



VIRGINIA DEPARTMENT OF TRANSPORTATION

**OFFICE OF PUBLIC PRIVATE  
PARTNERSHIPS**

**INSTRUCTIONAL AND INFORMATIONAL  
MEMORANDUM**

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| <b>GENERAL SUBJECT:</b><br><b>Organizational Conflict of Interest Guidelines for Procurement of Public Private Partnership (P3) Projects</b>   | <b>NUMBER:</b><br><b>IIM-P3-1.0</b>      |
| <b>SPECIFIC SUBJECT:</b><br><b>Framework to Evaluate Potential Organizational Conflicts of Interest for Private Entities Participating in P3 Projects</b>  | <b>DATE:</b><br><b>December 12, 2017</b> |
| <b>ISSUED:</b><br><br>_____<br><b>Morteza Farajian, PhD</b><br>Director Office of Public Private Partnerships  |  |
| <b>APPROVED:</b><br><br>_____<br><b>Robert E. Cary, PE</b><br>Chief of Innovation<br><b>Approved <input checked="" type="checkbox"/> Date: 12-14-17</b> |  |

## 1) EFFECTIVE DATE

- a) This memorandum is effective upon receipt.

## 2) PURPOSE/NEED/SCOPE/REQUIREMENTS

- a) To establish a policy on organizational conflicts of interest for the Virginia Department of Transportation (VDOT), relating to projects procured under the PPTA.
- b) To develop guidelines that: (i) protect the integrity, fairness and competitive spirit of the procurement process; (ii) avoid circumstances that result in unfair competitive advantage for private entities ("Proposers") desiring to participate in the procurement of P3 projects; (iii) protect the public's and VDOT's interests and, in particular, protect confidential and sensitive project-specific and programmatic information; (iv) inform potential consultants and Proposers of VDOT's policy and procedures.
- c) The VDOT P3 Office realizes actual, potential, or perceived conflicts of interest may be encountered during the project procurement phase. To assure transparency, accountability, and objectivity, any Proposal submitted to the VDOT, pursuant to the PPTA, will comply with state and federal laws, regulations and guidelines regarding organizational conflicts of interest including 23 CFR § 636.116, 23 CFR § 771, 48 CFR § 9.5, the Committee on Foreign Investment in the United States (CFIUS) processes, § 2.2-4373 of the Code of Virginia, and other pertinent state and federal Codes regarding potential organizational conflicts of interest. Nothing contained in this memorandum is intended to limit, modify or otherwise alter the applicability or effect of other relevant (federal, state and local) Codes, and rules and regulations (e.g., NEPA regulations pertaining to conflicts of interest and ethical rules pertaining to legal services). All such laws, rules, and regulations shall apply in their normal manner irrespective of this memorandum.
- d) Furthermore, the VDOT P3 Office also recognizes the size, scope, and complexity of P3 projects may increase the potential for conflicts of interest. Factors that may affect actual, potential, or perceived conflicts of interest are (without limitation):
  - i) the type of consulting services at issue,
  - ii) specialized procurement or other expertise needed by VDOT,
  - iii) the ability of the private industry to implement specific innovative technologies or disciplines,
  - iv) the particular VDOT Division or District managing the procurement,
  - v) past, current, or future working relationship among the consultant, Proposer, private entities, and VDOT,
  - vi) the period of time between the actual, potential, or perceived conflict situation and the initiation of the relevant procurement process, and
  - vii) the unique circumstances of a procurement.

- e) The VDOT P3 Office recognizes that its concerns must be balanced against the need to avoid unnecessarily restricting the pool of potential Proposers or consultants available to VDOT and available to private entities participating in the procurement. This memorandum neither purports to address every situation that may arise nor to mandate a particular decision or determination when faced with facts similar to those described here.
- f) This memorandum applies to the VDOT Divisions and Districts, particularly the VDOT P3 Office, and external consultants and advisors with present or former contracts with VDOT, involved in P3 procurement activities.

### 3) PROCEDURES

- a) The VDOT P3 Office will apply the following procedures in accordance with the state and federal Codes on a project specific basis. The Director of the VDOT P3 Office will review external consultants and advisors requests for determinations of actual, potential or perceived organizational conflicts of interest related to P3 procurement. The Director's determination may be appealed to the Chief of Innovation.
- b) Prior to submitting a response to a Request for Qualifications (RFQ) for two-phase procurements or to a Request for Proposals (RFP) for single-phase procurements, potential Proposers are urged to conduct an internal review of their affiliations to identify actual, potential or perceived organizational conflicts of interest. Proposers are responsible for determining whether any team members may have a conflict of interest. Prior, existing and future contractual obligations between an organization/individual and a federal or state agency relative to the proposed procurement may present a conflict of interest or an unfair competitive advantage.
- c) A potential Proposer may request a written determination of the Director of the VDOT P3 Office on an actual, potential, or perceived organizational conflicts of interest. The request shall specify the underlying facts from which a conflict of interest is anticipated to arise, and propose measures to avoid, neutralize or mitigate any resulting conflict of interest. To facilitate the VDOT P3 Office's determination, documents may be submitted to support the request.
- d) The VDOT P3 Office shall make a written determination whether it believes the actual, potential, or perceived organizational conflicts of interest results in an unfair competitive advantage, and whether the proposed measures can effectively avoid, neutralize or mitigate any unfair competitive advantage. The VDOT P3 Office will also take into consideration whether the exclusion of the private entity would limit

the number of potential qualified Proposers in a manner contrary to the best interests of the public body.

- e) If the VDOT P3 Office determines that an organizational conflict of interest exists and cannot be effectively mitigated, the potential Proposer shall not be allowed to participate as a team member in response to the RFQ or RFP solicitation. Failure to abide by the VDOT P3 Office's determination may result in a proposal being declared non-responsive.
- f) The following are examples of situations where an organizational conflict of interest may exist (if the implicated organization or individual desires to participate in the procurement). The list below is not intended to be an exhaustive list. Determinations will be made on a case-by-case basis.
  - i) An organization or individual under contract with VDOT to provide assistance in development of instructions to Proposers or evaluation criteria for a specific P3 project.
  - ii) An organization or individual under contract by VDOT to provide assistance in development of non-public evaluation criteria as part of the programmatic guidance or procurement documents for the P3 program, and as a result has a unique competitive advantage relative to a P3 project.
  - iii) An organization or individual with a present or former contract with VDOT to prepare planning, environmental, engineering, technical, financial, or legal work product for the P3 project, and has a potentially unfair competitive advantage because such work product is not available to all potential Proposers in a timely manner prior to the project's procurement process.
  - iv) An organization or individual with a present or former contract with VDOT to provide assistance in the administration of the Comprehensive Agreement for the specific P3 project.
  - v) Organizations or individuals who assist in the preparation of procurement documents (including providing planning, environmental, engineering, technical, financial, or legal work) will not be allowed to participate as a Proposer or join a team submitting a proposal unless the services or support provided was limited to the preparation of preliminary reports that (a) are unrelated to the development of instructions to Proposers or evaluation criteria, and (b) will be made available to all Proposers.
  - vi) Generally, if the National Environmental Protection Act (NEPA) process has been completed prior to issuing the final RFP, the organization or individual who prepared the NEPA document may be allowed to submit a proposal in response to the final RFP. However, the potential Proposer is strongly encouraged to request a written determination of organizational

conflict of interest for the team member who prepared the NEPA document from the VDOT P3 Office.

- vii) If the NEPA process has not been completed prior to issuing the final RFP, the organization or individual who prepared the NEPA document may be allowed to participate as a Proposer or join a team if VDOT releases the organization or individual from further responsibilities with respect to the preparation of the NEPA document.
- k) The VDOT P3 Office may determine an organizational conflict of interest may be mitigated by disclosing all or a portion of the work product owned by the organization or individual requesting the determination. If the work product is proprietary under law, the owner will be given the opportunity to waive this protection from disclosure. If the owner elects not to provide a waiver and subsequently submits a proposal, the proposal may be declared non-responsive.
- l) The VDOT P3 Office is not precluded from modifying its determination, should the situation described in the request change or facts different from representations in the request are subsequently discovered. During the course of the procurement, VDOT P3 Office is also not precluded from unilaterally determining that a Proposer has an actual, potential, or perceived conflict of interest that disqualifies it from further participation.

#### **4) REFERENCES**

§ 2.2-4373 of the Code of Virginia  
23 CFR § 636.116  
48 CFR § 9.5

