

## Public Private Partnerships: P3 Ethics

Public-private partnerships (P3s) are a popular way for governments to achieve policy goals. Through the implementation of a P3, a range of skills and assets from both the public and private sector are shared in delivering a service or facility for the use of the general public. However, there are inherent tensions related to the P3 concept. The tension between the public and private sectors may best be described as conflicting, or competing, interests. The public entity is generally focused on the protection of the public interest and the private entity is geared towards economic opportunity. Members of the P3 must be wary of conflict of interests that may arise in carrying out the public purpose of the P3. This fact sheet is



intended to make you aware of potential pitfalls that may arise during the administration of the P3. If you encounter a situation in which you are in need of additional advice, please contact us at (302) 739-2399.

There is no binding definition of “public-private partnerships” that spans across all agencies, but a federal working group has defined them as “collaborative working relationships between the government and private actors in which the goals, structures, and roles and responsibilities of each partner are mutually determined.



### APPLICABLE LAWS

#### State Code of Conduct (ethics laws)



#### **29 Del. C. § 5805. Prohibitions relating to conflicts of interest.**

(a) Restrictions on exercise of official authority. — (1) No state employee, state officer or honorary state official may participate on behalf of the State in the review or disposition of any matter pending before the State in which the state employee, state officer or honorary state official has a personal or private interest, provided, that upon request from any person with official responsibility with respect to the matter, any such person who has such a personal or private interest may nevertheless respond to questions concerning any such matter. A personal or private interest in a matter is an interest which tends to impair a person’s independence of judgment in the performance of the person’s duties with respect to that matter.

(2) A person has an interest which tends to impair the person’s independence of judgment in the performance of the person’s duties with respect to any matter when:

a. Any action or inaction with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons; or

b. The person or a close relative has a financial interest in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interests in the same enterprise.

### 29 Del. C. § 5806. Code of Conduct

(e) No state employee, state officer or honorary state official shall use such public office to secure unwarranted privileges, private advancement or gain.

## What to look for

**Conflicts** can arise both with respect to individual members (**personal** conflicts of interest) and with respect to the agency as a whole (**organizational** conflicts of interest).



A personal conflict of interest arises when an employee of an agency has a financial or relational stake in a private entity that seeks a partnership with the agency.



The government entity should also be wary of organizational conflicts of interests with the private partner. Those include:

Existing or upcoming grants

Existing or upcoming contracts

Investigations

Enforcement actions

Pending adjudications

Whether a private partner has pending business before the agency or board that would be involved in a partnership.

Whether a private partner is regulated by the agency that would be involved in the partnership

Whether a private partner has recently met with an agency or has meetings scheduled in the near future concerning other matters on which the partner is seeking favorable agency action.

## STATUTORY AUTHORITY

Statutory authority is the strongest indicator of success among P3s. Legislation that provides a statutory basis for the agency or board to enter into the partnership is an important factor in developing and implementing the P3. The statute helps to identify the specific actions that the agency or board will take under the P3. In addition, if an agency or board will expend funds in furtherance of the P3, it must ensure it operates only if the obligation and expenditure is consistent with the terms of the statute appropriating the funds or another authorizing statute.

## TOPICS FOR SPECIAL CONSIDERATION

### Endorsement

Endorsement is “an act of giving one's public approval or support to someone or something.” A public employee cannot be perceived as endorsing a private entity. Consequently, great care should be used when referencing the private members of the P3 and their employing businesses, lest the public think it is an endorsement of that business.

### FOIA

Private entities engaged in P3s should know that under the Freedom of Information Act (FOIA), if the public agency or board receives a FOIA request for their records, any records submitted by the private entity in furtherance of the P3 may become subject to public disclosure.

### Intellectual property

The parties in the P3 should have a clear understanding as to the ownership rights of any proprietary data or intellectual property created as a consequence of working together in the P3.

## KEYS TO SUCCESS



- Clear objectives and agreed-upon scope.
- Partners are brought to the table early in the process to help design the partnership. This process of co-creation helps to increase buy-in and maximizes the likelihood that the partnership will be structured in a way that fully takes advantage of the resources and capabilities of the various partners.
- Sufficient resources and information.
- Mutual benefits and responsibility. This requires that boards and agencies understand their partners' motivations, recognize their risks and constraints, and work to accommodate their needs.
- Trust and Respect. Partners trust one another, which helps them work together despite different organizational interests, motivations, cultures, values, and infrastructure.
- Good communication and transparency. Continuous communication and frequent opportunities to check progress build relationships; provide mutual recognition, trust, and respect; and improve the capacity of participants to solve problems together. It is important to explain the reasons for any decision or course of action adopted by an

agency on partnership matter and to accept responsibility for the consequences of the decision or action.

- Compliance with legal requirements.
- Board members with a conflict or potential conflict of interest should disclose the conflict and be prohibited from voting on any matter in which there is a conflict.
- Board meeting minutes should reflect when a board member discloses a conflict of interest and how the conflict was managed.

## EXAMPLE ACKNOWLEDGEMENT

I \_\_\_\_\_ hereby acknowledge that I have read and understood the P3 Ethics Fact Sheet. I agree to disclose any known conflicts of interest to my fellow board members and to recuse myself from the discussions and votes surrounding that conflict.

If a circumstance should arise in which I am not sure of my ethical obligations to the board/commission, I will contact the State Public Integrity Commission for further information. Failure to seek the appropriate advice may: result in nullification of the Board's decisions; subject the State to legal action; require that I obtain additional ethics training

Signature \_\_\_\_\_

Print \_\_\_\_\_

Date \_\_\_\_\_