



GOVERNMENT OF THE DISTRICT OF COLUMBIA
MAYOR MURIEL BOWSER
OFFICE OF PUBLIC-PRIVATE PARTNERSHIPS
John A. Wilson Building
1350 Pennsylvania Ave, NW, Suite 533
Washington, DC 20004



**Public Comments
for
Notice of Proposed Rulemaking (NPRM)
and
Draft Guidelines and Procedures**

June 10, 2016



Letter Sent Via Email

May 10, 2016

Seth Miller Gabriel, AIA, ICC, CBO, University Architect
Director, Office of Public-Private Partnerships
Office of the City Administrator, Executive Office of Mayor Muriel E. Bowser
1350 Pennsylvania Ave, NW, Suite 533
Washington, DC 20004
E: seth.millergabriel@dc.gov

RE: Edgemoor Infrastructure & Real Estate's Comments on DC OP3 Draft Guidelines & Procedures for the Public-Private Partnerships Act of 2014, Published for Public Comment April 29, 2016

Dear Mr. Miller Gabriel:

Thank you for the opportunity to comment on the OP3's draft Guidelines and Procedures. Below are our comments, and we would welcome the opportunity to meet with you and offer our feedback in person.

Section 6.1 Time Periods for Acceptance of Unsolicited Proposals

- Why would the DC OP3 limit itself to a window of only two months a year during which to accept unsolicited proposals (March & September)? The Guidelines state that the reason for this is to ensure that the proposals can be fully reviewed within the time limits stated in the P3 Act. However, accepting proposals during two one-month periods during the year would seem to have the opposite effect: the OP3 would get inundated with proposals during those two periods and all the proposals received during each period would then be in the same step of the process at the same time, potentially overwhelming District resources and making it difficult to adhere to the 90 day initial screening period for the proposals. If the DC OP3 were to allow proposals to be accepted throughout the year, it would receive proposals more steadily throughout the year, keeping workloads manageable.
- In addition, limiting the acceptance periods runs counter to encouraging innovation and unsolicited proposals. For example, if someone or a firm has a great idea in April, does the OP3 really want that person/firm to sit on the idea for five months until September? That person/firm may also be discouraged from continuing to advance the concept, recognizing that the unique idea and first-mover advantage would not be protected through an unsolicited proposal submission for another five months.

Section 6.4.1 Preliminary Evaluation Criteria

- Why does an unsolicited proposal need to address "a need identified in a District or regional planning document"? We suggest modifying this bullet to simply read "Addresses a District need", which would allow the OP3 discretion on whether or not the proposal addresses an unmet need.



- Requiring the proposal to address a need identified in a written District or regional planning document is unnecessarily limiting and counter to innovation. The clause suggests that the District has already identified everything it needs and implies that the private sector should not consider anything the District hasn't already planned. It would eliminate the ability for the OP3 to hear about a creative idea or home-run project that wasn't previously on its radar. A number of the unsolicited proposals we have submitted during our 15 years as a P3 developer were not previously identified by our public sector partner in a planning document, yet still met a need of that public agency. The clause as currently drafted handcuffs the OP3 unnecessarily.

Section 6.5.5 Requirements of Alternate Unsolicited Proposals

- Typo: "...the comprehensive evaluation fee described in section 6.5.6." The correct section reference should be 6.5.8.

Section 6.5.7.2 Comprehensive Evaluation Period

- We suggest setting an upper limit on the comprehensive evaluation period time frame, which encourages proposers to do business with the District, communicating to them that they will be entering a process with a known outside end-date. This eliminates some schedule risk and is helpful for planning and assigning resources to projects. A fear of proposers when submitting a proposal without a known end-date (go/no-go date) is that the procurement process could drag on for years - an unknown and potential sink of time and money.

Section 6.5.16 Termination of the Process

- This paragraph states: "In the event of such a termination, the DC OP3 will return the unused funds paid by unsolicited proposers for the comprehensive evaluation process equally to all proposers." What about the used portion of these funds? In order to show that DC OP3 is committed to seeing the procurement through and also has "skin in the game," we suggest that if OP3 terminates the procurement process after having made the decision to move forward with the Comprehensive Evaluation and collecting the \$50,000 comprehensive evaluation fee, the entire \$50,000 fee be returned to proposers. This would encourage the private sector that the District is serious and aims to see a project through after arriving upon a favorable initial evaluation.

8.6 Access and Right to Inspect

- This paragraph states: "the DC OP3 and Owner Agency shall have the right to access and inspect the P3 project facility at any time upon reasonable notice." Unlimited inspections of a project at any time are usually difficult to manage and price for the private sector partner. We suggest changing this language to read "the DC OP3 and Owner agency shall have the right to access and inspect the P3 project facility as agreed upon in the P3 Agreement." The number of times and notice period can then be negotiated for each project, as appropriate.

Appendix E (Executive Summary Form)

- It appears that the executive summary is to be made public and proposers must follow the Executive Summary Form in Appendix E. However, the form includes information that would be considered confidential in any proposal, solicited or unsolicited (e.g. estimated project costs,



financial plan, etc.). Please clarify if portions of this Executive Summary Form can be made confidential.

Sincerely,

EDGEMOOR INFRASTRUCTURE & REAL ESTATE LLC

A handwritten signature in black ink, appearing to read "Brian Dugan".

Brian Dugan, Director

Edgemoor Infrastructure & Real Estate

T: 301.272.2998 | M: 858.248.0025

E: brian.dugan@edgemoordevelopment.com

cc: Judah Gluckman, Deputy Director, Office of Public-Private Partnerships (E: judah.gluckman@dc.gov)

RECEIVED

By judah.gluckman at 10:48 am, 5/10/16

LAW OFFICE OF WM. MARK SCOTT PLLC

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MARK SCOTT, ESQ.
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May 4, 2016

VIA US Mail

Judah Gluckman
Deputy Director and Counsel
District of Columbia Office of Public-Private Partnerships
1350 Pennsylvania Avenue, N.W., Suite 533
Washington, D.C. 20004

Re: Notice of Proposed Rulemaking: 27 DCMR Ch. 48, Public-Private Partnerships

Dear Mr. Gluckman:

I write to provide input to the referenced proposed rulemaking. I am a full-time resident of the District of Columbia.

The proposed rulemaking could be dramatically improved by applying lessons from past P3 mistakes. In particular, as you are well aware, the Oyster School P3 is under IRS audit. The District of Columbia has had to expend time and resources to defend this audit, including hiring the law firm of Orrick, Herrington & Sutcliffe, LLP, at, presumably, considerable expense. The District of Columbia could eventually pay a substantial penalty to the IRS. And, lastly, as admitted in defense documents, the P3 transaction has enriched the developer LCOR--and cost District of Columbia taxpayers--substantially more than originally forecast.

Despite the ongoing dispute over the Oyster School P3 and the ever-increasing costs of this dispute to District of Columbia taxpayers, I found it remarkable that the proposed rulemaking does not learn from the mistakes made in that transaction.

In light of this failure, I provide the following specific comments.

- **§ 4802.4**. Although the provision bars persons "convicted of corruption or fraud," Federal officials do not have the resources to prosecute many fraudulent transactions. For this reason, the wording of this provision should be expanded to include, at a minimum, any person "found to be in violation of any Federal or District of Columbia law due to his or her participation" in any P3 transaction. And the RFP should specifically request a response to the question of whether any person or firm involved has been audited or otherwise investigated for prior involvement in any P3 transaction and the results of those investigations.

- **§§ 4804.5 and 4807.15.** None of the suggested criteria give weight to any previous disreputable conduct. For instance, the law firm that provided the tax opinion on the Oyster School P3 bond issue, Hunton & Williams, would not be held responsible for its failure to adhere to established standards of practice, or for any failure to address and resolve the dispute over the Oyster School P3 financing and its apparent dumping of such responsibility on District of Columbia taxpayers. Further, no consideration is given to the Federal tax and other risks associated with most P3 transactions, nor the fact that the private parties putting together these transactions may be placing District of Columbia taxpayers in significant risks. As District of Columbia taxpayers will not be able to independently assess and comment on these risks prior to the consummation of the P3 transaction due to the limited disclosure of information provided for in § 4804.12 of the proposed regulation, District of Columbia officials must protect District taxpayers. In assuming this duty, it is absurd to pretend that persons or firms that have a history of providing erroneous legal opinions or financial evaluations, or a failure to stand behind their work when such legal opinions or financial evaluations are challenged, would not have a propensity to repeat the same disreputable conduct. For this reason, as part of the RFP review process, for either solicited or unsolicited proposals, a firm or person that was previously involved in a failed transaction or failed to stand behind their work when challenged, should either be barred permanently (or for a substantial period of time) or at the very least, be disadvantaged in the RFP review and selection process. As an example, it makes no sense at all for LCOR to present a proposal, with the support of the firm Hunton & Williams, without taking into account their failure to compensate District of Columbia taxpayers in connection with the Oyster School P3 debacle.
- **§ 4810.2.** A report that fails to describe failures or problems with particular private entities in previous P3 transactions is incomplete and could lead to Council approval of P3 transactions with private parties with a substantial history of abusing the trust of the taxpayers of the District of Columbia.

In conclusion, I appreciate the opportunity to provide input into the rulemaking process. In making these comments, I hope and trust you will be open to input from persons who are not simply P3 cheerleaders but are, instead, cautiously concerned about the use of taxpayer dollars in P3 ventures that might in the long-term be judged a costly mistake for the taxpayers of the District of Columbia.

Very truly yours,

LAW OFFICE OF WM. MARK SCOTT PLLC



Wm. Mark Scott

Comments on Draft P3 Regulations
GOTHAM URBAN VENTURES LLC
May 13, 2016

Seth and Judah,

Thank you very much for the opportunity to comment on the DC Office of Public Private Partnership's draft regulations. They are very thorough and provide a clear guide for the processes that the office will be using to solicit, review and award P3 projects. I know that it has taken a great deal of time and effort to issue these regulations and I congratulate you on your accomplishment. I am including my comments and questions on the regulations below and would very much like to meet with you in person to discuss them in further detail.

Comments:

Figure 1: The DC OP3 Project Procurement and Cycle Management Process

- Could you please include an expected timeline for each of the project tracks?

Sect. 1.8 Funding of Project Development

- Will the P3 office share the budget for each project in advance?

Sect. 2.2 Identified Solicited Projects

- What is the definition of a "viable" project? How is a project determined to be viable?

Table 2: Stage One Initial Screening Criteria

- What are the "overall policies of the District government for infrastructure development?" Where can they be found?

Section 5.3.2.3 Expiration of Approval

- How long does the OP3 expect that it will take, after Council approval, to issue an RFP, review responses and select a development partner? If it takes OP3 longer to complete than projected, can an extension to the two-year expiration of the RFP be provided which reflects this?

Section 6.0 Project Procurement – Unsolicited Projects

- The restriction of the acceptance of unsolicited proposals to twice a year will stymie the development of innovative proposals and reduce developers' willingness to invest the time necessary to develop the types of well thought out, substantive proposals that the OP3 seeks to promote. With semi-annual submissions developers will attempt to time their work for a submission date rather than investing as much time as needed with the knowledge that a proposal will be reviewed throughout the year, when there is an excellent product to submit. Developers who go to the effort of preparing in depth proposals will also be wary of having proposals sit on a shelf, losing the competitive advantages of being the first entity to submit

the first proposal which shapes the scope of the Request for Alternate Proposals. If the issue driving this is concern the capacity of the OP3 to screen and evaluate proposals, it seems that this would be a good area in which for OP3 to utilize consultants. As proposal application fees would cover this cost, the budget of the OP3 should not be impacted.

Section 6.4.1 Preliminary Evaluation Criteria

- Restricting evaluation of Unsolicited Proposals to those that “addresses a need identified in a District or regional document” will stifle the creativity that the OP3 seeks to encourage. The District cannot know all of the needs that it has or how they can be effectively mitigated. The private sector, if allowed, can creatively solve problems that the District might not imagine possible and therefore was not included in a District or regional planning document. One example that comes to mind is a P3 solution to the redevelopment of the Daly Building. To my knowledge, the need for a renovated Daly Building is not reflected in current District planning documents. The OP3 should include the assessment of whether or not a proposal meets a District need in its initial review. The OP3 will need to be open and flexible to new ideas if it is to have a chance of promoting and encouraging the private sector to bring forth creative solutions to challenging problems.

6.4.3 Preliminary Evaluation Results

- Will an unsolicited proposal be deemed favorable if it meets all of the Preliminary Evaluation Criteria identified in Section 6.4.1 and includes a \$5,000.00 Application Review Fee?
- If an unsolicited proposal is deemed unfavorable, will the offeror be given a reason why it has been deemed so?
- If an unsolicited proposal is deemed unfavorable, will the offeror be given an opportunity to meet with OP3 to discuss the reasons for this determination?

6.5.16 Termination of the Process

- If the OP3 should terminate the process of proposal review for no fault of a developer, OP3 should return all of the funds received from the developer. Developers expend considerable time and money to develop comprehensive proposals. As an entity that wishes to encourage this behavior, OP3 should be accountable to following through with the process in which they engage and bear some financial risk if it is unable to do so. The development community will view this as an indicator of the OP3s seriousness of intent to be a committed partner.

Thank you for the opportunity to comment on your draft regulations. I would very much like to meet with you in person to discuss these comments and provide more general thoughts. Please let me know when it would be convenient for you to meet. I look forward to seeing you soon.

Best,

Desa Sealy
President/CEO

PBBC COMMENTS TO DC OP3 GUIDELINES AND PROCEDURES

May 15, 2016



Section	Title	Comment ¹
Executive Summary	Figure 1	<ul style="list-style-type: none">▪ The process would benefit from pre-approval during the project development stage. After the request for information, we suggest the DC OP3 prepare a business case with Value for Money analysis and recommendation to City Council for approval to proceed with the procurement. The approval could contain certain parameters, that if met, would provide certainty that the project will proceed. To defer the council approval to a letter stage introduces significant risk which will be of concern to bidders. We refer the DC OP3 to the Miami Dade Process Matrix for an example.▪ The unsolicited proposal 30 day minimum time frame for alternative proposals infers a time element that is too short. We suggest a minimum of 60 days.
1.6	Relationship between the DC OP3 and Other District Agencies	<ul style="list-style-type: none">▪ The statement “Those District agencies with the expertise and ability to manage a P3 agreement for the full life cycle of a project will be the public entity owners of an agreement.” Implies there are other agencies that may not have the requisite expertise. How they might be handled should be clarified, especially in the event the DC OP3 ceases to exist.
1.10	Conflict of Interest, Open Meeting and FOIA Requirements	<ul style="list-style-type: none">▪ Minor nits:<ul style="list-style-type: none">○ Exclude the word “are” in the sentence “Details are of these requirements are outlined in section 7.0.”○ Delete the word “under” in sentence “Although proprietary business information will be protected under as described in sections 5.4.11 and 6.5.11, the DC OP3 will strive to publish as much material as possible on its website while maintaining the interest in fair, competitive procurements.”
3.0	Project Screening for Solicited Proposals	<ul style="list-style-type: none">▪ Opening paragraph: Suggest modifying the sentence “The screening of projects on the P3 Project Pipeline will allow the DC OP3 and Owner Agencies to determine which projects are most likely to deliver the best value-for-money to the residents of the District.” Value for money implies the best approach; the sentence makes it confusing; ie will only the best projects advance, or projects which demonstrate better value for money under a P3 arrangement, subject, of

¹ The comments to the DC OP3 Guidelines and Procedures may require corresponding changes and revisions to the DC P3 statute and regulations.

PBBC COMMENTS TO DC OP3 GUIDELINES AND PROCEDURES

May 15, 2016

Section	Title	Comment ¹
		course to the Agency acceptance of the approach.
3.1	Stage One: Initial Screening Criteria	<ul style="list-style-type: none"> ▪ Some of considerations in the “Policy Priorities” screening criterion should be stated generally in terms of economic growth, opportunity and development (as opposed to mentioning specific groups or programs). This may provide more flexibility in considering unique benefits that a project may have to offer. ▪ The question of effective risk transfer should not focus solely on a “positive risk profile for the District”. Rather, effective risk transfer should result in an overall “efficient project risk profile” that can allocate risk to the party who is in a better position to manage and control a particular risk and has been demonstrated to be bankable based on precedent, successful transactions in the P3 market. ▪ The “Funding Considerations” screening criterion should include a consideration of whether a P3 frees up funds for other uses and needs. Also, could the application of a P3 process for a new facility result in funding from gains in the Agencies program efficiency improvements. ▪ The following consideration under the “Life Cycle Costs” screening criterion does not appear relevant to the criterion and should be removed or relocated: <p style="text-align: center;">Does the Owner Agency have the capability to manage the P3 contract, or the ability to gain that ability and what would be the associated cost to the District for this management?</p> ▪ The following consideration under the “Life Cycle Costs” screening criterion appears to be already covered under the “Funding Considerations” screening criterion and should be removed or relocated: <p style="text-align: center;">Could project revenues support full life cycle life cycle costs?</p> ▪ The Social Equity Considerations screening criterion should be combined and made

PBBC COMMENTS TO DC OP3 GUIDELINES AND PROCEDURES

May 15, 2016

Section	Title	Comment¹
		<p>part of the “Policy Priorities” screening criterion.</p> <ul style="list-style-type: none">▪ Under the “Market Readiness” screening criterion, a consideration should be added inquiring into the status of key governmental approvals or permits. For example, where is the project from an environmental planning standpoint, etc.▪ The “Complexity” screening criterion should be re-labeled and focus on “Innovative Opportunities.” Innovative opportunities may exist, regardless of size or complexity, that may be realized through the use of P3s.▪ Bullets 4 (local hiring, apprenticeship) & 5 (WMBE support) are unnecessary at this stage. If a project has merits, the RFP can be structured to promote / ensure these policy benefits are included in the project’s execution.
3.2	Stage Two: Detailed Screening Criteria	<ul style="list-style-type: none">▪ The following criteria appear more suited as screening criteria: improved benefits to the public; economic development; market reality; stakeholder support and engagement; legislative considerations. These criteria seem to be upfront and/or threshold issues that should be considered in advance of the detailed screening phase (which appears to be focused on the status of commercial, technical and financial due diligence and development activities).▪ Under the “Technical / Engineering Feasibility” screening criterion, a consideration should be added to inquire about the need, status and nature of any third party agreements that may be needed for the project (i.e. third party stakeholders).▪ The “Concession Term” screening criteria should be combined and made part of the “Financial Feasibility for the Full Life Cycle of the Project” criterion.▪ Under Financial Feasibility for the Full Life Cycle of the Project, it is unlikely that the Chief Financial Officer of the District would be able to certify that such funds would be available throughout the term of the contract. Rather, this will go to the critical nature of the project and the market’s willingness to take appropriation

PBBC COMMENTS TO DC OP3 GUIDELINES AND PROCEDURES

May 15, 2016

Section	Title	Comment¹
		risk. For example, unlikely that the market will take appropriation risk for a community recreation center, but highly likely that it will do so for a prison facility.
3,3	Creation and Publication of P3 Project Pipeline	From an organization standpoint, these provisions should be relocated to Section 2.0 “Project Identification”. Suggest a prioritized list indicating the status. Eg initial prioritization (Stage 1, 2, Request for Information). See earlier comment in Executive Summary. Also, of benefit would be some commentary as to type of P3 as P3 can have many connotations. Eg Hybrid, availability, demand risk, ownership, etc.
3.4	Project Prioritization	From an organization standpoint, these provisions should be relocated to Section 2.0 “Project Identification”.
4.0	Project Development	<ul style="list-style-type: none"> ▪ Project should be approved by the District prior to moving forward. Criteria could be set that effectively sets the broad parameters around which the project will be approved. Could include affordability criteria, funding source commitments, etc. as noted in Table 4
4.1	Project Development Tasks	<ul style="list-style-type: none"> ▪ The risk register should also identify if the risk register and allocation matrix should also identify if the risk can be mitigated and if so, measures to mitigate the risk. ▪ A project development task should include the identification of whether third party agreements will be required (and not be limited to federal agreements).
4.2 & 4.3	First Level VfM and Public Sector Comparator	<ul style="list-style-type: none"> ▪ DC OP3 would be well-served to have an experienced outside third-party consultant provide templates and instructions for DC OP3 to use when conducting both its P3 Value for Money (VfM) analysis and its Public Sector Comparator .
5.1	Request for Information	<ul style="list-style-type: none"> ▪ The RFI phase for a potential P3 project should include an industry day and allow meetings with interested teams to obtain input. ▪ The District should be allowed to use information and concepts contained in RFIs without the need to pay a stipend. RFIs are intended to help the District shape and structure a procurement to take into account industry input. This will avoid a dispute over who initially came up with the information or concept.
5.2	Prequalification / Request for Qualifications	<ul style="list-style-type: none"> ▪ The P3 statute/guidelines should make it clear that “prequalification” also means the ability to establish a shortlist of the most qualified proposers. The term “prequalification” can mean that all proposers who meet certain minimum

PBBC COMMENTS TO DC OP3 GUIDELINES AND PROCEDURES

May 15, 2016

Section	Title	Comment ¹
		requirements are eligible to submit a proposal. In contrast, a shortlist consists of those proposers who not only meet the minimum requirements, but also meet a certain level of qualifications/ranking as compared to other proposers (i.e. top 3).
5.2.3	Minimum Required for Pre-qualification	<ul style="list-style-type: none"> • Often a responding team is an entity that is not yet a legal entity, and as such it is not technically qualified to lawfully conduct business in the District. The RFQ should address this. • Parties responding to an RFQ should not need to be qualified to conduct business in the District (5.2.3). This will of course be a requirement of closing, but would seem to create unneeded cost and inconvenience with no benefit for the District. Also, teams change leading up to closing, so many registrations would likely have to be modified.
5.2.6	Simultaneous Competitive Negotiations	<ul style="list-style-type: none"> ▪ These provisions should be labeled as an “industry review process” as opposed to a “competitive negotiation process”. As we understand the process described, the purpose is to seek input and comments from the proposers regarding the draft RFP and P3 Agreement – which is a common practice. However, these are not “competitive negotiations” in that the District is not negotiating unique or specific terms and conditions with each proposer. Rather, the feedback is collectively being used to revise the procurement documents before a final RFP is issued.
5.2.10 (Added)	Additional RFQ Elements	<p>In addition to the items noted above, we suggest including:</p> <ul style="list-style-type: none"> ▪ List of advisors and other entities that the proponents should not contact; ▪ If a stipend and/or break fee will be paid, and to the extent possible, quantified
5.4.4	Evaluation and Selection Criteria Requirements	<ul style="list-style-type: none"> ▪ The P3 statute/guidelines should be revised to make it clear that the listed evaluation criteria are illustrative only of what may be included in the RFP documents. ▪ The following does not appear to be an evaluation criterion and should be deleted (this is an activity performed internally by the District): <ul style="list-style-type: none"> • Value-for-money and public sector comparator analysis of the proposal; • Cost should be net present cost at a stipulated discount rate over the term of the agreement as opposed to first cost, or a simple summation of the annual costs.

PBBC COMMENTS TO DC OP3 GUIDELINES AND PROCEDURES

May 15, 2016

Section	Title	Comment¹
5.4.6	Evaluation of Responses to Request for Proposals	<ul style="list-style-type: none"> ▪ The guidelines should make it clear that a Proposer must also be “responsible” in order for its proposal to be evaluated. ▪ The participation of the Director and Deputy Director of the DC OP3 and the Director of the Owner Agency in both the Technical Review Committee and Financial Review Committee should be permissive as opposed to mandatory. There may be instances when membership in the Technical Review Committee and Financial Review Committee should not overlap to facilitate concurrent reviews and to protect against pricing unduly influencing decisions on technical merit. ▪ For both the Technical and Financial Review Committees, DC OP3 would be well served to retain an outside advisor who is well versed in P3 solicitations. Suggesting names of qualified firms would be beneficial for DC OP3.
5.4.7	Selection of Preferred Bidder	<ul style="list-style-type: none"> ▪ Selection of the preferred bidder should be stated in terms of the proposal offering the best value or most advantageous to the District (as opposed to the highest overall score). Selection may be based on a trade-off analysis (and not on scoring).
5.4.8	Publication of Responsive Executive Summaries	<ul style="list-style-type: none"> ▪ Language should be added to recognize that proposals may receive rankings (as opposed to scores).
5.4.9	Payment of Stipends	<ul style="list-style-type: none"> ▪ OP3 does not have to pay a stipend if it cancels procurement > 30 days before due (5.4.9). This seems an arbitrary point in time, after which bidders will have expended considerable sums. What about cancellation [60] days after initial issuance of draft RFP? Also, can’t DC OP3 always delay the due date, and then cancel?
6.1	Time Periods for Acceptance of Unsolicited Proposals	<ul style="list-style-type: none"> ▪ What is the rationale for limiting the periods during which unsolicited proposals may be accepted? (6.1) Is this not a practice which should be encouraged?
6.2	Discussions with DC OP3 before Submission of Unsolicited Proposal	<ul style="list-style-type: none"> ▪ This section should clarify whether meetings with private entities (and materials shared) prior to the submission of an unsolicited proposal will be public and subject to disclosure. ▪ These meetings and their content should remain confidential to encourage the private sector to proceed with unsolicited proposals.
6.3	Unsolicited Procurement Process	<ul style="list-style-type: none"> ▪ The District could encourage more unsolicited proposals by including a maximum number of days for evaluation and the acceptance of competing proposals. Just including a minimum does not motivate the private sector as the District could choose

PBBC COMMENTS TO DC OP3 GUIDELINES AND PROCEDURES

May 15, 2016

Section	Title	Comment¹
		to keep the evaluation and acceptance period open for 6 months or more and undercut any advantage gained by submitting an unsolicited proposal.
6.4.1	Preliminary Evaluation Criteria	<ul style="list-style-type: none"> ▪ An unsolicited proposal for a project that is already identified in the District's P3 pipeline should be ineligible for consideration.
6.4.2	Preliminary Evaluation Fee	<ul style="list-style-type: none"> • The District could encourage more unsolicited proposals by eliminating the preliminary review fee (6.4.2) or at least putting it off until an initial indication that (i) it is consistent with development goals of the District and (ii) in compliance with current laws (no new law needed) <ul style="list-style-type: none"> ▪
6.5.4	Schedule	<ul style="list-style-type: none"> ▪ DC OP3 has placed a minimum open response period of 30 days. To encourage the private sector to submit unsolicited proposals, DC OP3 should also establish a maximum open response period. For example, Florida has set a minimum of 21 days and a maximum of 120 days in which to select alternative proposals.
6.5.7.4	Evaluation Committees	<ul style="list-style-type: none"> ▪ See comments to Section 5.4.6.
6.5.8	Comprehensive Evaluation Review Costs	<ul style="list-style-type: none"> ▪ The original unsolicited proposer should pay the fee at the time that alternative unsolicited proposals are due. ▪ There should be a "no later date" (i.e. 10 days after submission) when an unsolicited proposer can withdraw its proposal and receive its fee back. ▪ The \$50,000 from the unsolicited proposer is paid, but it is held by DC OP3 in escrow. If other respondents submit proposals the \$50,000 is returned to the unsolicited proposer. If no other respondent's submit a proposal DC OP3 (a) keeps the \$50,000 if the project is not approved and does not close or (b) returns the \$50,000 to the unsolicited proposer or credits it towards the solicited proposer's closing costs if the project is approved and closes.
6.5.10	Selection of a Preferred Bidder	<ul style="list-style-type: none"> ▪ See comments to Sections 5.4.4 and 5.4.7.
6.5.12	OAG Certification	<ul style="list-style-type: none"> ▪ The P3 statute/guidelines should be revised to require the following certification to be made as a condition to signing the P3 Agreement as opposed to a condition to selection (it is unlikely that the unsolicited proposal will have sufficient detail on these issues):

PBBC COMMENTS TO DC OP3 GUIDELINES AND PROCEDURES

May 15, 2016

Section	Title	Comment ¹
		<ul style="list-style-type: none"> • Proper indemnifications, including project insurance and bonding are included in the proposal; and ▪ The P3 statute/guidelines should be revised to require the following certification to be a screening criterion (this is an upfront/threshold issue that should be decided prior to spending the time to evaluate and select a proposer): <ul style="list-style-type: none"> • There are no interstate compact issues if the project involves multiple jurisdictions.
8.5	Prohibition Regarding Non-Compete Provisions	<ul style="list-style-type: none"> ▪ The P3 statute/guidelines should make it clear that the prohibition on “non-compete” provisions does not prohibit the District from agreeing to compensate a private entity if certain events occur.
8.9	Sovereign Immunity	<ul style="list-style-type: none"> ▪ The P3 statute/guidelines should clarify that the District’s sovereign immunity does not apply to a breach of contract claim against the District under the P3 Agreement.
8.10	Remedies	<ul style="list-style-type: none"> ▪ The P3 statute/guidelines should clarify that the following statement is not intended to limit the operator’s termination compensation (if any) to revenues collected on a project (some projects may not have an adequate revenue source): <p style="margin-left: 40px;">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.</p> <p>This section may require that the DC OP3 differentiate between “operator” and facility maintenance service provider”. To the extent the FM services provider continues to maintain the facility, it will be paid by the District as though the district was the concessionaire. If it exercised step in rights for the concessionaire.</p>
9.0	Final Approval	<ul style="list-style-type: none"> ▪ Is there any way to receive provisional approval from the Council based on certain parameters (e.g. affordability, term, scoring methodology, MWBW limits, VfM, etc.) such that the final approval is deemed to be granted unless the actual P3 agreement substantially differs from these parameters? Right now, any final agreement is subject to Council approval (9.0), and the Council members may change from the time the

PBBC COMMENTS TO DC OP3 GUIDELINES AND PROCEDURES

May 15, 2016

Section	Title	Comment¹
		procurement was instituted, after considerable funds have been spent.

Additional Questions/Comments:

1. Consider forming a Project Board for each project, from e.g. DC OP3, the Council, Mayor's staff, the private sector, etc.- Puerto Rico did something like this that worked well. The board will help navigate the project through procurement and shape it into something that the District will find appropriate. Will also help apply for federal funds.
2. There is very little discussion of public outreach to support a proposal. Will the District assist in this effort? Could it be a responsibility of the Project Board to coordinate with the sponsors?
3. There is no discussion of the acceptability of availability payments and what criteria must be followed? Must everything be subject to appropriation?
4. Is the District considering incorporating real estate assets/development as a potential subsidy for P3's? This may be relevant to any unsolicited financing proposal.
5. We would suggest assembling a list of qualified advisors to perform the value for money/public sector comparator analysis. There is an unequal level of understanding of these principles across the sector.



BOARD MEMBERS

May 25, 2016

William A. Marino

Chief Executive Officer
Star America
Chairman

Mr. Seth W. Miller Gabriel

Director

The District of Columbia Office of Public-Private Partnerships

John A Wilson Building

1350 Pennsylvania Avenue, NW, Suite 513

Washington, DC 20004

Salvatore Mancini

Chairman & Managing Partner
Star America
Vice Chairman

Richard Fierce

Senior Vice President
Fluor
President

Dear Seth,

Attached you will find comments from AIAI members regarding OP3's proposed Guidelines.

Joe Wingerter

Vice President
Kiewit Development Company
Secretary & Treasurer

Congratulations to you, Mayor Bowser and the DC Council and on your achievement in standing up this important new District office. AIAI and its members appreciate the opportunity to provide you this feedback and stand ready to assist you and your colleagues to help advance P3s in the District.

Nuria Haltiwanger

Chief Executive Officer
ACS Infrastructure Development
Director

Please feel free to contact me with any questions at any time.

Johan Henriksson

Executive Vice President
Skanska Infrastructure
Director

Warm Regards,

AIAI – Association for the Improvement of American Infrastructure

Gregory A. Kelly, PE

President and CEO, U.S.
WSP | Parsons Brinckerhoff
Director

Kent Marshall

Vice President & Director of
Public Private Partnerships
Granite Construction
Director

Lisa Buglione

Director of Operations and Development

Nicolas Rubio

President
Cintra US
Director

Anthony Phillips

Head of North America
John Laing
Director



Washington DC

Date: 5/26/16

Initiative Addressed: P3 Procurement / Best Practices

Summary Overview: Review of DC OP3 Guidelines and Procedures

Profile

DC OP3's draft Rules and Guidelines and Procedures were released for public comment. The Rules outline the process for the development, solicitation, evaluation, award, delivery, and oversight of solicited and unsolicited P3 projects in the District. Several AIAI members contributed to the thoughts and input on OP3's guidelines as documented below:

Commentary: Overall

1.0 Ability to Shortlist: One fundamental right of the office that needs to be expressly retained to help avoid litigation is the ability not just to prequalify bidders but to also shortlist based on qualification and selection of the MOST qualified. Typically the language says something like "retains the right in its sole discretion to identify a shortlist of more than one bidder and in most cases no more than 4."

Specific Points of Concern:

Figure 1, Page 3 – The 90-day initial screening seems to be a bit long. Consider 60 days for initial screening. In contrast, the evaluation of proposals appears to be only 30 days' maximum. This may refer to a different time period and should be clarified in the figure. The time frames in the Arizona P3 legislation may be of interest.

1.5 Defined Terms – Availability payments are not defined. It would be helpful to add this definition.

2.7 Identified Solicited Projects – In identifying the potential P3 projects, it may be helpful to provide a hierarchy of projects to identify their readiness for procurement. The Virginia P3 guidelines identify projects as candidate, conceptual P3s, etc. This enables the P3 industry to assess the pipeline and prepare for teaming when they have idea of when the P3 projects may reach the procurement stage.

3.1 Stage One: Initial Screening – The table in this section does not directly address O&M. It may be helpful to expand the table and provide criteria related to opportunities to include O&M elements in the P3 and also whether the project can be ring fenced to minimize interfaces with other projects or operations.

3.2 Stage Two: Detailed Screening – Fourth line from the bottom in the first paragraph, recommend inserting the word “appropriate” after criteria so that the sentence reads “Each project will be evaluated based on criteria “appropriate” to the project’s infrastructure sector”.

3.2 Stage Two: Detailed Screening – Per the comment above regarding Stage One, recommend adding O&M elements to the Table 3. Also, the ability to innovate is related to the level of design. Is there room for innovation based on the level of design?

3.3 Creation and Publication of P3 Project Pipeline – The paragraph seems to be at odds with transparency goals and could be rewritten to address that issue. Also, pipeline may be better referred to as candidate projects. This also relates to previous comments regarding classifying the pipeline to indicate progress towards procurement.

4.0 Project Development – It would be helpful to expand on how projects are selected from the pipeline and advanced to procurement.

4.1. First line, spelling of “therefor” should be corrected to “therefore”. In Table 4, the title “Identify environmental...” should be renamed “complete”. In addition, the title “Federal Agreements required” should be renamed “3rd Party Agreements”.

4.3 Draft Public Sector Comparator – Consider rewriting the first sentence to eliminate the phrase “if that project were delivered under the traditional model”.

4.4 Statement of Intent.... - Consider replacing the word “good” with beneficial when referring to value-for-money.

5.1 - RFI process should allow for market soundings and one-on-one meetings with potential bidders at the discretion of the agency. One-on-one meetings allow potential private participants to share sensitive and in some cases proprietary information with the public agency in an effort to ensure the procurement is structured to achieve maximum value for tax payers and encourage innovations to be considered throughout the process. It is important to maintain the flexibility to meet with some but not necessarily all of the RFI respondents). Usually RFIs are public and open to use by the procuring agency. Ideas from RFIs do not require a stipend as they are not part of a formal procurement process.

5.2.6 – This section cited below is confusing as is the title of this section. Is this supposed to refer to Alternative Technical Concepts? Please clarify the section title and the paragraph cited below:

The DC OP3 may utilize a simultaneous competitive negotiation process, which will be outlined in the RFQ. This process entails the DC OP3 giving each pre-qualified private entity a copy of the draft RFP and P3 agreement to solicit their feedback on the documents. The DC OP3 will then hold a series of meetings with each pre-qualified private entity to discuss their feedback in greater detail. The DC OP3 will then refine the draft RFP and P3 agreement based on the feedback received from pre-qualified private entities. At the end of this optional process, the draft RFP and P3 agreement will be submitted to the Council, and if approved, the pre-qualified private entities will be given the final RFP and P3 agreement to which they will respond.

While pre-qualified private entities will be able to respond with their proposals, including pricing, designs, and performance guarantees, they will not be able to change substantive terms of the P3 agreement after it has been approved by the Council unless the DC OP3 determines that extenuating circumstances justify changes and the relevant entities are notified. Re-approval by the Council according to section 5.3 may be required if substantive changes are made to the RFP.

Sec. 5.2.7 - An application fee in response to an RFP is unnecessary given the high costs applicants absorb, in terms of time and preparation, to respond and monitor.

Section 5.2.9 – It is not customary to provide stipends for RFIs or RFQs.

Sec. 5.3.2.3 – Ideally, Council approval would not expire given transaction times for P3s often goes longer than 2 years.

Sec. 5.4.2 - Proposers need at least 60 days to respond, with 90 days not out of the ordinary. Under what circumstances might there be a period of less than 30 days to respond to an RFP? “Shorter than 30 days” seems arbitrary.

Sec. 5.3 - A step needs to be added allowing for eligible respondents or if utilizing a shortlisting process, that shortlisted proposers have an opportunity to review, comment and submit questions prior to the final RFP being sent to the DC Council for review and approval. So Council will essentially review the 1st draft, then bidders and stakeholders including public will have an opportunity to comment. If necessary changes are then made and the final RFP is sent to Council for approval.

Sec. 6.4.2 - \$5,000 is too low for an Unsolicited given the time OP3 must take to review. \$25,000 is not unreasonable to ensure highly qualified applicants participate. The fee of \$5K does not seem to coincide with or reconcile with the \$50K fee set forth in Section 6.5.8. on page 30 – without some sort of cross reference to one and the other or explanation as to the difference between the two.

Sec. 6.5.3.and 6.5.4 - “...at least 30 days...” “...longer than 30 days...” There is no upper limit to the timeframes. We would recommend a cap of 45 to 60 days or 60 to 90. It is important to not let the process become arbitrary or capricious.

Sec. 6.5.13 - DC OP3 should only be able to begin negotiations with 2nd bidder upon **termination** of negotiations with the preferred bidder. This Section could result in potentially very expensive legal and advisory fees if DC OP3 were to have the ability to pause negotiations with one bidder and move on to another and then potentially return to the preferred bidder. It has the potential to undermine negotiations in good faith, with both parties equally committed to reaching agreement on all the terms and conditions of the contract.

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 intent to commence negotiations.

Sec. 8.1. - Last bullet point, strike “ a subsequent” and replace with “an”.

Sec.8.3 – This section is consistent with the comments regarding 6.5.13. It may be better to restate to ensure clarity relative to unsolicited proposals.

Sec. 8.5 - “...except as it may (or they may) interfere with or conflict with stated plans for addressing infrastructure needs as procured through a P3.” We believe this seems bold and arbitrary to not allow a non-compete.

Appendices Comments

Pg 40 – Does “DC Council Approval” mean ‘acceptance of the terms and conditions set forth in a negotiated agreement’? Or in some way are the members of the DC Council now active in renegotiation?

Pg 45 - Disclosure? Third paragraph – unlimited liability, without any notes or steps to provide for protection of intellectual property or confidential information. It appears to be appropriately addressed in Section 6.5.15. Therefore is this exclusion necessary or even appropriate?

Pg 46 - D. First bullet “Delivering the Best Value of Money:” should this be addressed as “Best Value for Money”? The last bullet – aspirational – is it really necessary? Or even appropriate?

Comments on Notice of Proposed Rule Making

4801.4 - Mentions using ideas from RFIs as part of procurement only if a stipend is paid. Usually RFIs are public and open to use (and also do not require a stipend as they are not part of a formal procurement).

4809.5 - Facilities Approval Plan. The concept is usual but the wording in the rule covers pretty much everything which is not normal. Normally a narrower set of “proposal commitments” are incorporated in the P3 agreement (and financing is rarely part of it – was on Presidio due to the “funding competition”).



Letter sent via email

May 26, 2016

Seth Miller Gabriel, AIA, ICC, CBO, University Architect
Director, Office of Public-Private Partnerships (OP3)
Executive Office of the Mayor, Government of the District of Columbia
1350 Pennsylvania Avenue, NW, Suite 533
Washington, DC 20004
E: seth.millergabriel@dc.gov

Mr. Miller Gabriel,

The Federal City Council (FC2) is pleased to have the opportunity to offer comments on the Notice of Proposed Rulemaking (NPRM) published by the Director of the District of Columbia Office of Public-Private Partnerships (OP3). This rulemaking would establish a new Chapter 48 (Public-Private Partnerships) of Title 27 in the District of Columbia Municipal Regulations (27 DCMR). FC2 views an active and successful OP3 as a critical tool for expanding and accelerating investment in public infrastructure in the District.

The NPRM is comprehensive and adheres to much of the standard framework for P3 operations in the US. For that reason and for the purposes of brevity, I will focus this letter on the recommendations that we would like to offer that might clarify or enhance the function of OP3. The comments are presented in the order that they are found in the document.

Section 4802.9 Use of Responses to Request for Qualification (page 4)

This language allows the District to retain the right to use information or concepts from proposers' submittals, if a stipend is paid (and accepted). This concept is a good way to secure intellectual property from proposers, even if they are not successful in securing the project award. The concepts can then be integrated into the scope and plans of the winning bidder. However, this provision may cause proposers to consider the value of offering innovative concepts to the District during the proposal process. The value of the stipend must be advertised and be competitive enough to incent competition.

Section 4803.3 Approval of Proposed Request for Proposals by the Council (page 4)

OP3 legislation requires the DC Council to approve the project solicitation, in advance of the project award. Council has preserved its right for diligent oversight, at the organizational and project level. However, requiring Council approval at every step of the project undermines the negotiating leverage of OP3. An empowered OP3 is able to negotiate aggressively for the best long-term value for the District. An alternative approach would be to have Council approve the RFP, and at the same time provide OP3 with parameters for the key terms a project award. OP3 could then negotiate with proposers, with the understanding that if the final award meets (at a minimum) the key terms outlined by Council, an additional Council vote would not be required.

This approach could be refined and initially limited to projects that conform with Section 4803.3(b), then reviewed after a predetermined number of awards.

Section 4804.7(b) Financial Review Committee (page 7)

FC2 believes that the participation of the Office of the Chief Financial Officer (OCFO) would be critical to the effectiveness of this committee. This would provide the Council with an independent view on the fiscal and financial implications of a decision to move forward with a P3 project agreement.

Section 4806.4 Preliminary Evaluation Results (page 11)

This section provides the proposer with rapid feedback on its submittal. However, it would be essential to define the criteria for “favorable” and “unfavorable” in the regulations. As it stands, it appears that a qualitative assessment is being made, which could discourage the participation of prospective bidders or convey a sense of subjectivity to the selection process.

Section 4810 Final Approval of the Public-Private Partnership Agreement (page 23)

This section directs OP3 to submit the P3 Agreement to Council, for review and approval, in addition to a formal report and public notice. I would again reference my comments on Section 4803.3 above about ensuring that OP3 is best able negotiate and represent the interests of District taxpayers.

Thank you for the opportunity to offer our views and recommendations for enhancing the effectiveness of the OP3. We are available to discuss any of these topics in more detail with OP3 staff.

Sincerely,



Emeka Moneme
Deputy Executive Director
T: 202-481-3258
E: emoneme@federalcitycouncil.org

cc: Judah Gluckman, Deputy Director, Office of Public-Private Partnerships (E: judah.gluckman@dc.gov)

Comments to the Proposed Office of Public-Private Partnership (“OP3”) Rules

- Section 4805.3 of the Proposed OP3 Rules states private entities are encouraged to meet informally with DC OP3 to discuss ideas and concepts but makes no mention of the confidentiality of those meetings which could stymie the open communication needed to achieve P3 goals. Accordingly, § 4805.3 should be amended to read as follows with the amendment underlined and in red:

“Discussions with DC OP3 before Submission of Unsolicited Proposal: Private entities are encouraged to contact the DC OP3 to arrange a meeting to confidentially discuss their ideas and concepts for unsolicited proposals before developing or submitting an unsolicited proposal. These meetings will be useful for all parties to determine the viability and desirability of a P3 project well 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.”

- Section 4806.3 states that any unused funds from the preliminary review fee will be returned at the end of the review period but does not state which review period. To clarify this ambiguity, § 4806.3 should be amended to read as follows with the amendment underlined and in red:

“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 preliminary review period.”

- Section 4806.4 states that unfavorable determinations at the end of the preliminary review cannot be appealed and makes no provision for a private entity to learn the reasons for its unfavorable decision, preventing it from improving its proposal for future submission. Accordingly, § 4806.4 should be amended to read as follows with the amended portion underlined and in red:

“Preliminary Evaluation Results: Within 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”. If the result is unfavorable, the DC OP3 will return the unsolicited proposal to the proposer without further action. A preliminary evaluation resulting in an unfavorable determination cannot be appealed by the proposer. However, the proposer receiving an unfavorable determination may meet confidentially with DC OP3 to discuss defects in the proposal and other reasons for denial. If the result of the preliminary evaluation is favorable, the unsolicited proposal will proceed to the comprehensive evaluation stage.”

- Section 4807.7 appears to bar a proposer from submitting a new proposal during the RFAP phase even when it was that proposer's proposal which lead to the RFAP. Yet, § 4807.5 lists that the RFAP phase will be longer than 30 days in most instances to increase the competitive environment. In the interest of increasing the competitive environment which the original proposer participates in, § 4807.7 should be amended to read as follows with the amendment in red and stricken below:

“Updated 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 and 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.”

- Section 4807.20 discusses confidential portions of proposals and states that a proposer may withdraw their proposal if an agreement cannot be reached with DC OP3 about whether a portion should be protected as confidential. This section later states that FOIA applies to a proposal after the final award of the P3 agreement. This section does not address whether withdrawn proposals are subject to FOIA following withdrawal. This section also does not address whether proposals that are not ultimately successful are later subject to FOIA. The following paragraph in § 4807.20 should be amended to say the following with amendments underlined and in red:

“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. All other proposals which are not awarded the P3 agreement will be treated as part of OP3's deliberative process and will therefore not be available through FOIA requests.”

RECEIVED

By judah.gluckman at 9:25 am, 5/31/16

IMG Rebel		Notice of Proposed Rulemaking		
Section	Subsection	Current Language	Suggested Language	Comment
4804.7 (a)	Evaluation of Responses to Request for Proposals	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, operation and maintenance of the project.	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, operation and maintenance of the project.	No need for colon after "including."
4804.12	Confidential Information Included as Part of a Solicited Proposal			Will Proposers be permitted to classify financial information such as income statements and balance sheets as confidential? This may be an issue for privately-held entities.
4807.12 (a)	Evaluation Committees	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, operation and maintenance of the project.	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, operation and maintenance of the project.	Colon not needed after "including."

IMG Rebel	Guidelines and Procedures For the Public-Private Partnership Act of 2014			
Section	Title	Current Language	Suggested Language	Comment
3.1	Table 2 Policy Priorities	Does the project address a public infrastructure need of the District?	Does the project address a public infrastructure and/or service need of the District?	
		Is the project consistent with priorities and agency performance goals identified by Owner Agencies or other public entities tasked with delivering infrastructure?	Is the project consistent with priorities and agency performance goals identified by Owner Agencies or other public entities tasked with delivering infrastructure and/or services ?	
5.2.1	Public Notice	A notice of an RFQ for a P3 project will be published in the DC Register, posted on the DC OP3 website, and mailed to affected Advisory Neighborhood Commissions (ANCs).	A notice of an a RFQ for a P3 project will be published in the DC Register, posted on the DC OP3 website, and mailed to affected Advisory Neighborhood Commissions (ANCs).	
5.2.6	Simultaneous Competitive Negotiation	This process entails the DC OP3 giving each prequalified private entity a copy of the draft RFP and P3 agreement to solicit their feedback on the documents. The DC OP3 will then hold a series of meetings with each pre-qualified private entity to discuss their feedback in greater detail. The DC OP3 will then refine the draft RFP and P3 agreement based on the feedback received from pre-qualified private entities.	This process may entails the DC OP3 giving each prequalified private entity a copy of the draft RFP and P3 agreement to solicit their feedback on the documents. The DC OP3 will then hold a series of meetings with each pre-qualified private entity to discuss their feedback in greater detail. The DC OP3 may will then refine the draft RFP and P3 agreement based on the feedback received from pre-qualified private entities.	Rather than committing to do this, you may want to make this optional.
5.4.6	Evaluation of Responses to Request for Proposals	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, operation and maintenance of the project.	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, operation and maintenance of the project.	No need for colon after "including."

IMG Rebel	Guidelines and Procedures For the Public-Private Partnership Act of 2014			
Section	Title	Current Language	Suggested Language	Comment
5.4.11	Confidential Information Included as Part of a Solicited Proposal			Will Proposers be permitted to classify financial information such as income statements and balance sheets as confidential? This may be an issue for privately-held entities.
6.1	Time Periods for Acceptance of Unsolicited Proposals			Is the correct understanding that DC OP3 will accept unsolicited proposals for review each year in the months of March and September?
6.4.2	Preliminary Evaluation Fee	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 period.	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 period.	Not sure if this is necessary. Surplus fee could be used to offset projects that require evaluation that exceeds \$5,000.
6.5.7.4	Evaluation Committees	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, operation and maintenance of the project.	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, operation and maintenance of the project.	Colon not needed after "including."
Appendix D				Replace periods at end of bullets with semi-colons.

THE SURETY & FIDELITY ASSOCIATION OF AMERICA

SERVING THE INDUSTRY SINCE 1908



May 27, 2016

Mr. Judah Gluckman
Deputy Director and Counsel
District of Columbia Office of Public-Private Partnerships
1350 Pennsylvania Avenue NW, Suite 553
Washington D.C. 20004

Re: Comments on 2016 DC Reg. Text 423594—Public Private Partnerships (P3s)

Dear Mr. Gluckman:

The Surety & Fidelity Association of America (SFAA) is a licensed non-profit corporation in the District of Columbia whose member companies collectively write the majority of surety and fidelity bonds in the U.S. SFAA is a licensed rating or advisory organization in all states and is designated by state insurance departments as a statistical agent for the reporting of fidelity and surety experience. Our comments on the proposed P3 regulations are limited to the bonding requirements for P3s in 27 DC ADC s 4809.2 (l), which require the P3 agreement to include a *“requirement that the private entity maintain performance and payment bonds, or other security and risk-mitigation tools deemed suitable by the DC OP3 and Owner Agency.*

SFAA recommends that this requirement be clarified as follows:

(l) a requirement that the private entity maintain **or cause to be maintained** performance and payment bonds **on the design and construction portion of the project as required under 2-357.02** ~~or~~ **and bonds**, other security, and risk-mitigation tools deemed suitable by the DC OP3 and Owner Agency **on other portions of the project.**

During the legislative process, the City Council accepted SFAA’s recommendation to add the requirement of payment and performance bonds to the security requirements that must be included in a P3 agreement. The Little Miller Act in the District procurement code in 2-357.02 requires a payment and performance bond in an amount equal to 100% of the contract price for any public construction project awarded that is in excess of \$100,000. The end result of any construction in a P3 will be a project that provides a public service or facility. A P3 is just another method to deliver a public works project, just like design-bid-build by a general contractor, design-build, and the construction manager methods. Public money also pays for the P3 project in the long run, and such public funds are at risk in a P3 just the same as in any other method of delivery. As such, any public construction in a P3 should be bonded just like any other public works project.

THE SURETY & FIDELITY ASSOCIATION OF AMERICA

SERVING THE INDUSTRY SINCE 1908

As the proposed regulation currently is drafted, it could be misread to require payment and performance bonds for functions other than construction or for the entire cost of the P3, and vice versa for some other alternative form of security. A surety needs clarity and certainty with regard to the obligation that it is being asked to guarantee. The sureties' concern is that any performance bond written for the public construction in a P3 should be limited to the amount of the construction, not the "performance" or "operation" of the P3 and not for the entire cost of a P3 project. This is an issue in the regulations because unlike traditional procurements, the private partner in a P3 can be involved in more facets of a P3 project other than just construction, such as financing, operations and maintenance. The performance bond that guarantees the completion of the construction contract must be based only on the construction costs. The construction contractor may well not qualify for a bond that covers portions of the P3 other than construction or for a bond at the full cost of the P3.

The suggested amendments clarify that the payment and performance bonds cover only the design and construction portion of the P3, and give the District the discretion to use other forms of security on other components of the P3. This change is consistent with the D.C. Little Miller Act in that 2-357.02 9(a)(1)(A) and (2)(b) specifically provide that the amount of the payment and performance bond shall not include the cost of the operation, maintenance and financing of a public works project, but rather shall cover only the construction costs.

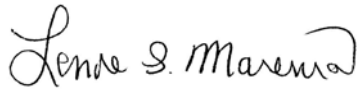
In addition, SFAA recommends an amendment so that the private partner would be required to obtain or cause the payment and performance bonds to be in place. Most often the private partner in a P3 will be a consortium/team of companies that forms to develop the P3. These companies form a Special Purpose Vehicle (SPV). The individual companies in the consortium become shareholders in the SPV and their liability is limited to the amount of capital they have invested in the P3. The individual companies in the consortium create the SPV to make a clear legal separation between their respective companies and the consortium and its P3 project. If the private partner is an SVP, it likely will not be able to obtain the required bonds. The SPV has no assets of its own and there is no recourse against the SPV in the event of the contractor's default. The surety needs to evaluate the construction risk in issuing bonds and that exposure is with the design build contractor not the SPV. If the private partner is the construction contractor, then the contractor should be required to obtain the bonds. In most instances, however, the private partner should be required under the P3 agreement to obtain bonds from its design build contractor.

THE SURETY & FIDELITY ASSOCIATION OF AMERICA

SERVING THE INDUSTRY SINCE 1908

Thank you for the opportunity to comment and for consideration of our proposed clarifications to the regulations. We would welcome the opportunity to further discuss this issue and are happy to address any questions or concerns.

Sincerely,

A handwritten signature in black ink that reads "Lenore S. Marema". The signature is written in a cursive style with a large, stylized 'L' and a clear, legible name.

Lenore Marema
Vice President of Government Affairs

Ex Parte Communications to Discuss Draft Rules and Guidelines

Date	Location	Attendees	Summary of Comments	Written Materials Provided
5/16/2016	Office of Public-Private Partnerships (OP3), 1350 Pennsylvania Ave NW, Suite 533, Washington, DC 20004	Brian Dugan, Edgemoor Infrastructure & Real Estate; Seth Miller Gabriel, DC OP3; Judah Gluckman, DC OP3	Edgemoor reiterated the opinions expressed in their written comments.	No
5/17/2016	National Council for Public-Private Partnerships (NCPPP) Office, 2020 K Street NW, Suite 650, Washington, DC 20006	Simon Santiago, Nossaman LLP; Marshall Macomber, ThinkP3; Sallye Perrin, WSP Parsons Brinckerhoff; Lisa Buglione, The Association for the Improvement of American Infrastructure (AIAI); Robert Brough, Facchina; Samara Barend, AECOM and Performance-Based Building Coalition (PBBC); Marv Hounjet, Plenary Group; Spencer Townsend, Virginia Office of Public-Private Partnerships; Rebecca Brooks, CDM Smith; Todd Herberghs, National Council of Public-Private Partnerships (NCPPP); Joe Lewis, Business Transformation Group (BTG); Eric Jones, Associated Builders and Contractors (ABC); Seth Miller Gabriel, DC OP3; Judah Gluckman, DC OP3	Requested pre-approval process for projects before solicitation process begins; remove Council-approval of RFP; clarify process for developing pipeline of projects, stakeholder involvement and prioritization of projects in pipeline; clarify that RFQ process will result in short-list of bidders and if and when a procurement would proceed with a single bidder; remove the ability to offer stipends during the RFI and RFQ phases; remove review fee for alternative unsolicited proposers; raise initial review fee for unsolicited proposers; extended minimum time period and establish maximum time period to accept alternative unsolicited proposals; clarify in project pipeline what types of deal structures will be considered, including the availability payment model; clarify requirements of unsolicited proposal beyond what's included in the executive summary form; make composition of technical and financial review committees mutually exclusive; define "cost" to be on net present value basis including operations and maintenance of project; clarify unique District laws and requirements of projects; maintain two windows for accepting unsolicited proposals rather than allowing year-round; allow for one-on-one meetings during the RFI phase instead of requiring burdensome submission of documents; clarify and rename the multiple simultaneous negotiation process in Rule 5.2.6; establish guidance for acceptance of alternative technical concepts; prohibit the collection of review fees for RFQ phase; clarify that primary preferred bidder must be removed from competition before negotiations with secondary preferred bidder can begin; clarify sovereign immunity waiver; clarify provision barring non-compete clauses.	No
5/24/2016	Office of Public-Private Partnerships (OP3), 1350 Pennsylvania Ave NW, Suite 533, Washington, DC 20004	Joseph Ruocco, Skidmore Owings & Merrill LLP; Seth Miller Gabriel, DC OP3; Judah Gluckman, DC OP3	Emphasized the importance of stipends to compensate bidders for their costs of preparing proposals and the value of intellectual property; requested that design be a consideration in the evaluation and selection of proposals and teams; expressed concern that consultants not be held to the same requirements as the concessionaire or consortium if they were not formal members of such groups.	No