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Infrastructure Alert

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US DOT issues final guidance on P3 evaluation and Value for Money requirements under IIJA

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Final US DOT guidance released: agencies must now follow updated requirements for evaluating P3 delivery and Value for Money under federal infrastructure laws.



What's the impact?

- Public sponsors seeking TIFIA/RRIF financing or other federal funding now have clearer direction on when and how to evaluate the use of P3 delivery and how to satisfy the statutory mandated Value for Money (VfM) analyses.
- Although the guidance does not impose new legal obligations, it effectively standardizes expectations for conducting P3 delivery option review and VfM analyses, which should be reflected in project procurement schedules and P3/project documentation.
- The guidance also has repercussions for private sector proposers and developers, who can expect to see the impact on procurement documents and processes, as well as P3/project documentation that reflect the new guidelines.

On March 3, 2016, the U.S. Department of Transportation (USDOT), through the Build America Bureau (Bureau) and the Federal Highway Administration (FHWA), issued final guidance regarding the statutory requirements to evaluate the appropriateness of public-private partnership (P3) project delivery, including Value for Money (VfM) analyses, under the Infrastructure Investment and Jobs Act (IIJA) and related statutes.

Although the guidance does not create new legal obligation, it provides important guidance and clarification for public sponsors pursuing TIFIA or RRIF credit assistance, and for other projects delivered as P3s that use federal funds.

This alert summarizes the key provisions and compliance implications.

Statutory framework and when a VfM is required

Existing federal statutes require public owners to conduct a VfM or comparable analysis in the following circumstances:

- / where the project cost is over \$750 million, the project sponsor is a public entity seeking federal credit assistance, the project is in a state with transportation P3 authorizing laws, and the project generates revenue or user fees;
- / any surface transportation project receiving federal financial assistance under Title 23 United States Code, in which the project sponsor intends to carry out the project through a P3 delivery method with an estimated project cost over \$500 million; and
- / any project type using a P3 delivery method and seeking federal credit assistance.

Any proposed P3 project that seeks TIFIA or RRIF credit assistance must complete a VfM or comparable analysis prior to the decision to advance the project as a P3, regardless of project size.

Even if a VfM analysis is not required, the Bureau encourages such an analysis for projects likely to cost over \$500 million to help inform decision makers.

The new USDOT guidance (which reflects public comments on draft guidance initially issued in 2024) provides guideposts with respect to the selection of the P3 procurement option and the performance of the VfM analysis, where required.

Two-stage evaluation framework

The new guidance establishes two key decision points for evaluating P3 delivery:

- / **Stage 1—Initial Evaluation (Pre-Procurement):** Public sponsors must evaluate delivery options

before commencing procurement. For projects subject to statutory requirements, this includes an initial VfM or comparable analysis conducted prior to selecting P3 delivery.

- / **Stage 1A**—Progressive P3 Procurements: For progressive P3s, an initial VfM must be conducted before signing a pre-development agreement, and a detailed VfM must be completed prior to executing the concession agreement.
- / **Stage 2**—Detailed Evaluation (Pre-Commercial Close): If Stage 1 or 1A analysis results in selection of a P3 delivery, a detailed Stage 2 VfM is required prior to signing the concession agreement. This Stage 2 analysis must be done when the project sponsor has additional details on project cost, funding, financing, and risk allocation and before signing the concession agreement. If the Stage 1 analysis resulted in the selection of a non-P3 delivery method, a Stage 2 analysis is not required.

Required contents of detailed Stage 2 evaluation

The detailed Stage 2 evaluation must include:

- / Life-cycle cost and project delivery schedule;
- / Comparison of public funding versus private financing costs;
- / Identification of required public contributions to cover funding gaps;
- / Key assumptions in developing the analysis, including federal assistance, tax impacts, expected private returns, risk allocation, risk premiums, and demand and revenue assumptions;
- / If applicable, user fees and other revenue forecasts for the project; and
- / Any additional information deemed appropriate by the Secretary of Transportation.

Transparency, audits, and disclosure

The new Guidance emphasizes that transparency is not merely a best practice, but a statutory and policy expectation for applicable projects. USDOT frames transparency as “an integral part of proper public sector decision making, particularly for long-term commitments.”

INDEPENDENT AUDIT PRIOR TO CONTRACT EXECUTION

Although not mandated in every case by statute, the Bureau strongly recommends that public sponsors conduct an independent audit prior to signing a concession agreement.

PUBLIC DISCLOSURE OF VFM AND CONCESSION TERMS

The guidance highlights several statutory transparency mandates. Under 49 U.S.C. § 116(e)(3), public sponsors must make the Vfm (or comparable analysis) and the key terms of the concession agreement publicly available. Similarly, IIJA § 70701 requires public sponsors to post the results of the required analysis on the project's website.

This creates practical implications for procurement sequencing:

- / Public sponsors should build disclosure timelines into procurement calendars.
- / Draft concession terms may need to be structured with public disclosure in mind.
- / Confidentiality carve-outs must be narrowly tailored to protect proprietary or trade-secret information, while still satisfying statutory transparency requirements.

POST-IMPLEMENTATION REVIEW AND CONTINUING TRANSPARENCY

Transparency obligations do not end at financial close. For Title 23 P3 projects costing \$100 million or more that receive federal financial assistance, IIJA requires that, within three years of opening to traffic, public sponsors must:

- / Review the project, including the private partner's compliance with concession agreement terms;
- / Certify compliance to the Secretary of Transportation, or notify the Secretary of non-compliance with a description of violations; and
- / Make the certification or notification publicly available, excluding proprietary or confidential information.

In addition, 49 U.S.C. § 116(e)(3)(A)(iii) imposes similar review requirements for P3 projects receiving TIFIA or RRIF assistance and requires public disclosure of a summary of total federal financial assistance in the project. Importantly:

- / The Bureau expects sponsors to execute a direct agreement or enforceable commitment at financial close memorializing these review and disclosure obligations.

Sponsors are expected to incorporate into the concession agreement provisions requiring cooperation by the private partner in satisfying these statutory review requirements.

Conclusion: Practical implications for sponsors and private partners

USDOT's final guidance clarifies statutory VfM requirements and formalizes expectations regarding analytical rigor, documentation, transparency, and post-implementation review. The expanded transparency framework in particular has material transaction implications:

FOR PUBLIC SPONSORS:

- / VfM analyses must be drafted with eventual publication in mind.
- / Risk allocation narratives and development should be clearly documented.
- / Decision-making records should reflect that VfM preceded and informed the P3 selection. Audit readiness should be embedded early in project governance structures.

FOR PRIVATE DEVELOPERS AND INVESTORS:

- / Anticipate potential additional public scrutiny re pricing assumptions and return profiles.
- / Risk transfer positions must be defensible in an independently reviewed VfM context.
- / Post-opening compliance reporting should be clearly addressed in concession agreement drafting.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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