

August 19, 2014

Ms. Jackie Cromwell
Office of Transportation Public Private Partnerships
600 E. Main Street
Suite 2120
Richmond, VA 23219

**Re: Public-Private Transportation Act of 1995 Implementation Manual and Guidelines –
Draft Update.**

The American Road & Transportation Builders Association (ARTBA) offers these initial comments on the Office of Transportation Public Private Partnerships' (OTP3) draft update to the Public Private Partnership Act of 1995 Implementation Manual and Guidelines (Draft Manual). Founded in 1902, ARTBA's membership includes private and public sector members that are involved in the planning, designing, construction and maintenance of the nation's roadways, bridges, ports, airports and transit systems. Our industry generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs.

ARTBA maintains ongoing and thorough involvement in federal legislative, policy, regulatory and legal developments relating to transportation infrastructure development and investment. This includes public private partnerships (P3s) in transportation, with which ARTBA has a long history. Our P3 Division dates back more than 25 years and includes prominent concessionaires, planning and design firms, contractors, law firms, financial entities and other experienced parties in the P3 field. Through the reauthorization processes which have produced a series of federal surface transportation bills in recent decades, ARTBA has advocated for provisions that have helped make P3s a viable option for the financing and delivery of transportation improvement projects in appropriate circumstances around the country.

ARTBA appreciates Virginia's longtime leadership in P3 project delivery. OTP3's public dialogue relating to the Draft Manual is the latest instance of this leadership, and is a great indicator by itself of the transparency VDOT is striving to achieve. Given that P3-related developments in Virginia can carry national implications, ARTBA – an association national in scope – carefully follows these activities and engages in the commonwealth's policy discussion on occasion. In fact, just last year ARTBA helped to defend Virginia's P3 enabling legislation in court by submitting an amicus brief in the *Elizabeth River Crossings OPCO, LLC v. Meeks* litigation. We are pleased to participate in the current comment process as well.

Overall, ARTBA supports the proposed revisions to the Draft Manual and we offer the following comments in hopes of improving further on what has been proposed.



On a general level, ARTBA offers comments in two areas. In regards to transparency, it is clear the OTP3 is focused on ensuring an open and engaging public process. ARTBA strongly agrees and supports this approach. The Draft Manual does a very good job of providing multiple opportunities for public input. ARTBA believes that OTP3 should be vigilant in consistently looking for additional opportunities to increase transparency with the public. This primarily comes from holding as many public meetings as possible, at all stages of project development, permitting, and procurement. Public meetings only improve transparency with the general public and reduce the threat of time-consuming opposition or litigation, particularly in the latter stages of the process.

Second, ARTBA suggests clarification as to the competing time frame for unsolicited proposals. This does not appear to be spelled out in the Draft Manual. A prior version of the Draft Manual stated a window for such, and that the particular time frame was dependent upon the size and complexity of the project. Such an approach seems reasonable, as less complex projects should have a shorter time frame while larger projects would naturally take longer, and ARTBA asks that this concept be re-inserted into the Draft Manual.

On a more specific level, ARTBA asks OTP3 to consider the following comments on specific sections of the Draft Manual:

- **Section 1.5.3 Virginia Freedom of Information Act (VFOIA):** Without sufficient confidence that sensitive information will be kept confidential, potential project sponsors could opt not to participate in the P3 process. In order to provide a balance between maximizing transparency and also not unnecessarily releasing sensitive information, we strongly suggest that this section be revised to reflect that documents should only be subject to VFOIA when a procurement is over *and* the contract documents are signed. If the project is in procurement, the documents should be treated as proprietary. Further, the party submitting the documents should be contacted before a VFOIA request is granted.
- **Section 6.2.2 Short-Listing of Qualified Respondents:** This section should specify the number of qualified Respondents on the short-list for any project being considered. The size of the list could vary according to the complexity of the project being considered, but a range should be given in the policy. Also, OTP3 should consider adding a pro-rata payment system for stipend payments on cancelled procurements to offer a level of protection for Respondents in instances where a project is unexpectedly cancelled, whether final proposals were submitted or not
- **Section 6.3 Request for Proposals:** Under this section, OTP3 reserves the right to conduct a Best and Final Offer (BAFO) process with the short-listed Proposers. However, there is no explanation of when or why a BAFO process would be used. In order to provide increased transparency and give Proposers a better understanding of the process, OTP3 should provide greater clarity in this section as to what types of scenarios might trigger a BAFO process.
- **Section 6.7 Contract Finalization and Award:** Under this section, final approval is required before the contract can be awarded to the successful Proposer. This provision

appears to be administrative, as opposed to legislative, in nature, as the Virginia Department of Transportation (VDOT) would provide it. However, we are concerned this section could be interpreted as requiring some sort of final legislative approval for P3 projects. While legislators should be involved in the P3 process, as you are aware there should also be great care taken to ensure the process is not politicized in any way. In order to accomplish this, ARTBA strongly recommends that legislative involvement should be at the pre-solicitation stage, perhaps through a P3 board or panel. After the pre-solicitation stage, legislators could be informed through frequent project status updates. Finally, even if the final approval is purely administrative (and not legislative) in nature, there should still be safeguards put in place to prevent politicization of the process in its final stages. This could be done by the policy generally, yet clearly, describing the extremely rare scenarios and/or requiring a specific set of conditions to be met where final approval would be denied.

Again, these comments constitute initial feedback upon review of OTP3's current Draft Manual, and in many ways suggest areas for further discussion rather than definitive opinions on the many details of that draft.

We appreciate OTP3's considering these initial views and the request for more interaction as the agency further refines the draft model contract guide. As noted previously, ARTBA and its P3 Division remain available to work with OTP3 through the remainder of this process, as well as any other activities relating to Virginia's P3 policy. Please contact ARTBA's Vice President for Regulatory Affairs and Assistant General Counsel Nick Goldstein-at any time. He can be reached at 202-289-4434 or ngoldstein@artba.org.

Thank you for your consideration of these views and your leadership in P3 policy.

Sincerely,



T. Peter Ruane
President & C.E.O.