



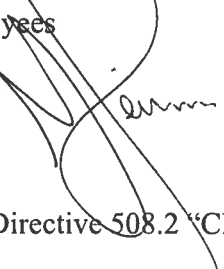
**COLORADO**

**Department of Transportation**

Office of the Executive Director  
4201 East Arkansas Ave, Suite 262  
Denver, CO 80222

**RELEASE MEMORANDUM**

TO: All CDOT Employees

FROM: Michael P. Lewis 

DATE: May 10, 2018

SUBJECT: New Procedural Directive 508.2 "CDOT's Open Records Act Procedure for Engineering Contracts"

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1. Name of New Procedural Directive: "CDOT's Open Records Act Procedure for Engineering Contracts"

2. Rationale for New Procedural Directive: New Procedural Directive 508.2 was adopted in order to provide greater transparency for requests concerning professional service, CM/GC, design-build and other innovative contracting mechanisms. New PD 508.2 is consistent with CDOT's general CORA Procedural Directive, PD 25.1 "CDOT's Colorado Open Records Act Procedure" providing specific milestones applicable to these types of projects. The Directive is intended to make those documents available under CORA and Colorado law available more quickly to requesters, and to clarify which documents are protected.

New PD 508.2 provides a streamlined process through which engineering contract documents may be disclosed under CORA. The Directive includes a chart showing the procurement stages for engineering contracts, which documents may be disclosed and by what means. Under this more efficient process, CDOT is making the following changes to business practice in order to support transparency:

- The RFP will outline any areas of proposals that have been identified in advance as having the potential to contain proprietary information. That information will automatically be considered exempt from disclosure. All other proposal contents will be presumptively subject to disclosure;
- Additional documentation for engineering contracts will be made publicly available on CDOT's website, such as the selection of short-listed proposers and final selection results;



- Inspection of engineering contract documents, including proposals and evaluation materials can be requested by directly contacting the Engineering Contracts Unit.;
  - CDOT will be providing a “first advisement” to the proposer for the first time a CORA request comes in for the proposer’s documents, which will allow the proposer an opportunity to assert a legal basis for denial of inspection under Colorado law.
3. These Directives have been reviewed by: Contract & Market Analysis Branch, Office of the Attorney General, Office of Communications, and OPGR.
  4. Key Benefits: Providing a streamlined process for disclosure of engineering contracts pursuant to CORA.
  5. Effective Date: May 9, 2018



<b>COLORADO DEPARTMENT OF TRANSPORTATION</b>		<input type="checkbox"/> <b>POLICY DIRECTIVE</b> <input checked="" type="checkbox"/> <b>PROCEDURAL DIRECTIVE</b>
<b>Subject</b> <b>CDOT's Open Records Act Procedure for Engineering Contracts</b>		<b>Number</b> <b>508.2</b>
<b>Effective</b> 5/9/18	<b>Supersedes</b> New	<b>Originating Office</b> <b>Contracts and Market Analysis / Communications Office</b>

## I. PURPOSE

The Colorado Open Records Act (“CORA”), § 24-72-201 to § 24-72-206, C.R.S., provides that all public records shall be open for inspection by any person at reasonable times, unless specifically provided for by law. This Directive is intended to provide general guidance to Proposers, their subcontractors or partners and members of the public regarding the schedule for the release of certain Engineering Contract documents created or submitted during the course of the procurement process. As noted herein, this Directive will apply to most Engineering Contract procurements, but projects may vary. Not all documents or stages will apply to every selection.

The Engineering Contracts procurement process set forth herein states how and when documents constituting Public Records under CORA will be made available for disclosure, up to and including, through public announcement, posting online or formal CORA request. The Engineering Contracts Unit has developed these milestones with the goal of balancing the need for transparency against the need to protect the integrity of the Engineering Contracts procurement process.

## II. AUTHORITY

Executive Director pursuant to § 43-1-105, C.R.S.

§ 24-72-201 through § 24-72-206, C.R.S. ("Colorado Open Records Act")

§ 24-30-1401, *et. seq.*, C.R.S. (Negotiation of Consultant Contracts)

§ 24-92-101 , *et. seq.*, C.R.S. (Construction Bidding for Public Projects Act)

§ 24-93-101 , *et. seq.*, C.R.S. (Integrated Delivery Method for Public Projects Act)

§ 43-1-1401, *et. seq.*, C.R.S. (Design-Build Contracts)

5 U.S.C. § 552 (Freedom of Information Act)

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### III. APPLICABILITY

This Procedural Directive applies to the Colorado Department of Transportation ("CDOT") employees whose work involves procurement of Engineering Contracts. It also applies to all members of the public, including Proposers, their subcontractors or partners doing business or seeking to do business with CDOT on public projects as well as members of the public seeking Public Records from CDOT. This Directive applies to all CDOT highway and bridge projects advertised for the following types of services:

- Professional Services (Engineering, Architecture, Landscape Architecture, Land Survey, and Industrial Hygiene)
- Design-Build (Including two-step and "streamlined" or "modified" design-build)
- Construction Manager/General Contractor ("CMGC")
- Best Value Construction

This Directive shall not apply to Engineering Contracts for construction projects using Design-Bid-Build delivery method and that are awarded on a "low bid" or "A+B" basis, or PIII (public-private partnership) projects or procurement of personal services.

### IV. DEFINITIONS

"CORA" shall mean § 24-72-201 through § 24-72-206, C.R.S. The definitions set forth in § 24-72-202, C.R.S. are incorporated herein by this reference. In the event of a conflict between § 24-72-202, C.R.S., and the specific statutes set forth above in Section II "Authority," the specific statute shall apply.

"Construction Manager/General Contractor" or "CMGC" shall mean a project delivery method using a two-phase contract with a CMGC contractor for services during the preconstruction and, if there is an agreed price, construction phases of a project.

"CORA Exempt Material" shall mean documents or sections of documents which are exempt from disclosure under CORA and/or under the common law.

"CORA Officer" shall mean the CDOT Public Information Officer who reports to the Director of Communications and who oversees the process for receiving, assessing and disclosing information in response to requests made to CDOT under the Freedom of Information Act ("FOIA") and/or the CORA by ensuring that information and requests are handled in a timely fashion in accordance with relevant state and federal law and policies.

"Design-Bid-Build" shall mean the traditional project delivery method where design and construction are sequential steps in the project development process.

"Design-Build" shall mean a project delivery method that provides for design and construction of improvements by a contractor or private developer. The term encompasses design-build-maintain, design-build-operate, design-build-finance and other contracts that include services in

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addition to design and construction.

“Engineering Contract” for purposes of this Procedural Directive shall mean a contract for CDOT Highway and Bridge projects including contracts for Professional Services, Construction, or Innovative Contracts (Design-Build or CMGC).

“Freedom of Information Act” or “FOIA” shall mean 5 U.S.C. § 552. For guidance on FOIA, see <http://www.osc.gov/foia.htm>.

“Proposer” shall mean a person that has submitted (or is intending to submit) a Proposal submission in order to participate in an ongoing procurement for an Engineering Contract.

“Professional Services” for purposes of this Procedural Directive shall mean engineering and design-related services including program management, construction management, feasibility studies, preliminary engineering, design engineering, surveying, mapping, or architectural related services or other services which may be logically or justifiably performed by a person licensed, registered, or certified to provide services with respect to a highway construction project.

"Proposal" for purposes of this Procedural Directive shall include statements of interests, statements of qualifications, proposal submissions, bids, and any other submission material required by a Request for Proposal (“RFP”) or Request for Quotation (“RFQ”).

“Public Record” shall mean all writings (referred to herein as records, documents, materials) made, maintained, or kept by CDOT for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds. § 24-72-202(6)(a), C.R.S. For the purposes of this Procedural Directive, “Public Record” shall also include "Records" as defined in § 24-80-101(2), C.R.S.

“Request for Proposals” or “RFP” shall mean the document that describes the procurement process, forms the basis for the final proposals and may potentially become an element in the contract.

"Stipend" shall mean CDOT's payment of an amount of money to the Proposer to purchase the intellectual property that may be contained in highly technical proposal documents (such as Alternative Technical Concepts) in a limited number of circumstances. This stipend is typically reserved for proposals on large and complex design-build RFPs. Prior to accepting a stipend, a Proposer may qualify that certain portions of the proposal documents to be purchased contain information that is proprietary or constitutes a trade secret.

## **V. PROCEDURE**

### **A. General Requirements**

1. It is declared to be the public policy of this state that all Public Records shall be open for inspection by any person at reasonable times, except as provided in the Colorado Open Records Act or as otherwise specifically provided by law. § 24-72-201, C.R.S.

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This includes all documents generated or maintained by CDOT in relation to an Engineering Contract, including Proposal materials submitted to CDOT, and shall be disclosed as set forth below.

2. Procedural Directive 25.1 (“CDOT’s Colorado Open Records Act Procedure and Fee Schedule”) sets forth CDOT’s policy with regard to the CORA and the disclosure of Public Records. Where this Procedural Directive is silent on a given issue, Procedural Directive 25.1 shall apply.

**B. Procurement Stages for Engineering Contracts and Availability of Documentation**

1. Stage One. Stage One comprises the qualification review and short list selection, where applicable. Where an asterisk is noted (\*) this excludes CORA Exempt Material(s). Proposers’ financial statements and cost proposals are included in CORA Exempt Material. Any materials are subject to redaction.

<b>NO.</b>	<b>DELIVERY METHOD</b>	<b>DOCUMENT TYPE</b>	<b>FORMAT PROVIDED</b>	<b>TIME PROVIDED</b>
1	Design-Build / Design-Bid-Build	Initial RFQ, Addenda to RFQ, Final RFQ	Posted to the CDOT website	At the same time as issued to Proposers
2	Design-Build / Design-Bid-Build	RFQ Comments submitted by Proposers and CDOT responses	Posted to the CDOT website	At the same time as responses are issued to Proposers*
3	Design-Build / CMGC / Design-Bid-Build	Statements of Qualification and/or Statements of Interest (SOQ/SOI)	Available to be viewed at CDOT Engineering Contracts Office by appointment <i>or</i> Available through CORA request process	After final selection and contract award
4	Design-Build / CMGC / Design-Bid-Build	Official Evaluation Materials (e.g. Panelist Score books, names of evaluators and other confidential material consistent with the RFP shall be redacted)	Available to be viewed at CDOT Engineering Contracts Office by appointment <i>or</i> Available through CORA request process	After the later of (i) expiry of the protest period following announcement of Short Listed Proposers and (ii) resolution of any protest*
5	Design-Build / CMGC / Design-Bid-Build	Identity of Short-Listed Proposers	Posted to CDOT website	Upon announcement of selection of Short Listed Proposers

2. Stage Two. Stage Two comprises the final evaluation and selection, where applicable. Where an asterisk is noted (\*) this excludes CORA Exempt Material(s). Proposers' financial statements and cost proposals are included in CORA Exempt Material. Any materials are subject to redaction.

NO.	DELIVERY METHOD	DOCUMENT TYPE	FORMAT PROVIDED	TIME PROVIDED
1	Design-Build / CMGC	Initial RFP	Posted to the CDOT website	At the same time as issued to Proposers
2	Design-Build / CMGC	Documents resulting from discussions, and one-on-one meetings during Draft RFP Phase	Posted to the CDOT website	After final selection and contract award.
3	Design-Build / CMGC	Final RFP	Posted to the CDOT website	At the same time as responses are issued to Proposers*
4	Design-Build	Documents resulting from discussions, and one-on-one meetings during Final RFP (ACC/ATC Meetings)	Generally considered to be CORA Exempt	Not Applicable
5	Design-Build / CMGC / Design-Bid-Build	Interview responses, handouts, presentation materials	Interviews are not recorded and materials presented are not generally considered part of the proposal documents	Not Applicable
6	Design-Build / CMGC	Requests for Best and final offers (BAFO)	Posted to the CDOT website	At the same time as Request for BAFO is issued to Proposers
7	Design-Build / CMGC / Design-Bid-Build	Final Selection	Posted to the CDOT website	Upon announcement of selection to Short Listed firms
8	Design-Build / CMGC / Design-Bid-Build	Scores and ranking of all Proposers	Sent by email upon request to unsuccessful Proposers <i>or</i> Available through CORA request process	Upon announcement of final selection
9	Design-Build / CMGC / Design-Bid-Build	Final Proposal of Winning Firm	Available to be viewed at CDOT HQ (Engineering Contracts Unit) by	After final selection and contract award

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			appointment <i>or</i> Available through CORA request process	
10	Design-Build / CMGC / Design-Bid-Build	Final Proposals of all Short Listed Firms	Available to be viewed at CDOT HQ by appointment <i>or</i> Available through CORA request process	After final selection and contract award
11	Design-Build	Approved Alternative Configuration Concepts/ Alternative Technical Concepts (ACC/ATCs) from all Short Listed Firms	Available to be viewed at CDOT HQ by appointment <i>or</i> Available through CORA request process	After Stipend approval and acceptance  Note: ACC/ATCs will not be provided if the applicant Proposer has refused the Stipend

3. **Stage Three.** Stage Three comprises negotiations after final selection, including the issuance of a Stipend and finalization of cost and scope. Due to the nature of the negotiations between the selected firm(s) and CDOT, any materials produced during this stage will generally be presumed to be CORA Exempt Material. Proposers' financial statements and cost proposals are included in CORA Exempt Material. Any materials are subject to redaction.

### C. Proposals Submitted to CDOT

1. The RFP shall outline any areas of the proposal that have been identified in advance as having the potential to contain proprietary information which shall be considered exempt from disclosure as set forth above. The designation in the RFP shall supersede all designations in individual Proposals.

2. A Proposer's designation of a document or section of a document other than that designated in the RFP as CORA Exempt Material shall not be dispositive of its exemption from disclosure. Proposer shall be solely responsible for obtaining a legal determination for exemption of records in excess of those designated in the RFP.

3. All Proposals submitted to the CDOT Engineering Contracts Unit are subject to disclosure under CORA unless the grounds for protecting the information under Colorado law are provided in the RFP.

4. **Successful Proposals.** At the time that a contract is awarded, the Proposal becomes a part of the contract documents and the Proposer can no longer assert that the successful



Proposal is protected from disclosure.

5. Unsuccessful Proposals. Unsuccessful Proposals shall be retained for the time period set forth in CDOT's document retention requirements and shall not be returned to the unsuccessful Proposer.

6. If there is no award on an RFP, then any materials submitted in response to the RFP are presumed to be CORA Exempt Material.

7. In the event that CDOT issues a Stipend to purchase the unsuccessful Proposal, no material shall be considered exempt from disclosure unless agreed to by CDOT and memorialized in the Stipend. CDOT reserves the right to request a privilege log if acceptance of the Stipend is contingent on any privilege conditions that are agreed upon by the parties in writing.

8. The Engineering Contracts Unit, together with the CDOT CORA Officer and other CDOT employees as required, shall make the determination whether the material is CORA Exempt Material.

9. The Proposer's failure to follow this Directive may subject the materials to disclosure under CORA.

#### **D. CDOT's First Advisement of Record Request to Proposer**

1. While not required by law, CDOT will advise the Proposer of a public records request in the first instance so as to allow the Proposer the opportunity to assert a legal basis for denial of inspection under Colorado law regarding any material not previously identified as proprietary, trade secret or confidential.

2. Thereafter, no notification shall be provided to the Proposer regarding subsequent public record requests pertaining to the same information. The determination of confidentiality made during the first request shall be controlling for any subsequent request.

3. CDOT shall adhere to the timing requirements by which to respond under CORA. As such, Proposer has 2 business days three (unless otherwise provided in the notification) to notify CDOT of the legal basis for denial of inspection and the intent of the Proposer to seek allowable relief.

4. All public record requests will be treated equally under CORA, regardless of the identity of the requesting party.

5. In the event that CDOT determines to disclose the documents requested pursuant to CORA, the Engineering Contracts Unit, through the CDOT CORA Officer, will provide the Proposer with notice of its intent to disclose; however, the objection of the Proposer to the pending disclosure shall not toll the time frame for disclosure unless notice to file

for injunctive relief is provided.

### E. Disputed Disclosure

1. In the event that CDOT seeks a determination from the court as to whether materials should be disclosed under § 24-72-204(6)(a), C.R.S., CDOT's pursuit of the action may be contingent upon Proposer's continued participation.
2. Each Proposer is advised to contact its own legal counsel concerning CORA, other applicable laws, and their application to the Proposer's own circumstances.
3. In the event of litigation brought by Proposer concerning the contested/impending disclosure of any materials submitted by the Proposer, CDOT's sole involvement will be as a necessary party retaining the material until ordered by a Court. The Proposer shall be responsible for otherwise initiating or defending any action concerning the materials at its sole expense. If costs are assessed against CDOT as a result of such litigation, the Proposer shall indemnify CDOT.
4. CDOT will not render legal advice to the Proposer regarding the nature or content of documents entitled to exemption under CORA or other applicable laws.

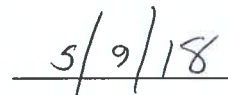
### VI. IMPLEMENTATION PLAN

- A. The Department's Contracts and Market Analysis Branch shall be responsible for implementing this Procedural Directive.
- B. Within a week of its effective date, the Contracts and Market Analysis Branch shall disseminate the Procedural Directive to all CDOT employees who are involved in the CORA Process.
- C. The Office of Policy and Government Relations shall post the Procedural Directive on the intranet within three days of the effective date.

### VIII. REVIEW DATE

This Procedural Directive shall be reviewed on or before May 2022.

  
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 Michael P. Lewis  
 Executive Director

  
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Date of Approval