



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Guide to Legal Issues Involved in Public-Private Partnerships

Prepared by the Public-Private Partnerships Working Group

Office of the Chairman  
Administrative Conference of the United States

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## **Guide to Legal Issues involved in Public-Private Partnerships at the Federal Level**

### **Introduction to the Guide**

Federal agencies, to assist in carrying out their missions, have long participated in public-private partnerships (P3s).<sup>1</sup> There is no binding definition of “public-private partnerships” that spans across all agencies, but an interagency working group has defined them as “collaborative working relationships between the U.S. government and non-federal actors in which the goals, structures, and roles and responsibilities of each partner are mutually determined.”<sup>2</sup>

There is no bright line distinction between P3s and other forms of collaboration between federal agencies and the private sector. This Guide does not attempt to adopt a definitive definition of P3s. Ultimately, it is up to agencies to determine what relationships qualify as P3s and under what circumstances they should draw upon this Guide.<sup>3</sup>

P3s are most often formalized through non-binding memoranda of understanding (MOUs) or memoranda of agreement (MOAs), and sometimes through contracts. Additionally, some P3s are not formalized at all, but rather arise through informal understandings between the agency and private partner.

A private sector entity and the federal government may have a variety of reasons for wanting to partner with one another. Both sectors may find, for instance, that a partnership with the other allows them to access more resources and expertise. Expanded access to such resources and expertise may allow them to complement and reinforce their missions, producing outcomes with greater impact than they could achieve working entirely independently of one another.<sup>4</sup> Recent

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<sup>1</sup> The term “public-private partnership” is most commonly used, across levels of government (i.e., state, local, and federal), to describe agreements between a government entity and a private firm in which the government owns and seeks to upgrade or replace an infrastructure asset, and the private partner designs, builds, finances, operates, or maintains the asset. Infrastructure P3s are not the focus of this Guide. Rather, the Guide focuses on P3s that relate to social welfare topics, such as health, labor, education, and diplomacy. The Guide focuses on these kinds of P3s, as opposed to infrastructure P3s, because such P3s are more common than infrastructure P3s at the federal level, and social welfare topics are areas of expertise for agencies involved in the working group. Readers who are interested in infrastructure P3s should also consult, among other sources, U.S. Dep’t. of Treas., *Expanding the Market for Infrastructure Public-Private Partnerships: Alternative Risk and Profit Sharing Approaches to Align Sponsor and Investor Interests* (Apr. 2015).

<sup>2</sup> CMTY. P’S SHIPS INTERAGENCY POLICY COMM., BUILDING PARTNERSHIPS: A BEST PRACTICES GUIDE 1 n.1 (2013).

<sup>3</sup> For examples of relationships that some agencies consider to be P3s, readers should consult Occupational Safety & Health Admin., U.S. Dep’t of Labor, *Partnership: An OSHA Cooperative Program*, [www.osha.gov/dcsp/partnerships/index.html](http://www.osha.gov/dcsp/partnerships/index.html) (last visited Aug. 18, 2017); *Partnership for Freedom*, <https://partnershipforfreedom.org/> (recently ended) (last visited Aug. 18, 2017); and U.S. Dep’t of State, *Diplomacy Lab*, <https://www.state.gov/s/partnerships/ppp/diplab/> (last visited Aug. 8, 2018).

<sup>4</sup> See CMTY. P’S SHIPS INTERAGENCY POLICY COMM., *supra* note 2, at 2.

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governmentwide initiatives relating to, among other areas, workforce training<sup>5</sup> and technology innovation,<sup>6</sup> are centered on P3s.

Reflecting the expertise of most members of the working group, the Guide is intended primarily for attorneys in agency general counsel offices (or equivalent government legal offices). It starts by briefly describing two previous interagency efforts to address issues regarding P3s. It will then point the reader to the interagency group's definition of the term "public-private partnership." The Guide will then identify agency activities that are often associated with P3s.

The specific activities this Guide highlights are: 1) Drafting of the Memorandum of the MOU,<sup>7</sup> 2) Financial Transactions, and 3) Evaluating Results. The Guide then offers some examples of recent P3s in which agencies have participated, followed by a detailed discussion of some of the major legal issues that arise in P3s. Finally, the Guide discusses the importance of agencies' conducting due diligence (vetting) of potential private partners.

### **Recent History of Interagency Efforts Regarding P3s**

In 2012, a federal interagency working group, led by the National Security Council and consisting of 23 federal agencies, was established to define "public-private partnerships" and to address a range of cross-agency issues involved in P3s. The group developed a best practices guide, using the following definition of a P3, which all agency participants in the working group approved:

"[A] collaborative working relationship[] between the U.S. government and non-federal actors in which the goals, structures, and roles and responsibilities of each partner, are mutually determined."<sup>8</sup>

In the spring of 2017, at the suggestion of the Administrative Conference of the United States' (the Conference's) Committee on Regulation, the Conference's Office of the Chairman convened dozens of federal officials from 21 different agencies who actively work on P3s. The Office of the Chairman held three in-person meetings with the group from July 2017 through February 2018 and engaged in extensive discussions with individual group members outside of these meetings. The group collaboratively drafted this Guide.

### **Agency Activities Often Associated with P3s**

There are, of course, many kinds of activities that agencies may undertake in developing and administering P3s, but it would be nearly impossible to list all possible activities. The Guide

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<sup>5</sup> See Exec. Order No. 13,845, 83 Fed. Reg. 35,099 (July 24, 2018).

<sup>6</sup> See OFFICE OF MGMT. & BUDGET & GEN. SERVS. ADMIN.: THE GEAR CENTER, <https://www.performance.gov/GEARcenter/> (last visited Aug. 8, 2018).

<sup>7</sup> Some agencies use Memoranda of Agreement (MOAs), rather than MOUs, to formalize a P3. This Guide will use the term "MOU" but the same principles apply to MOAs.

<sup>8</sup> See CMTY. P'SHIPS INTERAGENCY POLICY COMM., *supra* note 2, at 1 n.1.

calls attention to these three specifically because they capture particularly well the ways that agencies and private entities interact with one another as a P3 is developed and carried out. Further, they relate to the major legal issues encountered in P3s, to be discussed in the *Common Legal Issues* section below.

### Drafting Memoranda of Understanding

A memorandum of understanding (MOU) is a non-binding, written document that defines the roles and responsibilities of each party.<sup>9</sup> The drafting of the MOU is the process by which the vision and logistics of a P3 are formalized in writing. There are many reasons an agency might want to formalize a P3 through one or more MOUs, including establishing, in writing, the reason or need for the P3; setting up a way to measure the impact and effectiveness of the P3; specifying the duration of the P3; and clarifying the expectations of the parties with respect to performance and funding. Some agencies include a section within their MOU templates titled “Performance Measures.” This section allows both government and private partners to declare the agreed upon metrics, outcomes, and impacts that will be captured.

An MOU can also help ensure that both parties stay well within the bounds of ethical and other legal requirements, some of which are discussed in the *Common Legal Issues* section below. Numerous agencies have wisely adopted internal policies that require P3s to be formalized through an MOU, even if a statute does not require it. All MOUs should be drafted in consultation with the agency’s designated legal counsel.

### Financial Transactions

A grant, contract, gift, or other financial transaction between an agency and a private sector entity or individual does not itself establish a P3. However, P3s might involve such transactions, which should be reviewed by agency counsel.

At a minimum, agencies and their private partners nearly always spend funds on day-to-day or operational expenses such as the salaries of employees involved in the activities of the P3. Travel and the purchase of supplies or equipment may also be involved, depending on the roles of the partners.

Beyond routine expenses, P3s may involve more substantial expenditures of funds directly in furtherance of the goals of the P3. For example, an agency and a private foundation that have similar missions (say, for instance, to reduce childhood obesity) might decide to work together to advance their missions by identifying grassroots organizations that encourage healthy eating habits for children and agree to each fund one or more such organizations. Funding of this sort is often called an “aligned investment.”

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<sup>9</sup> See CTRS. FOR DISEASE CONTROL & PREVENTION, DEVELOPMENT AND EXECUTION OF MEMORANDA OF UNDERSTANDING AND MEMORANDA OF AGREEMENT OPERATIONAL POLICY 2 (2013).

In this case, the grant from the agency to the organization can be thought of as one part of a large bundle of actions that comprise the P3. Other actions that comprise the P3 may include the drafting of the MOU between the agency and the foundation, the joint strategizing of the vision and mission of the P3, and the joint evaluation of the results of the P3.

### Evaluating Outcomes

P3s are often undertaken for a specific policy purpose. A given P3 might be initiated, for example, to reduce recidivism or homelessness, increase literacy, or remedy water pollution. Agencies and their private partners often attempt to evaluate how successful their initiatives have been in achieving these goals.

Evaluation may consist of hiring an independent third party to collect and analyze data or doing the data collection and analysis “in-house” using the agency’s or private partner’s staff (or both in tandem). Agencies and private partners often work closely with one another as they identify a suitable third-party evaluator, perform the relevant analyses, interpret the results, and decide whether to modify, continue, or terminate the P3 based on the evaluation.

In some P3s, evaluation and achievement of outcomes are pre-conditions for government payment to the provider of the previously obligated government funding. This kind of funding mechanism is sometimes referred to as “Pay for Success” or “Pay for Results.”<sup>10</sup> For example, the U.S. Department of Veterans Affairs and the Corporation for National and Community Service are administering a P3 to improve employment outcomes for veterans with post-traumatic stress disorder. Funding for start-up and operating costs for this intervention were raised from non-government social impact investors by an intermediary. Repayment of these funds by the government to investors requires that the intervention show, over an 18-month period, that certain metrics related to employment outcomes for veterans in the P3 project have been achieved. An independent third party analyzes the data, but the VA itself is also heavily involved in defining outcomes. The evaluation is a joint enterprise between the VA, an intermediary, and the third-party evaluator.

### **Examples of P3s**

Example 1: Occupational Safety and Health Administration’s (OSHA’s) Strategic Partnership agreements. Under these agreements, OSHA enters into an extended, voluntary, cooperative relationship with private sector employers, groups of employers, and labor unions to encourage, assist, and recognize their efforts to eliminate serious hazards and achieve a high level of worker safety and health. The partners work with OSHA cooperatively to find solutions to the problems of worker safety and health. Partnership agreements may include commitments to work with the

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<sup>10</sup> The recently enacted Social Impact Partnerships to Pay for Results Act, Pub. L. No. 115-23, authorizes \$100 million over a ten-year period, a large portion of which is to be used for outcomes payments.

agency to collect and analyze relevant data, develop and carry out training programs, develop guidance about best practices, and engage in other efforts to improve worker safety and health.<sup>11</sup>

Example 2: State Department Diplomacy Lab. Under this program, the State Department partners with various colleges and universities to engage Americans in the work of diplomacy and broaden the State Department's research base. The State Department provides potential partner institutions with a list of project proposals on topics including counterterrorism, energy security, and economic policy. Institutions identify faculty members who can lead teams of typically at least four students to develop work products for these proposals, and they submit bids for their preferred projects. The final work products take various forms, including brief policy memoranda, research papers, statistical analyses, and data sets, which are specified by the Department in its project announcements.<sup>12</sup> Students performing research are given the opportunity to meet with State Department officials such as career diplomats for the purpose of presenting their findings.

Example 3: DOJ, HHS, and HUD's Partnership for Freedom. Under this program, which ended in 2016, the U.S. Department of Health and Human Service's Administration for Children and Families, the U.S. Department of Housing and Urban Development (HUD), and various offices within the U.S. Department of Justice partnered with an organization called Humanity United to combat human trafficking. Humanity United provided staff time, expertise, and overall coordination of the project. Additionally, Humanity United authorized funding for a prize competition for eligible entities that could demonstrate innovative approaches to combating human trafficking. The agency partners provided staff time for the overall coordination of the project and pledged funding for organizations that work on human trafficking initiatives. The parties also jointly evaluated and monitored results and engaged in outreach and publicity surrounding the project.<sup>13</sup> Responsibilities were memorialized through an MOU.

Example 4: USAID's Global Development Alliances (GDA). A GDA is a partnership involving the U.S. Agency for International Development (USAID) and the private sector (and possibly other partners) to co-create and co-implement activities to achieve key development goals that also advance core business interests. GDAs are based on complementary interests and objectives with the private sector, utilize market-based approaches and solutions, involve extensive co-creation and shared responsibility, and require private sector contributions for increased impact. A GDA is not a procurement mechanism; rather, it is an approach used by USAID to invite the private sector to identify and define compelling business and development challenges jointly before collaborating to determine whether and how they, together, can solve those problems and achieve sustainable impact. Through the GDA process, USAID may award grants to support

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<sup>11</sup> See OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, PARTNERSHIP: AN OSHA COOPERATIVE PROGRAM, <https://www.osha.gov/dosp/partnerships/index.html> (last visited Aug. 18, 2017).

<sup>12</sup> See SEC'Y'S OFFICE OF GLOB. P'SHIPS, U.S. DEP'T OF STATE, DIPLOMACY LAB, <https://www.state.gov/s/partnerships/ppp/diplab/> (last visited Aug. 18, 2017).

<sup>13</sup> See *Partnership for Freedom*, *supra* note 3.

activity implementation, but USAID funding is not guaranteed or may not be necessary for a particular GDA.<sup>14</sup>

### **Common Legal Issues That Arise in P3s**

The below describes the most common legal issues that agency officials should consider before and while they participate in a P3. It is not exhaustive. Each P3 will likely raise a unique set of legal issues that cannot be captured in a single document.

#### Authorization and Appropriations

Agencies are creatures of statute.<sup>15</sup> As such, they may only act pursuant to statutory authority, which can be found in the agency's authorizing statutes and appropriations statutes. Although agencies generally do not need specific authority to participate in a P3, an agency considering participating in a P3 must carefully identify the specific actions that it will take under the P3, and then determine whether it has statutory authority to take those actions or perform those functions. In addition, if an agency will obligate and expend funds in furtherance of the P3, it must ensure it has the legal authority to do so.

In other words, an agency may obligate and expend money in furtherance of a P3 only if the obligation and expenditure is consistent with the terms of the statute appropriating the funds or another authorizing statute. This includes the use of employee time in furtherance of the P3, which may be done only if the employee time is being used in compliance with the agency's authorizing statutes and any statutes that provide authority to obligate and expend funds for the salaries of the employees.

The U.S. Government Accountability Office's Principles of Federal Appropriations Law (commonly known as "the GAO Red Book") is a comprehensive, authoritative source for matters related to appropriations and authorization.<sup>16</sup> Agencies should consult the GAO Red Book, along with their authorizing and appropriations statutes, to ensure that the actions they take in furtherance of a P3 comply with all requirements.

#### Endorsement

A variety of ethics considerations arise with respect to P3s. One such consideration is endorsement. According to the Standards of Ethical Conduct for Employees of the Executive Branch, "An employee shall not use or permit the use of his Government position or title or any authority associated with his public office to endorse any product, service or enterprise."<sup>17</sup> The

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<sup>14</sup> See U.S. AGENCY FOR INT'L DEV., GLOBAL DEVELOPMENT ALLIANCES, <https://www.usaid.gov/gda> (last visited Oct. 4, 2018).

<sup>15</sup> See, e.g., *Atl. City Elec. Co. v. F.E.R.C.*, 295 F.3d 1, 8 (D.C. Cir. 2002).

<sup>16</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (3d ed. 2004).

<sup>17</sup> 5 C.F.R. § 2635.702(c) (2018).

Standards do not specifically define “endorsement” but note as a hypothetical example a government official appearing in a commercial encouraging people to buy a product. Although there is generally a wide prohibition on endorsements, the Standards do provide exceptions to this general prohibition for authorized statements of an individual employee acting in an official capacity, when such endorsement is in “furtherance of statutory authority to promote products, services or enterprises” or “[a]s a result of documentation of compliance with agency requirements.”<sup>18</sup> In addition to the Standards, there are statutes, regulations, and other policies that may limit the unauthorized use of agency names, logos, seals, decorations, insignia, or symbols.

In the context of P3s, private partners sometimes wish to highlight their affiliation with a government agency, or perhaps even use the agency’s logo, on their websites. Although this area is highly fact-dependent, such actions could appear to constitute “endorsements,” even if an agency official is not involved in the private partner’s decision to highlight the partner’s affiliation with the agency. Therefore, the MOU should specify to what extent a private partner may highlight its affiliation with the government agency or use agency logos and ensure that the private partner obtain written permission from the agency before it publishes any statement highlighting its affiliation with the agency or uses the agency logo. Before such permission is granted, the agency’s designated counsel should review the proposed statement or use of the logo to ensure it does not create the perception of an impermissible endorsement or violate other relevant law.

#### *Personally Identifiable Information Generally*

Agencies are required to develop, implement, document, maintain, and oversee an agency-wide privacy program that includes people, processes, and technologies. Agencies’ privacy programs are led by Senior Agency Officials for Privacy (SAOPs). SAOPs manage privacy risks, develop and evaluate privacy policy, and ensure compliance with all applicable statutes, regulations, and policies regarding the creation, collection, use, processing, storage, maintenance, dissemination, disclosure, and disposal of personally identifiable information (PII) by programs and information systems. The term “PII” refers to information that can be used to distinguish or trace an individual’s identity, either alone or when combined with other information that is linked or linkable to a specific individual.

P3s may, at times, entail the sharing of PII between government and private partners. There are a series of federal requirements of which agencies must be aware with respect to any material that may contain PII. The Privacy Act of 1974,<sup>19</sup> privacy provisions of the E-Government Act of 2002, the Federal Information Security Modernization Act of 2014, and the Office of Management and Budget’s (OMB’s) implementing guidance (e.g., OMB Circular A-130) are some of those key authorities. Agencies’ privacy programs are required to ensure that entities that create, collect, use, process, store, maintain, disseminate, disclose, or dispose of information

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<sup>18</sup> *Id.*

<sup>19</sup> *See* 5 U.S.C. § 552a (2012).



on behalf of a Federal agency or that operate or use information systems on behalf of a Federal agency comply with the privacy requirements in law and OMB policies.

Among other responsibilities, this includes documenting and implementing policies and procedures for privacy oversight of contractors and other entities and ensuring that privacy controls selected for information systems and services used or operated by contractors or other entities on behalf of the agency are effectively implemented and comply with National Institute of Standards and Technology standards and guidelines and agency requirements. Agencies' P3 staff should consult with their agencies' SAOP and/or privacy program staff for additional guidance.

### *The Freedom of Information Act*

All information or records a private partner submits to a federal agency are subject to public disclosure under the Freedom of Information Act (FOIA). If an agency receives a FOIA request for agency records, it may assert several statutory exemptions. For example, FOIA exempts from release certain confidential or proprietary information (known as a (b)(4) exemption).<sup>20</sup> It also exempts from release information that would invade another individual's personal privacy, provided that there is not a sufficiently overriding public interest for the release of the information (known as a (b)(6) exemption).<sup>21</sup>

In the MOU, agencies should include a clause covering FOIA applicability that instructs partners, before they turn over any documents to the agency, to mark as proprietary any communications that might reveal trade secrets or confidential business information, which generally includes financial information and organizational processes and operations.

Additionally, the MOU should note that the private partner should label any names or personal information associated with documents they hand to the agency, such as addresses or phone numbers, as PII. The MOU should, in addition, note that such marking does not guarantee that a document or piece of information will, in fact, be protected from disclosure, since an agency determination that the information is exempt could be challenged in court.

If the agency receives a FOIA request, agency counsel should carefully review all materials that the private partner marked as confidential or as containing PII to ensure that such designations are correct and should review other materials to determine whether a potential exemption applies. If there is a relevant FOIA request, and the information qualifies as agency records, the agency must release to the requestor all relevant agency records that do not meet one of the statutorily delineated exemptions.

### *Ownership of Partnership-Related Intellectual Property, including Proprietary Data*

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<sup>20</sup> Freedom of Information Act, 5 U.S.C. § 552(b)(4) (2012).

<sup>21</sup> 5 U.S.C. § 552(b)(6) (2012).

Agency counsel should be mindful of the fact that intellectual property, including proprietary data, may be developed during the course of a P3. This may result in disputes between the agency and the private partner, or between an agency's employee and the agency, as to who owns the property. For example, a private sector partner may enter a P3 with technology that it owns, but then, during the course of the P3, both the public and private entities improve upon or otherwise work on it. Disputes could arise about which partner owns the improvements and whether the other partner must license its use.

Who owns intellectual property, including proprietary data, and under what conditions are highly fact-dependent inquiries that elude generalization. Counsel should be very familiar with the relevant statutes, regulations, and guidance that pertain to ownership of intellectual property<sup>22</sup> and should consider including a statement in the MOU that these statutes, regulations, and guidance will be used to resolve questions of ownership and use of any intellectual property, including proprietary data, created or modified during the course of the P3.

#### *The Paperwork Reduction Act*

The Paperwork Reduction Act (PRA) applies when the federal government seeks to collect information from non-federal actors. Generally, if an agency intends to collect "information" from at least ten people, not acting in their capacity as federal employees, it must submit an information collection request to the Office of Information and Regulatory Affairs, within OMB, for review.

The PRA is potentially relevant to many different activities carried out under a P3. For example, it applies to any applications that an agency puts forward to participate in a P3 (just as it applies to grant applications). It also potentially applies to reporting obligations that are part of the P3, any recordkeeping requirements, any required disclosures that are part of the MOU, and any collections used to evaluate the P3.

It is important to note that "information" is a term of art as used in the PRA. Under some circumstances, if an agency requests certain kinds of "information," the PRA might not apply. For example, the PRA does not apply to general solicitations of information or feedback.<sup>23</sup> An agency that runs a prize competition, for example, need not concern itself with the PRA as long as it frames its request for ideas in an open-ended way that "permits respondents to create their own submissions."<sup>24</sup> However, if it requires participants to answer standardized questions (other

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<sup>22</sup> See ENVTL. PROT. AGENCY, FEDERAL TECHNOLOGY TRANSFER ACT AND RELATED LEGISLATION, <https://www.epa.gov/ftta/federal-technology-transfer-act-and-related-legislation>.

<sup>23</sup> See 5 C.F.R. § 1320.3(h) (2018).

<sup>24</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FREQUENTLY ASKED QUESTIONS RELATED TO CHALLENGES AND PRIZES 1 (2010), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/inforeg/challenge-and-prizes-faqs.pdf>.

than those questions necessary to contact the contestant), including demographic questions, the PRA does apply.<sup>25</sup>

Agency counsel should carefully review the PRA and associated guidance to determine whether the information collection requirements apply to a particular activity envisioned by its agency in relation to a P3. The applicability of the PRA will vary on a case-by-case basis.

### *Special Legal Requirements Pertaining to Contracts, Grants, and Other Financial Transactions*

As stated above, a contract, grant, or other financial transaction between an agency and a private sector entity or individual does not itself establish a P3. However, P3s might involve such transactions, which should be reviewed by agency counsel.

Agencies considering awarding grants or contracts or making other financial transactions pursuant to a P3 (or otherwise) must first locate their authority to do so in any relevant authorizing or appropriations statutes. Those provisions will instruct the agency on how much they may spend or obligate, the time period during which they may spend or obligate, who may receive the funding, and the purposes for which funds may be used.

Beyond authorizing and appropriations statutes, there are several government-wide authorities that agencies must consult before engaging in any financial transaction. These include the Federal Acquisition Regulation (FAR), the Procurement Integrity Act, relevant supplemental agency regulations for procurement, and the OMB Uniform Guidance for grants and cooperative agreements. Furthermore, the DATA Act, Executive Order 13,576, the Federal Financial Accountability and Transparency Act of 2006, and the Federal Grant and Cooperative Agreement Act are some of the authorities that structure OMB guidance and internal agency procedures concerning grants and cooperative agreements.

The FAR is the primary regulation applicable to all Federal Executive agencies in their acquisition of supplies and services with appropriated funds. For contracts below the simplified acquisition threshold, the FAR Part 13 lays out simplified acquisition procedures.<sup>26</sup> The threshold changes periodically. The 2018 Defense Authorization Act increased the simplified acquisition threshold from \$150,000 to \$250,000.<sup>27</sup>

In general, contracts, grants, and other financial transactions must be competed. However, there are some exceptions to this general rule. The FAR, for example, allows agencies to award “sole source” contracts under certain circumstances.<sup>28</sup> Agencies that wish to award grants, contracts, or other financial transactions to any entity on a sole source basis must adhere strictly to the

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<sup>25</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, AND INDEPENDENT REGULATORY AGENCIES 7 (Apr. 7, 2010), available at [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/inforeg/SocialMediaGuidance\\_04072010.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf).

<sup>26</sup> See 48 C.F.R. pt. 13 (2017).

<sup>27</sup> See 2018 Defense Authorization Act, Pub. L. No. 115-91, 131 Stat. 1283.

<sup>28</sup> See 48 C.F.R. §6.303-1 (2017) (requirements for awarding sole source contracts).

relevant authorities, which almost always require transparent analysis justifying the deviation from open competition.<sup>29</sup>

Most acquisition and procurement-related information can be found at acquisition.gov. There is a tab at the top of that website that allows users to search the FAR and another tab that allows users to search the supplemental agency regulations.

### Gift Acceptance Authority

As discussed above, financial transactions such as gifts do not in themselves establish P3s. However, P3s sometimes involve gifts from a private sector entity or individual to an agency. Absent statutory authority, agencies may not augment their appropriations from sources outside the government, including from gifts. Many federal agencies, however, have gift acceptance authority, which can override augmentation concerns. Gifts may include both in-kind and monetary resources. The parameters of an agency's gift acceptance authority vary. For instance, some agencies may not accept conditional gifts or gifts of real or personal property. Other agencies have broad authority to accept and utilize gifts and property and to utilize the services and facilities of various entities with or without reimbursement.<sup>30</sup>

Conditional gifts are especially relevant to P3s because donors often wish to place limits on the use of the gift funds; at times, donors have asked the agency to sign grant agreements or similar documents. If an agency lacks the statutory authority to accept conditional gifts, the gifts that place a duty, burden, or condition upon the government cannot be accepted.<sup>31</sup>

Given that gift funds are public funds, certain requirements attach. If the gift funds will be used to acquire services or to make a grant, they may need to be competed. Agencies may wish or be bound to follow established procedures, including publication in the *Federal Register* of notices of awards made with gift funds. It may also be advisable to notify Congress. For example, the Explanatory Statement accompanying HUD's annual appropriation directs HUD to notify Congress when it establishes a new program, even with a gift. HUD did so with the Strong Cities Strong Communities (SC2) Fellowship Program, funded by a gift from the Rockefeller Foundation, by including the \$2.5 million gift in its FY 2012 budget justifications.

The gift of services, which commonly arises when a private partner offers its employees' time to the agency, presents other complexities. First, agencies should check whether their authorizing statutes specifically permit them to accept voluntary services and under what circumstances. Such language will be controlling.

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<sup>29</sup> See 48 C.F.R. §6.303-1 to 6.303-2 (2017).

<sup>30</sup> See, e.g., 5 U.S.C. § 595(c) (2012).

<sup>31</sup> See *Story v. Snyder*, 184 F.2d 454, 456 (D.C. Cir. 1950). For example, the Department of State is generally permitted to accept conditional gifts "at the discretion of the Secretary." 22 U.S.C. § 2697(a) (2012).

Generally, students pursuing a degree may donate their services to the government without pay, provided that they are receiving academic credit.<sup>32</sup> To accept voluntary services from any private sector individual other than students, agencies must be aware of at least two statutes that apply governmentwide: the Intergovernmental Personnel Act (IPA) and the Antideficiency Act.<sup>33</sup> The IPA permits agencies to accept detailees, without paying them, provided that the detailee is permanently employed by an eligible entity, which includes non-profit organizations that the agency has certified as eligible to participate as an IPA sponsor.<sup>34</sup> Agency counsel should be familiar with the IPA and its regulations before accepting an IPA detailee.

If an agency accepts voluntary services from any non-student other than a detailee approved pursuant to a valid IPA agreement, and if the agency does not have specific statutory authority to accept services from such volunteers, it runs a high risk of violating the Antideficiency Act. Although the agency may be able to avoid an Antideficiency Act violation if it receives a written waiver of payment from the prospective volunteer, the far safer course for the agency seeking voluntary services from non-student private sector individuals is to accept a detailee using the IPA process.<sup>35</sup>

### Permissible Categories of Partners

Most agencies do not have a general statutory or other regulatory or ethical bar to partnering with certain kinds of organizations (e.g., for-profit organizations). However here, as elsewhere, the agency's authorizing statute should be the guide.

Assuming there is no statutory prohibition to partnering with certain kinds of organizations, agencies have broad discretion to select the kind of partner. In general, an agency may engage in partnerships with both non-profit and for-profit enterprises, including private businesses, foundations, financial institutions, philanthropists, investors, business and trade associations, faith-based organizations, international organizations, universities, civic groups, and service organizations.<sup>36</sup>

Agencies' ethics counsel may wish to limit that discretion on a case-by-case basis or more broadly based on political or other agency-specific considerations. Some agencies, such as the Food and Drug Administration and HUD, primarily partner with non-profit organizations based on guidance from ethics counsel, whereas other agencies, such as the Department of State and USAID, readily work with for-profit partners.

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<sup>32</sup> See 5 U.S.C. § 3111 (2012) (permitting voluntary services rendered by student interns).

<sup>33</sup> See 31 U.S.C. §§ 1341–54 (2012).

<sup>34</sup> See 5 U.S.C. §§ 3371–75 (2012).

<sup>35</sup> See Dep't of the Treasury—Acceptance of Voluntary Services, B-324214, 2014 WL 293545 (Comp. Gen. Jan. 27, 2014).

<sup>36</sup> See CMTY. P'SHIPS INTERAGENCY POLICY COMM, *supra* note 2, at 6.

*Personal and Organizational Conflicts of Interest*

Agencies must be aware of the potential for conflicts of interest in the selection of partners and must take safeguards to protect against such conflicts. Conflicts can arise both with respect to individual employees (“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 imputed financial stake in a particular private entity that seeks a partnership with the agency. That employee would therefore have a financial interest in securing a partnership between the agency and the entity. Under federal law, the employee would be disqualified from taking part in the agency’s decision to partner with the entity, subject to criminal and civil penalties. As a result, the agency must guard against the possibility of such conflicts of interest arising.

An agency should require employees, before they become involved in the consideration and selection of private sector partners, to commit to informing agency counsel if they have a financial stake in the entities they are considering for partnership. Additionally, the agency might consider having agency counsel review available records such as previously filed financial disclosure reports to determine whether such employees would have a disqualifying financial interest in a partnership the agency is considering. Agencies may also consider requiring such employees to file confidential financial disclosure reports, if they are not already required to do so.<sup>37</sup>

The legal basis for the avoidance of such conflicts is found in the Standards of Ethical Conduct for Employees of the Executive Branch<sup>38</sup> and the criminal conflict of interest statutes (18 U.S.C. § 201-209 (2012)), which prohibit executive branch employees from participating in government matters that will affect their financial interests.<sup>39</sup> The financial disclosure requirements that are overseen by the U.S. Office of Government Ethics are intended to uncover and eliminate potential conflicts of this sort.<sup>40</sup>

Organizational conflicts of interest can arise when potential partners have applied for grants or contracts in the recent past with the agency or plan to do so in the future. They may also arise when a partner is lobbying Congress on issues relevant to the agency; has activities, products, or interests directly in conflict with the agency’s mission; is regulated by the agency; or has meetings planned in which the partner is seeking favorable agency action.<sup>41</sup>

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<sup>37</sup> 5 C.F.R. § 2634.904(a)(1)(i) (2018).

<sup>38</sup> 5 C.F.R. pt. 2635 (2018).

<sup>39</sup> Agencies should also consider the potential application of other relevant criminal conflict of interest laws. *See* 18 U.S.C. §§ 201–209 (2012).

<sup>40</sup> *See* 5 U.S.C. app. §§ 101–111 (2012); 5 C.F.R. pt. 2634 (2018).

<sup>41</sup> The Centers for Disease Control and Prevention (CDC), for example, considers the following to be sources excluded from partnerships with the agency: tobacco corporations or foundations related to tobacco corporations; private interests involved in the manufacture, sale, or distribution of products or services that in CDC’s view directly conflict with agency missions and do unequivocal harm to the public’s health; private entities that seek to fund an investigation into their own conduct and practices; and entities that seek to exercise undue influence over the design,

To guard against organizational conflicts, agency ethics counsel should conduct due diligence and vetting of potential partners. During such vetting, agency counsel should examine whether the potential partner has applied for contracts or grants from the agency in the recent past or plans to do so in the future. Ethics counsel should also consider whether the partner is currently lobbying Congress on issues relevant to the agency, is regulated by the agency, or has meetings planned in which the partner is seeking favorable agency action.

If agency P3 staff and counsel determine that a given P3 would reflect poorly on the agency or that a private entity is attempting to gain preferential treatment from the agency, it should exclude that private sector entity from consideration. Furthermore, once a partner is selected, it is incumbent on the office participating in the P3 to ensure that personal and organizational conflicts do not arise during the course of the P3.

Within such boundaries, agency staff should feel free to explore potential P3s. A recommended best practice to avoid preferential treatment concerns is to issue a general notice to, or have discussions with, a broad audience of potential partners, rather than approaching partners individually. The selection should be made based on objective criteria rooted in the agency's interests for choosing the partner. Once a partner is selected, the agency should be prepared to articulate why that partner was selected.

### **Due Diligence**

Running afoul of relevant legal requirements can result in severe consequences for the agency, including unfavorable inspector general reports, congressional inquiries and investigations, litigation, and financial penalties. These consequences, in addition to the underlying agency action that led to them, cast the agency in a negative light. However, even if the agency complies with all relevant laws, its reputation may suffer if it partners with an entity that does not, or if that entity exhibits otherwise unethical conduct.

Therefore, before any partner is selected, the agency must perform due diligence and research the potential partner for any positive or negative impacts a relationship may have on the agency's reputation. The scope of the review is at the discretion of the agency and its ethics counsel, but the public image and motivation of the private partner, its financial soundness, dedication to social and environmental responsibility, adherence to non-discrimination laws, and conflicts of interest as described above comprise some relevant factors.

Due diligence requires a substantial amount of time and resources. Commonly, agency ethics counsel research publicly available information and conduct reference checks. The research informs an evaluation of the risks and benefits of an association with the presumptive private partner. Some of the factors relevant to a due diligence inquiry include whether the private entity

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management, reporting of results, or the dissemination of findings and will not agree to modifications that permit the CDC to maintain control of all phases of the project and avoid undue influence, either in fact or appearance.

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is likely to be an effective partner; any legal claims made against the partner or substantiated claims of impropriety; whether the partner is party to any pending legal action brought by or against a government agency; and whether the partner is complying with industry standards and practices, as well as applicable laws and regulations. If social and environmental responsibility is a significant issue, the partner's reputation, labor policies and practices, the nature of the goods or services from which it profits, and how much a share of its business such activities account for should all be considered. Finally, the public image of the partner and its motivation for pursuing the P3 (both subjective qualities, to some extent) are basic elements of the due diligence process.

The multifaceted nature of this inquiry is, at its core, an effort to arrive at a prudential judgment about how a potential P3 might affect the agency's reputation. The extent of the vetting is at the discretion of an agency's internal process, agency ethics counsel, or other designee.

## **Conclusion**

Given the many legal and policy issues involved in P3s, it is important for offices within agencies to work closely with one another to share their expertise, ideally as early as possible in the formation of the P3. Some key questions that agencies should ask internally regarding P3s are:

- 1) Are the activities envisioned being undertaken as part of the P3, and the kinds of partners we are considering, consistent with our authorizing and appropriations statutes?
- 2) What safeguards ought we put in place in our MOU to avoid the appearance and reality of improper endorsement?
- 3) What PII might be shared during the course of the P3 and how can we best involve SAOPs and/or privacy program staff to ensure that all privacy-related requirements are complied with?
- 4) How should the MOU address FOIA requests and marking of privileged or confidential material?
- 5) How should we best structure the MOU so that it is clear that any disputes related to intellectual property are governed by relevant statutes, regulations, and guidance?
- 6) What portions of the P3 might trigger the PRA and how should we best prepare and plan for the PRA process?
- 7) If the P3 involves contracts, grants, or other financial transactions, have we consulted all relevant government-wide authorities, in addition to our authorizing and appropriations statutes, to ensure that all requirements are complied with?
- 8) If a private partner offers a gift to the agency, whether it be monetary, in-kind, or voluntary services, have all relevant legal authorities been consulted and have we determined whether and under what situations we may accept the gift?
- 9) Have we fully analyzed potential personal and organizational conflicts of interest that may arise during a P3 and have we instituted appropriate safeguards?
- 10) Have we vetted the potential private partner to determine the reputational impact the P3 may have on the agency?