



I-70 East Corridor Project

Key Procurement Issues

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KEY PROCUREMENT ISSUES

The objective of this deliverable is to provide early identification of key issues which CDOT is likely to experience in the procurement of the I-70 East Redevelopment project.

The key priority issues identified in this memo are those that have the largest policy implications for Colorado and would be most likely to have the greatest immediate impact on creating and strengthening the PPP market there. These issues are summarized in the list below and are further discussed in the following sections.

- Information and due diligence requirements;
- Market sounding;
- Shortlisting;
- Stipend;
- DBE/localization requirements;
- Restricted parties;
- Two stage submission (technical and financial proposals);
- Level of financial commitment required at bid;
- Commitment periods;
- Bid performance securities;
- Time period to close;
- Stakeholder consultation;
- Changes to proponent teams;
- Security deposits;
- Conflict of interest;
- Communications; and
- Evaluation criteria and disclosure to bidders.

Information and due diligence requirements

Information requirements will increase as the project progresses through four distinct phases:

1. Market sounding/industry forum phase
2. At RFQ launch
3. At RFP launch
4. During the RFP

At the market sounding phase, bidders will want to understand the basic project scope and the different alternatives that are being considered. Procurement method and deal structure is important to signal to the market i.e., revenue risk or availability payment as that will drive teaming decisions. The State should demonstrate political support for the project and the availability of public funds to demonstrate credibility that the project will move forward.

At RFQ launch, teams will need to understand the project definition as well as the state's goals and objectives. It is important to have an established timeline at this point and keep it.

At the RFP, bid teams will need to understand what the evaluation criteria are and their relative weighting. Goals and objectives should be clear and reflected in the evaluation criteria. The Alternative Technical Concept (ATC) process will need to be defined as well. Teams will also need the following information:

- Land acquisition requirements and schedule
- Utility relocations
- Master agreements with affected parties
- Geotechnical baseline
- Areas of hazardous material contamination

- Tolling strategy
- Availability and quantum of any public funding (eg TIFIA, PABs)

During the RFP, bid teams will need any aesthetic or design requirements.

Market soundings: project structure, size and scope

It is generally recommended that public sector sponsors have a dialogue with the market early in the process to ensure project feasibility, "finance-ability" and sufficient market interest. In other words, to ensure the public sector pursues the most appropriate type of projects.

The overarching goal is to pursue projects with acceptable scope and size and feasibility as a public-private partnership while delivering value for money. By developing the right business terms and risk allocation, and by ensuring project feasibility, timing and staging of the procurement process, the public sector will be in a better position to reach that goal and to pursue the right projects.

The business plan has been developed in Value for Money study; key business terms and risk allocation are generally outlined enabling a robust market sounding process.

Shortlisting

The number of firms or individuals invited to submit a proposal depends on the complexity and value of the opportunity being competed.

Fundamentally teams should be evaluated on financial strength and experience. Experience should be broad-based and include experience with P3's, with projects of similar scope and size and local market expertise as well. There should be no doubt that each shortlisted team could technically and financially complete the project.

The P3 market has moved around in recent years, regarding the optimal number of shortlisted firms. Our recommendation, assuming there are at least four qualified teams, is to shortlist four in the event that one team drops out, to maintain competitive tension. Recently, two major PPPs – LaGuardia in NY and Purple Line in Maryland both shortlisted four qualified teams.

Stipend

The payment of stipends is now generally accepted practice to bidders that submit a compliant proposal. Both the private and public sector agree that there is a need to better understand the actual costs being incurred by bidders and sponsors to participate in procurements as a considerable level of detail is required from proponents to support their bids. A modest stipend offsets costs, and demonstrates a seriousness and commitment from CDOT to see the project through. This helps keep bidders in the process.

Perhaps more importantly payment of a stipend ensures CDOT owns the approach, concepts, ATCs and all other information created by both the winning and unsuccessful proposer.

CDOT should include a modest stipend for bidders who submit a compliant bid.

DBE/Localization Requirements

Best practice typically requires private sector proponents to use best efforts to achieve mandated targets for local or DBE participation, but does not penalize failure to achieve these targets in the event that the market is not sufficiently deep to achieve the targets. Private sector bidders should be expected to conduct outreach and networking functions in order to reach out to the local small and disadvantaged business community. It is common for over achievement of DBE targets to be rewarded through bonuses, either in evaluation points and/or in additional availability payments.

CDOT should establish its targets and policies towards local and DBE participation as early as possible in the process and set these out in the contact and procurement documents.

Restricted Parties

During the procurement process, the persons listed below should be identified as restricted parties for bidders:

- CDOT technical advisors (e.g., engineering and consulting firms);
- CDOT financial advisors (e.g., investment banks, accounting firms);
- CDOT legal advisors;
- CDOT environmental advisors; and
- CDOT social and labor advisors.

These persons may be engaged by CDOT and involved in preparing the RFQ and/or the RFP.

Any person serving as a consultant to any of the above and that wish to participate in an RFQ and/or an RFP should describe the nature and extent of the scope of work under the existing subcontract as well as under the proposed proponent team which will submit a proposal.

Additional persons may be identified as restricted parties, including by being added to the list during the competitive selection process. Restricted parties, their respective directors, officers, partners, employees, and affiliates are not eligible to participate as a proponent or as a proponent team member, or advise any proponent or proponent team member, directly or indirectly, or participate in any way as an employee, advisor, consultant or otherwise in connection with any proponent. Each proponent will have to ensure that neither the proponent nor any proponent team member uses, consults, includes, or seeks advice from any restricted party.

CDOT should establish a list of restricted parties prior to issuing the RFQ.

Two Stage Submission (Technical and Financial Proposals)

Best practice is increasingly for a two-stage submission with technical bids submitted without any pricing information approximately two months ahead of the final bid date. This allows evaluation of the technical proposals and any clarifications or revisions to be made before bidders go to their financiers for final commitments. Because much of the detailed technical evaluation is completed earlier, it should allow for the public sector to evaluate the final bids more quickly. This in turn allows for shorter commitment periods after submitting the bids which is beneficial in terms of financing availability and pricing.

Macquarie recommends a two stage submission process.

Level of Financial Commitment Required at Bid

At RFQ response, bidders should provide support letters from lenders and equity.

At financial proposal submittal, bidders should provide commitment letters from equity, lenders (or underwriters), the design-build contract, the operations & maintenance contract, QA/QC contract and insurance.

Partnerships BC evaluates bids based on the level of commitment provided by proponents, using a minimum acceptable level of lender commitment as a pass/fail. Macquarie recommends following this precedent.

Commitment Periods

CDOT must manage and control the final stage to contract close following the appointment of the winning bidder. In the past in other jurisdictions, this has been the stage where project timetables have been most

vulnerable to slippage. CDOT will be under pressure to adhere to timetables for contract signature that are expected (by the end user and/or the relevant Government department) to be delivered on time.

The timetable for evaluation and award will be established in the RFP. Additionally, bidders will be required to reach commercial and financial close within a certain timeframe or face penalties for failing to do so, unless the delay was not attributable to them.

Time Period to Close

Negotiation is an integral part of the procurement process, however, there should be minimal to no negotiation during the closing phase. It is a process, not an event. Successful negotiation culminates in contract award, concluding the procurement phase, and starting implementation. CDOT and the Concessionaire have different perspectives of the negotiation phase; the Concessionaire wants to reduce risk and increase its margins, while CDOT wants to reduce its costs and maximize the value of the services provided through the PPP. There will be certain provisions that will always be non-negotiable. The output of the negotiation must be a PPP contract with all ancillary agreements containing the service level agreements and payment mechanism.

Macquarie has recommended a procurement process with several rounds of one-on-one's with bidding teams to allow for negotiation and discussion.

Stakeholder Consultation

Stakeholders include employees and their trade unions, the public, the people who will use the assets, local community groups, elected officials, and interest groups. In selecting, developing and implementing PPP projects, the economic, social and environmental concerns of those directly affected at local level should be taken into account along with the statutory rights and legitimate economic interests of stakeholders, in line with recommendations.

CDOT has already undertaken significant stakeholder communication with legislators, local governments and the community. Consultation and communication should continue throughout the process.

Changes to Proponent Teams

In many instances consortia formed in response to an RFQ change during the RFP bid stage. This is more acceptable than a complete withdrawal of a consortium, provided that the consortium maintains its strength at least to the same level as before the change. In no circumstance should a consortium change be allowed without written consent from CDOT. The process should be set out in the RFP as follows:

- Consortium advises CDOT of proposed change, in writing, with full details of the reason for the change, the parties involved and the impact on the consortium;
- CDOT applies the same evaluation criteria used in the pre-qualification evaluation to re-assess the consortium, using where possible the same evaluation processes. The required standard is that the changed consortium should score at least the same number of points scored during pre-qualification;
- If satisfactory, CDOT advises the Consortium of the acceptance in writing; and
- If not satisfactory, CDOT advises the Consortium of the no acceptance in writing and is given certain amount of time to propose an alternative. Failing this, the Consortium is disqualified.

Security Deposits

CDOT will need to consider its general policies with respect to security deposits provided by bidders at various stages of the procurement process. It is recommended that CDOT require a security deposit of 2% of estimated project value, which steps up to 5% for the preferred proponent at commercial close.

Conflict of Interest

Conflict of interest provisions should be included in the procurement documents. Proponents must not include among their team members or key individuals any business entity or individual who is, or is associated with, in any way likely to create a conflict of interest or a perception of conflict of interest in the project.

If a proponent considers that a particular relationship or association does not or will not create a conflict of interest, but is concerned that CDOT could arrive at a different conclusion, the proponent should be able fully disclose the circumstances to CDOT at the earliest possible date, and request that CDPT provide an advance interpretation as to whether the relationship or association will be likely to create a conflict of interest or a perception of conflict of interest.

The procurement documents should state that a failure to comply with these provisions may result in disqualification of the proponent from the procurement process.

Communications

Once an RFP has been issued, the proponents or their representatives should not contact or communicate with CDOT or its representatives, other than those representatives of CDOT that have been designated as authorized representatives, and only under the circumstances permitted in the RFP. This prohibition should not apply to individual meetings or pre-proposal conferences as described in the RFP.

Communications protocols will have to be established for proposers in dealing with stakeholders. Most P3 procurements place fairly tight restrictions on communications. While CDOT will want to maintain process integrity, some outreach and communication from bidders should be allowed.

Evaluation Criteria and Disclosure to Bidders

Proponent's proposals should be assessed against the criteria set out in the procurement documents. The assessment should follow the pre-defined evaluation strategy and be consistent with the ultimate objectives of the project. The financial and qualitative elements of tenders should be assessed separately by CDOT. Weightings may be applied to the criteria to allow price and non-price factors to be scored to reflect their importance to the project and to arrive at a final value for money judgment. This process requires skilled and experienced staff, and staff training sessions should be conducted prior to evaluation so that a consistent approach is applied to the review of documents.

If requested, CDOT should debrief unsuccessful proponents, separately, after the execution of the contacts. During such debriefing, the evaluation, scoring, ranking and content of any Proposals will not be disclosed. Only the strengths and weaknesses of the Proponent's Proposal relative to the evaluation criteria will be disclosed and discussed.

Debriefing should not include:

- Point-by-point comparisons of the debriefed proponent's proposal with those of other proponents;
- Specific numerical evaluation scores; or
- Discussion or disclosure of proprietary information provided by other proponents.