



OFFICE OF THE
SECRETARY

2016 JUN 20 PM 4: 50

MURIEL BOWSER
MAYOR

JUN 20 2016

The Honorable Phil Mendelson
Chairman
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W., Suite 504
Washington, D.C. 20004

Dear Chairman Mendelson:

Enclosed for consideration and approval by the Council of the District of Columbia is the "Office of Public-Private Partnerships Rules Approval Resolution of 2016."

Pursuant to Section 301(c)(2) of the Public-Private Partnerships Act of 2014, effective March 11, 2015 (D.C. Law 20-228; D.C. Official Code § 2-274.01(c)(2)), the proposed resolution would approve the proposed rules to establish procedures for the Office of Public-Private Partnerships (OP3). OP3 is charged with building collaborations between private sector businesses and District government to support large-scale projects such as infrastructure development and enhancements. These rules, which are the product of extensive public outreach and stakeholder feedback, lay out a clear, streamlined, and predictable framework for how OP3 will operate and the process by which P3s projects of all kinds will be procured in the District of Columbia. Transparency and fairness are prioritized to ensure the highest level of competition and to maximize the public interest in building infrastructure that is critical to the growth and economic development in all 8 Wards of the District.

I urge the Council to take prompt and favorable action on this measure. For additional information, please contact Seth Miller Gabriel, Director of the Office of Public-Private Partnerships, at 202- 727-9878 or seth.millergabriel@dc.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Muriel Bowser".

Muriel Bowser

Enclosures


Chairman Phil Mendelson
at the request of the Mayor

A PROPOSED RESOLUTION

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Phil Mendelson, at the request of the Mayor, introduced the following resolution,
which was referred to the Committee on _____.

To approve the proposed rules to amend and add to the schedule of fines for violations related
food service ware.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this
resolution may be cited as the “Office of Public-Private Partnership Rules Approval Resolution
of 2016”.

Sec. 2. Pursuant to section 301(c)(2) of the Public-Private Partnership Act of 2014,
effective March 11, 2015 (D.C. Law 20-228; D.C. Official Code § 2-274.01(c)(2)), the Mayor
transmitted to the Council proposed rules to establish procedures for the Office of Public-Private
Partnerships. The proposed rules were published in the *D.C. Register* on April 29, 2016 at 63
DCR 6657. The Council approves the proposed rules as submitted.

Sec. 3. Fiscal impact.

The Council adopts the fiscal impact statement in the committee report as the fiscal
impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act,
approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02

1 Sec. 4. The Secretary to the Council shall transmit a copy of this resolution, upon its
2 adoption, to the Mayor, The Director of the District Department of the Environment, and the
3 Administrator of the Office of Documents and Administrative Issuances.

4 Sec. 5. This resolution shall take effect immediately.

DISTRICT OF COLUMBIA OFFICE OF PUBLIC-PRIVATE PARTNERSHIPS

NOTICE OF FINAL RULEMAKING

The 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 of a new Chapter 48 (Public-Private Partnerships) of Title 27 (Contracts and Procurement) of the District of Columbia Municipal Regulations (27 DCMR).

This final rulemaking action establishes the procedures for the operations of the District of Columbia Office of Public-Private Partnerships (“DC OP3” or “Office”), including the procurement process for public-private partnerships (“P3s”) in the District of Columbia (“District”). The DC OP3 is charged with building collaborations between private sector businesses and District government in support of large-scale projects such as infrastructure development and enhancements. The Office was established by the P3 Act to extend the utilization of P3s and expand economic opportunities for the District. These rules, which are the product of extensive public outreach and stakeholder feedback, lay out a clear, streamlined, and predictable framework for how the DC OP3 will operate and the process by which P3s projects of all kinds will be procured in the District of Columbia. Transparency and fairness are prioritized to ensure the highest level of competition and to maximize the public interest in building infrastructure that is critical to the growth and economic development in all eight (8) wards of the District.

This rulemaking outlines the process for the development, solicitation, evaluation, award, delivery, and oversight of solicited and unsolicited P3 projects. Additional requirements will be outlined in the procurement documents for each project and further, non-binding guidance is provided in the Guidelines and Procedures published on the website of the DC OP3 at <http://op3.dc.gov>.

The Notice of Proposed Rulemaking was published in the *District of Columbia Register* on April 29, 2016, at 63 DCR 6657. The DC OP3 received several comments from the public concerning the proposed rules during the thirty (30) day comment period, which expired on April 28, 2016. A copy of all comments received, a document summarizing the DC OP3’s responses to each comment, and a list of all meetings held to receive additional feedback on the rules is available at <http://op3.dc.gov>. Changes were made to correct grammar, clarify initial intent, clarify proposed procedures, or lessen the burdens established by the proposed rules. The changes do not substantially alter the intent, meaning, or application of the proposed rules or exceed the scope of the rules as published with the Notice of Proposed Rulemaking.

This rulemaking was submitted to the Council of the District of Columbia (“Council”) for a forty-five (45) day review period, excluding days of Council recess. Pursuant to § 301 of the P3 Act (D.C. Official Code § 2-274.01), the rulemaking was approved by the Council on [DATE]. The rules shall take effect upon publication of this notice in the *District of Columbia Register*.

A new Chapter 48, PUBLIC-PRIVATE PARTNERSHIPS, in Title 27, CONTRACTS AND PROCUREMENT, of the DCMR is added to read as follows:

CHAPTER 48 PUBLIC-PRIVATE PARTNERSHIPS

4800 GENERAL PROVISIONS

- 4800.1 This chapter implements the provisions of the Public-Private Partnerships Act of 2014, effective March 11, 2015 (D.C. Law 20-228; D.C. Official Code § 2-271.01 *et seq.*) (P3 Act).
- 4800.2 This chapter outlines the process for the development, solicitation, evaluation, award, delivery, and oversight of solicited and unsolicited public-private partnership (P3) projects. Additional requirements will be outlined in the procurement documents for each project, further, non-binding guidance is provided in the Guidelines, and Procedures published on the website of the District of Columbia Office of Public-Private Partnerships (DC OP3) at <http://op3.dc.gov>.
- 4800.3 All public and private entities involved in a P3 project shall be subject to all applicable District and federal laws unless otherwise stated in the P3 Act or this chapter.

4801 SOLICITED PROCUREMENTS: REQUESTS FOR INFORMATION

- 4801.1 **Generally:** The DC OP3 may issue a Request for Information (RFI) at the beginning of the P3 procurement process to obtain information and insight from the private sector regarding a potential P3 project.
- 4801.2 **Publication:** The DC OP3 will publish notice of each RFI in the District of Columbia Register, the DC OP3 website, and any other publications deemed appropriate by the DC OP3.
- 4801.3 **Schedule:** Responses to an RFI will be accepted for a period of time to be determined by the DC OP3, and the deadline for responses will be included in the RFI. This schedule may include a pre-response public meeting to allow interested parties to meet with the DC OP3 and Owner Agencies to ask questions and obtain additional information regarding the proposed project and the requirements of the RFI.
- 4801.4 **Use of Responses to Request for Information:** Each response to an RFI shall become the property of the District, and the District may use any information or concepts within the response for whatever purpose it deems appropriate.

4801.5 **Proposer Presentations:** The DC OP3 and Owner Agencies may communicate with an entity that provides a response to an RFI or request the entity to give one (1) or more oral presentations to clarify its response and answer questions that will aid in the understanding of the response.

4802 SOLICITED PROCUREMENTS: REQUESTS FOR QUALIFICATION

4802.1 **Generally:** The DC OP3 may issue a request for qualifications (RFQ). The RFQ provides for a process of qualification for private sector proposers to submit qualifications for a solicited project. The RFQ, if issued, will be issued after the completion of the RFI process, if an RFI was issued.

4802.2 **Public Notice:** A notice of an RFQ for a P3 project will be published in the District of Columbia Register, posted on the DC OP3 website, and mailed to each affected Advisory Neighborhood Commission. In addition, the notice of an RFQ may be published in any publication deemed appropriate by the DC OP3 to achieve the optimal level of private sector response and public awareness.

4802.3 **Schedule:** The DC OP3 will determine the time limit for submittal of qualifications based on the complexity and specialization of the project. The deadline for responses will be included in the RFQ.

4802.4 **Minimum Required for Qualification:** The DC OP3 will determine requirements for the qualification of a private entity. At a minimum, in order to be qualified to submit a bid under a request for proposals, a private entity shall demonstrate:

- (a) The availability of sufficient sources of funding, capital, securities, or other financial resources necessary to carry out the P3 project if selected;
- (b) The availability and identification of key personnel, either through its staff, subcontractors, a consortium or joint venture agreement, that possess the managerial, organizational, technical capacity and experience working on projects of similar scope, scale and complexity as the type of project for which the proposer would be submitting a bid;
- (c) It will be qualified to lawfully conduct business in the District at the time of entering into a P3 agreement with the District; and
- (d) No director, officer, partner, owner, or other individual with direct and significant control over the policy or finances of the private entity has been convicted of corruption or fraud in any jurisdiction of the United States.

- 4802.5 **Other Requirements and Criteria for Qualification:** The RFQ shall set forth any other requirements for qualification and the criteria that the DC OP3 will use to determine which private entities qualify.
- 4802.6 **Certification of Qualification:** For each private entity that responds to the RFQ, the DC OP3 will determine if the entity possesses the qualifications appropriate for the P3 project, according to evaluation criteria established in the RFQ under subsections 4082.4 and 4082.5. The DC OP3 reserves the right to issue an RFP to a short list of the private entities that were deemed to possess the qualification appropriate for the P3 project, rather than issuing the RFP to all private entities that were deemed to possess the qualifications appropriate for the P3 project.
- 4802.7 **Application Fee:** The DC OP3 may, if deemed appropriate, impose an application fee for prequalification not to exceed the actual direct cost of evaluation. The specific amount of the fee will be stated in the RFQ. This fee, if collected, shall be deposited in the Public-Private Partnerships Administration Fund (the Fund) for the use by the DC OP3 for costs associated with the review of responses to RFQs.
- 4802.8 **Modification and Cancellation of Request for Qualification:** The DC OP3 retains the right to modify or cancel the RFQ process at any time for any reason.
- 4802.9 **Use of Responses to Request for Qualification:** Each response to an RFQ shall become the property of the District, and the District may use any information or concepts within the response for whatever purpose it deems appropriate.
- 4802.10 **Proposer Presentations:** The DC OP3 and Owner Agencies may communicate with those entities that provide responses to an RFQ 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.
- 4803 SOLICITED PROCUREMENTS: REVIEW OF DRAFT REQUEST FOR PROPOSALS**
- 4803.1 **Generally:** The final step in the solicitation phase is the issuance of a Request for Proposals (RFP). Before issuing an RFP, the DC OP3 will develop a draft RFP for public comment. In addition, by law the draft RFP must be approved by the Council of the District of Columbia (Council) before it is formally issued.
- 4803.2 **Public Review of Draft Request for Proposals:** The first step in the RFP process is the development of a draft RFP by the DC OP3 for public comment. DC OP3 will publish the draft RFP on its website for public comment and will hold at least one (1) public hearing on the proposed RFP. The hearing will be subject to the Open Meetings Act (D.C. Law 18-350; D.C. Official Code § 2-571 *et seq.*) and will be held at an accessible evening or weekend time and in an accessible location near the proposed P3 project. The DC OP3 will provide at

least thirty (30) days' notice of the public hearing to each affected ANC and will publicize the hearing by placing a notice in the District of Columbia Register at least fifteen (15) days before the hearing.

4803.3

Approval of Proposed Request for Proposals by the Council: By law, each RFP must be approved by the Council before the RFP is issued by the DC OP3. The Council approval process will follow one (1) of two (2) review tracks depending on the value and duration of the project. Each approval process starts with the Mayor submitting a resolution to the Council to approve the RFP. The two (2) review tracks are outlined below.

- (a) **Proposals for Projects over fifty million dollars (\$50,000,000) or ten (10) years:** Proposals for possible P3 projects that the DC OP3 estimates will cost fifty million dollars (\$50,000,000) or more (full life cycle cost) or extend for a contract term of ten (10) years or more will be deemed approved by the Council forty-five (45) calendar days after the Mayor submits the approval resolution to the Council, unless the Council votes to disapprove the resolution during that time period. The Council may also actively vote to approve the resolution at any time during the forty-five (45) day period. The forty-five (45) calendar day review period begins on the first day (excluding Saturdays, Sundays and holidays) following the receipt by the Office of the Secretary of the Council of the proposed resolution.
- (b) **Proposals for Projects less than fifty million dollars (\$50,000,000) or ten (10) years:** Proposals for possible P3 projects that are anticipated by the DC OP3 to cost less than fifty million dollars (\$50,000,000) (full life cycle cost) or extend for a contract term less than ten (10) years will be deemed approved by the Council ten (10) calendar days after the Mayor submits the approval resolution, unless during that ten (10) day period a Councilmember introduces a resolution to approve or disapprove the proposed RFP. If a Councilmember introduces such a resolution the ten (10) day Council review period is extended to forty-five (45) calendar days and the RFP will be deemed approved by the Council at the end forty-five (45) calendar day period, unless the Council votes to disapprove the resolution during that time period. The Council may also actively vote to approve the resolution at any time during the forty-five (45) day period. The ten (10) day and forty-five (45) day time periods begin on the first day (excluding Saturdays, Sundays and holidays) following the receipt by the Office of the Secretary of the Council of the proposed resolution.
- (c) **Expiration of Approval:** The Council's approval of an RFP expires two years after the date of approval. If the DC OP3 determines that a P3 agreement cannot be entered into within the two (2) year period, the Mayor may submit to the Council a resolution requesting an extension of the time period. The resolution must be submitted at least sixty (60) days

before the end of the two (2) year period. If the Council does not approve or disapprove the proposed extension resolution within thirty (30) days (excluding Saturdays, Sundays, legal holidays and days of Council recess) after receipt, the proposed resolution is deemed disapproved.

- (d) **Substantive Changes Requiring Approval; Notice of Changes:** If a substantive change is made to a previously approved RFP, the revised RFP must be resubmitted to the Council for re-approval. Notice of each change that is made to an RFP will be published in the District of Columbia Register and/or delivered to qualified bidders if the RFQ process is utilized under § 4802.

4804 SOLICITED PROCUREMENTS: SOLICITATION THROUGH REQUEST FOR PROPOSALS

4804.1 **Generally:** After the RFP has been approved by the Council, the DC OP3 will formally issue the RFP to solicit proposals from the qualified bidders.

4804.2 **Public Notice:** Each RFP will be posted on the DC OP3 website. A notice of the issuance of the RFP will also be published in the District of Columbia Register and mailed to each affected ANC. Notice of the issuance may also be published on websites or in printed publications deemed appropriate by the DC OP3.

4804.3 **Schedule:** The deadline to respond with a proposal will be stated in the RFP. Potential proposers will be given at least 30 days to respond, unless the DC OP3 determines that a shorter response period is appropriate. If the DC OP3 establishes a shorter response period, it shall describe the reason for the shorter response period in the RFP.

4804.4 **Requests for Proposals Requirements:** Each RFP will contain, at a minimum, the following information regarding the proposed P3 project:

- (a) A detailed description of the scope of the proposed P3 project;
- (b) The technical requirements and material terms and conditions applicable to the procurement and any resulting contract; and
- (c) The criteria for evaluation and selection of a proposal, which shall indicate the relative weight given to each criterion.

The DC OP3, working with the Owner Agency, may include more specific response requirements to address the unique aspects of the project.

4804.5 **Evaluation and Selection Criteria Requirements:** Each RFP issued by the DC OP3 will include a set of evaluation criteria by which proposals submitted by the

private sector will be scored. A relative scoring weight will be assigned in the RFP to each criterion.

At a minimum, the following evaluation criteria will be included in each RFP:

- (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;
- (i) How the proposal benefits the public; and
- (j) Other factors as the DC OP3 deems appropriate to obtain the best value for the District.

The DC OP3, working with the Owner Agency, may include more specific evaluation criteria to address the unique aspects of the project in question.

4804.6 **Format for Responses and Executive Summaries:** Each response to an RFP must follow the guidance and format outlined in the RFP, including that the proposal has an executive summary and identifies those aspects of the proposal that are confidential or proprietary according to § 4804.12.

4804.7 **Proposer Presentations:** The DC OP3 and Owner Agencies may communicate with an entity that provides a response to an RFP or require them to give one (1) or more oral presentations to clarify its response and answer questions that will aid in the understanding and evaluation of the response.

4804.8 **Evaluation of Responses to Request for Proposals:** The DC OP3 will evaluate all responses to an RFP that are deemed to be responsive and meet the minimum requirements of the RFP. The evaluation of proposals will be based on the criteria stated in the RFP.

For most RFPs, the evaluation of responses to an RFP will be divided between two (2) committees matching the two (2) required packets outlined in the Guidelines. The two (2) 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 RFP and separate packets for technical and financial aspects of proposals will not be required.

The Director and Deputy Director of the DC OP3, as well as the Director (or his or her designee) of the Owner Agency may serve on both committees.

4804.9 **Selection of 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 point of contact provided on the proposal of the Preferred Bidder will be notified by the DC OP3. 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. If it has been determined that a secondary bidder will also be selected, that secondary bidder will also be notified.

4804.10 **Publication of Responsive Executive Summaries:** Upon the selection of the preferred bidder, the DC OP3 will publish executive summaries of all responsive proposals on the DC OP3 website. The executive summary of each proposal will include the information outlined in the Guidelines and the following information:

- (a) The scoring for each proposal; and

- (b) The identity of the proposer including all listed members of the proposal team.

4804.11 **Payment of Stipends:** The DC OP3 may pay a stipend to an unsuccessful proposer in the following situations:

- (a) The DC OP3 cancels the procurement process fewer than 30 days before the date the bid or proposal is due; or
- (b) An unsuccessful proposer submits a proposal that is responsive and meets all requirements established by the DC OP3 for the P3 project.

Each RFP will state whether the DC OP3 is offering a stipend as part of the procurement process. If a stipend is being offered, the RFP will also state the amount of the stipend and the specific terms and conditions under which the stipend will be paid.

Stipends will generally be used to generate meaningful competition and to compensate bidders for novel concepts or information that is utilized in a P3 agreement.

4804.12 **Use of Responses to Request for Proposals:** Each response to an RFP shall become the property of the District, and the District may use any information or concepts within the response for whatever purpose it deems appropriate.

4804.13 **Confidential Information Included as Part of a Solicited 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 as part of the cover letter or executive summary of the proposal;
- (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 under applicable law. 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.

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 §§ 108(f) and 114(a) of the P3 Act (D.C. Official Code §§ 2-273.03(f) 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.

4805 UNSOLICITED PROCUREMENTS: SUBMISSION REQUIREMENTS

4805.1 The DC OP3 may accept unsolicited proposals for P3s.

4805.2 **Time Periods for Acceptance of Unsolicited Proposals:** The DC OP3 will accept unsolicited proposals during limited time periods to ensure that the proposals can be fully reviewed within the time limits stated in the P3 Act. The time periods during which the DC OP3 will accept unsolicited proposals will be published in the Guidelines and in the DC Register, on the DC OP3 website and any other publications deemed appropriate.

4805.3 **Discussions with DC OP3 before Submission of Unsolicited Proposal:** Private entities are encouraged to contact the DC OP3 to arrange a meeting to discuss their ideas and concepts for unsolicited proposals before developing or submitting an unsolicited proposal. These meetings, which may include the relevant Owner Agencies, will be useful for all parties to determine the viability and desirability of a P3 project before a proposal is written. This informal discussion process will aid the DC OP3 and private entities to maintain an environment of open communication needed to achieve the goals of the District P3 program. No proposals nor project information will be accepted by the DC OP3, Owner Agencies nor any other representative of the District government during these meetings. Such meetings will be confidential to the extent allowed by the Freedom of Information Act, including statutory exclusions that protect proprietary information among other things.

4805.4 **Structure and Format of Unsolicited Proposals:** An unsolicited proposal must follow the format outlined in the Guidelines and must include a signature of the authorized corporate officer of the proposer.

4806 UNSOLICITED PROPOSALS: PRELIMINARY EVALUATION

4806.1 Preliminary Evaluation of Unsolicited Proposals: An unsolicited proposal will be screened in a three-step process that includes a review to confirm that baseline requirements are met, a preliminary evaluation, and a comprehensive evaluation.

4806.2 Baseline Requirements: The DC OP3 will only accept an unsolicited proposal and undertake a preliminary evaluation of that unsolicited proposal if the proposal:

- (a) Is independently developed and drafted by the proposer without District supervision;
- (b) Includes sufficient detail and information for the DC OP3 to evaluate the proposal in an objective and timely manner under the comprehensive evaluation process outlined in § 4807; and
- (c) Adheres to the format outlined in the Guidelines, including that the proposal has an executive summary and identifies those aspects of the proposal that are confidential or proprietary according to § 4807.20.

4806.3 Preliminary Evaluation Fee: Private entities interested in submitting an unsolicited proposal are required to pay a non-negotiable Preliminary Evaluation Review Fee in an amount provided in the Guidelines at the time of submitting the proposal to the DC OP3 for review. This review fee will be deposited into the Fund to cover the costs of the preliminary evaluation only. Payment should be made by check or money order made out to the account listed in the Guidelines. If the fees paid to the DC OP3 exceed the DC OP3's total cost for the preliminary review, the DC OP3 will reimburse the remaining funds to the private entity at the end of the review process.

4806.4 Preliminary Evaluation Results: Within ninety (90) days after receiving an unsolicited proposal, the DC OP3 will complete its preliminary evaluation and report the result to the proposer. The result will be either "favorable" or "unfavorable" based on whether the proposal:

- (a) Addresses a need identified in a District or regional planning document, including the DC OP3 Project Pipeline;
- (b) Shows that the proposed project could benefit the District;
- (c) Includes a financing plan to allow the project to move forward pursuant to all applicable District budget and finance requirements, including the District's debt cap;

- (d) Provides a plan for the operation and maintenance of the proposed facility or facilities for the full life-cycle of the project; and,
- (e) Is consistent with priorities and agency performance goals of the Owner Agency or Agencies tasked with delivering infrastructure projects similar to the project proposed.

If the result is unfavorable, the DC OP3 will return the unsolicited proposal to the proposer with a letter explaining the reason for the determination. The proposer cannot appeal a preliminary evaluation resulting in an unfavorable determination and no further action on the proposal will be taken by the DC OP3 after such a determination. If the result of the preliminary evaluation is favorable, the unsolicited proposal will proceed to the comprehensive evaluation stage.

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 Proposals: 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. 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 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.

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 issued under § 4807.4.

Each alternative proposer will be required to pay the preliminary evaluation fee described in § 4806.3 and the comprehensive evaluation fee described in § 4807.13.

4807.7 Amended Submittals by the Original Unsolicited Proposer: During the RFAP response period, the original unsolicited proposer may submit 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 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. The original unsolicited proposer will not be required to pay an additional preliminary evaluation fee if it submits an amended 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 but not limited to 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 Agencies 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 and meet the minimum requirements of the

RFAP. 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.

The Director and Deputy Director of the DC OP3, as well as the Director (or his or her designee) of the Owner Agency may serve on both committees.

4807.13

Comprehensive Evaluation Review Costs: The original unsolicited proposer and any alternative proposers will be required to pay a comprehensive evaluation fee. 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 public notice described in § 4807.4. Each alternative proposer will be required to submit the fee to the DC OP3 with its alternative proposal. 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 will include, at a minimum, the following:

- (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:** For the proposal to be selected, 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:** For the proposal to be selected, 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. To be relied upon by all parties, 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.

4808 PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

4808.1 **Generally:** If the DC OP3 selects a Preferred Bidder through either a solicited or unsolicited procurement process, the Owner Agency will negotiate with the preferred proposer to enter into a P3 agreement as the Owner Agency will be the designated public entity for all agreements.

4808.2

Requirements for the Public-Private Partnership Agreement: Each P3 agreement must include the following elements:

- (a) An agreement term length clearly defined to include the estimated construction and operational period, as needed, not to exceed 99 years from the date of full execution of the agreement;
- (b) A complete description of the P3 facility to be developed and the functions and responsibilities to be performed by the District and the private entity;
- (c) Risk mitigation plans and responsibilities for facility operations and maintenance for both the private entity and the Owner Agency;
- (d) Type of property interest, if any, that the private entity will have in the project facility during both the construction and operations phases;
- (e) Terms regarding the planning, acquisition, financing, development, design, construction, reconstruction, rehabilitation, replacement, improvement, maintenance, management, operation, repair, leasing, and ownership of the P3 facility;
- (f) The rights that the District and the private entity have, if any, in revenue generated as a result of the agreement;
- (g) The minimum quality standards, technical requirements, and key performance indicators applicable to the P3 project, including performance criteria, reporting requirements, incentives, cure periods, performance points systems, monitoring rights of the Owner Agency and the DC OP3, and penalties for failure to achieve these standards;
- (h) A maintenance plan for the full life cycle of the P3 project;
- (i) A hand-back plan that includes requirements regarding state of good repair of the facility;
- (j) Any compensation and/or revenue structure of the private entity, including the extent to which, and terms upon which, the private entity may charge fees to individuals and entities for the use of the P3 facility. Under the P3 Act, no new fees may be imposed nor may existing fees be amended unless authorized by a subsequent act of the Council;
- (k) A schedule for an annual independent audit report to be furnished by the private entity to the DC OP3 and Owner Agency covering all aspects of the agreement and the financial condition of the private party;

- (l) A requirement that the private entity maintain or cause to be maintained performance and payment bonds, letters of credit, or other acceptable forms of security in compliance with title VII of the Procurement Practices Reform Act of 2010, effective April 8, 2011, (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*);
- (m) Insurance requirements for any facility to be operated by the private entity. The insurance must be in an amount that ensures coverage of tort liability for the District and the private entity, and its employees;
- (n) Grounds for termination of the P3 agreement by the Owner Agency or the District government in general and the financial impact of that termination;
- (o) Grounds for termination of the P3 agreement by the private entity and the financial impact of that termination;
- (p) Procedures for amending the P3 agreement;
- (q) Provisions for the termination of the P3 agreement and the disposition of the P3 facility upon termination;
- (r) All rights and remedies available to the District government for material breach of the agreement by the private entity, up to and including material default;
- (s) Identification of funding sources to be used to fully fund the capital, operation, maintenance, and other expenses under the P3 agreement;
- (t) Certification of compliance with applicable District and federal laws;
- (u) A plan for the sharing of refinancing gains between the private entity and the District in the event that the private partner generates a large financial benefit from the refinancing or restructuring of the P3 project; and,
- (v) Any additional provisions determined to be appropriate by the DC OP3 and Owner Agency.

4808.3 **Negotiation:** After the issuance of a notification that a preferred bidder and a secondary bidder have been selected as described in §§ 4804.8 or 4807.15, the DC OP3 and Owner Agency will commence negotiations with the preferred proposer.

4808.4 **Engagement of Secondary Bidder:** If negotiations with the preferred bidder fail to result in a P3 agreement after a reasonable period of time and good faith efforts by all parties as determined by the DC OP3 and Owner Agency, the DC OP3 and Owner Agency, in joint agreement, may terminate the negotiation with the

Preferred Bidder and choose to begin negotiations with the secondary bidder or to terminate the solicitation.

- 4808.5 **Facilities Plan Approval:** The DC OP3 and the Owner Agency have the right to review and approve the private partner's plans for the development, operation, maintenance, and financing of the P3 project facility before entering into a P3 agreement. Those plans, once approved, will become part of the P3 agreement. A material change in any of these aspects of the facility during the term of the agreement will require approval by the DC OP3 and the Owner Agency.
- 4808.6 **Prohibition Regarding Non-Compete Provisions:** The P3 agreement may not contain a non-compete provision that would prevent or inhibit any public entity from performing its government function.
- 4808.7 **Access and Right to Inspect:** During the term of the P3 agreement, the DC OP3 and Owner Agency shall have the right to access and inspect the P3 project facility at any time upon reasonable notice.
- 4808.8 **External Funding:** The DC OP3, with the Owner Agency, may apply for and accept funds from the District or federal government, as well as other sources of financial support to fund P3 projects or otherwise advance the cause of innovative project delivery in the District.
- 4808.9 **Projects of Regional Scope:** The DC OP3 and the Owner Agency may enter into P3 agreements with other local and state government agencies that are regional in scope as long as that regional aspect of the project is expressed in the request for proposal submitted to the Council pursuant to § 4803.3.
- 4808.10 **Sovereign Immunity:** In no way shall a P3 agreement or any element of a P3 agreement be construed as a waiver of the sovereign immunity of the District government, nor will a P3 agreement be viewed as a grant of sovereign immunity to any private entity.
- 4808.11 **Remedies:** A provision may be included in a P3 agreement providing that, in addition to any remedy available to the District, and any cure provisions within the agreement, in the event of a material default by the private partners, the District may elect to assume the responsibility and duties of the operator in the P3 project in partial or full capacity, and, in such instance, the District or a designated public entity shall succeed to all of the rights, titles, and interests in the P3 project.

The District Government may terminate, with cause, the P3 agreement and exercise any other rights and remedies that may be available to it under the law or in equity. If the District or a designated public entity elects to assume the responsibility and duties of a P3 project pursuant to this section, the District may develop or operate the P3 project, impose previously approved user fees, impose

and collect lease payments and comply with any service contracts as if it were the operator.

The assumption of the operation of the P3 project shall not obligate the DC OP3 or the District government to pay any obligation of the operator from sources other than revenue from the project.

4808.12

Compliance with Federal and District Laws: Under a P3 agreement, the private sector partner will be required to comply with all applicable federal and District laws governing infrastructure projects. Some of these applicable laws include, but are not limited to, the following:

- (a) §§ 202 (Council contract review), 415 (anti-collusion), title VII (bonding) and title X (appeals) of the Procurement Practices Reform Act of 2010, effective April 8, 2011, (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*);
- (b) The First Source Employment Agreement Act of 1984, effective June 29, 1984 (D.C. Law 5-93; D.C. Official Code § 2-219.01 *et seq.*);
- (c) The Living Wage Act of 2006, effective June 8, 2006 (D.C. Law 16-118; D.C. Official Code § 2-220.01 *et seq.*), or the rate established by the use of a project labor agreement, notice of which must be provided by the DC OP3 and Owner Agency before soliciting bids or proposals for a P3;
- (d) The Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33; D.C. Official Code § 2-218.01 *et seq.*);
- (e) Subchapter II of Chapter 28 of Title 47 of the D.C. Official Code (Clean Hands Before Receiving a License or Permit);
- (f) The Green Building Act of 2006, effective March 8, 2007 (D.C. Law 16-234; D.C. Official Code § 6-1451.01 *et seq.*);
- (g) The Anacostia Waterfront Environmental Standards Act of 2008, effective March 26, 2008 (D.C. Law 17-138; D.C. Official Code § 2-1226.31 *et seq.*);
- (h) The Davis-Bacon Act of 1931, approved March 3, 1931 (46 Stat. 494; 40 U.S.C. § 3141 *et seq.*);
- (i) The Hotel Development Projects Labor Peace Agreement Act of 2002, effective April 2, 2003 (D.C. Law 14-266; D.C. Official Code § 32-851); and

- (j) The District Anti-Deficiency Act of 2002, effective April 4, 2003 (D.C. Law 14-285; D.C. Official Code § 47-355.01 *et seq.*).

4808.13 **Repayment of Fees Paid by the Original Unsolicited Proposer:** If a P3 agreement is entered into with a proposer who is not the original unsolicited proposer, the DC OP3 may require, as a condition of entering into the P3 agreement, that the “winning” proposer repay the preliminary evaluation and comprehensive evaluation fees as well as any stipend authorized under § 4804.10 to the original unsolicited proposer. The District will not pay, or provide for the payment of, any additional proposal costs of the original unsolicited bidder.

4808.14 **Monitoring of P3 Agreement Performance:** The DC OP3 and Owner Agency will provide a performance monitoring plan for the agreement. The performance monitoring plan will provide detail on how the Owner Agency, with assistance from the DC OP3 as needed, will monitor the performance of the private entity for the full term of the agreement. This plan will include required skills and resources for monitoring, monitoring schedules, and performance schedules with possible performance-points systems.

4809 **FINAL APPROVAL OF THE PUBLIC-PRIVATE PARTNERSHIP AGREEMENT**

4809.1 **Generally:** Before executing a P3 agreement, the DC OP3 must submit a report to the Council and provide public notice of the report. In addition, the agreement itself must be submitted to the Council for its review and approval.

4809.2 **Council Report Requirements:** The P3 Act requires that, before entering into a P3 agreement, the DC OP3 and Owner Agency must submit to the Council a report containing details of the planned P3. The report will include the following information:

- (a) The name of the private partner and the names of all members of the private partner;
- (b) Significant terms of the P3 agreement;
- (c) Overall project cost;
- (d) Total estimated cost to the District for the full life cycle of the project;
- (e) Results of the value-for-money analysis and public sector comparator;
- (f) Estimated time for project construction;
- (g) Method to be used to deliver the project;

- (h) A list of the District agencies participating in the project;
- (i) A list of the private entities that responded to the RFP or RFAP;
- (j) A description of how the proposals were scored during the evaluation process; and
- (k) A description of how the private entity was selected according to the criteria and methodology for evaluation of responses to the RFP or RFAP.

The DC OP3 will also post the report on its website.

4809.3 Council Approval of the Public-Private Partnership Agreement: The P3 agreement also must be approved by the Council pursuant to § 451 of the District's Home Rule Act, approved December 24, 1973 (87 Stat. 803; D.C. Official Code § 2-104.51). The P3 Agreement will be submitted to the Council for such approval with the project report.

4810 RESERVED RIGHTS

4810.1 The DC OP3 reserves the following rights as allowed by law:

- (a) To reject any and all proposals, at any stage of the procurement process and under either the solicited or unsolicited procurement processes for any reason at any time;
- (b) To terminate the review of any and all proposals, at any stage of the procurement process and under either the solicited or unsolicited procurement processes for any reason at any time;
- (c) To negotiate with a proposer, either solicited or unsolicited, at any time during the procurement process, without being bound to any provision in the proposal;
- (d) To request additional information or clarification regarding any proposal at any time;
- (e) To waive minor errors, omissions, or irregularities in a response to any requests and the right to determine if such occurrence is minor in nature;
- (f) To issue addenda to and/or cancel any procurement;
- (g) To revise, supplement, or withdraw all or any part of these Guidelines as needed; and

- (h) To modify the process and submission requirements for reviewing any proposal in connection with a re-lease, re-tendering, transfer or other disposition of a project pursuant to the provisions of an existing P3 agreement.

4811 DISCLAIMERS

4811.1 Neither the District of Columbia government, nor any agency, officer, employee, or agent of the District of Columbia government, shall be liable for, or reimburse, the costs that may be incurred by solicited, unsolicited or alternative proposers, whether selected or not as the private sector partner or for negotiations, in developing and submitting proposals or in negotiating the P3 agreement.

4811.2 Any and all information made available to proposers is made for convenience purposes only and is without representation or warranty of any kind.

4811.3 Neither the District of Columbia government, nor any agency, officer, employee, or agent of the District of Columbia government, shall be liable to any private entity or proposer for the disclosure of all or a portion of a response to a request for information, a response to a request for qualifications, a response to a request for proposals, a response to a request for alternative proposals, an unsolicited proposal, or any other information provided to the District government.

4812 RULES TO ENSURE ETHICAL CONDUCT

4812.1 **Generally:** The DC OP3 is committed to ensuring that all procurements for P3 projects are conducted in a fair, competitive, and ethical manner without actual or apparent conflicts of interest.

4812.2 **Ethical Duty:** All parties responsible for the proper administration of the P3 procurement process on behalf of the District, both public and private, shall maintain a position of strict impartiality and refrain from any activity that would imply support of or opposition to a particular private entity, proposer, or operator of a P3 agreement. This requirement extends to all consultants and contractors engaged by the District.

4812.3 **Ethical Obligations under the Comprehensive Code of Conduct:** The DC OP3 will comply with and enforce through appropriate administrative, personnel, or contractual procedures all provisions of the District government’s Code of Conduct, as defined in § 101 of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01), and Chapter 18 of the District Personnel Manual (6B DCMR, Chapter 18) where applicable, including the following provisions:

- (a) **Duty of Loyalty:** District employees associated with any P3 procurement shall place loyalty to the law and ethical principles above any potential private gain.
- (b) **Financial Conflicts:** No District employee associated with any P3 procurement shall hold a financial interest that conflicts with the conscientious performance of the employee's duty.
- (c) **Private Gain:** No District employee associated with any P3 procurement shall use the employee's public office or position for private gain, whether for the employee's own personal gain, the gain of a family member or friend, or the gain of a private entity.
- (d) **Nonpublic Information:** No District employee associated with any P3 procurement shall engage in a financial transaction using nonpublic information acquired or allow the improper use of such information to further any private interest.
- (e) **Outside Employment:** No District employee associated with any P3 procurement shall engage in any outside employment or other activity, including seeking or negotiating for employment, incompatible with the responsibilities assigned to them under the P3 Act or that would capitalize on the employee's title or position.
- (f) **Gifts from Outside Sources:** No District employee associated with any P3 procurement shall solicit or accept any gift from a prohibited source or given because of the employee's official position unless the item is excluded from the definition of a gift or falls within one of the exceptions set forth in 6-B DCMR § 1803.
- (g) **Post-Employment Conflicts of Interest:** A former District employee associated with any P3 procurement shall not act on a particular matter that would create a conflict of interest if the employee participated personally and substantially in that matter as a government employee.
- (h) **Government Property:** No District employee associated with any P3 procurement shall use government property, or allow its use, for other than authorized purposes.
- (i) **Disclosure of Prior Employment:** As a means to evaluate real or potential conflicts of interest, each employee associated with any P3 procurement shall be required to disclose to the employee's employing agency upon appointment, such previous employment relationships, including full disclosure of any ongoing economic benefits to the employee from previous employment relationships.

4812.4 **Additional Obligations:** The provisions in this section highlight several of the relevant obligations in the Comprehensive Code of Conduct. Reference to these particular obligations in no way limits the applicability of other District government ethics regulations, nor implies in any way that such other regulations will not be strictly enforced by the DC OP3.

4812.5 **Reporting Conflicts and Violations:** The DC OP3 requires District government employees and the employees of private entities associated with any P3 procurement to report actual or apparent conflicts of interest and credible violations of the District Code of Conduct to the appropriate authorities.

(a) **District Employees:** District employees associated with any P3 procurement shall report actual or apparent conflicts of interest and credible violations of the District Code of Conduct and these guidelines immediately upon discovery to the employee’s supervisor, the Board of Ethics and Government Accountability, or the appropriate authorities.

(b) **Private Entity Employees:** Employees of private entities associated with any District P3 procurement shall report actual or apparent conflicts of interest and credible violations of the District Code of Conduct and these guidelines immediately upon discovery to the DC OP3, the Board of Ethics and Government Accountability, or the appropriate authorities.

(c) **Mitigating Conflicts and Violations:** Upon receiving the report of an actual or apparent conflict of interest or credible violation of the District Code of Conduct or these guidelines, the DC OP3 shall take steps to avoid, mitigate or correct the issue, including having the affected employee recuse himself or herself or resign; disqualifying a contractor at any point during a procurement; rescinding or terminating a contract subsequent to contract award; or cancelling a pending solicitation and initiating a new procurement. The analysis of these issues and recommendations on steps taken to mitigate or correct an issue shall be in writing.

4899 **DEFINITIONS**

4899.1 For the purposes of these guidelines, the term:

(a) **“Alternative proposer”** means a proposer responding to the request for alternative proposals under the unsolicited proposal procurement method.

(b) **“ANC”** means Advisory Neighborhood Commission.

(c) **“DC OP3”** means the Office of Public-Private Partnerships established by § 102 of the P3 Act (D.C. Official Code § 2-272.01).

- (d) **“Office”** means the DC OP3.
- (e) **“Original Unsolicited Proposer”** means the proposer who is the first to submit an unsolicited proposal to the DC OP3 regarding a particular P3 project.
- (f) **“Owner Agency”** means the agency within the District government that will be the qualified public entity of the P3 agreement and project.
- (g) **“P3 Act”** means the Public-Private Partnerships Act of 2014, effective March 11, 2015 (D.C. Law 20-228; D.C. Official Code § 2-271.01 *et seq.*)
- (h) **“Private Entity”** means a natural person, corporation, limited liability company, partnership, joint venture, or other private business entity.
- (i) **“Proposer”** means a private entity submitting a proposal in response to a request for proposals or request for alternative proposals issued by the Office or an unsolicited proposal for a P3.
- (j) **“Public Entity”** means a District government agency, department, board, commission, or instrumentality; or a similar governmental organization of a different government jurisdiction.
- (k) **“Public Sector Comparator”** means a risk-adjusted estimate of the total cost for the lifetime of a project, including all capital, operating, financing, and ancillary costs, if a P3 project were to be financed, built, and operated through a traditional government procurement method.
- (l) **“Public-Private Partnership”** means the method in the District for delivering a qualified project using a long-term, performance-based contractual agreement between a public entity and a private entity or entities where appropriate risks and benefits can be allocated in a cost-effective manner between the public and private entities in which:
 - (1) A private entity performs functions normally undertaken by the government, but the public entity remains ultimately accountable for the qualified project and its public function; and
 - (2) The District may retain ownership or control in the project asset and the private entity may be given additional decision-making rights in determining how the asset is financed, developed, constructed, operated, and maintained over its life cycle.
- (m) **“Qualified Project”** means the planning, acquisition, financing, development, design, construction, reconstruction, rehabilitation,

replacement, improvement, maintenance, management, operation, repair, leasing, or ownership of:

- (1) Education facilities;
- (2) Transportation facilities, including streets, roads, highways, bridges, tunnels, parking lots or garages, public transit systems, and airports;
- (3) Cultural or recreational facilities, including parks, libraries, theaters, museums, convention centers, community centers, stadia, athletic facilities, golf courses, or similar facilities;
- (4) A building or other facility that is beneficial to the public interest and is developed or operated by or for a public entity;
- (5) Utility facilities, including sewer, water treatment, storm water management, energy producing or transmission, telecommunications, information technology, recycling, and solid waste management facilities;
- (6) Improvements necessary or desirable to any District-owned real estate;
- (7) Any other facility, the construction of which shall be beneficial to the public interest as determined by the Office.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Executive Office of Mayor Muriel Bowser



Office of the General Counsel to the Mayor

To: Lolita Alston
From: Betsy Cavendish
Date: June 13, 2016
Subject: Legal sufficiency review of a resolution approving rules for the Office of Public Private Partnerships

This is to Certify that this office has reviewed the above-referenced legislation and found it to be legally unobjectionable. If you have any questions in this regard, please do not hesitate to call Rob Hawkins, Deputy General Counsel, Executive Office of the Mayor, at 202-724-1303, or me at 202-724-7681.

A handwritten signature in cursive script that reads 'Elizabeth A. Cavendish'.

Elizabeth Cavendish