City Policy & Procedure

Subject: PUBLIC-PRIVATE PARTNERSHIP (P3) POLICY

Policy Number: #1011

Effective: September 3rd, 2014

Purpose: The City of Brandon Public-Private Partnership (P3) Policy intends to provide the following:

a) Processing framework and guidelines that will apply to capital projects under $20 million that involve public-private partnership in Brandon.

b) Specific criteria against which all public-private partnerships will be measured and approved that will ensure the best interests of Brandon's citizenry are met.

c) A consistent, fair and transparent review process to be followed for all public-private initiatives, and an assurance that government services are delivered in the most economical, effective and efficient manner.

d) A high level of confidence to Brandon's citizenry that decisions made with respect to public-private partnerships are fully informed and justifiable, and have been found to be the best alternative.

DEFINITIONS

Business Case: A business case is typically a presentation or a proposal to an authority by an organization seeking funding, approval, or both for an activity, initiative, or project. A business case puts a proposed investment decision into a strategic context and provides the information necessary to make an informed decision about whether to proceed with the investment and in what form. It is also the basis against which continued funding will be compared and evaluated. The document provides the context for an investment decision, a description of viable options, analysis thereof, and a recommended decision. The recommendation describes the proposed investment and all of its characteristics, such as benefits, costs, risks, time frame, change requirements, impact on stakeholders, and so forth.

Life-cycle Cost Analysis: A method for assessing the total cost of facility ownership. It takes into account all costs of acquiring, owning, and disposing of a building or building system. Life-cycle Cost Analysis is especially useful when project alternatives that fulfill the same performance requirements, but differ with respect to initial costs and operating costs, have to be compared in order to select the one that maximizes net savings.

Net Present Value: The difference between the present value of cash inflows and the present value of cash outflows. NPV is used in capital budgeting to analyze the profitability of an investment or project.

Private Entity: Any non-government organization from which the City may procure infrastructure and/or services. Not-for-profit partnerships are not considered Private Entities in this policy.

Public-Private Partnerships: A public-private partnership as "a cooperative venture between the public and private sectors, built on the expertise of each partner, that best meets clearly defined public needs through the appropriate allocation of resources, risks and rewards." P3s are a long-term performance-based approach for procuring public infrastructure where the private sector assumes a major share of the responsibility in terms of risk and financing for the delivery and the performance of the infrastructure, from design and structural planning, to long-term maintenance.

A public-private partnership in Brandon is also defined as a contractual arrangement between the City and a private sector entity for the procurement of a public work or improvements under which:

a) the private sector entity assumes responsibility for all or substantially all of at least two of the following aspects of the project:
    i. its design
    ii. its construction
    iii. the long-term private sector financing for its construction
    iv. the activities related to its long-term operation
    v. its long-term maintenance
b) at least one of the aspects of the project for which the private sector entity assumes responsibility is its long-term operation or maintenance, or the long-term financing for its construction; and
c) ownership of the public work or the improvements, as the case may be, if held by the private sector entity, reverts to the public sector entity during or at the end of the term of the arrangement; or
d) is a type of arrangement prescribed by regulation.

Public Sector Comparator: Estimated total costs (including adjustments for risks retained and ancillary costs) to the public sector of delivering an infrastructure project using traditional procurement processes.

Shadow Bid: An estimate of the expected private party bid (including financing costs) for a particular project.

Transfer of Risks: The ability to transfer certain risks to the private sector has a value because it reduces or even eliminates those risks for the City, and by extension, for the taxpayer. Examples include design risk, construction/implementation risks (i.e., project cost risk, completion risk), and financing risks (i.e., interest rate, ownership, property, operating risks associated with inflation and/or maintenance). The elimination of these quantifiable risks by the City provides greater certainty in its future financial commitments. However, it is important to understand that not all risks can or should be transferred entirely. The more risk the City transfers to its private partner, the greater the level of compensation the partner may require in return. The challenge in any partnership is to share the risks in such a way that each partner receives the maximum benefit. It is essential to identify the full range of potential risks and determine which ones should be assumed by the City and which should be transferred to the private partner. It is important to maintain enough flexibility to allow innovative risk sharing suggestions from the private sector.

POLICY:

P3 PROJECT FRAMEWORK

1. A P3 project may involve one private sector operator, or a consortium, which will typically carry out some or majority of the activities involved – such as design, finance, construction, and ultimately sales. The opportunity and ability to share resources with the private sector through a long-term relationship allows the City to pursue initiatives which may not otherwise have been possible for several years had a partnership arrangement not been achieved. The key roles of the City in such a scenario would be, in addition to public fund, to provide the required land and the enabling environment, and particularly fostering smooth interaction of all stakeholders.

2. All potential P3 projects must be reviewed and evaluated by the City's "P3 Committee" that is comprised of specialized expertise in public-private partnerships including members of senior Administration staff from the Treasury, Operation, and Development Services departments to make decisions on all P3 projects. Administration may seek advice from independent external experts as part of this process.

3. Some of the fundamental drawbacks with unsolicited proposals are a lack of fairness and transparency, loss of control of the process, the solution may be what the private sector proponent deems as appropriate to a municipal need and the lack of determination if value for money was maximized. Should unsolicited proposals be received, they could be explored using the following framework:
   a) Projects must be part of the City's 10-year capital plan to be considered.
   b) If an unsolicited proposal is received which does not contain sufficient detail and is merely requesting negotiation of the details of an arrangement, then this proposal should not be considered further.
   c) If an unsolicited proposal is received which contains sufficient detail and very strong commitments by the potential partner, the proposal could be considered as part of a "Swiss Challenge." A Swiss Challenge is a form of public procurement which requires a public authority that has received an unsolicited bid for a public project (such as a port, road or railway) or services to be provided to municipality, to publish the bid and invite third parties to match or exceed it. In other words, the detailed unsolicited proposal would be subject to a formal process, allowing other bidders to participate and providing the initial bidder the opportunity to make changes to their original submission if it did not meet the best value test.
   d) Other projects that do not meet the above criteria but are aligned with other major policy objectives of the City may be considered for evaluation as a P3; however, the resources needed to perform the evaluation must be considered relative to the benefit prior to beginning the evaluation process. Priority will be given to the evaluation of projects meeting the above criteria.

PROCESS

4. In order to ensure a transparent, consistent and equitable process and to ensure compliance with all statutory requirements, all potential P3 projects must go through the process as identified in this section.

5. Prior to considering if a major capital project qualifies for a public-private partnership, the City must engage an independent consultant to assist in meeting the requirements set forth in Section 6 and 7. It is important to note that neither the consultant, nor any person or organization with whom the consultant has a significant connection, shall
   a) submit, or assist in the preparation of, a response to the City's request for qualifications or proposals, call for tenders or any other document that initiates the procurement process for that project;
   b) participate in the provision of any goods, services or construction to be provided for that project by the successful proponent or bidder.

6. Prior to considering a major project for a public-private partnership, the City must provide the following:
   a) Have a public sector comparator prepared for the project in accordance with the regulations;
   b) a life-cycle analysis that takes into consideration quantifiable and non-quantifiable costs;
   c) analyze the viability and the expected risks, costs and benefits by providing the following:
      i. A demonstrated transfer of risk from the City to the private sector must be evident and clearly documented.
      ii. The optimal allocation of risk between the public and private partners must be based on which partner is best suited to manage and/or mitigate each risk.
      iii. The respective roles of the public and private sectors in the partnership are based upon which party can provide the functions most efficiently and cost effectively.
      iv. The transfer of risk for various elements has a value that must be quantified where possible.
      v. A Value-for-Money Assessment of the project. The term "value for money" is used to describe the difference in risk-adjusted cost to the City between traditional procurement and P3 procurement which will involve the following components:
         1) Estimation of the Public Sector Comparator;
         2) Estimation of the shadow bid;
         3) Comparison of the Public Sector Comparator to the shadow bid to determine the value for money, if any, offered by the shadow bid;
         4) An allocation of risks between partners
         5) Project finance requirements resulting in a need for taxpayer support; and
         6) The benefits and costs should be systematically analyzed considering both quantifiable costs and benefits, and other non-quantifiable measures.

7. When considering a public-private partnership approach and one proposal versus another, the comparison of future cash flow is the primary financial analysis required in evaluating value for money. Other factors to consider include a commitment to ensure that government's resources are managed with due regard for economy, efficiency and effectiveness. The Value for Money analysis must also demonstrate the following:

a) The use of a standardized discount rate and a critical review of the true value of risk transfer, including separating risk transfer from interest rates and discounting.
b) The lowest cost alternative to the taxpayer.
c) An economic advantage to the City.
d) With a sound business case consisting of reasonable estimates of costs and benefits. The business case must continue to be sound throughout the process.
e) Anticipated efficiency and effectiveness of service delivery meet or exceed identified standards.
f) Quality service which is responsive to the needs of the public.

8. Upon completion of the Value-for-Money Assessment and determination that the project is appropriate for a public-private partnership, the consultant will provide a report that summarizes the findings in Section 6 and 7 above which include a statement of the expected results. Administration will undertake the competitive procurement process that comply with all applicable procurement laws, agreements, policies and procedures.

9. If, after completing the requirements set forth in Section 6 and 7, the City still wishes to proceed with the P3 procurement method, it must
   a) Make information about the project and all reports publicly available, but without disclosing information that, if disclosed, could jeopardize the public sector entity's ability to realize the best value for money through a competitive procurement process; and
   d) Provide a reasonable opportunity for members of the public to comment on it.

10. If Council accepts the recommendation to proceed with the development as a P3 project, Administration will enter into a procurement phase of the project that will include the development of tendering documents to pre-qualify and select a private entity that meets all the technical and financial requirements to deliver the project. Administration will follow the existing procurement policies and processes for tendering the contract. However, unlike a traditional procurement process, Administration must clearly describe in the procurement document that the public private partnership with the City requires long-term commitment and obligations.

11. All projects to be developed as a P3 will be subject to a fair, open and transparent public tendering process, with all tendering documents being published in the public media for a length of time sufficient to generate awareness on the part of local, national and international bidders. The City will not sole source any P3 contract.

12. The selection of the winning bidder will be based on a multi-stage process whereby the bidding entities will submit a technical proposal that will be evaluated on a pass/fail basis, or scored accordingly to criteria set out in the tendering (Request for Proposals) document. Subsequently, bidders will submit a financial proposal based on a Net Present Value (NPV) total project price. In order to maintain consistency and objectivity, as well as deliver value to taxpayers, Administration will select the lowest net present value bid, unless there are significant differences between bids in terms of the expected social and/or environmental impacts that offset the financial basis for awarding the bid.

13. If the tendering and bidding process results in new information that impacts the evaluation of the project, then the Value-for-Money Assessment will be revised to include the new information and the resulting recommendation will be revised accordingly.

14. The P3 Committee will prepare an implementation and monitoring plan with a clearly defined monitoring schedule, consistent with existing procurement management policies and processes, to ensure that the performance objectives and other terms of the contract are being met. The implementation and contract management will proceed as is currently done with City contracts, whereby the P3 Committee works in partnership with the sponsoring business unit. The P3 Committee is responsible for monitoring the overall contract, while the sponsoring business unit is responsible for monitoring the technical provisions.

REPORT ON RESULTS

15. the City must prepare a report on the results for the P3 project in the following manner:
    (a) As soon as is reasonably practicable after construction is completed, but no later than two years after it is completed;
    (b) At least once every four years during the term, including any renewals, of the public-private partnership established for that project; and
    (c) Within six months after the termination of the public-private partnership or within any longer period allowed by regulation for that type of project.
    (d) Continue to make the reports and comments publicly available throughout the term of the public-private partnership and for one year after the end of that term.

LIMITATIONS

16. By entering into a P3 contractual agreement with the City, the private sector entity is not exempt from any local governing regulations, including, but not limited to, the zoning by-law, subdivision or any building code regulations.

17. Any assistance provided to the private sector entity under a P3 agreement such as any waiver of fees or charges must be published in a local newspaper. The notice must be published prior to the granting of the assistance and must include the intended recipient and the nature, term and extent of the proposed assistance.

18. Any exemption of the local property tax under a P3 agreement must be made by bylaw, and the exemptions from any taxation must be made only as permissible by the Municipal and Provincial Acts. Any local tax exemption does not automatically provide an exemption for the property from school or other provincial property taxes.

19. Any property tax exemption under a P3 agreement is only available for the part of the land or improvements used for a public purpose.

20. A tax exemption under a partnering agreement ceases to apply to property the use or ownership of which no longer conforms to the conditions necessary to qualify for exemption.

OTHER STATUTORY REQUIREMENTS

Disclosure Requirements

21. City Council must be given sufficient information to make an informed decision when voting on the content of a partnering agreement, which includes the disclosure of the agreement and records relating to the agreement to the extent that these documents would be available under the Freedom of Information and Protection of Privacy Act. Administration must ensure that all relevant documents and agreements are publicly available. The City and the private partner must be aware of the extent of the information that can be disclosed in this regard. Generally, the City will be required to release information, except in cases where information may result in undue loss or gain to any person, group, committee or financial institution or agency information will contravene or harm the public interest, this except does not apply to risk analysis as this information ensures meaningful public scrutiny and transparency process.

Proper Authority

22. The signatories to the contract must have the authority to enter into the contract on behalf of the partners. In the case of the City, this will have been determined by Council or designee. The contract should be reviewed with Council prior to ratification. Administration should also ensure that the signatory for the private sector partner has the authority to sign the contract. This is of particular concern where a consortium, joint venture or similar arrangement has been established by the private partner.

Accounting Treatment of Public Private Partnerships

23. The method of accounting for the public private partnership should be clarified and resolved to ensure that both parties understand and accept the proposed approach. The accounting requirements for public private partnership and other associated issues must be handled in accordance with all statutory standards.

Labour and Collective Agreement Issues

24. In some cases, public private partnerships can result in situations where local government employees may be affected. The key concerns of many employees will be maintenance of seniority, pensions, wages, benefits and collective bargaining rights. These are all issues that must be dealt with carefully throughout the public private partnership process.

Conflict Resolution

25. Public private partnerships can involve a myriad of complex legal arrangements. The interpretation—or in some cases misinterpretation—of these arrangements can lead to conflict between the parties to these agreements. Public private partnerships can involve long-term arrangements between two or more parties. The ultimate goal in conflict resolution is to ensure that any differences are resolved quickly and with no disruption in service to the end user. However, this is not always possible. It is therefore imperative that the public private partnership contract set out dispute resolution mechanisms to help both parties come to a solution. In the event of a contractual dispute arises between the City and its P3 partner, mediation and arbitration should be the methods of dispute resolution prior to any litigation. This requirement should be clearly identified in the contract for the P3 project.

Off Ramps

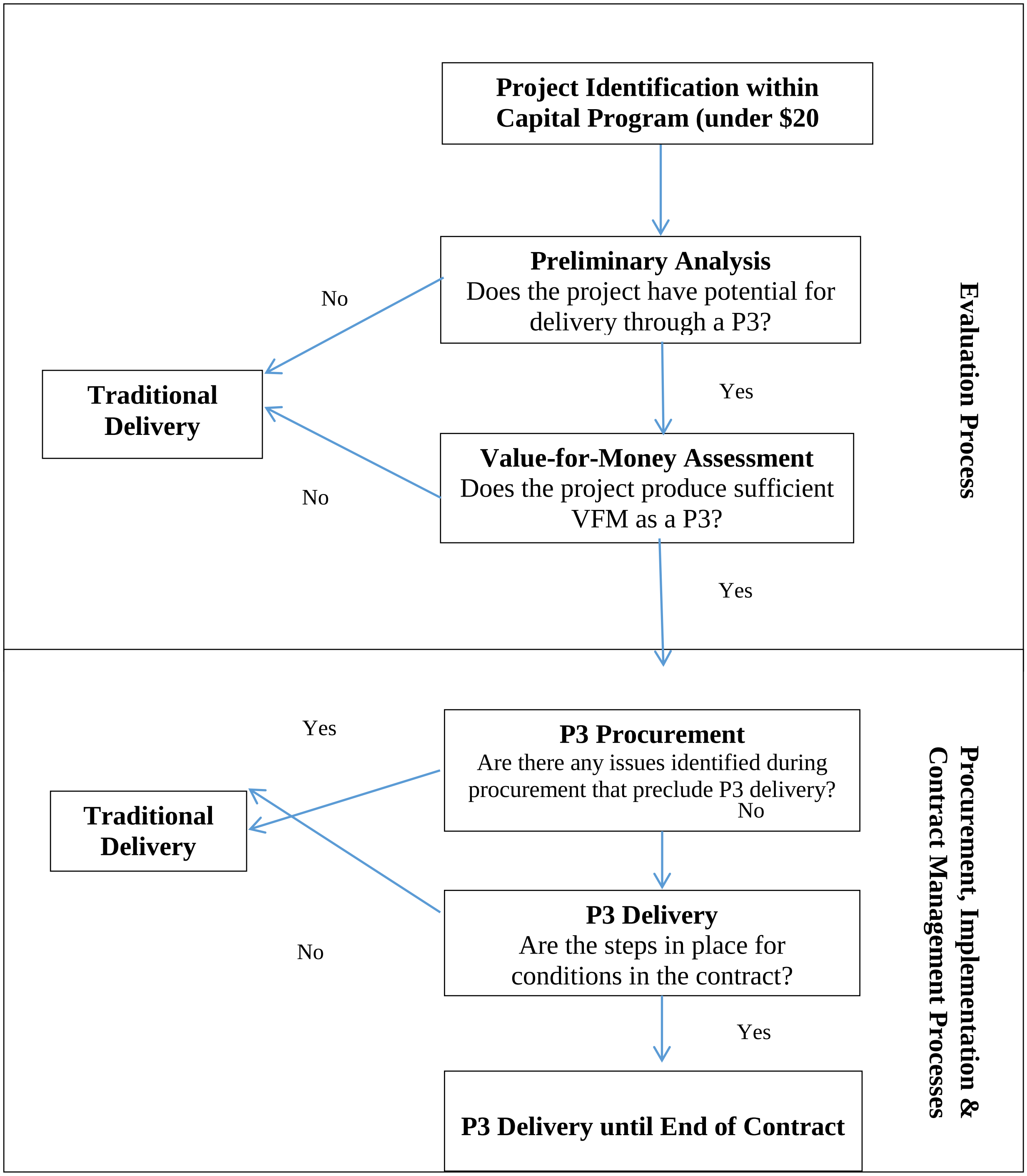
26. In some situations, rather than creating a battle in the courts, both parties may agree that the public private partnership cannot proceed. An "off ramp" clause or provision should be considered in the public private partnership contract to dissolve the partnership. The reasons to dissolve the partnership should be explicitly identified in the public private partnership contract. Off ramp clauses may be included to provide for:
    a) the deterioration of the private partner's financial ability to complete the project
    b) the private partner not being able to complete the project
    c) the initial financial assessment of the project being substantially inaccurate
    d) the initial financial assessment of the project being no longer relevant or materially unattainable

27. Much like the decision to partner, Administration should be aware of the costs and benefits associated with the use of off ramp provisions before they are used. Administration should also have a contingency plan to mitigate service interruption should a public private partnership off ramp be used.

Dissolving the Partnership

28. Dissolving a partnership at the end of the contract term is a legal process. This process is subject to both contract and statutory law. The original public private partnership contract between the parties should contain provisions to deal with dissolving the partnership. Provisions to this effect may include:
    a) provision for disposal or transfer of assets (in cases where infrastructure or facilities are being transferred to the local government from the private sector partner, assurances of the state of the infrastructure or facilities need to be explicit in the contract)
    b) allocation of net earnings or losses
    c) repayment of capital
    d) payment of liabilities

P3 Project Process Summary



Related Information

- **City of Brandon Tendering and Procurement Policy (#1010)**

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