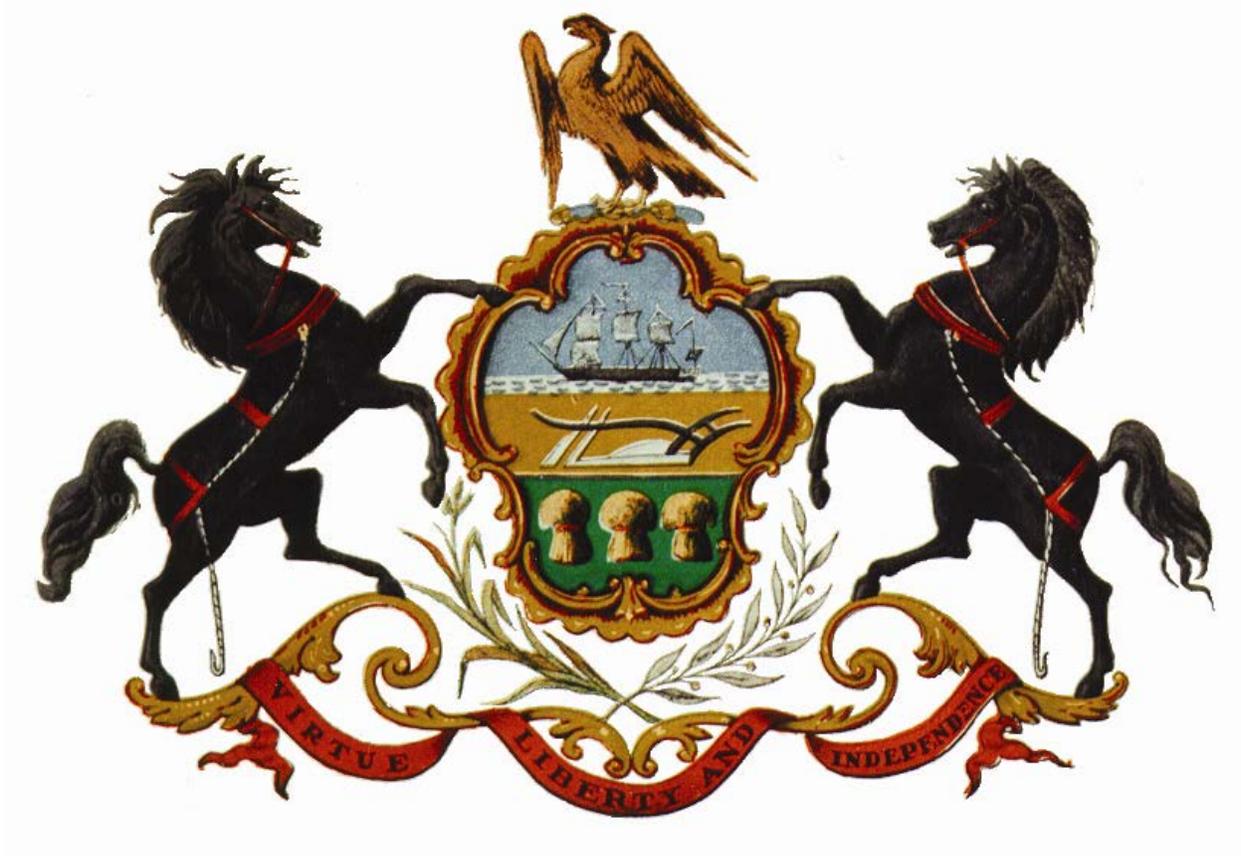


# The Commonwealth of Pennsylvania



**Act 88 of 2012**

**Providing for Public Private Transportation Partnerships**

**Implementation Manual & Guidelines**

**Approved for use January 9, 2013**

**As Amended November 24, 2015**

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## Table of Contents

### Chapters

<b>1. Introduction.....</b>	<b>Page 3</b>
1.1 Purpose of the Implementation Manual & Guidelines	
1.2 Organization of the Implementation Manual	
1.3 Legal Framework	
<b>2. Organization.....</b>	<b>Page 12</b>
2.1 Organizational Structure	
2.2 Director	
2.3 Steering Committee	
2.4 Secretary of Transportation	
2.5 Public Private Transportation Partnership Board	
<b>3. Project Identification.....</b>	<b>Page 17</b>
3.1 Solicited Projects	
3.2 Unsolicited Projects	
3.3 Key Action Items	
<b>4. Project Screening.....</b>	<b>Page 22</b>
4.1 Solicited Projects	
4.2 Unsolicited Projects	
4.3 Legislative Consideration of Commonwealth Projects	
4.4 Prioritization Process	
4.5 Key Action Items	
<b>5. Project Development.....</b>	<b>Page 31</b>
5.1 Project Development Process	
5.2 Best Value Analysis	
5.3 Key Action Items	
<b>6. Project Procurement.....</b>	<b>Page 35</b>
6.1 Procurement Process	
6.2 Solicited Proposals	
6.3 Contracting	
6.4 Key Action Items	
<b>Defined Terms.....</b>	<b>Page 49</b>

## **1. INTRODUCTION**

Act 88 of 2012, 74 Pa.C.S. §§ 9101-9124, is a statutory tool that enables the Commonwealth of Pennsylvania and other Public Entities to enter into agreements with the private sector to participate in the delivery, maintenance and financing of transportation related projects.

### **1.1 Purpose of the Implementation Manual & Guidelines**

The Implementation Manual & Guidelines (Implementation Manual) provides guidance regarding Public Private Transportation Project (P3 Project or Transportation Project) development and implementation in the Commonwealth of Pennsylvania. This guidance applies to both solicited and unsolicited Transportation Projects across all modes including multi-modal and intermodal. The Public Private Transportation Partnership Board (P3 Transportation Board or Board) approves this manual for use by transportation agencies in the Commonwealth including the Department of Transportation (PennDOT) and other eligible Public Entities as well as any interested Private Entities.

The P3 Transportation Board recognizes that each P3 project is unique and that certain elements set forth in this manual may not apply in all circumstances and may be subject to change as deemed appropriate by the Board in certain circumstances. The manual may be periodically revised or updated in order to meet the mission of the P3 Transportation Board and the objectives of the P3 program. Revisions can be made based on the recommendations of the PennDOT Office of Public Private Partnerships (P3 Office) in consultation with the Secretary and subject to approval by the P3 Transportation Board.

This manual does not modify or supersede the requirements of Act 88 of 2012.

### **1.2 Organization of the Implementation Manual**

The Implementation Manual is organized into the following chapters that specifically address the roles and responsibilities of the P3 Transportation Board and the P3 Office. Following this Chapter 1, these include:

2. Organization
3. Project Identification
4. Project Screening
5. Project Development
6. Project Procurement

## **1.3 Legal Framework**

### **1.3.1 The Public-Private Transportation Partnership Board**

#### 1.3.1.1 Composition and Operation

The P3 Transportation Board is comprised of seven (7) members: The Secretary of Transportation and the Secretary of the Budget (or a designated employee of their respective agencies); one (1) gubernatorial appointee; and four (4) legislative appointees designated by the Majority Leaders and Minority Leaders of the Senate and the House. Appointees must be residents of Pennsylvania and have expertise or substantial experience in transportation, finance, law or land use and public planning. All appointees serve at the pleasure of their respective appointing authorities.

The Board is chaired by the Secretary of Transportation. If the Secretary designates an employee of the Department to serve in his/her stead, that person also serves as Chair of the Board. The Board is required to meet as often as necessary to perform its duties and must meet at least one (1) time a year. Four (4) members of the Board must participate in a meeting in order for the Board to conduct its official business in accord with Act 88's quorum requirement. A majority vote of the members of the Board at a meeting is necessary for it to take official action such as the approval or disapproval of a proposed project. Meetings of the Board are subject to the Sunshine Act; there must be public notice, and they must be open to the public except in the limited circumstances where the Sunshine Act allows for them to be closed. Records of the Board are subject to disclosure under the Pennsylvania Right-to-Know Law.

#### 1.3.1.2 Duties

The P3 Transportation Board must meet for the purpose of conducting its business and adopting this Implementation Manual that establishes procedures for the submission of requests and unsolicited proposals for public-private transportation projects, which the P3 Transportation Board is charged with evaluating. Part and parcel of the evaluation process is a requirement that there be consultation with persons affected by a proposed project. Proposed projects found by the P3 Transportation Board to be in the best interest of the Commonwealth and a Public Entity are to be approved by resolution. The P3 Transportation Board is also charged with submitting an annual report to the General Assembly. This report will be prepared by the Department of Transportation for the P3 Transportation Board's approval as part of the Department's Act 88 responsibility to provide the P3 Transportation Board with technical assistance and analytical support.

### 1.3.1.3 Restrictions, Conflicts and Ethics

Under Act 88, individual members of the P3 Transportation Board are subject to a full array of legal limitations relating to the Transportation Projects that the P3 Transportation Board is charged with reviewing or that flow directly from their status as members of the P3 Transportation Board.

Section 9103(h) of Act 88 expressly prohibits a member of the P3 Transportation Board from “directly or indirectly” owning, having any “significant financial interest in,” being associated with or receiving “any fee, commission, compensation or anything of value” from any entity, public or private, which is seeking to engage in a public-private transportation project.

Section 9103(i), in turn, makes clear that P3 Transportation Board members are “public officials” for purposes of the Public Official and Employee Ethics Act. That means they are subject to prohibitions relating to conflicts of interest and associational restrictions that are similar to those set forth in Act 88 itself, as well as restrictions that extend to their spouse, immediate family members and businesses with which they or their family members are associated. The restrictions in the Ethics Act have a somewhat broader focus than those expressly set forth in Section 9103-(h) because they can involve entities other than those having business before the P3 Transportation Board, including former employers. The Ethics Act also precludes a former P3 Transportation Board member from representing any entity in a matter before the P3 Transportation Board for a period of one year after the conclusion of the member’s service with the P3 Transportation Board. Each member of the P3 Transportation Board must annually file a statement of financial interests with the State Ethics Commission. That statement, which is on a form provided by the Commission, is for the calendar year and must be filed by May 1 of the succeeding year.

Under Section 9103(i) of Act 88, P3 Transportation Board members are also subject to the State Adverse Interest Act. As “state advisors” under the terms of that legislation, members are subject to restrictions on their ability to participate at a later time in contracts arising out of projects approved by the Board.

P3 Transportation Board members for whom participation in any matter before the P3 Transportation Board will violate Section 9103-(h) of Act 88, the Public Official and Employee Ethics Act or the State Adverse Interest Act must abstain fully from any involvement in such a matter. To the extent that a P3 Transportation Board member has any doubt as to whether involvement in a matter is problematic under the Ethics Act, he/she may obtain an advisory opinion from the Ethics Commission that can be relied on to guide the P3 Transportation Board member’s decision as to whether abstention is necessary.

By contrast, neither Act 88 nor the State Adverse Interest Act provides for official advisory opinions. Lawyers for the Department and others associated with the Office of General Counsel can advise members regarding their responsibilities under the law, but those opinions do not provide the same type of protection that an opinion or advice from the State Ethics Commission affords under the Ethics Act.

## 1.3.2 Contractual Framework

### 1.3.2.1 Selection and Award:

Proposals for P3 Transportation Projects are to be solicited through a request for proposals (RFP) issued by the Public Entity. Proposals must be evaluated on the basis of pre-established criteria with assigned weights. Evaluation criteria that may be considered include:

1. Cost.
2. Price.
3. Financial commitment.
4. Innovative financing.
5. Bonding.
6. Technical, scientific, technological or socioeconomic merit.
7. Financial strength and bonding.
8. Design, operation and feasibility of the transportation project.
9. Public reputation, qualifications, industry experience and financial capacity of the private entity.
10. The ability of the transportation project to improve economic growth, to improve public safety, to reduce congestion, to increase capacity or to rehabilitate, reconstruct or expand an existing transportation facility.
11. The compatibility of the proposal with existing local and regional land use plans.
12. The commitment of local communities to approve land use plans in preparation for the transportation project.
13. Other factors deemed appropriate by the public entity.

So long as provided for in the RFP, a Public Entity may conduct discussions and hold negotiations with the responsible offerors as a prelude to their submission of best and final offers. The offeror whose proposal is determined in writing to be the best value for and in the best interests of the Public Entity shall be selected for final negotiations for a contract. A contract shall be awarded and entered into with the selected offeror in the event negotiations are successfully concluded. If negotiations with the selected offeror are not successfully concluded, they may be formally terminated. At the discretion of the Public Entity it may then enter into negotiations with the next ranked offeror, if any, and so on with other offerors in

order of rank until an agreement is reached. In the alternative, the Public Entity can cancel the procurement at any time prior to the execution of a Public-Private Transportation Agreement when it determines that cancellation is in its best interest.

#### 1.3.2.2 The Contract

Once a contract is executed between the Proprietary Public Entity and a responsible offeror, the latter is termed the “Development Entity” by Act 88. The Act requires that the contract include provisions addressing nineteen (19) discrete aspects of the P3 Transportation Project. In summary fashion, those are:

1. A detailed description of the project.
2. The term of the contract (which cannot exceed ninety-nine (99) years).
3. The nature of the Development Entity’s property interest including the acquisition of any needed right-of-way.
4. Allowances for the Public Entity to inspect project related assets and properties and review the Development Entity’s project records.
5. Grounds for termination of the agreement.
6. Procedures for amendment of the agreement.
7. Rights and remedies for breach or default.
8. Requirements for bonds or other forms of security in amounts acceptable to the Proprietary Public Entity.
9. Requirement that ownership of the subject transportation facility remain with the Proprietary Public Entity.
10. Standards for construction, maintenance and/or operation of the transportation facility.
11. Standards for improvement or modification of a capital facility if such activities are part of the project.
12. Standards relating to payments by the Proprietary Public Entity to the Development Entity if such payments are part of the project.
13. Standards for allocation and management of risk.
14. Standards for allocation of costs of development including cost overruns.
15. Remedies, damages and dispute resolution procedures in an event of nonperformance.

16. Performance criteria and incentives, if any.
17. Terms requiring that at the termination of the contract the subject transportation facility be turned over to the Proprietary Public Entity in good condition.
18. Provisions for law enforcement coverage of the facility.
19. Provisions incorporating Act 88's requirement for the Development Entity's employment of public employees who would otherwise lose employment because of the project.

Act 88's list of required provisions is not exclusive. A Development Entity and the Proprietary Public Entity are free to include other terms and conditions in their contract.

#### 1.3.2.3 Other Provisions

Act 88 allows a Proprietary Public Entity to agree to pay or reimburse a Development Entity for actual costs associated with the remediation of existing environmental contamination on, under or emanating from the real property associated with a P3 Transportation Project. Costs associated with contamination of the property that occurs after the date the Development Entity assumes responsibility for the project cannot be reimbursed.

If a Transportation Project is going to involve user fees, the contract must spell out the basis for their imposition and collection including the technology to be employed. The contract must also detail enforcement of payment requirements involving persons who fail to pay required user fees and whether and under what circumstances the Proprietary Public Entity will receive a share of the revenue from user fees.

#### 1.3.2.4 Disputes

Act 88 includes a limited waiver of the sovereign immunity of Public Entities for disputes arising out of a contract for a P3 Transportation Project. Development Entities may bring claims against Proprietary Public Entities that are subject to the Commonwealth Procurement Code in the Commonwealth's Board of Claims in accordance with the Procurement Code's requirements for such a proceeding. Claims where the Proprietary Public Entity is a municipal authority are governed by the procurement law applicable to the authority.

As part of the Public-Private Transportation Partnership Agreement, a Proprietary Public Entity can agree to allow the Development Entity to also seek specific performance of the Proprietary Public Entity's obligations under the contract.

### **1.3.3 Conflicts of Interest and Other Considerations**

Section 9120 of Act 88, captioned “Adverse Interests,” sets the boundaries for private entities regarding activities that do or would qualify them as “state advisors” or “consultants” under the State Adverse Interest Act, 71 P.S. §§ 776.1 – 776.8. A private entity that is otherwise a state advisor or consultant is not precluded from preparing or submitting a response to a request for proposals or Transportation Projects under Act 88; participating in any activity with the Department of Transportation relating to the same; negotiating or entering into a contract for any resulting Transportation Project; or engaging in other action taken in furtherance of the purposes of Act 88.

Private Entities which submit a response to a request for proposals or Transportation Projects, or advise or consult for another private entity on its submission to the Department of Transportation, are prohibited from consulting or providing advice to the Department on its review or approval of the submission. The identical restrictions apply to the Department’s review or approval of responses submitted directly to the P3 Transportation Board.

### **1.3.4 Right-to Know-Law and Records**

Records of the P3 Transportation Board are subject to Pennsylvania’s Right-to-Know-Law (RTKL). To the extent that records received or created by or for the P3 Transportation Board or its members qualify as “public records” under the RTKL, they are subject to public inspection by requestors in accordance with the timeframes specified in the RTKL. The Department will administer requests for P3 Transportation Board records as part of its responsibility to provide the P3 Transportation Board with the assistance necessary to carry out its operations. Requests for P3 Transportation Board records will be referred to the Department’s Open Records Office in accord with the Department’s published RTKL policy. The Department’s Agency Open Records Officer, in consultation with the Department’s Office of Chief Counsel, will determine whether a request is to be granted or denied and, to the extent a request is granted, will coordinate production of the subject records. In the event a denial of a request is appealed to the Commonwealth’s Office of Open Records, the matter will be handled by the Department’s Office of Chief Counsel.

Section 9111 of Act 88 addresses the extent to which records relating to the selection and retention of a Development Entity by a Proprietary Public Entity are public. The selection itself triggers a requirement that the identity of the selected entity, its response to the RFP, its final proposal (if any) and the form of the Public-Private Transportation Partnership Agreement all be made public. However, financial information submitted by the Development Entity in response to the requirements of the RFP or which was requested by the Proprietary Public Entity during discussions or negotiations with the Development Entity and used to demonstrate the latter’s financial capacity to fully meet the requirements of the contract for the project is not subject to public inspection unless the Development Entity and the Proprietary Public Entity agree, as a matter of discretion, to make them public. Other “information” which Act 88 states “shall not be public” is:

1. Information relating to proprietary information, trade secrets, patents or exclusive licenses, architectural and engineering plans and information relating to competitive marketing materials and strategies.
2. Security information.
3. Records which are nonpublic under regulations of the Securities and Exchange Commission.
4. Financial information which the Proprietary Public Entity deems confidential upon a showing of good cause by an offeror or Development Entity.
5. Records prepared or utilized to evaluate a proposal.

### **1.3.5 Applicability of Other Laws**

Section 9113 of Act 88 provides that the Pennsylvania Vehicle Code, other state laws and local ordinances all apply to highways, bridges, tunnels and similar such public-private transportation facilities for use by motor vehicles to the same extent they would apply if the facility was not part of a Transportation Project. Likewise, police and other law enforcement officers have the same authority on all such facilities within their jurisdiction, regardless of whether they are part of a Transportation Project. The extent to which law enforcement services are to be provided for any facility and how the cost of such service, if any, will be accounted for, must be addressed in the Public-Private Transportation Partnership Agreement.

Taxation of the Development Entity is addressed in Section 9115 of Act 88. As a general rule, to the extent that any political subdivision has a tax in place prior to September 3, 2012, that applies to revenue or user fees received by a Development Entity from a Transportation Project, those revenues and user fees remain subject to the tax including any future increases in the applicable rates. Taxes enacted by political subdivisions after September 3, 2012, cannot be imposed on the revenues or user fees received by a Development Entity pursuant to a Public-Private Transportation Partnership Agreement.

Real property involved in a Transportation Project is not subject to state or local realty transfer taxes under the Local Tax Enabling Act or the Tax Reform Code of 1971 or any successors to those statutes. All property used in connection with a Transportation Project is considered to be public property and therefore exempt from ad valorem property taxes and special assessments levied by the state or any political subdivision.

Under Section 9116, the exercise of the power of eminent domain to acquire property for a Public-Private Transportation Project is deemed a taking for a public purpose.

The Commonwealth Procurement Code, 62 Pa.-C.S. §§ 101-2311, generally does not apply to agreements for Transportation Projects. Section 9119(b) of Act 88, however, sets forth a half-dozen discrete elements of the Code which do apply if a Commonwealth agency is a party to the agreement. Those elements include provisions relating to reciprocal limitations, debarment

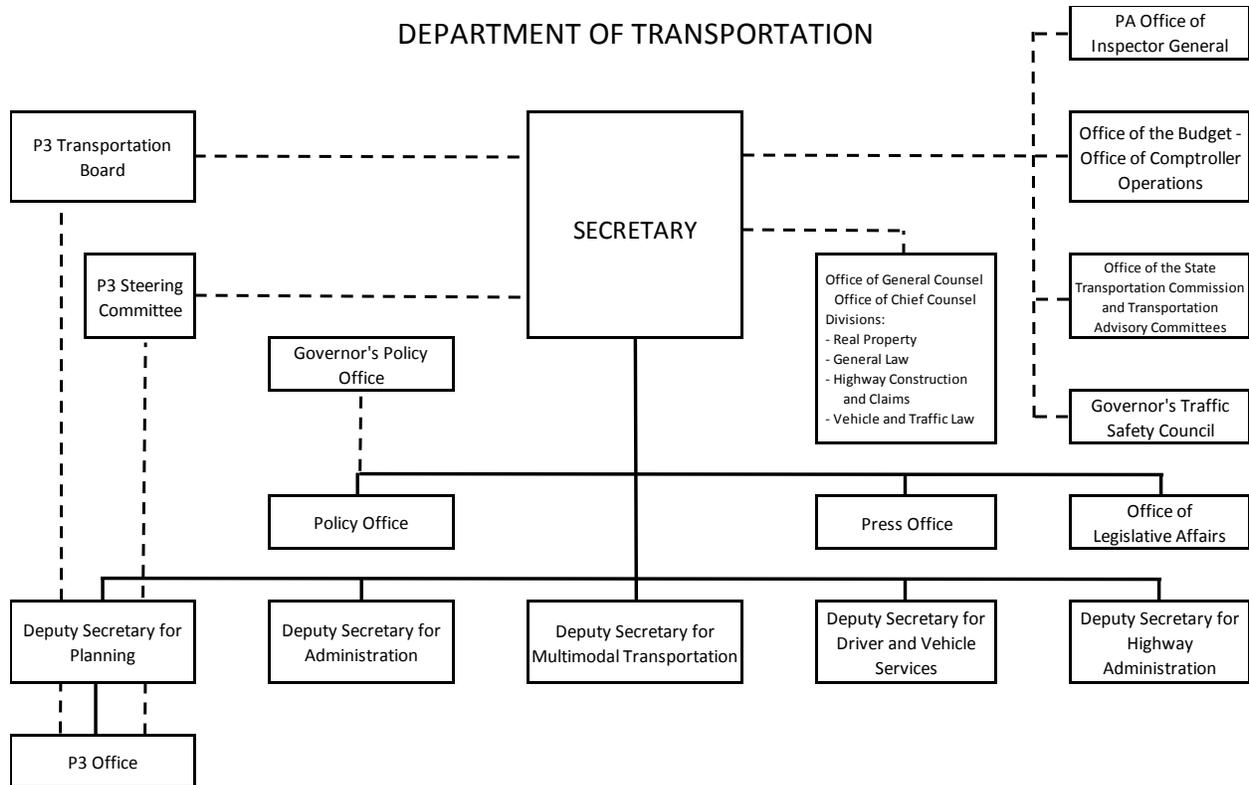
and suspension, approval of accounting systems, plant inspection, the Commonwealth agency's right to audit records relating to the transaction, retention of procurement records and legal and contractual remedies.

In addition to the limitations on the applicability of the Procurement Code, Section 9119 provides that "all provisions of laws related to the development, construction, operation or financing of a transportation project in effect on the date the Public-Private Transportation Partnership Agreement is fully executed shall apply" to the agreement. The Commonwealth Separations Act and the Pennsylvania Prevailing Wage Act are expressly identified as being among those laws.

## 2. ORGANIZATION

### 2.1 Organizational Structure

The P3 Office reports directly to the Deputy Secretary for Planning with access to all the expertise and resources of the Department of Transportation covering all modes, including multi-modal and intermodal solutions.



The P3 Office and its Director report directly to the Deputy Secretary for Planning with regard to policy implementation. The P3 Office works directly with the respective Deputy or appropriate agency administrator based on the particular mode and at times this may include impacted Public Entities outside the Governor's jurisdiction. For example, on a road or bridge project, the P3 Director works with the Deputy Secretary for Highway Administration, and on a project involving the Pennsylvania Turnpike Commission, the Director may work directly with its CEO.

## **2.2 Director**

The P3 Office Director is responsible for overseeing all aspects of the program, from identifying, screening and prioritizing candidate P3 Projects for approval by the P3 Transportation Board to development, procurement, and contract management. This includes P3 program outreach and stakeholder coordination and reporting all program and project activities to the Secretary of Transportation and the P3 Transportation Board.

Additionally, the P3 Office Director is responsible for working collaboratively with other public agencies and the private sector regarding the program and projects, complying with applicable statutes, regulations, and policies, and ensuring that external stakeholders, such as impacted transportation modes, local stakeholders, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), the Federal Aviation Administration (FAA), the Federal Railroad Administration (FRA), the Federal Maritime Commission (FMC) and the Office of Chief Counsel (OCC) are adequately represented during the various stages of project identification, screening, development, procurement and implementation processes, as and when appropriate. For projects under the Governor's jurisdiction the P3 Office Director, in consultation with the Agency Administrator and appropriate executive-level staff, is empowered to represent the Commonwealth in the development of commercial terms in discussion with Private Entities or Public Entities which are seeking to carry out Transportation Projects in the capacity of a Development Entity.

The P3 Office Director, supported by a multidisciplinary program staff, is responsible for delivering key functions, including P3 Project screening, developing and delivering P3 Projects across all modes and contract management for ongoing P3 Projects under the Governor's jurisdiction. The P3 Office Director works closely with the Press Secretary or similar officer of the Commonwealth's transportation agencies and local jurisdictions, as appropriate, to facilitate public understanding and support for P3 Projects. Additionally, the P3 Office Director collaborates with Private Entities, the Commonwealth's transportation agencies, Planning Organizations and other groups for developing appropriate communication strategies for the P3 Program.

For approved P3 projects that fall under the jurisdiction of Public Entities outside the Governor's jurisdiction, the P3 Director takes on an oversight, and as requested, a technical support role, with the Public Entity maintaining direct control of procurement and project delivery.

### **2.2.1 Deputy Director**

The Deputy Director reports directly to the Director and is responsible for providing a high level of support to assist the Director with all aspects of the P3 Office including, program management, project development and administration of the Public Private Transportation Partnership Board. The Deputy Director is responsible for consulting with the Director and the Secretary on all aspects of the program, from identifying, screening and prioritizing candidate P3 projects for approval by the Board to development, procurement, and contract management.

This includes program outreach, stakeholder coordination and reporting program and project activities to the Board.

Other duties of the Deputy Director include: participation in P3 and associated industry organizations; working collaboratively with internal stakeholders within PennDOT; assisting the Director with the management of projects, staff and consultants engaged to assist the P3 Office; evaluating private sector recommendations for P3 initiatives; advancing the Commonwealth's objectives to promote economic development, sound land use, and effective long-range transportation planning through the implementation of P3 projects; managing projects and P3 initiatives in a manner that is consistent with Act 88 of 2012 and the P3 Implementation Manual & Guidelines; evaluating "best practices" utilized by other states and jurisdictions; providing recommendations for modernization and process improvement to the Director; assimilating objectives of Department and interagency programs related to the P3 program; and representing the Department, the Secretary and the Director on task forces, boards, committees, and commissions.

### **2.2.2 Project Screening**

The P3 Office leads the P3 project screening effort. The project screening function includes coordination with the relevant Agency's planning division, evaluation of short- and long-term transportation plans and applying detailed screening criteria to a specific project or group of candidate Transportation Projects. Additionally, the project screening function culminates in making a recommendation to the P3 Transportation Board about whether to move forward with a particular project utilizing the P3 delivery method.

### **2.2.3 Developing Projects**

The second key function of the P3 Office is project development. For agencies under the Governor's jurisdiction the P3 Office Director appoints a Project Manager for each project approved by the P3 Transportation Board and selected for development through the P3 Program. Initially, the P3 Office and the appropriate Deputy Secretary or other agency official will identify a Project Manager from existing staff with subject matter and technical expertise applicable to the Transportation Project under development. Over time and depending upon the number of Transportation Projects under consideration, the P3 Office may be staffed with full time Project Managers. The Project Manager serves under the direction of the P3 Office Director. The Project Manager will be a person with strong commercial expertise and public policy and infrastructure industry knowledge. Working closely with other disciplines within the Department, the Project Manager has overall responsibility for addressing the needs of a specific Transportation Project, including overseeing its development, procurement, contract execution and reaching financial close. Any member of the P3 Office may serve as the Project Manager at the discretion of the P3 Office Director.

The Project Manager is responsible for leveraging the appropriate financial, commercial, procurement and technical expertise required for developing a specific Transportation Project. The Project Manager ensures that appropriate coordination with other agencies and stakeholders occurs throughout the project development lifecycle. Because more than one

Transportation Project may be considered for procurement at a given time, there may be more than one Project Manager under the direction of the P3 Office Director, each assigned to a specific Transportation Project.

For approved Transportation Projects that fall under the jurisdiction of Public Entities outside the Governor's jurisdiction, the P3 Office Director will not appoint a Project Manager; instead it will be the responsibility of the Agency Administrator of the Public Entity to appoint an individual or individuals to perform these duties. The P3 Office Director will designate a P3 Office Liaison that will provide support and oversight as well as coordinate with the Public Entity on the development, procurement, negotiation and execution of Transportation Projects.

#### **2.2.4 Contract Management**

The third key function of the P3 Office is contract management. Once a Public Private Transportation Partnership Agreement is executed and financial close has occurred, the P3 Office will assist with contract management and serve as a resource for the Department or agency for any commercial issues that may arise during the development, and/or operations and maintenance phases of the project. The P3 Office's role also includes certain contract compliance responsibilities such as reviewing the periodic updates to the financial model, evaluating revenue sharing provisions, monitoring refinancing activities, reviewing the audited financial statements for the Transportation Project, use of public funds, if any, in compliance with Federal and Commonwealth requirements, and other activities as defined in the applicable Public Private Transportation Partnership Agreement.

For approved Transportation Projects that fall under the jurisdiction of Public Entities outside the Governor's jurisdiction, contract management will be the responsibility of the Public Entity.

#### **2.3 Steering Committee**

The primary function of the Steering Committee is to provide policy and procurement guidance and analyze Transportation Projects for the purpose of making recommendations to the P3 Transportation Board. The Committee's review shall include comments received from affected Public Entities.

The Steering Committee is comprised of any or all of the following Department of Transportation officials or their designees: the Secretary of Transportation, Deputy Secretary for Planning, Deputy Secretary for Administration, Deputy Secretary for Highway Administration, Deputy Secretary for Driver and Vehicle Services, Deputy Secretary for Multimodal Transportation, and Chief Counsel. Also represented are the Secretary of Budget, Secretary of Policy and Planning and the Governor. Additionally, the Secretary may appoint any person representing a Public Entity to serve on the Steering Committee on an ad hoc basis to represent a specific Public Entity affected by a Transportation Project and/or provide subject matter expertise to evaluate a Transportation Project from a technical and/or financial perspective.

## **2.4 Secretary of Transportation**

The Secretary of Transportation serves as the Chairman of the Steering Committee and the P3 Transportation Board and will provide oversight, guidance and direction to the activities of each as appropriate and necessary.

The Secretary has the legal authority to make decisions on commercial, policy and contractual issues related to Transportation Projects within the Pennsylvania Department of Transportation. Decisions on commercial, policy and contractual issues on projects related to other agencies or Public Entities are the legal responsibility of the appropriate official(s) of those entities.

## **2.5 Public-Private Transportation Partnership Board**

The purpose of the P3 Transportation Board is to evaluate and, when in the best interests of the Commonwealth and the Public Entity, approve proposed Transportation Projects. Approval of a project establishes the scope and framework from which the Public Entity can solicit, negotiate and enter into an agreement with a Private Entity. The P3 Transportation Board will adopt guidelines establishing the procedures by which a Public Entity may submit a Request for a Transportation Project or a Private Entity may submit an Unsolicited Proposal for a Transportation Project to the P3 Transportation Board; consult with public and private parties affected by proposed Transportation Projects; and submit an annual report to the General Assembly detailing all the Transportation Projects evaluated and approved.

The statutory requirements of the P3 Transportation Board are described in further detail in the Legal Framework Section 1.3.1 of this manual.

### 3. PROJECT IDENTIFICATION

Project identification is the first phase of the P3 framework. As mentioned in Chapter 2 Organizational Structure, the P3 Office and the Public Entity's relevant planning divisions are responsible for managing the project identification process.

There are two primary sources from which transportation projects can be identified for consideration as Transportation Projects:

- **Solicited Projects:**

The planning staffs across all Public Entities are encouraged to identify Transportation Projects for P3 consideration. Planning staffs should review the High-Level Screening Criteria discussed in Chapter 4, Project Screening, as they consider suitable candidates for P3 Transportation Projects.

- **Unsolicited Projects:**

Unsolicited Proposals submitted by Private Entities will be considered as unsolicited projects. The specific steps to be followed for each of the two sources are outlined below.

#### 3.1 Solicited Projects

Solicited projects are identified through the transportation planning process that is carried out at the state, regional, local and municipal levels throughout the year by the Commonwealth's transportation agencies and offices that have the authority to develop and/or operate public transportation facilities. Examples of sources for candidate Transportation Projects may include the various planning documents and entities listed below:

Guidance: Potential Sources of Candidates for Solicited Transportation Projects

- Transportation Related P3 Priority of the Governor
- Twelve-Year Transportation Improvement Program (TIP)
- Transportation Related P3 Priority of a Public Entity
- Port Authority Master Plan
- Airport Capital Improvement Plan
- Planning Organizations

The Department or other Public Entities may also issue a Request for Transportation Projects under the authority of Section 9106 of Act 88 (as differentiated from a Request for Transportation Project submitted to the P3 Transportation Board under Section 9107) to help

identify potential Public Private Transportation Projects for consideration by the P3 Office and the P3 Transportation Board.

### **3.1.1 Candidate Project Form**

To initiate a high-level review and policy analysis of a proposed P3 Transportation Project, the Department Deputate, or other Public Entity that has identified a candidate project should submit a completed *P3 Candidate Project Form* to the P3 Office. This form can be submitted at any time pursuant to this implementation manual. Information requested in this form will allow for a high-level analysis by the P3 Office, Steering Committee and P3 Transportation Board.

The P3 Office and/or Steering Committee will provide feedback to the Department, Agency or other Public Entity based on the High Level Analysis and make a recommendation as to whether the Transportation Project should advance to the detail-level screening process.

The Department, Agencies and other Public Entities are encouraged to provide relevant supporting information / documentation for the candidate Transportation Project to allow the P3 Office to conduct the high-level screening and evaluation in a timely manner. Such information should include the expected scope, schedule and lifecycle costs of the Transportation Project; expected benefits e.g. improved mobility, enhanced economic development, reduced congestion; conceptual financial plan; rationale for/benefit of a P3 implementation relative to a conventional project delivery approach; as well as any additional information the P3 Office determines is necessary to complete a high-level screening.

## **3.2 Unsolicited Projects**

The P3 Office on behalf of the Department, any other Public Entity or the P3 Transportation Board is permitted to receive and evaluate Unsolicited Proposals from Private Entities to develop and/or operate Transportation Facilities under their jurisdiction. Private Entities may submit Unsolicited Proposals for all transportation modes at any time, pursuant to this implementation manual.

### **3.2.1 One-on-One Meetings**

Private Entities are encouraged to request one-on-one meetings with the P3 Office and/or a Public Entity to have preliminary discussions on potential Unsolicited Proposals prior to submission. As part of such one-on-one meetings, the P3 Office and/or Public Entity may provide informal feedback and comments, as appropriate, to the Private Entity. However, a formal review of an Unsolicited Proposal will only be undertaken once a Private Entity makes a formal submission. The P3 Office and Public Entity will review the Unsolicited Proposal based on the guidelines defined in this Implementation Manual and will advise the P3 Transportation Board whether to proceed with the project just as it would for a solicited project.

### 3.2.2 Unsolicited Proposal Required Contents

An Unsolicited Proposal must contain information which is sufficient for the P3 Office and/or Public Entity to evaluate the merits of the proposed Transportation Project for the purposes of making a recommendation to the P3 Transportation Board including: the capability of the Private Entity to deliver the project, the financial viability of the project and the benefits to the Commonwealth and the Public Entity of a P3 delivery method over a conventional delivery method. The Unsolicited Proposal is required to include the following:

- **Executive Summary** covering the major elements of the Proposal
- **Qualifications** concerning the experience, expertise, technical competence and qualifications of the Private Entity and of each member of its management team and of other key employees, consultants and subcontractors, including the name, address and professional designation. Financial strength and capacity of the Private Entity should be demonstrated by the inclusion of financial statements (including audited financial statements where available) and disclosure of material changes in the Private Entity's financial position.
- **Project Description**, a narrative with supporting graphics and maps describing
  1. The limits, scope, location of the proposed Transportation Project
  2. Right-of-way requirements
  3. Connections with other transportation facilities and improvements to those facilities which will be necessary if the project is developed
  4. A conceptual project design, if appropriate
  5. A statement of the project's consistency with the Twelve Year Plan and relevant MPO Long Range Transportation Plans and expected results including financial performance and improvements to mobility and capacity
  6. All studies which may have been completed by the Private Entity concerning the Transportation Project
  7. Information to the extent available on the Department and/or prospective Proprietary Public Entity's performance of its environmental review responsibilities
- **Schedule** showing anticipated dates of contract award, start of construction, completion of construction, start of operations and anticipated major maintenance or

reconstruction activities during the life of the proposed Public Private Transportation Project Agreement.

- **Operating Plan** describing the operation of the completed facility if operation is part of the Proposal. This should describe the management structure and approach, the proposed period of operations, enforcement, emergency response and other relevant information.
- **Finance Plan** describing the proposed financing of the project. It should identify the source of funds to design, construct and maintain the Transportation Project, including, as relevant, Private Entity equity, capital markets debt, TIFIA loans, public equity contributions if any and any projected revenue streams including user fees. Proposals must include a detailed cash flow model in Excel format projecting all sources and uses of funds on an annual basis from execution of a Public Private Transportation Project Agreement to the earlier of the proposed end of the term of the Public Private Transportation Project Agreement, or 99 years. The assumptions supporting the financial plan and financial model must be documented.
- **Financial feasibility** of the project should be demonstrated by showing that projected funding from all relevant sources is sufficient to support all design, construction, operation and maintenance activities, as well as providing for contingencies and sums to meet facility turn-back requirements at the end of the Public Private Transportation Project Agreement.
- **Legal Basis**, the Private Entity must cite the statutory authority (Federal, State and local if applicable) under which the Transportation Project will be delivered. If such authority does not exist, exemptions or proposed changes to the relevant Statutes which are necessary to allow the project to move forward should be identified.
- **Bonds, Letters of Credit and Guarantees**, If the Unsolicited Proposal proceeds to the Detailed Level Screening phase, the Private Entity must demonstrate that it is able to obtain performance and payment bonds, a letter of credit, parent company guarantee or other security acceptable to the P3 Office and/or Public Entity and consistent with the size and complexity of the Transportation Project. Similarly, it must demonstrate that it is able to obtain insurance covering general liability and liability for errors and omissions as the P3 Office and/or prospective Proprietary Public Entity, in its sole discretion, may require.
- **No Previous Breach of Contract or Disqualification**, the Private Entity must demonstrate that it, its subcontractors and consultants (1) are not currently debarred by any federal, Commonwealth and local entity and (2) have never failed to complete a contract for a Public Entity as a result of having been declared in default.
- **Licenses and Certifications**, the Private Entity must demonstrate that it and its members, subcontractors and consultants possess or can obtain by the Award Date, if

any, the licenses and certificates necessary to carry out their respective functions within the Commonwealth.

### **3.3 Key Action Items**

- Public Entity Submits Request for Transportation Project on the P3 Candidate Project Form
- Private Entity Submits Unsolicited Proposal
- P3 Office and/or Public Entity reviews candidate solicited and unsolicited proposals

#### 4. PROJECT SCREENING

A proposal for a P3 project may be submitted one of three ways: directly to the P3 Transportation Board, directly to the P3 Office or directly to the Public Entity. A proposal from the private sector submitted directly to the P3 Transportation Board and/or to the P3 Office will be considered an Unsolicited Proposal for purposes of screening. A proposal submitted directly to the Public Entity will receive an initial review by that agency which will determine whether to submit the project to the P3 Office as a Request for Transportation Project.

Project screening is designed to assist the P3 Office and a Public Entity in determining the suitability of delivering projects utilizing a P3 framework. The project screening methodology is a means to systematically apply evaluation criteria to Solicited Projects and Unsolicited Proposals.

A key element of the project screening effort will be the development and application of a Best Value analysis. The Best Value methodology, which is described further in Chapter 5, takes into account the technical and financial elements of a Transportation Project considered for a P3. The development of a Transportation Project as a P3 will be evaluated against the delivery of the project under a more conventional approach. Under this analytical framework, the P3 Office, working in concert with the Department and/or a Public Entity, as appropriate, will conduct a qualitative and quantitative assessment to determine if a P3 structure provides the preferred solution, or “Best Value” when compared to a conventional project delivery method. The P3 approach represents Best Value if it delivers lower lifecycle costs and/or greater revenues to the Commonwealth and/or a Public Entity while surpassing the conventional delivery approach in achieving the established objectives of the Transportation Project. The results of the Best Value analysis will be used by the P3 Office to evaluate whether a proposed Transportation Project should be recommended as a P3 to the Steering Committee and the P3 Transportation Board.

The entire Project Screening process is organized into two phases:

- **High Level Screening:** This initial analysis will be conducted to assess how well the proposed project would benefit from a P3 approach compared to a conventional delivery approach. Factors to be considered can include
  - Opportunity to accelerate project implementation and reduce reliance on public funds
  - Potential for increased revenue generation/revenue sharing with the Department or Public Entity
  - Capability of the private sector to address project complexities
  - Ability to allocate/share risks in a cost effective manner

- Technical and financial feasibility
- Ability to meet Commonwealth and/or Public Entity transportation, economic development and environmental goals

The High Level Screening analysis will be conducted based on the Candidate Project Form and supporting information provided by the Department or Public Entity for Solicited Projects or Proposals submitted by Private Entities for Unsolicited Projects.

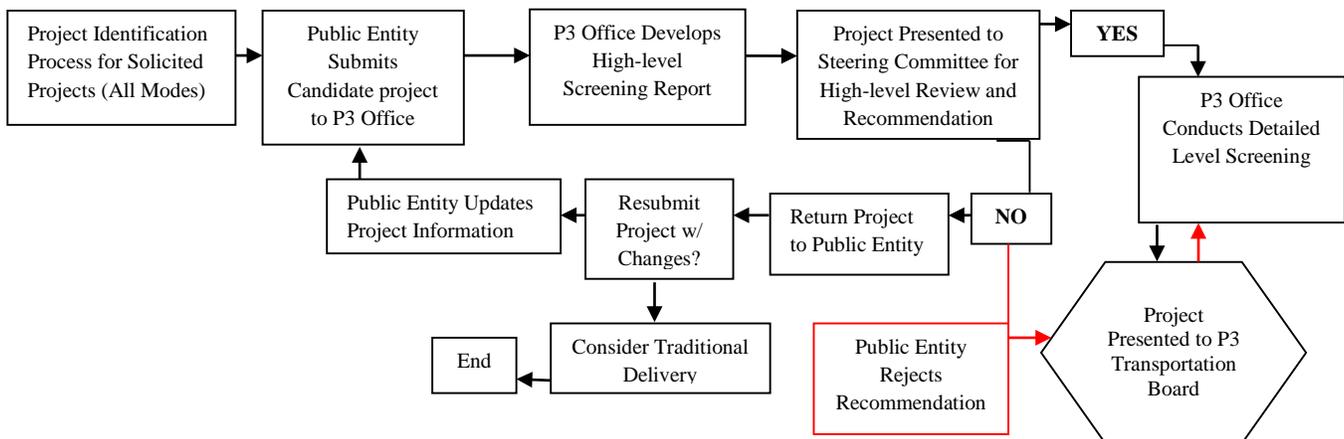
- **Detailed Level Screening:** Projects passing the High Level Screening analysis will proceed to the Detailed Level Screening phase. More detailed quantitative and qualitative analyses will be undertaken to evaluate proposed projects relative to those factors listed above for the High Level Screening effort as well as additional considerations the P3 Office and Public Entity deem appropriate. This may involve additional planning, engineering, travel demand, environmental and financial analyses to further define a project. Such analyses will be determined by the P3 Office and/or Public Entity on a project by project basis. As part of this effort, the P3 Office in concert with the Department and/or a Public Entity will conduct a Best Value analysis to evaluate in greater detail whether the P3 approach is an optimal solution. The results of the Detailed Level Screening analysis will form the basis of the P3 Office’s recommendation to the Steering Committee and the P3 Transportation Board whether to proceed with a Transportation Project as a P3.

## 4.1 Solicited Projects

### 4.1.1 Policy Review and Screening Process

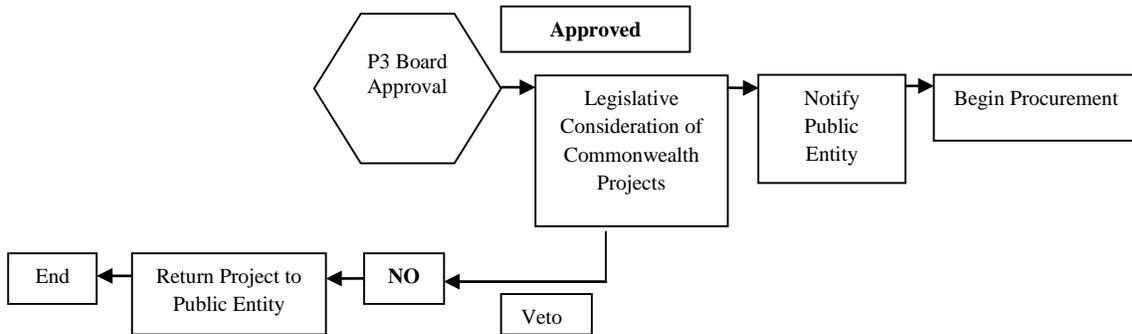
Periodically the P3 Office will undertake a review of potential solicited projects, identified through the process described in Chapter 3, within the Department and coordinate a similar effort with other Public Entities in the Commonwealth.

The following diagram presents the steps to be taken during the screening review of a solicited project:



### 4.1.2 Board Consideration

The following diagram presents the steps to be taken following P3 Transportation Board consideration for Solicited Proposals:



## 4.2 Unsolicited Proposals

All projects, solicited or unsolicited approved by the P3 Transportation Board shall be procured by the Public Entity by means of a Request for Proposals (RFP); there is no authority under Act 88 to undertake a sole source procurement.

The P3 Office will establish and publish in the Pennsylvania Bulletin and on the P3 Office website dates when it and the P3 Transportation Board will accept and consider unsolicited proposals for projects on facilities owned by the Commonwealth. There will be at least two periods during the calendar year for private entities to submit unsolicited project proposals to the P3 Office and/or the P3 Transportation Board. Each such period will begin no later than six months following the beginning of the immediately prior period and will last at least 30 days.

A Public Entity that is outside the jurisdiction of the Governor may determine as appropriate its own timeline for consideration of unsolicited project proposals including whether to limit the receipt of such proposals to particular times.

### 4.2.1 Proposal Deposit

Projects with a total estimated or projected overall cost of less than \$10 million will not be subject to a deposit.

Projects with a total cost of greater than \$10 million will require a deposit of \$50,000 to serve as a review fee should it advance beyond the Pass/Fail and High Level Project Screening process. If a project does not receive a favorable recommendation by the Steering Committee, as part of the High Level Screening process, the deposit will be returned to the Private Entity with its agreement not to offer the proposal directly to the P3 Transportation

Board. If a Private Entity submits the proposal directly to the P3 Transportation Board despite an un-favorable recommendation from the Steering Committee, the deposit will become a review fee and non-refundable regardless of further action taken by the Board.

Once a project advances to the Detail Level Screening process, the P3 Office may require the private entity to share in a portion of the costs associated with the evaluation and review of the proposal. Review costs billed to the Private Entity will be based on terms and rates mutually agreed to by both parties prior to any work being performed.

## **4.2.2 Evaluation Process**

Unsolicited Proposals will be subject to a three-step evaluation process: Pass/Fail, High Level Project Screening, and Detailed Level Project Screening.

Once a Proposal has been determined to be in compliance with the filing requirements (Pass/Fail test), the P3 Office and/or Public Entity will conduct a High Level Project Screening and then a Detailed Level Project Screening if the High Level Project Screening indicates further evaluation is warranted. Considering the P3 Office and/or Public Entity's analysis and the Steering Committee's review of the Unsolicited Proposal, the P3 Transportation Board may return the Unsolicited Proposal to the Proposer at any time during this period if it determines that the Unsolicited Proposal lacks the necessary merit to move forward.

### **4.2.1.1 High Level Screening**

Once an Unsolicited Proposal has passed the Pass/Fail Review, the P3 Office with input from the Public Entity will undertake a High Level Project Screening analysis of the Proposal. The P3 Office may determine that the Proposal is not in the best interest of the Commonwealth or the Public Entity and, if so, it will reject the Proposal and return it. If the P3 Office is reasonably satisfied that the Transportation Project is of value to the Commonwealth and the Public Entity; and it is consistent with the existing State Transportation Improvement Program (TIP) or Twelve Year Plan and relevant Planning Organization Long Range Transportation Plans. The P3 Office will summarize its initial assessment of the Proposal for discussion with the Steering Committee.

The P3 Office, the Public Entity and the Steering Committee will meet to discuss the Transportation Project. The Steering Committee's input will be considered by the P3 Office. At this point in the process the P3 Office may make a recommendation to the Steering Committee and P3 Transportation Board to reject and return the Proposal. Alternatively, the P3 Office may proceed to the Detailed Level Project Screening phase.

### **4.2.1.2 Detailed Level Project Screening**

The Detailed Level Project Screening will be made by the P3 Office with input provided by the Public Entity and Steering Committee. This evaluation will be more comprehensive than the High Level Project Screening and will examine technical, financial and legal elements of

the Proposal in greater detail. At this stage in the process the P3 Office may at its sole discretion choose to seek public input through public polls, focus groups or other public meetings.

During the Detailed Level Project Screening the P3 Office with the Public Entity may at its sole discretion choose to meet with the Private Entity to clarify certain issues not clearly developed in the Proposal. Such meetings are for information only and the P3 Office and the Public Entity are not bound by any such informal discussions.

At the completion of the Detailed Level Project Screening, the P3 Office may make a recommendation to the Steering Committee and P3 Transportation Board to reject the Proposal and return it to the Proposer or it may -- having satisfied itself with Proposer qualifications and capability, value of the project and suitability of a P3 delivery process -- choose to make a recommendation to the Steering Committee and P3 Transportation Board to move the project forward and undertake a competitive solicitation process.

#### 4.2.1.2.1 Evaluation Criteria

As part of the Detailed Level Screening, the P3 Office, with input from the Public Entity, will conduct the Detailed Level Screening of the Unsolicited Proposal utilizing any of following evaluation criteria. The P3 Office may choose to use a subset of the criteria or place more weight on one or more factors depending upon the scope of the Transportation Project:

1. Cost
2. Price
3. Financial Commitment
4. Innovative Financing
5. Bonding
6. Technical, Scientific, Technological or Socioeconomic Merit
7. Financial Strength and Viability
8. Design, Operation and Feasibility
9. Ability of the Transportation Project to improve economic growth, to increase capacity or to expand an existing Transportation Facility
10. The compatibility of the Proposal with existing local and regional land use plans
11. The commitment of local communities to approve land use plans in preparation of the Transportation Project

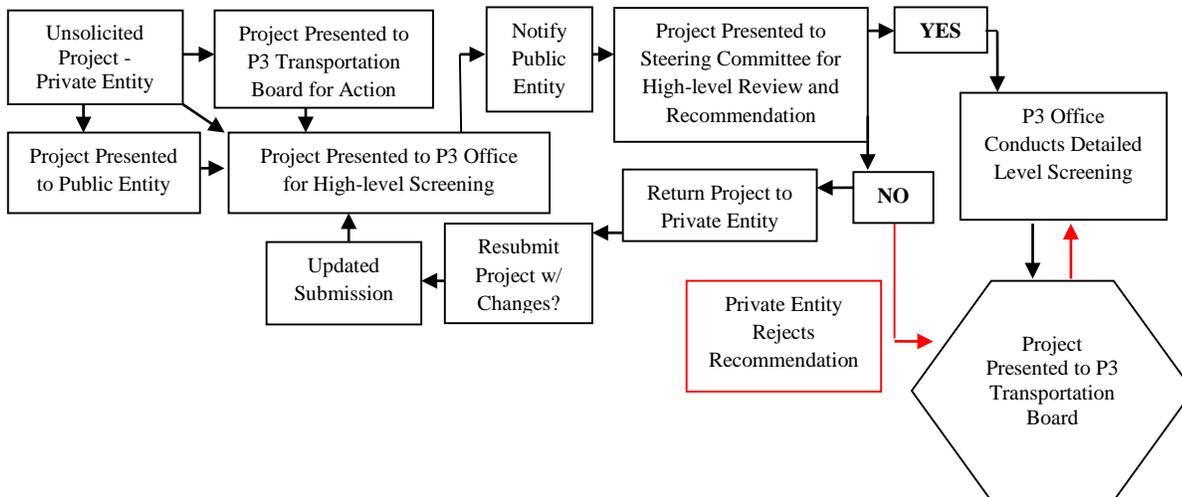
12. The reasonableness of the Private Entity’s proposed project scope and schedule assumptions and projected receipt of public funds, if any, based on a review of applicable Federal and Commonwealth requirements

13. Other factors deemed appropriate by the P3 Office and the Public Entity

The P3 Office with the advice of the Public Entity will determine the relative importance of each evaluation factor and identify members of the Proposal evaluation committee. No individual who has been employed by the Private Entity submitting an Unsolicited Proposal within the last two (2) years may participate in the evaluation of proposals.

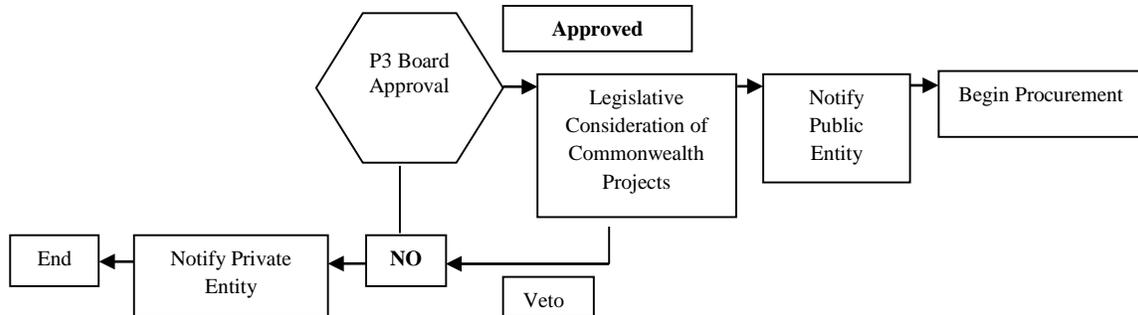
As part of the Detailed Level Screening Process, the P3 Office, with advice from the Public Entity, will conduct a Best Value Analysis of the Proposal relative to the implementation of the Transportation Project under a conventional delivery mechanism.

The following diagram presents the steps to be taken during the screening review of an Unsolicited Project:



### 4.2.2 Board Consideration

The following diagram presents the steps to be taken following P3 Transportation Board consideration for Unsolicited Proposals:



### 4.3 Legislative Consideration of Commonwealth Projects

If a project approved by the P3 Transportation Board includes a transportation facility owned by the Commonwealth, the General Assembly will be notified, and given an opportunity of 9 legislative days or 20 calendar days, whichever is longer, to pass a concurrent resolution by majority vote in both the House and Senate rescinding approval of the project.

### 4.4 Prioritization Process

Once a project under the Governor's jurisdiction, solicited or unsolicited, has been approved by the P3 Transportation Board, the Steering Committee will begin the process of prioritizing the project using the following guidance: Commonwealth policy, priorities and objectives; available public funding; market timing; P3 Transportation Board and P3 Office recommendations; availability of human resources; and current level of project development.

For approved projects that fall under the jurisdiction of Public Entities outside the Governor's jurisdiction, the Steering Committee will not prioritize the project; instead it will be the responsibility of the Public Entity to begin that process using similar guidance.

### 4.5 Key Action Items

#### **Project Screening Activity for Solicited Projects**

- P3 Office develops high-level screening report
- P3 Office presents project to Steering Committee for review
- Steering Committee makes a recommendation based on policy analysis and feasibility

- If recommended by the Steering Committee the P3 Office conducts a detail-level screening
- If a project is not recommended, Public Entity can decide to accept the Steering Committee recommendation or proceed directly to the Board to request a detailed analysis be performed
- P3 Office performs detail-level analysis and presents it to the Steering Committee
- Steering Committee makes Recommendation to the P3 Transportation Board whether to approve the project
- P3 Transportation Board consults with affected persons and Approves or Disapproves
- If approved by P3 Transportation Board, the General Assembly will be notified and Transportation Project approval may be rescinded by concurrent resolution within the longer of 20 calendar days or nine legislative days of approval if the subject transportation facility is owned by the Commonwealth
- P3 Office notifies relevant Public Entity
- If approved, Public Entity begins procurement process

### **Project Screening Activity for Unsolicited Projects**

- P3 Office develops high-level screening report
- P3 Office notifies Public Entity if it did not submit a Request for Transportation Project
- P3 Office presents project to Steering Committee for review
- Steering Committee makes a recommendation based on policy analysis and feasibility
- If recommended by the Steering Committee, the P3 Office conducts a detail-level screening
- If a project is not recommended, the Private / Public Entity can decide to accept the Steering Committee recommendation or proceed directly to the Board to request a detailed analysis be performed
- P3 Office performs detail-level analysis and presents it to the Steering Committee including Best Value Analysis
- Steering Committee makes Recommendation to the P3 Transportation Board whether to approve the project

- P3 Transportation Board consults with affected persons and approves or disapproves
- Approved project submitted to the legislature for consideration if subject transportation facility is owned by the Commonwealth
- P3 Office notifies relevant Public Entity
- If approved, Public Entity begins procurement process

## **5. PROJECT DEVELOPMENT**

### **5.1 Project Development Process**

The P3 Office, in concert with a Department Deputate, will advance a Department Transportation Project to the development phase in accordance with the procurement priority assigned to it by the Steering Committee. The P3 Office Director and the appropriate Deputy Secretary shall appoint a Project Manager for each transportation project selected for development. The Project Manager is responsible for getting the Transportation Project ready for procurement with assistance from relevant disciplines within the Department and external advisors, as applicable and necessary. The Project Manager assembles and manages resources required to administer the specific Transportation Project through the development and procurement phases. Other Public Entities will act according to their own established policies and procedures regarding the development of their own Transportation Projects. At the request of any such Public Entity, the P3 Office will act as a resource to assist in the development of these projects.

The P3 Office Director is responsible for maintaining appropriate coordination with other Public Entities and stakeholders throughout the project development lifecycle and providing Transportation Project information such as budget, scope and schedule.

During the project development phase, a number of key tasks may take place to prepare the Transportation Project for procurement depending upon its characteristics. These include, but are not limited to:

- Further defining project scope, design concept and phasing schedule
- Analyzing compliance with Federal and Commonwealth environmental and transportation planning requirements and verifying that the project's scope and schedule is consistent with these requirements
- Analyzing technical feasibility and evaluations of operations and maintenance
- Refining project costs, revenue estimates and lifecycle costing
- Conducting a risk assessment of key project elements including environmental, scope and design elements, schedule, costs and revenue estimates
- Performing market outreach to determine private sector interest in the project
- Defining an approach to risk allocation and management
- Submitting funding and grant applications as required

- Performing outreach, coordinating public involvement and garnering stakeholder support
- Performing a Best Value analysis
- Determining the optimal procurement process

Depending upon the scope and complexity of the Transportation Project, some or all of these tasks will be undertaken as part of the High Level and Detailed Level Screening analyses. Once the P3 Transportation Board approves a Transportation Project, further detailed analyses involving some or all of these tasks will be required throughout the project development and procurement process.

For those Transportation Projects for which a federal action may be required, the P3 Office will ensure that decisions relating to, among other things, mode, location, user fees, and capacity are made after adequate consideration of potential alternatives to address needs and assess impacts of the Project. The P3 Office in coordination with appropriate Department Deputies may implement slight modifications to the scope of Department Projects so long as such changes are compatible with the scope approved by the P3 Transportation Board. Requirements for major changes will necessitate the review of the Steering Committee and approval of the P3 Transportation Board. Likewise, Public Entities may implement minor modifications to the scope of their Transportation Projects so long as they are consistent with the P3 Transportation Board's approval. The Public Entity will require P3 Transportation Board approval for any modifications that represent a material change to the Transportation Project's scope.

Both Solicited and Unsolicited Projects will accommodate several different types of project and service delivery methods. The types of delivery mechanisms will be analyzed as part of the Initial and Detailed Screening processes on the basis of, among other things, the nature and status of the project, project risk factors, schedule, funding and goals. The procurement package will reflect the intended project delivery mechanisms as set forth in Act 88 of 2012. The P3 Office or the Public Entity will evaluate the appropriate project delivery methods for each Transportation Project.

Possible delivery mechanisms for Transportation Projects include:

- Predevelopment Agreements leading to other implementing agreements
- Design-Build Agreement
- Design-Build-Operate Agreement
- Design-Build-Maintain Agreement
- Design-Build-Finance-Operate Agreement

- Design-Build-Operate-Maintain Agreement
- Design-Build-Finance-Operate-Maintain Agreement
- Operate-Maintain Agreement
- Concession providing for the Development Entity to design, build, finance, operate, maintain, manage or lease a Transportation Facility
- Any other innovative or non-traditional project delivery method or agreement or combination of methods or agreements that the P3 Office and/or a Public Entity determines will address the transportation needs of the Commonwealth and the Public Entity and serve the public interest

Once the project development work has reached a sufficient level to support an initial Best Value assessment, the P3 Office will perform an initial Best Value analysis to provide information both quantitative and qualitative regarding the relative value of a P3 delivery versus the most likely method of delivering the Transportation Project under a more conventional project delivery approach.

## **5.2 Best Value Analysis**

While the P3 Office reserves the right to develop an evaluation approach tailored to each Transportation Project, it is anticipated that most Transportation Projects will utilize a Best Value evaluation methodology. Best Value analyses will be undertaken as part of the Detailed Level Project Screening analysis and the evaluation of proposals submitted during the procurement process. In advance of the evaluation of proposals submitted in conjunction with a procurement, the P3 Office, in consultation with the Department Entity or the Public Entity will determine the evaluation factors and the scoring process. The P3 Office will project a base case and conduct sensitivity analyses to assess how well a Transportation Project under a P3 or conventional delivery approach can accommodate the manifestation of potential downside risks such as higher than expected construction and lifecycle costs, delayed implementation, greater than expected financing costs and/or lower than projected revenues.

The P3 Office in concert with the Department and/or Public Entity will evaluate the projected financial results on a year by year nominal basis and/or a present value basis, as appropriate to determine whether the Transportation Project should continue as a P3 project. The financial analysis is combined with the results of the quantitative and qualitative assessment to determine Best Value. Based on the findings from this analysis, the P3 Office will recommend to the Steering Committee and the P3 Transportation Board whether a Transportation Project should proceed using a P3 delivery method.

The P3 Office will update the initial financial analysis with inputs that accompany the submission of Proposals by Private Entities during the competitive procurement process to ensure that the Transportation Project continues to provide Best Value throughout the procurement process.

The appropriate Best Value methodology will vary across modes and revenue structures—e.g., toll roads versus availability payment transactions. However, the Best Value analysis should be conducted for all Transportation Projects considered for P3 delivery in the project development phase to ensure this project delivery approach is the optimal method.

### **5.3 Key Action Items**

- The Department, Public Entity and P3 Office perform project development activities (e.g., geotech, survey, project procurement/delivery strategy, environmental, preliminary engineering, and risk analysis)
- The P3 Office in concert with the Department and/or Public Entity conduct the initial Best Value analysis
- The P3 Office Director notifies project sponsors and affected jurisdictions
- The P3 Office manages and coordinates the project development process

## **6. PROJECT PROCUREMENT**

If the P3 Transportation Board determines that a proposed project, whether arising from an Unsolicited Proposal or a Request for Transportation Project, is in the best interest of the Commonwealth and the Public Entity, the P3 Office and/or a Public Entity may request competing Proposals to develop, finance, construct, improve, maintain or operate, or any combination thereof, the Transportation Project. If such a determination is made, the regulations developed pursuant to Act 88 of 2012 and this Implementation Manual, which has also been developed under the authority of Act 88, will govern the procurement.

### **6.1 Procurement Process**

#### **6.1.1 Phased Procurement**

Once the P3 Transportation Board approves a Transportation Project, the P3 Office or a Public Entity can initiate the procurement process. The P3 Office or a Public Entity may use a multi-phase process to procure a Transportation Project. A multi-phase selection process may consist of some or all of:

- The issuance of a Request for Qualifications (RFQ),
- Industry Review Meetings (see below), and/or
- Issuance of a Request for Proposals (RFP).

The determination as to whether to utilize some or all of these procurement phases will be project-specific. However, an RFP is required for Transportation Projects approved by the P3 Transportation Board. Although there may be several phases as described above, including Industry Review Meetings, common terminology refers to “one-step” or “two-step” procurements. The former is used when an RFP is posted and any entity may respond. The latter is used when bidder qualifications are solicited, evaluated and then used to define a group of qualified bidders to whom an RFP is then issued.

Upon receipt of an Unsolicited Proposal and a determination by the P3 Transportation Board that the Transportation Project is in the best interest of the Commonwealth and the Public Entity, the P3 Office or Public Entity may issue an RFP for competing project Proposals or may issue an RFQ. The P3 Office or a Public Entity may also incorporate minor modifications to the potential project submitted in the Unsolicited Proposal for the RFP, in keeping with scope approved by the P3 Transportation Board. Only a material modification subsequent to the P3 Transportation Board’s approval requires an additional review and approval by the Board.

The purpose of an RFQ is to identify qualified candidates for continuing in the procurement process. The P3 Office or Public Entity may prequalify or short-list one or more candidates based on their responses to the RFQ and/or information already provided during the Unsolicited Proposal review process. Those candidates will then be eligible to receive an RFP

and submit a proposal for the project in response to the RFP. The P3 Office and/or Public Entity is not obligated to utilize an RFQ and may, in its sole discretion, proceed directly to the issuance of an RFP. If procurement is for a proposed project identified by an Unsolicited Proposal, the Private Entity that submitted the original Unsolicited Proposal may, in the sole discretion of the P3 Office or Public Entity, be required to submit a Qualification Submittal in response to an RFQ or a Proposal in response to an RFP.

Industry Review Meetings, held at the discretion of the P3 Office or Public Entity, are intended to share information regarding RFP-related documents (Instruction to Private Entities, Technical Provisions, Public Private Transportation Partnership Agreement Term Sheet) and are either open to all interested Private Entities or restricted to prequalified or shortlisted Private Entities in order to obtain feedback, comments and suggestions from such Private Entities regarding draft documents, key project components and technical, financial and legal issues.<sup>1</sup> The meetings may be joint workshops with all interested or pre-qualified/shortlisted Private Entities or individual one-on-one meetings (which may be physical meetings or conference calls), as deemed necessary by the P3 Office or the Public Entity. One-on-one meetings are generally confidential and often address matters that are proprietary to the shortlisted Private Entity. Nonetheless, the P3 Office or Public Entity will always reserve the right to modify or revise the RFP documents as a result of the one-on-one meetings. Generally, shortlisted/prequalified Private Entities shall each be afforded the same opportunity to meet and talk with the P3 Office and/or Public Entity in connection with the Transportation Project and, to the extent practicable, the same P3 Office, Department and/or Public Entity personnel and advisors should be present during each round of meetings. Industry Review Meetings, whether conducted as joint sessions or as one-on-one meetings, are for informational purposes only; they are NOT to be used for the purpose of conducting negotiations or otherwise reaching agreement between a Private Entity, the P3 Office or a Public Entity. Information divulged to a Private Entity as part of a one-on-one meeting must be shared equally with all interested or eligible Private Entities. For Transportation Projects sponsored by a Public Entity, the P3 Office can serve as a technical resource.

In addition to meetings with the interested or prequalified/shortlisted Private Entities, the P3 Office or Public Entity may issue drafts of some or all of the RFP documents, including Instructions to Private Entities, Technical Provisions/Scope of Work and the draft Public Private Transportation Partnership Agreement (or a Term Sheet). The P3 Office or the Public Entity may also make available technical and financial information relevant to the Transportation Project through an electronic data room and respond to requests for information and/or site inspections by Private Entities in support of their due diligence review of the Transportation Project. Information provided pursuant to such a request or opportunities for site inspections must be made available to all interested or eligible Private Entities. Private Entities will be encouraged to submit written comments and questions concerning these documents and the P3 Office or Public Entity will review and consider such input and potentially revise or adjust the documents in consideration thereof.

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<sup>1</sup> None of this is to the exclusion of a Public Entity that may want to be considered for a P3 Transportation Project as permitted by Act 88.

The goal of the Industry Review process is to refine the RFP to attempt to address Private Entity concerns, to the extent possible, in order to maximize competition and incorporate innovative and/or cost-saving ideas. The Industry Review process can prove mutually beneficial to the P3 Office, Public Entity and Private Entities. Information and materials that may be provided and discussed during Industry Review Meetings may also include updated project information on preliminary engineering, ROW acquisition, utility work, environmental clearances and the procurement schedule.

Following shortlisting/prequalification and/or the Industry Review process if either or both are utilized, the P3 Office and/or Public Entity may issue an RFP. The RFP will outline the minimum Proposal requirements and selection criteria.

### **6.1.2 Public Notice**

The P3 Office or Public Entity will issue public notices of its procurements consistent with regulations adopted by the Department. The notice shall be given a reasonable time prior to the date set for the close of receipt of the proposals or statement of qualifications. The method of public notice may include any of the following:

- Electronic publication which is accessible to the general public
- Advertisement as provided for in 45 Pa.C.S §306
- Issuance of Requests for Proposals to Offerors on the mailing list of a Public Entity
- Publication in a newspaper of general circulation
- Where prequalification is a requirement of submitting a proposal, notification to all Private Entities who have been prequalified by the Public Entity

Copies of a RFP shall be made available to any interested person upon request to the P3 Office or Public Entity. The P3 Office and/or Public Entity may establish procedures for the distribution of an RFP, including the imposition of a fee to reimburse the P3 Office and/or Public Entity for the costs of photocopying and mailing.

### **6.1.3 Rights Reserved**

Consistent with Act 88 of 2012 and policy established in this Implementation Manual, the P3 Office and/or Public Entity reserve all rights available by law and in equity in its procurement process, including, without limitation, the right to:

1. Modify the procurement process in its sole discretion to address applicable law and/or the best interests of the P3 Office or Public Entity and the Commonwealth
2. Develop the project in any manner that it, in its sole discretion, deems necessary

3. Issue an RFQ relating to a project described in an Unsolicited Proposal after the rejection or termination of the evaluation of the Unsolicited Proposal and any Competing Proposals
4. Modify all dates set or projected in the RFQ and RFP
5. Reject any and all submittals, responses, Statement of Qualifications (SOQs) and Proposals, whether Solicited or Unsolicited, at any time
6. Terminate evaluation of any and all Proposals, whether Solicited or Unsolicited, responses, and SOQs at any time
7. At the RFQ stage and prior to the initiation of an RFP, consult with any Responsible Offeror to include unique, or innovative aspects of their submitted documents into the solicitation
8. Negotiate with a Responsible Offeror other than the apparent best value Responsible Offeror if negotiations with the apparent best value Responsible Offeror are unsuccessful or if financial close with the apparent best value Responsible Offeror does not occur
9. Require confirmation of information furnished by a Responsible Offeror, require additional information from a Responsible Offeror concerning its SOQ and/or Proposal, require additional evidence of qualifications to perform the work described in the RFQ and RFP, including holding meetings and exchanging correspondence with the Responsible Offeror to seek an improved understanding of the SOQs and Proposals. If individual Responsible Offeror informational meetings are held, all Responsible Offerors submitting a responsive SOQ and Proposal shall be afforded an opportunity to participate in an individual Responsible Offeror informational meeting
10. Add or delete Responsible Offeror responsibilities from the information contained in the RFQ or RFP
11. Issue Addenda, Supplements and Modifications to an RFQ and/or RFP. In addition, revise and modify the evaluation factors or otherwise revise or expand the evaluation methodology for the SOQ at any time before the SOQ due date and for the Proposals at any time before the Proposal Due Date. If such revisions or modifications are made, the P3 Office and/or Public Entity shall circulate an Addendum to all prospective Offerors setting forth the changes to the evaluation criteria or methodology
12. Cancel an RFQ or RFP in whole or in part at any time prior to the execution of a Public Private Transportation Partnership Agreement while honoring any agreed upon compensation or stipends to proposers and having no further obligation thereafter

13. Issue a new RFQ and/or RFP after withdrawal of original RFQ and/or RFP
14. Determine whether to shortlist or prequalify any prospective Offeror responding to an RFQ
15. Appoint Evaluation Committees to review SOQs and Proposals, make recommendations and seek the assistance of outside technical, financial and legal experts and consultants in SOQ and Proposal evaluation
16. Establish protocols for remedying minor deficiencies within a specified period of time in a proposal of SOQ
17. Disqualify any Offeror under an RFQ, an RFP or during the period between the RFQ or RFP for violating any rules or requirements of the procurement set forth in the RFQ, the RFP or in any other communication from the P3 Office and/or Public Entity
18. Determine whether to issue a Notice to Proceed after execution of the Public Private Transportation Partnership Agreement
19. Determine whether to pursue TIFIA credit approval on behalf of the Private Entities
20. Determine whether to seek an allocation for Private Activity Bonds (PAB) on behalf of the Private Entities
21. Develop some or all of the project itself
22. Disclose information contained in an SOQ/Proposal to the public as governed by the law and/or by the RFQ/RFP
23. Exercise any other right reserved or afforded to the P3 Office and/or Public Entity under the RFQ/RFP or applicable law or in equity
24. Disqualify any Private Entity for any conflict of interest, including a violation of the State Adverse Interest Act, or other conduct or behavior manifesting a lack of responsibility.

Additional reservations of rights may be included in the solicitation documents for a project. Except as set forth in the Solicitation Documents, should the procurement process or negotiations be suspended, discontinued or terminated the Private Entity shall have no rights of recourse, including reimbursement of Private Entity review fee(s) or costs associated, directly or indirectly, with the Proposal development or presentations.

#### **6.1.4 Ex- Parte Communications**

No Offeror, prospective or actual, or representative thereof shall have any ex-parte communications during the procurement for a proposed project with any member of the P3 Transportation Board, Steering Committee, or with any of the P3 Office, Department and/or Public Entity's staff, advisors, contractors or consultants involved with the procurement, except for communications expressly permitted by the RFQ, RFP or except as approved in advance by the P3 Office Director, Public Entity or designee, in such individual's sole discretion. The foregoing restriction shall not, however, preclude or restrict the Private Entity from communications with regard to matters unrelated to the RFQ or RFP or from participation in public meetings. Any Private Entity engaging in prohibited communications may be disqualified in the sole discretion of the P3 Office, Department and/or Public Entity. Additional requirements and limitations on communications may be included in the solicitation documents for a project. The P3 Office will provide a list in the Procurement Documents of agencies, organizations, stakeholders, consultants and contractors with whom Private Entities should not communicate.

Unless otherwise stated in the Procurement Documents, under no circumstance shall the P3 Office, Department, Public Entity and/or any other Commonwealth Agency be liable for or reimburse the costs incurred by the Private Entity whether or not they are selected, or if the procurement process is delayed, altered or terminated.

#### **6.1.5 Disclaimers and Conditions**

Except as expressly provided in the Procurement Documents, any and all information the P3 Office and/or Public Entity makes available to Private Entities shall be as a convenience to the Private Entity without representation or warranty of any kind.

#### **6.1.6 Stipends**

The P3 Office or Public Entity may compensate responsive and Responsible Offerors for a portion of the costs associated with the preparation of a proposal in response to a RFP. The determination to offer a stipend and its amount will be determined on a project by project basis and will be based on the expected time required and expected complexity of the proposal as well as the Department or Public Entity's resources available for a stipend.

### **6.2 Solicited Proposals**

Once a Transportation Project is approved by the P3 Transportation Board, the P3 Office or the Public Entity will undertake a competitive solicitation process. At the P3 Office and/or Public Entity's sole discretion, an Industry Meeting may be held prior to issuing either an RFQ or RFP in order to inform the industry of the opportunity and to hear industry suggestions which may at the P3 Office and/or Public Entity's sole discretion be incorporated into solicitation documents.

### 6.2.1 Original Proposer Qualifications

The original Private Entity that submitted an Unsolicited Proposal which is found to have merit by the P3 Transportation Board and for which competing Proposals are sought may be deemed to be qualified by the P3 Office and/or Public Entity and may not have to submit Qualifications in response to an RFQ for the Unsolicited Proposal.

### 6.2.2 Original Proposal May Be Modified

The P3 Office and/or Public Entity may, subject to the project scope approved by the P3 Transportation Board, modify an Unsolicited Proposal which is found to have merit by and for which Competing Proposals are sought for the competitive solicitation.

### 6.2.3 Required Content for Response to RFQ

The P3 Office and/or Public Entity may issue an RFQ for a Transportation Project for the purpose of short listing/pre-qualifying Private Entities who are determined to have the qualifications, experience and approach required for successful development of the project. In response to an RFQ, Private Entities must submit a SOQ. The RFQ may require Proposers to submit information different from or in addition to such information referenced in these Guidelines which are outlined below.

- **Structure and Experience:** As a part of the SOQ, Private Entities will be required to provide information related to the structure of the proposed team, the background and experience of the Private Entity, individual team members, and key personnel with developing, designing, constructing, financing, operating and/or maintaining projects comparable to the Transportation Project, and their specific experience with similar projects.
- **Financial Capacity:** This includes a submittal of financial information from the Private Entity as determined by the P3 Office and/or Public Entity. The intent of this requirement is to ensure that the Proposer has sufficient financial capacity to assume the responsibilities and obligations required to deliver the project on schedule and on budget.
- **Approach to Development:** Information that may be required, as part of the SOQ, includes a description of the approach to some or all of the development, design, construction, financing, operations and/or maintenance of the project for which the SOQ is submitted. Such required information may include a description of the Private Entity's conceptual plan to develop, design, construct, finance, operate and/or maintain the project, commitment of resources, risks and risk allocation, and the use of subcontractors and suppliers.

## 6.2.4 Required Content for Response to RFP

Upon making a determination of shortlisted/prequalified Private Entities for a particular project, the P3 Office and/or Public Entity may issue a RFP which will require the Offerors to provide a Proposal containing at least two basic components, a Technical Proposal, and a Financial Proposal. The P3 Office and/or the Public Entity may also issue a RFP without first issuing a RFQ. If the project delivery model is a Project Development Agreement (PDA), then components other than a Technical Proposal and Financial Proposal may be required as discussed in Section 6.3. The RFP may require Offerors to submit information different from or in addition to such information referenced in this Implementation Manual.

### 6.2.4.1 Technical Proposal

The P3 Office and/or prospective Proprietary Public Entity may require the Private Entity to provide such technical information regarding the project scope of work and technical requirements as the P3 Office and/or Public Entity deems appropriate. Such required information may include, without limitation, design elements and approach, construction approach, operations approach, maintenance approach, project management approach, schedule, phasing, quality control and assurance approach, and other information as appropriate for the project's development. The intent of the Technical Proposal is to provide assurance that the Development Entity selected has:

- A sufficient understanding of the project or desired service
- The Private Entity's ability to timely and efficiently deliver the project or service in a quality manner consistent with technical and contractual requirements

### 6.2.4.2 Financial Proposal

The type and extent of financial documentation to be submitted as part of the Financial Proposal will depend on the delivery mechanism. The RFP may also require that the Private Entity update the financial information provided in the SOQ.

If the RFP and project scope require the Private Entity to finance any portion of or the entire project, the Financial Proposal must include a Financial Plan and a Financial Model. The nature of the project, the project delivery method and current market conditions will dictate:

- The contents and level of detail of the Financial Plan
- Whether the Financial Proposal is fully or partially committed
- Whether conditions may be included by the Proposer

Requirements for a Financial Plan may require the Private Entity to:

- Identify the financial institution(s) involved;
- Provide a description of senior debt finance, mezzanine debt finance, equity, subordinated debt, any other forms of finance; Identify investors, lead arrangers, lead managers and/or underwriting banks and/or equity providers that have given indications/commitments;
- Describe the type and purpose of each funding source and facility;
- Describe the proposed steps and timeframes for reaching financial close;
- Provide specific information for each separate bank, loan facility, or other debt instrument such as commitments, amounts, terms and conditions attaching to the loan, drawdown schedule, capital repayment moratorium, repayment schedule and final maturity date, events of default, security required (including any guarantees), any reserve accounts, interest rate, any proposed hedging arrangements in respect of interest rates, average life of debt, due diligence, and timetables.
- At the option of the Proprietary Public Entity, provide a preliminary rating letter from at least one Nationally Recognized Statistical Rating Organization (NRSRO) with demonstrated expertise in assessing the credit quality of Public Private Transportation Projects. The preliminary rating letter should indicate that the senior debt obligations of the proposed Transportation Project would be rated in at least the lowest investment grade category, e.g., BBB-, Baa3 or similar grading.

The RFP will provide details regarding requirements for the Financial Plan and Financial Model portions of the Financial Proposal.

Where possible and financially feasible, the P3 Office and/or Public Entity will seek Proposals that minimize the use of public funds as well as the creation of State-supported debt. If a Proposal including public or private debt is submitted, then the RFP may require that the Proposal, to the extent possible, identify the amount of public funds required and specify the project-level approvals by the P3 Office, Department, Public Entity, private lending institutions and ratings agencies. If a Public Private Transportation Agreement is executed for a Transportation Project requiring public funds or public debt from a Commonwealth Agency, this may require the Transportation Project to be listed in the Commonwealth's Capital Budget.

### **6.2.5 Project Development Agreement (PDA) Approach**

If the procurement delivery model is a PDA, the Proposal contents will differ significantly from that required for other project delivery methods. In the case of a PDA, the Transportation Project has typically not advanced to a level where a defined technical approach and firm pricing and financing (debt or equity) may be proposed. Environmental approvals may not be in place, the alignment may not be set and the scope of work may not be defined.

As a result, the proposal for a PDA will generally focus on the Private Entity's:

- Approach to undertaking the PDA scope of work
- Price for undertaking this scope of work
- Conceptual approach to developing the Transportation Project
- Conceptual approach to financing the Transportation Project

The P3 Office and/or Public Entity may also require the Private Entity to submit a proposed conceptual development schedule and approach, confirmation of financing alternatives for pre-development, information related to delivery options, preliminary engineering, environmental approvals and the public involvement process. Proposal requirements will be detailed in the RFP.

## **6.2.6 Evaluation and Selection Process**

When all responsive Proposals have been evaluated, the P3 Office or Public Entity may, at its sole discretion, request Best and Final Offers (BAFOs) from the Private Entities. Once an apparent Best Value Proposer is selected, the P3 Office may enter into negotiations with that Proposer for a Department sponsored Transportation Project. Upon completion of satisfactory negotiations and the Secretary's approval, the P3 Office will execute the Public Private Transportation Partnership Agreement. For Transportation Projects sponsored by a Public Entity, the Public Entity may enter into negotiations with the Private Entity and upon satisfactory completion of negotiations seek approval by its governing Board of the Public Private Transportation Project Agreement. The P3 Office may be used as a resource to support the negotiations of the Public Entity.

### **6.2.6.1 Evaluation Criteria**

As part of the evaluation process, the P3 Office and/or the Public Entity will conduct an evaluation of SOQ's and Proposals using any of the criteria listed below. The P3 Office and/or Public Entity may choose to use a subset of the criteria or place more weight on one or more factors depending upon the scope of the Transportation Project and/or the type of procurement RFQ, PDA or RFP.

1. Cost
2. Price
3. Financial Commitment
4. Innovative Financing
5. Bonding

6. Technical, Scientific, Technological or Socioeconomic Merit
7. Financial Strength and Viability
8. Design, Operation and Feasibility
9. Public Reputation, Qualifications, Industry Experience and Financial Capacity of the Private Entity
10. Ability of the Transportation Project to improve economic growth, to increase capacity or to expand an existing Transportation Facility
11. The compatibility of the Proposal with existing local and regional land use plans
12. The commitment of local communities to approve land use plans in preparation of the Transportation Project
13. The reasonableness of the Offeror's proposed project scope and schedule assumptions and proposed receipt of public funds, if any, based on a review of applicable Federal and Commonwealth requirements
14. Other factors deemed appropriate by the P3 Office and/or the Public Entity

The P3 Office and/or the Public Entity will determine the relative importance of each evaluation factor and identify members of the Proposal evaluation committee. If the Public Entity is a Commonwealth Agency, the P3 Office is required to invite its Comptroller to participate in the evaluation as a non-voting member of any evaluation committee. No individual who has been employed by the Private Entity submitting an Unsolicited Proposal within the last two years may participate in the evaluation of proposals.

As part of the evaluation process of Proposals in response to a RFP, the P3 Office and the Public Entity will conduct a Best Value Analysis of the Proposal relative to the implementation of the Transportation Project under a conventional delivery mechanism.

#### 6.2.6.2 Negotiations

The P3 Office and/or Public Entity may engage in negotiations regarding project elements, project scope, risk allocations, price, project financing, financial terms, P3 terms, technical requirements and other matters with the Proposer offering the apparent best value. The P3 Office and/or Public Entity should not disclose the contents of any Proposal to competing Private Entities during the negotiation and selection process. As may be provided in the Procurement Documents, the P3 Office and/or Public Entity may discuss an acceptable or potentially acceptable Proposal with the Private Entity to assess that Proposer's ability to meet each requirement of the procurement.

If at any point in negotiations, it appears to the P3 Office and/or Public Entity that the apparent highest ranking Best Value Proposal will not provide the overall best value or that the parties will be unable to reach agreement, the P3 Office and/or Public Entity may suspend or terminate negotiations with the apparent Best Value Private Entity and enter into negotiations with the Private Entity submitting the next highest ranking best value proposal. This process may continue until the P3 Office and/or Public Entity reaches an agreement acceptable to it or determines that it will not be able to do so. The P3 Office and/or Public Entity can cancel an RFP at any time. Act 88 of 2012 provides Private Entities that are aggrieved by a selection under the negotiations process to file a protest or claim pursuant to 62 Pa.C.S Ch. 17 if the selection is made by a Commonwealth Agency . In the event the selection is made by a Public Entity that is not a Commonwealth Agency, the aggrieved Private Entity may file a claim with the Court of Common Pleas where the Public Entity is located.

### **6.3 Contracting**

Prior to developing, designing, constructing, financing and/or operating and maintaining a project, the Development Entity selected must enter into a Public Private Transportation Partnership Agreement with the Department or Public Entity. Because of the unique nature of every project and the potential for a variety of P3 approaches and project delivery methods, it is anticipated that Agreements may differ significantly. For instance, an Agreement for a Design-Build-Finance project will be very different than an Agreement for a Concession or for a PDA. The Agreement will define the rights and obligations of the parties with regard to the project. The Department or the Public Entity will consider such policy, legal, financial and technical advice as it deems necessary or appropriate to successfully develop, structure and negotiate the Agreement. The Department or the Public Entity also may seek the advice and involvement of affected state, local or regional public entities during the negotiation process.

If the Transportation Project requires debt financing to facilitate its initial construction, then the Private Entity will be required to provide prior to the execution of a Public Private Transportation Project Agreement, one or more rating letters from two NRSROs with demonstrated expertise in assessing the credit quality of Public Private Transportation Projects indicating that senior debt obligations of the Transportation Project are rated in at least the lowest investment grade category e.g., BBB-, Baa3 or similar grading.

Act 88 requires that, at a minimum, a Public Private Transportation Partnership Agreement shall include the following provisions:

1. A description of any planning, development, design, leasing, acquisition of interest in, financing, installation, construction, reconstruction, replacement, expansion, operation, maintenance, improvement, equipping, modification, enlargement, management, running and control of the Public Private Transportation Project
2. The term of the Public Private Transportation Partnership Agreement

3. The type of property interest or other relationship the Development Entity will have in or with respect to the Public Private Transportation Partnership Agreement, including the acquisition of right-of-way and other property interests that may be required
4. Authorization for the Department/Proprietary Public Entity or its authorized representatives to inspect all assets and properties of the Public Private Transportation Project and all books and records of the Development Entity relating to the Public Private Transportation Project to review the Development Entity's performance under the Public Private Transportation Partnership Agreement
5. Grounds for the termination of the Public Private Transportation Partnership Agreement by the Parties
6. Procedures for the amendment of the Public Private Transportation Partnership Agreement
7. The rights and remedies available in the event of breach, default, or delay
8. Requirements for a Private Development Entity to provide performance and payment bonds, parent company guarantees letters of credit or other acceptable forms of security in an amount acceptable to the Department and/or the Proprietary Public Entity
9. A requirement that ownership of the Transportation Facility acquired or constructed go to or remain with the Proprietary Public Entity
10. Standards for construction, maintenance and operation of the Public Private Transportation Project if the activities are to be performed by the Development Entity
11. Standards for capital improvement or modification of the Public Private Transportation Project if they are to be made by the Development Entity
12. Standards relating to how payments, if any, are to be made by the Proprietary Public Entity to the Development Entity, including Availability Payments, Performance Based Payment and payments of money and revenue sharing with Development Entity
13. Standards relating to how the parties will allocate and share management of the risks of the Public Private Transportation Project
14. Standards relating to how the Parties will allocate costs of development of the Public Private Transportation Project, including any cost overruns
15. Standards relating to damages to be assessed for nonperformance, specifying remedies available to the Parties and dispute resolution procedures
16. Standards relating to performance criteria and incentives

17. A requirement that upon termination of the Public Private Transportation Partnership Agreement, a Transportation Facility that was the subject of the Public Private Transportation Partnership Agreement must be in a state of proper maintenance and repair and shall be returned to the Proprietary Public Entity in satisfactory condition at no further cost to the Proprietary Public Entity
18. Provisions for law enforcement related to the Public Private Transportation Project
19. An obligation of the Development Entity to offer employment to any employee of the Proprietary Public entity who would lose employment due to the execution of the Public Private Transportation Partnership Agreement and who is in good standing at the time of execution of the Public Private Transportation Partnership Agreement, including salary, retirement, health and welfare benefits which are substantially identical to the benefits received by the employee immediately prior to the execution of the Public Private Transportation Partnership Agreement for the term of the collective bargaining agreement of those employees in effect. An employee of the Proprietary Public Entity who does not accept employment with the Development Entity shall be reassigned to an equivalent position without loss of seniority, within a worksite in as close proximity to the Public Private Transportation Project as feasible. Nothing in this provision shall impair provisions related to furlough and layoffs of the collective bargaining agreement of those employees in effect.
20. Other terms and provisions as required under Act 88 of 2012 or agreed to by the Development Entity and the Proprietary Public Entity

#### **6.4 Key Action Items**

- For Solicited and Unsolicited Transportation Projects develop procurement documents
- Conduct Industry Review Meetings, as appropriate
- Issue the RFQ
- Evaluate responses and short list qualified Offerors
- Issue the RFP
- Evaluate proposals, including detailed Best Value analysis
- Select preferred Responsible Offer and undertake negotiations
- Execute Public Private Transportation Partnership Agreement

## DEFINED TERMS

These definitions are applicable to capitalized terms contained in the Pennsylvania Department of Transportation's Public Private Transportation Project Implementation and Guidelines Manual

**Act 88 of 2012** means Title 74 Part V Chapter 9 of the Pennsylvania Consolidated Statutes, 74 Pa.C.S. §§ 9101 – 9124, which is a legislative framework enabling Public Entities as defined in the Act to enter into agreements authorizing Private or other Public Entities to undertake a Transportation Project.

**Best Value** means the overall combination of quality, price, schedule and various elements of required services that, in total, provide the highest relative worth for the Public Entity's needs.

**Best Value Private Entity** or **Best Value Proposal** means a Private Entity that has submitted a Responsive Proposal that has been determined by the Department or Public Entity to provide Best Value

**Department** means the Pennsylvania Department of Transportation

**Development Entity** means an entity which is a party to a Public Private Transportation Partnership Agreement and which is any of the following:

1. A Private Entity
2. A Public Entity other than the Public Entity providing or improving its own Transportation Facilities

**Nationally Recognized Statistical Rating Organization or NRSRO** means credit rating agency which is registered with the United States Securities and Exchange Commission and provides its opinion on the creditworthiness of an entity and the financial obligations (such as, bonds, preferred stock, and commercial paper) issued by an entity

**Offeror** or **Proposer** means a person that submits a Proposal or a response in answer to a Request for Proposals for Transportation Projects.

**Private Entity** means a person, entity, group or organization that is not the Federal Government, the Commonwealth or a Municipal Authority.

**Proposal** means the documents submitted by a Private Entity in response to an RFP issued by the Department or a Public Entity

**Proprietary Public Entity** means a Public Entity which owns a Public Private Transportation Project and which is a party to a Public Private Transportation Partnership Agreement

**Public Entity** means a Commonwealth Agency as defined in 62 Pa.C.S. § 103, a Municipal Authority or an Authority created by statute which owns a Transportation Facility. The term does not include the General Assembly and its members, officers or agencies of any court or other office or agency of the Pennsylvania Judicial System

**Public Private Transportation Partnership Agreement** means a contract for a Transportation Project which transfers the rights for the use or control, in whole or in part, of a Transportation Facility by a Public Entity to a Development Entity for a definite term which the Development Entity will provide the Transportation Project to the Public Entity in return for the right to receive all or a portion of the revenue generated from the use of the Transportation Facility, or other payment such as the following transportation related services:

1. Operations and maintenance
2. Revenue collection
3. User fee collection or enforcement
4. Design
5. Construction
6. Development and other activities with respect to existing or new Transportation Facilities that enhance traffic throughput, reduce congestion, improve safety or otherwise manage or improve a Transportation Facility
7. Financing

**Public Private Transportation Partnership Board** also **P3 Transportation Board** or **Board** means the Board established pursuant to Act 88 of 2012 for the purpose of providing the review and approval of Requests for Transportation Projects and Unsolicited Proposals necessary for a Transportation Project to proceed under Act 88.

**Public Private Transportation Project** means a Transportation Project undertaken by a Development Entity pursuant to a Public Private Transportation Partnership Agreement.

**RFP** means the documents constituting the Requests for Proposals and identifying the Transportation Project, the work to be performed and materials to be furnished, in response to which a Private Entity may submit a Proposal.

**RFQ** means the documents constituting the Request for Qualifications issued for a Transportation Project by the Department or a Public Entity

**Request for Transportation Projects** means a solicited or unsolicited plan for a Transportation Project submitted to the Board by the Department or a Public Entity

**Responsible Offer** means an Offeror that has submitted a Responsive Proposal and that possesses the capability to fully perform the requirements of the Public Private Transportation Partnership Agreement in all respects and the integrity and reliability to assure good faith performance.

**Responsive Proposal** means a Proposal that conforms in all materials aspects to the requirements and criteria in the Request for Proposals

**Solicited Project** means a Transportation Project developed and procured by the Department or a Public Entity through the issuance of an RFQ or RFP to develop and/or operate a Transportation Project by a Private Entity in accordance with Act 88 of 2012.

**Statement of Qualifications** of SOQ means the documents submitted by a Private Entity in response to an RFQ issued by the Department or a Public Entity

**Transportation Facility** means a proposed or existing road, bridge, tunnel, overpass, ferry, busway, guideway, public transportation facility, vehicle parking facility, port facility, multimodal transportation facility, airport, station, hub, terminal or similar facility used or to be used for the transportation of persons, animals or goods together with any buildings, structures, parking areas, appurtenances, intelligent transportation systems and other property needed to operate or related to the operation of the Transportation Facility. The term includes any improvements or substantial enhancements or modifications to an existing Transportation Facility.

**Transportation Project** also a **P3 Transportation Project** or **P3 Project** means an undertaking by a Private Entity or a Public Entity, other than the Public Entity providing or improving its own Transportation Facilities, to provide or improve a Transportation Facility or transportation-related service which is totally or partially located within this Commonwealth.

**Unsolicited Project** means a project to develop and/or operate a Transportation Project submitted by a Private Entity not in response to an RFQ or RFP.

**Unsolicited Proposal** means a proposal to develop and/or operate a Transportation Project submitted by a Private Entity not in response to an RFQ or RFP.