

October 24, 2012

Jose Sepulveda  
Division Administrator  
Federal Highway Administration  
Kentucky Division  
330 West Broadway  
Frankfort, KY 40601

Subject: Request for the LSIORB Downtown Crossing Design-Build Project  
Kentucky Transportation Cabinet, Frankfort Kentucky

Dear Mr. Sepulveda:

The Kentucky Transportation Cabinet ("KYTC") is currently conducting the procurement process for the Downtown Crossing portion ("Downtown Crossing") of the Louisville-Southern Indiana Ohio River Bridges ("LSIORB") Project. The Project is being developed using the design-build delivery method pursuant to Kentucky Revised Statute 45A.010, *et seq.*, and specifically 45A.030, 45A.180, 45A.181, and 45A.182. KYTC is seeking federal aid for the Project and is structuring the procurement to comply with applicable federal requirements.

KYTC will make a value-based selection of its design-build team ("DBT") based upon two-part proposals (Technical and Price) submitted by the DBTs. More specifically, KYTC's selection will be based upon the technical quality of the DBT's Technical Proposal, the DBT's proposed schedule, compliance with the Project's disadvantaged business enterprise (DBE) goals, and the price contained in its Price Proposal.

For the Technical Proposal component, KYTC intends to allow the proposing DBTs to submit Innovative Technical Concepts (ITCs), consistent with 23 CFR 636.209, for review and approval by KYTC. The ITCs will be approved only if they meet certain minimum requirements and are otherwise acceptable to KYTC. 23 CFR 636.209 permits ITCs for design-build procurements, but states, "Alternate technical concept proposals may supplement, but not substitute for base proposals that respond to the Request for Proposal (RFP) requirements." The well-understood concern underlying this requirement is to provide for a fair and open competition among the DBTs. An ITC may also be pertinent to the Price Proposal to the extent the ITCs reduce cost or schedule length.

KYTC therefore requests that the requirement to submit separate proposals for the "base" and "alternate" technical concepts be waived for the Project, allowing each DBT the opportunity to submit ITCs for pre-approval and then to submit a proposal with or without ITCs. The process, which requires preapproval by KYTC of deviations from design and other technical requirements of the design-build contract and the other contract documents, has been drafted by KYTC so as to guard against any potential unfairness. The ITC process gives KYTC the ability to factor the DBT's technical solutions into the selection process, allowing a true "best value" selection, and gives KYTC access to solutions from all proposers. It also gives the successful proposer the ability to advance the implementation of its ITCs, and avoids unnecessary costs for the DBTs to advance a base design that ultimately will not be used.

Imposing a requirement for the DBTs to submit separate proposals for both the "base" and "alternate/ITC" concepts would impose an unnecessary burden on both the proposers and KYTC, and possibly delay the procurement process as it currently stands. KYTC has addressed the underlying concern regarding fairness by including minimum criteria for ITCs in the RFP documents, specifically the Instructions to Proposers ("ITP"). The deviations that will be allowed will not change the character of the Project, change tolling operations or increase the amount of time required to complete the Project past the established maximum date of June 30, 2018. In addition, the ITP and other DBT Contract Documents place the cost and delay risk associated with any additional permits, governmental approvals and third party approvals necessitated by the ITC on the DBT. If the DBT is unable to obtain approvals or satisfy other conditions identified by KYTC that are necessary to implement the ITC, the DBT will be required to develop the Project in accordance with the DBT Contract Documents without regard to the ITC and without any additional cost or extension of time. KYTC has however limited even this possibility by stating that any ITC requiring changes to the Environmental Documentation will not be approved.

Given these protections, KYTC believes that a waiver of the requirement is appropriate. To illustrate the depth of these protections, KYTC includes the following sections of its Instructions to Proposers contained in the RFP documents.

#### **A. ITC Review Process and Submission Requirements**

ITP Section 6.1 sets forth KYTC's rationale for the use of ITCs-allowing for innovation, increased flexibility, time reductions, and costs savings to KYTC. At the same time, it is made clear that ITCs which require modifications to the Environmental Documentation shall not be approved.

ITP Section 6.2 clarifies that any proposed design that requires additional right-of-way acquisition to implement will require an ITC submittal and approval by KYTC. It is reiterated that such ITCs must nonetheless meet the requirements of the Environmental Documentation. KYTC also directs the DBT to Section 3.7 of the Project Scope which requires the DBT to acquire any such additional right-of-way for the purposes of an approved ITC.

ITP Section 6.3 explains the deadlines for submitting ITC documentation for consideration by KYTC. ITCs pertaining to pavement rehabilitation were required to be submitted by August 10, 2012, with a deadline for all others of July 16, 2012.

ITP Section 6.4 outlines KYTC's right to reject any ITC submitted. It further describes KYTC's intent to review all ITCs quickly-targeting an evaluation period of less than 14 days. In any case, all ITCs shall be reviewed and either approved or denied no later than 30 days prior to the due date for proposals.

ITP Section 6.5 outlines 13 categories of information every ITC shall contain. These categories of information are required in each ITC to assure that the ITC "meets or exceeds the project goals", while at the same time assuring KYTC that the character of the Project will not be changed and that the ITC will not involve dangers to the schedule. The categories list in Section 6.5, which all ITCs must address are:

- A. Description (requiring specifications and conceptual drawings)
- B. Usage
- C. Deviations

- D. Analysis (how the ITC meets or exceeds the project goals)
- E. Traffic and Safety Impacts
- G. Environmental Impacts (how the ITC accords with permits and Environmental Documents)
- H. Right-of-Way
- I. Utilities
- J. Maintenance (long term)
- K. History (other projects where ITC used)
- L. Inspection
- M. Schedule

ITP Section 6.6 describes the confidential nature of the ITC discussion and submission process. The DBTs are permitted to request one-on-one pre-ITC meetings to discuss potential ITCs. The purpose of the meetings is to provide the DBTs with a general overview of KYTC's assessment of a proposed ITC's viability. No final decisions are made in the meetings.

ITP Section 6.7 describes five possible responses KYTC may give to an ITC submission: 1) approved 2) approved subject to conditions 3) not approved but capable of resubmission 4) not approved, and 5) the submission is not an ITC.

ITP Section 6.8 discusses the incorporation of ITC(s) into the Technical Proposal and that the DBT's Price Proposal shall also reflect all incorporated ITCs.

ITP Section 6.9 discusses Kentucky Open Records law, confidentiality, and proprietary information contained in the ITCs.

## **B. How the ITC Will Be Considered in the Best Value Determination**

Each DBT proposer will submit one Technical Proposal and one Price Proposal. The RFP and the evaluation process for the Technical and Price Proposals does not distinguish between proposals that do not include ITCs and proposals that include ITCs. Both types of proposals (those that include ITCs and those that do not) are evaluated against the same technical evaluation factors, and a highest score determination for both types is made in the same manner. A pre-approved ITC may or may not result in a higher rating of the Technical Proposal, either on the whole or for categories within the Technical Proposal, and a pre-approved ITC also may or may not result in a higher score for the Price Proposal. However, in allowing ITCs, KYTC anticipates that both the outcomes of higher quality lower price will occur. The relevant Sections of the ITP, Sections, 2, 3, and 7, are attached.

## **C. What Happens if an ITC is Not Feasible**

The Contract Documents included in the RFP include provisions making it clear that the DBT is responsible for designing the Project in conformance with all requirements of the Contract Documents (including ITCs included in its proposal) and ensuring that any ITCs do not require modifications to the Environmental Documentation. ITP Section 6.1 states not merely that the DBT will be responsible for securing any necessary changes to the Environmental Documentation required by a proposed ITC, but that ITCs that require modifications to the Environmental Documentation will not be approved in the first place.

## **D. Timeline for ITC Approvals**

Please refer to the attached ITP excerpts, particularly Section 6.3 and 6.6.

#### **E. Betterments**

As noted above, KYTC wishes to encourage ITCs that will improve project quality as well as ITCs that reduce project costs or schedule without reducing quality. The evaluation process described above allows flexibility for the evaluators to consider quality enhancements.

Thank you for your assistance on this issue and your input and suggestions on other aspects of the RFP and Contract Documents. If you have any questions or concerns, please feel free to contact me at (502) 564-5102.

Secretary  
Kentucky Transportation Cabinet

Attachment

cc: Steve Waddle, P.E.  
Rebecca Goodman  
Andy Barber, P.E.