



U.S. Department
of Transportation
**Federal Highway
Administration**

Memorandum

Subject: **ACTION:** Pennsylvania Pre- Development /
Progressive Public-Private Partnership under
Special Experimental Project No. 14 (SEP-14)

Date: March 7, 2022

From: *Digitally signed by BRIAN JEFFERY FOUCH Date: 2022.03.09 08:09:47 -05'00'*
Brian J. Fouch
Director, Office of Construction,
Preconstruction, and Pavements

In Reply Refer To:
HICP-20

To: Alicia Nolan
Division Administrator
Harrisburg, PA

This memorandum is regarding the January 26, 2022 email from Tony Mento of your office which transmitted, endorsed, and recommended for approval a Pennsylvania Department of Transportation (PennDOT) workplan for the use of a Pre- Development / Progressive Public-Private Partnership (P3) under Special Experimental Project No. 14 (SEP-14). PennDOT plans to use this contracting method for the PennDOT Pathways Major Bridge P3 Initiative which will rehabilitate or replace nine major bridges and related facilities and convert them to toll facilities. The locations of the nine bridges across the Commonwealth of Pennsylvania (“Commonwealth”) are as follows:

1. I-81 Susquehanna;
2. I-80 Nescopeck Creek Bridges;
3. I-78 Lenhartsville Bridge Replacement;
4. I-80 over Lehigh River Bridge;
5. I-95 Girard Point Bridge Improvement;
6. I-83 South Bridge;
7. I-80 Canoe Creek Bridges;
8. I-80 North Fork Bridges; and
9. I-79 Widening, Bridges and Bridgeville Interchange Reconfiguration.

P3 procurements are permitted in the Commonwealth under Act 88 of 2012, as amended (the “P3 Law”). This law enables the Commonwealth to enter agreements with the private sector to participate in the delivery, operations, maintenance, and financing of transportation related projects. PennDOT proposes to solicit a single, competitive Pre-Development / Progressive P3 procurement that will lead to conventional P3 agreement(s) for the reconstruction and rehabilitation of these nine major Interstate Bridges throughout Pennsylvania.

The total direct costs of the Project are estimated to be \$3.2 billion (\$2.7 billion federal-aid eligible.), which includes pre-development, construction, maintenance, and lifecycle costs. However, with financing through availability payments generated by tolling each bridge over the 30-year term, the Project’s total cost is estimated to be \$7.7 billion (\$6.3 billion federal-aid eligible).

PennDOT will deliver this project in compliance with the National Environmental Policy Act (NEPA), including the consideration of a “no build” alternative. The NEPA class of action that has been established is an Environmental Assessment unless it is determined that an Environmental Impact Statement is appropriate.

Summary of the SEP-14 Technique

This SEP-14 technique allows teams to compete to become the Project Development Agreement (PDA) Entity, which would then lead the development of design-build-finance-maintain (DBFM) contracts for nine Interstate Bridges throughout Pennsylvania. A unique aspect of this SEP-14 technique is that the PDA Entity is not an agent of PennDOT. This is a deviation from the requirements of 23 CFR § 636.119(b). This and other deviations from FHWA regulations are discussed in the table in Attachment A below.

The PDA Entity is responsible for pre-construction investigation, design, and financial analysis. The PDA Entity’s team consists of: (1) lead construction contractor; (2) lead engineering firm; (3) at least one independent quality assurance firm; (4) optional nominated subconsultants and subcontractors; and/or (5) equity members. The PDA Entity is required to identify packages/bundles of bridges and form at least two Development Entities (DEs). Each package of bridges consists of 1 to 8 bridges. The DEs are responsible for design and construction. To ensure financial stability, the PDA Entity and/or its equity members hold at least 51% equity interest in each DE.

Each DE will develop a financial plan and obtain financing for its package of bridges. Accordingly, PennDOT would enter into a FMIS project agreement with the Division for each package. A DE would have to reach financial close on the first bridge package by December 2022. If a DE is unable to reach financial close on its package, it would be in default.

PennDOT would also enter into a project agreement and a design-build contract with the DE for each package. Similar to CM/GC, the establishment of construction costs would be by open book negotiation and Independent Cost Estimates (ICEs) will be developed.

For payment under the P3 approach, availability payments (milestone payments), rather than progress payments will be used, as the DEs will not be reimbursed until the design-build contracts are underway. In a similar fashion, if PennDOT seeks Federal-aid participation, reimbursement of Federal-aid funds to PennDOT would be associated with these milestone payments.

Other details may be found in the SEP-14 workplan.

In conclusion, PennDOT’s use of a Pre-Development / Progressive P3 under SEP-14 is approved for a period of eight years, subject to the limitations below:

- The SEP-14 approval and evaluation period begins with the date of this approval and extends through the design and construction of all nine bridges; and
- The FHWA’s approval of the PennDOT P3 Major Bridges SEP-14 workplan is limited to the deviations from FHWA’s procurement rules at 23 CFR Parts 635 and 636 as set forth in the Workplan. FHWA’s approval is not intended to be and should not be interpreted as an

approval, either expressly or implied, of deviations from any other title 23 USC, title 23 CFR, or other Federal requirement (including provisions contained in the recently enacted Bipartisan Infrastructure Law, enacted as the Infrastructure Investment and Jobs Act, Pub. L. 117-58 (Nov. 15, 2021)) applicable to any other aspect of the project advanced under the SEP-14 Workplan.

Thank you for the opportunity to review and comment on this SEP-14 request. Should you have any questions, please contact Brian Hogge at (202) 366-1562, or John Huyer at (720) 437-0515

Attachment A – table of deviations sought from 23 CFR § 636¹

Requirement	Citation	Explanation of Deviation Sought	Comments, if any
1. Proceeding to award prior to conclusion of NEPA process, FHWA concurrence for RFP issuance, award and proceeding with preliminary design work	23 CFR § 636.109(b), (c), (d)	Inasmuch as the PDA Entity is awarded the concession, and under the specific facts of the nine bridges, some in varying stages of design, PennDOT seeks “award a design- build contract” to mean “entry into a Project Agreement” and not entry into the PDA.	PennDOT does not intend to enter into any Project Agreements prior to conclusion of the NEPA process.
2. Stipends are allowed	23 CFR § 636.112-113	Allowed Costs to the PDA Entity if the PDA is terminated or if a bridge within a package (or a package) is removed from the program are fairly “stipends” inasmuch as the PDA Entity is proposing packages as part of the PDA Work.	
3. Organizational conflicts of interest – ITP must reference certain state and federal conflicts standards and require proposers to disclose potential conflict of interests (COIs).	23 CFR § 636.116(a), (b)	Section 6.3 of the RFQ and Section 1.12 of the RFP required Respondents/Proposers to abide by federal and state law, including, but not limited to federal organizational conflict of interest laws and rules (found in 23 CFR Part 636, 2 CFR § 200.112, 23 CFR § 1.33 and 23 CFR Part 172), the laws and rules relating to the National Environmental Policy Act, the State Adverse Interest Act (71 P.S. §§ 776.1 –776.8), and the P3 Law (74 Pa.C.S. § 9120 (discussing the State Adverse Interest Act as it pertains to P3 projects)). Further, if a Respondent/Proposer sought a conflict of interest determination, the RFQ and RFP set a process for submittals and for PennDOT to review. PennDOT has determined that a team member is precluded from working on any of the nine bridges where that team member has previously performed work (i.e. “their	Inasmuch as the purpose of the program is the pre-development of packages, and insofar as the bidding PDA Entities and their team members compete, post-selection the engineers of record that had helped PennDOT with early bridge design are not “participating as an offeror” or “join[ing] a team submitting a proposal...” with respect to a bridge where the team member has previously performed work, so much as being eligible for contracting, ultimately to PennDOT’s benefit. No competitive advantage will have been realized during the solicitation for the PDA Entity itself.

¹ Only those sections within 23 CFR § 636 from which PennDOT seeks a deviation cited, it being PennDOT’s position that the subject procurement otherwise meets all other federal regulatory requirements (and thus is not seeking permission to deviate therefrom). See, e.g., 23 CFR § 636.107 (geographic preference), where PennDOT is not using a geographic preference.

Requirement	Citation	Explanation of Deviation Sought	Comments, if any
3. (continued)		bridges) but where the PDA Entity will have won the concession (and with it the right to propose packages), inasmuch as the engineers of record for the nine bridges that comprise the program are precluded from working on “their” bridges as part of the PDA Entity’s team, the Development Entity affiliate of the PDA Entity would be permitted to contract with such engineers of record after selection of the PDA Entity (see 23 CFR § 636.116(a)(1)). ²	
4. Application to P3s	23 CFR § 636.119(a)	The “competitive process” to award the contract includes the Pre-Development / Progressive P3 alternative bidding procedure whereby the competitive constraints on fees and rates of return, coupled with the maximum self- performance regime, among other things, suffices for purposes of this regulation.	Please see the SEP-14 workplan, sections C and E in particular
5. Nature of the P3	23 CFR § 636.119(b)	<p>The constraints on fees and rates of return, coupled with open-book pricing, “off-ramping” of bridges/packages within the PDA, and the maximum self-performance constraint suffice for “establishing price” and the PDA Entity is not required to competitively bid the Project Agreements as an “agent of the owner”</p> <p>Furthermore, price determinations on a package basis after PDA Entity selection (and performance under the PDA) affords PennDOT a legitimate, risk-informed price and the benefit of 23 CFR 636(b)(1)</p>	Please see the SEP-14 workplan, sections C and E in particular

² PennDOT Office of Chief Counsel may wish to further amend. To be clear, this is not so much as a sought deviation from the obligation to have conflicts of interest provisions in place as an effort to explain how the current procurement approaches this EOR issue.

Requirement	Citation	Explanation of Deviation Sought	Comments, if any
6. Competitive procurement process; Two-phase selection procedure with weighted criteria should be considered	23 CFR § 636.201-204, 23 CFR § 636.207-208	That selection of the PDA Entity, via the procurement described above, constitutes the equivalent of a “best value” procurement	Please see the SEP-14 workplan, sections C and E in particular
7. RFP must include requirements for technical proposals and price proposals in phase two of solicitation	23 CFR § 636.209(a)	That the fee constraints, constraints on rate of return, coupled with open-book pricing during the package preparation process - which will result in a price/cost proposal that PennDOT may accept or reject - suffices for a “price proposal” in a two- phase solicitation, mindful that the DBFM ultimately entered into under an accepted package proposal will have a fixed-price “price proposal”	Please see the SEP-14 workplan, sections C and E in particular
8. Requirement to Evaluate Price	23 CFR § 636.302(a)(1)	That the fee constraints, constraints on rate of return, coupled with open-book pricing during the package preparation process, suffices for the necessity to evaluate price in every source selection where construction is a significant component of the scope of work	<p>Where the regulation appears permissive for when price must be evaluated, it only does for those design-build contracts let before conclusion of the NEPA process. Here, with no payment made to the PDA Entity, and Allowed Costs are to be recovered only after a financing of an approved package, the attenuation from the need for pricing in a design-build selection as relates to this pre-development P3 renders our proxies for “pricing” sufficient guardians of the public interest.</p> <p>Furthermore, selection of the PDA involves little to no construction work, properly speaking, and package preparation will be focused on risk mitigation but foremost on open-book pricing, thus “evaluating price” in the package approval process.</p>