



**GOVERNMENT OF PUERTO RICO
PUBLIC-PRIVATE PARTNERSHIPS AUTHORITY**

**GUIDELINES FOR THE EVALUATION OF CONFLICTS OF INTEREST AND UNFAIR
ADVANTAGES IN THE PROCUREMENT OF PUBLIC-PRIVATE PARTNERSHIP
CONTRACTS**

Date of Approval: December 19, 2009

SECTION 1- BASIS; PURPOSE; SCOPE; BACKGROUND

1.1 Basis of Guidelines. The Public-Private Partnerships Authority (the “**Authority**”) was created by the Public-Private Partnerships Act, Act No. 29, approved on June 8, 2009 (the “**Act**”), for the purpose of implementing the public policy of the Commonwealth concerning Public-Private Partnerships as contemplated under the Act. Persons who desire to enter into contracts with the Authority must comply with the provisions of Act No. 84 of June 18, 2002, also known as the Code of Ethics for Contractors, Suppliers, and Economic Incentive Beneficiaries of the Executive Branch Agencies of the Commonwealth of Puerto Rico (the “**Code of Ethics**”).

1.2 Purpose of Guidelines. The purpose of these guidelines is to establish certain procedures to detect and manage conflicts of interest and unfair advantages in connection with the procurement process for Projects developed pursuant to the Act, which will allow the Authority to implement the public policy of the Commonwealth concerning the establishment of Public-Private Partnerships in a manner that is fair, consistent, transparent, and encourages and supports a climate of private sector innovation and investment in the Commonwealth. To this end, these guidelines have been developed in order to: (i) protect the integrity, fairness and competitive spirit of the procurement process; (ii) avoid circumstances that result in an actual or perceived unfair advantage for potential Proponents; (iii) protect the public’s and the Authority’s interests; and (iv) inform potential advisors and Proponents of the Authority’s policies and procedures concerning conflict of interest and unfair advantage.

1.3 Scope of Guidelines. The scope of these guidelines is limited to those Projects covered by the definition of a PPP set forth in the Act and the Regulation for the Procurement, Evaluation, Selection and Negotiation of Public-Private Partnership Contracts promulgated pursuant to the Act (the “**Regulation**”). Capitalized terms used herein and not otherwise defined shall have the meaning set forth in the Regulation.

1.4 Background. The Authority is the only governmental entity authorized to enter into PPP Contracts for the Government of Puerto Rico. The Authority’s process for establishing a PPP is detailed in the Act and the Regulation. The Authority’s mandate is to implement and develop PPPs that serve the public interest in Puerto Rico in accordance with the public policy considerations described in the Act. In the fulfillment of its objectives, the Authority encourages the development of a strong and competitive market for PPPs. As the market develops, the Authority recognizes the need to be flexible to promote a vibrant competitive process while establishing clear procedures for identifying and addressing situations that could result in conflict of interests or unfair advantages in the procurement process.

SECTION 2- LEGAL REQUIREMENTS; NO PREEMPTION

2.1 Legal Requirements. The Code of Ethics applies to any natural person or legal entity that wishes to establish a contractual, commercial or financial relationship with the Authority, or that has executed a contract with the Authority to render goods or services. The Code of Ethics defines a “conflict of interest” as a situation in which the personal or financial interests of a contractor or supplier could reasonably be in contravention with the public interest and contains certain general principles that apply to every contractual relationship established or

to be established with the Authority. The Code of Ethics requires that contractors and suppliers, among others:

- (a) disclose all information needed by the Authority to evaluate the transactions in detail, and make correct and informed decisions;
- (b) not offer or deliver, directly or indirectly, goods of monetary value, contributions, gifts, gratuities, favors, services, donations, loans or share in any commercial or legal entity to a public servant or former public servant or a member of his/her family, with which he/she desires to establish a contractual, commercial or financial relationship;
- (c) not intervene in matters that could result in a conflict of interest or that could appear as such; and
- (d) not to use confidential information acquired in the course or as a result of any negotiation that has been entrusted to him/her through a contract by the Authority, for purposes foreign to the contracted endeavor, not obtain, directly or indirectly, any financial advantage or benefit for him/herself, for any member of his/her family unit, or another other person, business or entity.

Although “unfair advantage” is not defined in the Code of Ethics, the Code of Ethics imposes certain obligations on private parties that are geared towards preventing that one party have an “unfair advantage” over another. The Authority considers that an unfair advantage may arise when a member of, or advisor to, a prospective Proponent has information about the Authority, a Project or a Partnering Governmental Entity that is not generally available to all other prospective Proponents for a particular PPP, and that such information may be material to an outcome related to the Project. An unfair advantage may also arise if an advisor to, or member of, a prospective Proponent is in a position to influence the outcome of the competition (other than within the competitive process) through a relationship with the Authority or a Partnering Governmental Entity.

The factors that may affect conflicts of interests or unfair advantage issues include: (i) the type of service involved, (ii) the particular circumstances of each procurement, (iii) specialized expertise needed by the Authority, a PPP Committee or a Partnering Governmental Entity and the private industry to implement specific innovative technologies or disciplines, (iv) the past, current or future working relationship between the Proponents, their advisors and the Authority; and (v) the period of time between the potential conflict situation and the initiation of a particular procurement process.

The Authority recognizes that the size, scope and magnitude of the Projects may lead to a significant variance in the potential for conflicts of interest or unfair advantages and that its preference for the proper solution to a conflict of interest or unfair advantage situation may not be viable in all circumstances. The Authority also recognizes that its concern with conflicts of interest and unfair advantage must be balanced against the need to not unnecessarily restrict the pool of potential service providers and Proponents available to the Authority, a PPP Committee

or a Partnering Governmental Entity and private entities competing as part of a team in a procurement process for a Project. As a result, these guidelines do not purport to address every situation that may arise in the context of a procurement process sponsored by the Authority or mandate a particular decision or determination by the Authority when faced with facts similar to those described in these guidelines.

2.2 No Preemption. The Authority follows the pertinent state and federal laws regarding potential organizational conflicts of interest. Nothing contained in these guidelines is intended to limit, modify or otherwise alter the applicability or effect of other relevant (federal, state and local) law, rules and regulations. All of such laws, rules and regulations shall apply in their normal manner irrespective of these guidelines.

SECTION 3- PROCEDURES

3.1 Review and Analysis. The Authority will apply the following procedures in accordance with the Code of Ethics and applicable law on a Project by Project basis:

- A. Prior to submitting a proposal or response to an RFP, each potential Proponent shall conduct an internal review of its current affiliations and shall require its team members to identify actual, potential or perceived conflicts of interest or unfair advantages relative to the anticipated procurement. Potential Proponents are notified that prior and existing contractual obligations between a company and a federal or state agency relative to the proposed procurement may present a conflict of interest or an unfair advantage.
- B. If a potential Proponent identified an actual, potential or perceived conflict of interest or unfair advantage, it shall submit in writing the pertinent information to the Authorized Representative so that a determination can be made as to the extent of the conflict or unfair advantage.
- C. The Executive Director of the Authority will review potential or perceived conflicts of interest and unfair advantages related to each procurement process sponsored by the Authority. The Executive Director's determination may be appealed to the particular PPP Committee.
- D. The Authority, in its sole discretion, will make the final determination relative to actual, potential or perceived conflicts of interest or unfair advantage, and its ability to neutralize or mitigate such a conflict or unfair advantage. If the Authority determines that mitigation is not possible, the organization determined to have the conflict of interest or unfair advantage will not be able to participate as a team member for proposals in response to RFPs issued by the Authority for the Project in question. Failure to abide by the Authority's determination in this matter may result in a proposal being declared nonresponsive and disqualified pursuant to the Regulation.

3.2 Examples. The participation of the following entities as a part of a Proponent's team in a procurement process may result in a conflict of interest or unfair advantage and should be disclosed to the Authority. This list is not exhaustive:

1. An organization or individual hired by the Authority or a PPP Committee to provide assistance in development of instructions to potential Proponents or evaluation criteria for a specific Project.
2. An organization or individual hired by the Authority or a PPP Committee to provide assistance in development of instructions to potential Proponents or evaluation criteria as part of the programmatic guidance or procurement documents for the Authority's programs.
3. An organization or individual with a present or former contract with the Authority, a PPP Committee or a Partnering Governmental Entity to prepare planning, environmental, engineering, or technical work product for the Project.
4. An organization or individual with a family member or personal friend that is an officer or employee of the Authority, the PPP Committee or the Partnering Governmental Entity.
5. An organization or individual that holds an interest in the advisors to, or members of, more than one Proponent.

3.3 Mitigation. The Authority may, in its sole discretion, determine how an actual, potential or perceived conflict of interest or unfair advantage may be mitigated (such as by requiring proof of compliance or imposing firewalls between certain members of, or advisors to, a Proponent). For example, the Authority may determine to mitigate an unfair advantage by disclosing all or a portion of the work product produced by the organization or individual subject to review under this section. If documents have been designated as proprietary under applicable law, the owner of the documentation will be given the opportunity to waive this protection from disclosure. If the owner elects not to provide a waiver and subsequently submits a proposal, the Proposal may be declared nonresponsive and disqualified pursuant to the Regulation.

3.4 Designation. The Authority reserves to right to designate an organization or individual as exclusive or shared at any point during the competitive procurement process. An organization designated as exclusive is not eligible to advise or be a member of a potential Proponent. The Authority may designate an organization or entity as exclusive because it has an actual conflict of interest or unfair advantage. For example, the Authority would designate as exclusive those advisors that assisted the Authority with the procurements documents for a specific PPP.

The Authority may also designate an organization or individual as a shared party that would be available to do work for a potential Proponent but is required to commit that such work will not be performed on an exclusive basis. This designation will usually apply to an organization or individual with a unique or specialized field of work that needs to be available to all Proponents in order to have a competitive process.

An organization or individual that has not been designated as exclusive or shared by the Authority may render services to, or be a member of, a potential Proponent on an exclusive basis.

SECTION 4- IMPLEMENTATION

4.1 Effectiveness. These guidelines will become effective immediately on all procurement processes administered by the Authority.