- 4813.7 An approved alternative technical concept that is incorporated into a proposer's proposal will become part of the contract upon award of the contract unless the parties agree otherwise.
- 4813.8 To the extent authorized by law, and except as provided in this subsection, an alternative technical concept properly submitted by a proposer and all subsequent communications regarding the proposer's alternative technical concept will be considered confidential prior to the award of the contract. Exceptions to the confidentiality protection may be set forth in the RFP or RFAP.

**Section 4899, DEFINITIONS, is amended as follows:**

**Subsection 4899.1 is amended as follows:**

The opening phrase is amended by striking the phrase “guidelines” and inserting “rules” in its place.

A new subparagraph (a-1) is added to read as follows;

- (a-1) “**Alternative technical concept**” means a proposed technical, financial, or other change or variance from a requirement contained in an RFP or RFAP that a proposer proposes to the District pursuant to § 4813.

All persons desiring to comment on these proposed regulations should submit written comments to Judah Gluckman, Deputy Director and Counsel, Office of Public-Private Partnerships, 1350 Pennsylvania Ave, NW, Suite C-06, Washington, D.C. 20004, or by e-mail to [judah.gluckman@dc.gov](mailto:judah.gluckman@dc.gov), not later than thirty (30) days after publication of this notice in the *D.C. Register*. Copies of the proposed rules can be obtained from the address listed above.