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STATE OF MICHIGAN
DEPARTMENT OF TRANSPORTATION
LANSING

KIRK T. STEUDLE
DIRECTOR

August 11, 2010

Mr. David Calabrese
Engineering and Operations Manager
Federal Highway Administration
315 W. Allegan Street, Room 201
Lansing, Michigan 48933

Dear Mr. Calabrese:

SEP-14 Waiver of Base Proposal

The Michigan Department of Transportation's (MDOT) design-build program utilizes one phase (low-bid) and two-phase (shortlist and final procurement) contracts. This letter outlines MDOT's proposed process for allowing each proposer on a design-build the opportunity to submit Alternative Technical Concepts (ATCs) for pre-approval and then to submit a proposal with or without ATCs. MDOT's method gives the contractor's team the flexibility to advance beyond the bare minimum approach, and offer the best plan for the money and provide the best value to the State of Michigan.

MDOT proposes to allow proposers to submit ATCs, consistent with 23 CFR 636.209, for review and approval (or disapproval) by MDOT during the pre-proposal period. The ATCs will be approved only if they meet certain requirements and are otherwise acceptable to MDOT. 23 CFR 636.209 permits ATCs 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." We understand that the concern underlying this requirement is to ensure fair and open competition, and to make sure that all proposers are competing for the same project.

MDOT hereby requests that the requirement to submit separate proposals for the "base" and "alternate" technical concepts be waived for all design-build projects, allowing each proposer the opportunity to submit ATCs for pre-approval and then to submit a single technical proposal with or without pre-approved ATCs and a single price proposal. MDOT has carefully crafted the procedure to avoid any potential unfairness. Pre-approval of deviations, from design requirements that otherwise would be deferred until after the contract is awarded, will be required as part of this process. The proposed ATC process gives MDOT the ability to factor the proposers' technical solutions into the selection process, allowing a true "best value" selection; and gives MDOT access to solutions from all proposers. It also gives the successful proposer a head start on implementation of its ATCs, and avoids unnecessary costs for proposers to advance a base design that ultimately will not be used.

Imposing a requirement for the proposers to submit separate proposals would impose an unnecessary burden on both the proposers and MDOT, and would likely deter proposers from submitting ATCs. MDOT has addressed the underlying concern regarding fairness by including minimum criteria for ATCs in the RFP. The deviations that will be allowed will not change the character of the project nor require any additional environmental approvals. MDOT therefore believes that a waiver of the requirement is appropriate.

Following is information supporting the waiver request:

- a. Review process and requirements. Enclosure 1 is an excerpt of the ATC provisions from the 9 Mile over I-75 Bridge Replacement RFP. These provisions are standard in all MDOT design-build contracts.
 - Section 3.8 sets forth MDOT's rationale behind the use of ATCs-further opportunity for innovation and flexibility and to allow pre-approved concepts be part of the best value decision. It also lists the contract documents that contain the requirements against which alternate concepts may be proposed, and clearly cites the approval criteria of "equal to or better" and permitted by environmental approvals. The use of one-on-one meetings (if required) may be requested by the proposer to discuss proposed ATCs.
 - Section 3.8.1 lays out the specific submittal and review process for ATCs including timeframes, actions by MDOT, and a re-submittal process. It also sets forth the detailed submittal requirements/contents of an ATC.
 - Section 3.8.2 clearly outlines the determinations that may be made by MDOT on submitted ATCs. It also clearly provides a notice to all proposers that approval of an ATC constitutes pre-approval of a deviation from requirements that would otherwise apply.

Confidentiality is vital to the success of ATCs. Confidentiality is a critical issue with proposers, who need to be reassured that their innovative thinking and concepts will not be shared with other proposers. This section also authorizes proposers to incorporate pre-approved ATCs into their proposals. Any proposer that incorporates an ATC must also provide a copy of the ATC approval letters, to facilitate MDOT's review of the as-proposed concept for compliance with the ATC approval requirements.

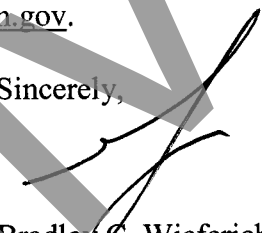
- b. How the ATC will be considered in the best value determination. Each proposer submits only one technical and price proposal. The RFP does not distinguish between a proposal that does not include any ATCs and proposals that include ATCs. Both types of proposals are evaluated against the same technical evaluation factors, and a best value determination is made in the same manner. A pre-approved ATC may or may not result in a higher technical rating in a particular evaluation factor and may or may not result in a lower price. However, it is the intent in allowing ATCs that both the outcomes of higher quality and lower price will occur.

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- c. How clauses assigning responsibility if an ATC is not feasible. The current contract documents include provisions making it clear that the design-builder is responsible for designing the project in conformance with all contract requirements (including ATCs included in its proposal) and is also responsible for obtaining all third party approvals required for ATCs. Provisions will be added to clarify that the design-builder must conform to the original RFP requirements if it is unable to obtain approvals or the concept otherwise proves to be infeasible.
- d. Timeline for ATC approvals. Please refer to the enclosed excerpts.
- e. Betterments. As noted above, MDOT wishes to encourage ATCs that will improve project quality as well as ATCs that reduce project costs without reducing quality. The evaluation process described above allows flexibility for the evaluators to consider quality enhancements.

MDOT is seeking your concurrence in the process outlined above. If you have questions, please contact me at 517-373-0030 or wieferichb@michigan.gov.

Sincerely,



Bradley C. Wieferich
Engineer of Design

Enclosures

cc: Kirk Steudle, MDOT
Greg Johnson, MDOT
Mark Van Port Fleet, MDOT
Wayne Roe, MDOT
Kathy Hulley, MDOT
Chris Youngs, MDOT
Kurt Zachary, FHWA

Attachment 1: Excerpt from 9 Mile over I-75 Bridge Replacement RFP- Design-Build Project Section 3 Procurement Process

3.8 Alternative Technical Concepts

MDOT realizes that the RFP Scope of Work was developed based on preliminary engineering and that each Proposer may have different approaches for accomplishing the same goals. MDOT has chosen to use the Alternative Technical Concepts (ATC) process set forth in this Section 3.8 to allow innovation and flexibility, to allow the design and construction to be completed together, thereby minimizing conflicts and maximizing speed and efficiency, and ultimately to obtain the best value for the motoring public. Unless specifically stated elsewhere in the Contract that "an ATC will not be considered" for a specific Contract requirement, ATC's may be proposed to change any Contract requirement believed to meet the goal of the ATC process.

Proposers may propose **up to five (5)** alternatives that are equal or better in quality or effect as determined by MDOT in its sole discretion and that have been used elsewhere under comparable circumstances. A concept is not an ATC if it merely results in reduced quantities, performance or reliability. Also, if it is determined by MDOT that the ATC is actually an error in the RFP, MDOT may issue an addenda to correct the error.

Each Proposer may request **up to two (2)** private meetings with MDOT to discuss proposed ATC's in addition to the one-on-one meetings discussed above. The meetings will be held at a time agreed to by the Proposer and MDOT. The discussions of Proposer ATC's will be confidential.

3.8.1 Submittal of ATCs

A Proposer may include an ATC in its Proposal only if it has been received by MDOT's Project Manager as described in Section 3.3 by 1:00 p.m., Eastern Time, on the ATC Submittal Due Date (identified in Section 2) and it has been Approved by MDOT (including conditionally Approved ATCs, if all conditions are met).

Each ATC shall be numbered sequentially, beginning with 1. Each ATC submittal shall be e-mailed to MDOT's Project Manager or 5 (five) copies delivered. Proposers must deliver the ATC's at least 3 (three) Working Days in advance of the private meetings to allow for advanced review by MDOT, unless otherwise requested and Approved by MDOT. ATC submittals shall include the following:

- A. Description. A detailed description and schematic drawings of the configuration of the ATC or other appropriate descriptive information (including, if appropriate, product details [e.g., specifications, construction tolerances, special provisions], and a traffic operational analysis);
- B. Usage. Where and how the ATC would be used on the Project;
- C. Deviations. References to all requirements of the RFP documents that are inconsistent with the proposed ATC, an explanation of the nature of the

- deviations from said requirements, impacts to other design elements, and a request for Approval of such deviations;
- D. Analysis. An analysis justifying use of the ATC and why the deviations from the requirements of the RFP documents should be allowed;
 - E. Impacts. Discussion of potential impacts on vehicular traffic, environmental impacts identified on appropriate environmental documents, community impact, safety and life-cycle Project, and infrastructure costs (including impacts on the cost of repair and maintenance);
 - F. History. A detailed description of other projects where the ATC has been used, the success of such usage, and names and telephone numbers of project owners that can confirm such statements;
 - G. Risks. A description of added risks to MDOT and other Persons associated with implementing the ATC (e.g., maintenance, impacts to other design elements, etc.);
 - H. Additional Testing and Inspection Requirements.

If a Proposer wishes to make any announcement or disclosure to third parties concerning any ATC, it shall first notify MDOT's Project Manager as described in Section 3.3 in writing of its intent to take such action, including details as to date and participants, and obtain MDOT's prior Approval to do so.

3.8.2 Preproposal Review of ATCs

MDOT may request clarifications and additional information regarding a proposed ATC at any time. Due to the time constraints of this Project's procurement process, MDOT will make every attempt to respond to the ATC within a timely manner. MDOT and the Proposer can discuss ATC's at private meetings or via teleconferences. Subject to the Freedom of Information Act, MDOT will use its best efforts to keep all discussions with Proposers regarding ATCs confidential, provided that under no circumstances will MDOT be responsible or liable to a Proposer or any other party as a result of disclosing any materials, whether the disclosure is deemed required by law, by an order of court, or occurs through inadvertence, mistake or negligence on the part of MDOT or its respective officers, employees, contractors, or consultants.

MDOT will review each ATC and may respond to Proposer with one of the following determinations:

- A. The ATC is Approved.
- B. The ATC is Conditionally Approved
- C. The ATC is not Approved.
- D. The ATC is not Approved in its present form, but may be Approved upon satisfaction, in MDOT's sole judgment, of certain identified conditions that shall be met or certain clarifications or modifications that shall be made.
- E. The submittal does not qualify as an ATC but may be included in the Proposal without an ATC (i.e., the concept complies with the baseline RFP requirements).
- F. The submittal does not qualify as an ATC and may not be included in the Proposal.

Proposer may incorporate up to five Approved ATCs as part of its Proposal (including conditionally Approved ATCs, if all conditions are met). The Proposer must clearly state which ATC's it is incorporating into its Proposal and that all conditions of the ATC will be met. If MDOT responded to an ATC by stating that it would be Approved if certain conditions were met, those conditions will become part of the Contract Documents. The ATC's submitted with the Technical Proposal will be considered to be part of the Contract Documents including any associated MDOT conditions.

If a Proposer submits an ATC based on a proprietary product, the Proposer is solely responsible for meeting the requirements referenced in 23 CFR 635.411. The Proposal Price should reflect any incorporated ATCs. Except for incorporating Approved ATCs, the Proposal may not otherwise contain exceptions to or deviations from the requirements of the RFP.