

Conducting a P3 Procurement

Webinar 3: Conducting a P3 Procurement

Webinar Series

- Webinar 1: An Overview of the P3 Procurement Guide
- Webinar 2: Preparing for a P3 Procurement
 - Recordings available at:
https://www.fhwa.dot.gov/ipd/p3/p3_training/webinars.aspx
- **Webinar 3: Conducting a P3 Procurement (today)**

Webinar Overview

- **Part 1.** Starting the Procurement through Development and Issuance of Request for Qualifications
- **Part 2.** Developing the RFP
- **Part 3.** RFP Issuance through Selection
- **Part 4.** Selection to Commercial and Financial Close
- Questions and Answers – 20 minutes.



Presenters



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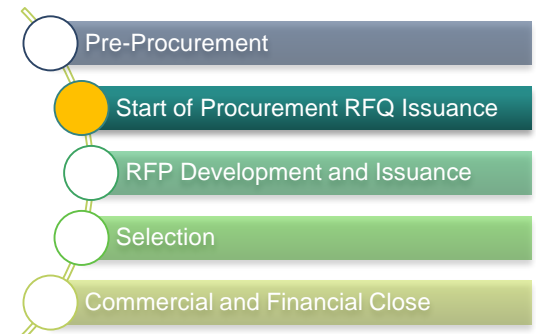
Part 1. Starting the Procurement - Issuance of Request for Qualifications



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Goals and Activities through RFQ Issuance

- **Goal: Structure a procurement process**
 - Conduct Procurement Strategy Workshop
 - Develop evaluation structure and procedures
 - Develop procedures to ensure full, fair and open procurement
 - Develop Organizational Conflict of Interest policies
 - Develop policies to ensure full, fair and open procurement that minimizes conflicts of interest



Goals and Activities through RFQ Issuance

- **Goal: Determine Request for Qualifications Terms and Basis for Shortlisting**
 - Determine RFQ terms and basis for shortlisting
 - Develop and issue RFQ
 - Evaluate and shortlist bidders based on SOQs submitted

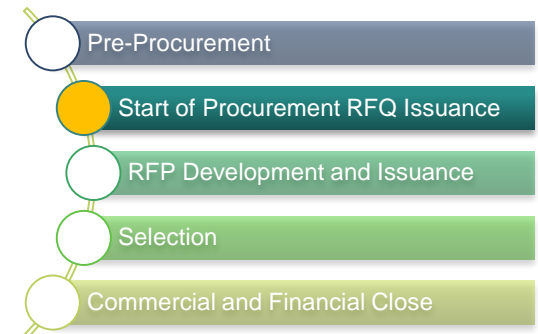


Starting the Procurement

- A. Establishing procurement strategy
- B. Developing evaluation criteria and submittal requirements
- C. Ensuring full, fair and open competition
- D. Organizational conflict of interest
- E. Developing evaluation structure and procedures
- F. Developing Request for Qualifications (RFQ)



1-A. Establishing Procurement Strategy



Establishing Procurement Strategy

- Procurement strategy workshop
- Alternative selection approaches
- Evaluation criteria and submittal requirements
- Other issues



Procurement Strategy Workshop

- Initial workshop focusing on project goals and how to meet them through different alternatives. To include:
 - Overall procurement strategy
 - Discussion on selection methodology, evaluation criteria
 - Agency decision-makers and those with knowledge about the project
- Confidential nature sensitive procurement information
- Recommendations from workshop should be reviewed by executive steering committee

Alternative Selection Approaches

- **Best Value Approach:** Most transportation P3 projects in the United States and Canada
- **Low Bid Approach:** Some agencies have elected to award P3 contracts to the lowest bidder (or highest bidder, for revenue positive projects) providing a technically acceptable proposal.



Best Value Selection Approach

- *How to evaluate cost relative to technical criteria and to determine the relative importance of the technical evaluation factors and subfactors?*
- **Formula Approach**
 - Pre-set formula combining price and technical scores
- **Tradeoff approach**
 - Decision as to which proposal represents best overall value to agency based on assessment regarding value provided by different proposals
 - Selection official reviews evaluator ratings and prices and exercises judgment to determine whether added value justifies higher price



Best Value Selection: Approaches to Evaluation

More Quantitative

Minimum Level to “Pass”	Adjectival Ratings	Price Evaluation + Technical Rating “Tradeoff”	Formulaic Approach
Based solely on aspects of the proposal that exceed the minimum	Adjectives: “Unacceptable” “Marginal” “Acceptable” “Highly Acceptable”/ Color ratings	Inform tradeoff decisions as to which proposal represents the best overall value to agency	Formula: Predetermined weight to price + Technical Score
Mitigates tendency to rate all proposals within a narrow band of passing marks which could result in less than “best value.”	Substantive narrative explanations for the adjective ratings needed. Can be used with tradeoff or formulaic approach.	Price evaluated against technical value specific to technical improvements proposed. E.g. MD Purple Line	Mathematically derived but scoring is still subjective. Impossible to predict what will be included in proposals, so formula may not always result in the best selection decision.

Low Bid Approach

P3s in Alberta Highway P3s in British Columbia

- Award P3 contracts to the lowest bidder (or highest bidder, for revenue positive projects)
- Long-term nature of contract requires agency to base selection on net present value (NPV) of payments
- **Advantage**
 - Structure of P3 and a pass/fail technical evaluation sufficiently assure project quality
- **Disadvantage**
 - Places additional emphasis on the RFQ process
 - Problematic if only a small number of proposers respond to the RFQ



1-B. Developing Evaluation Criteria and Submittal Requirements

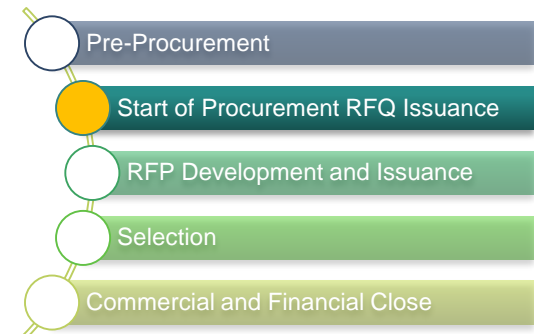


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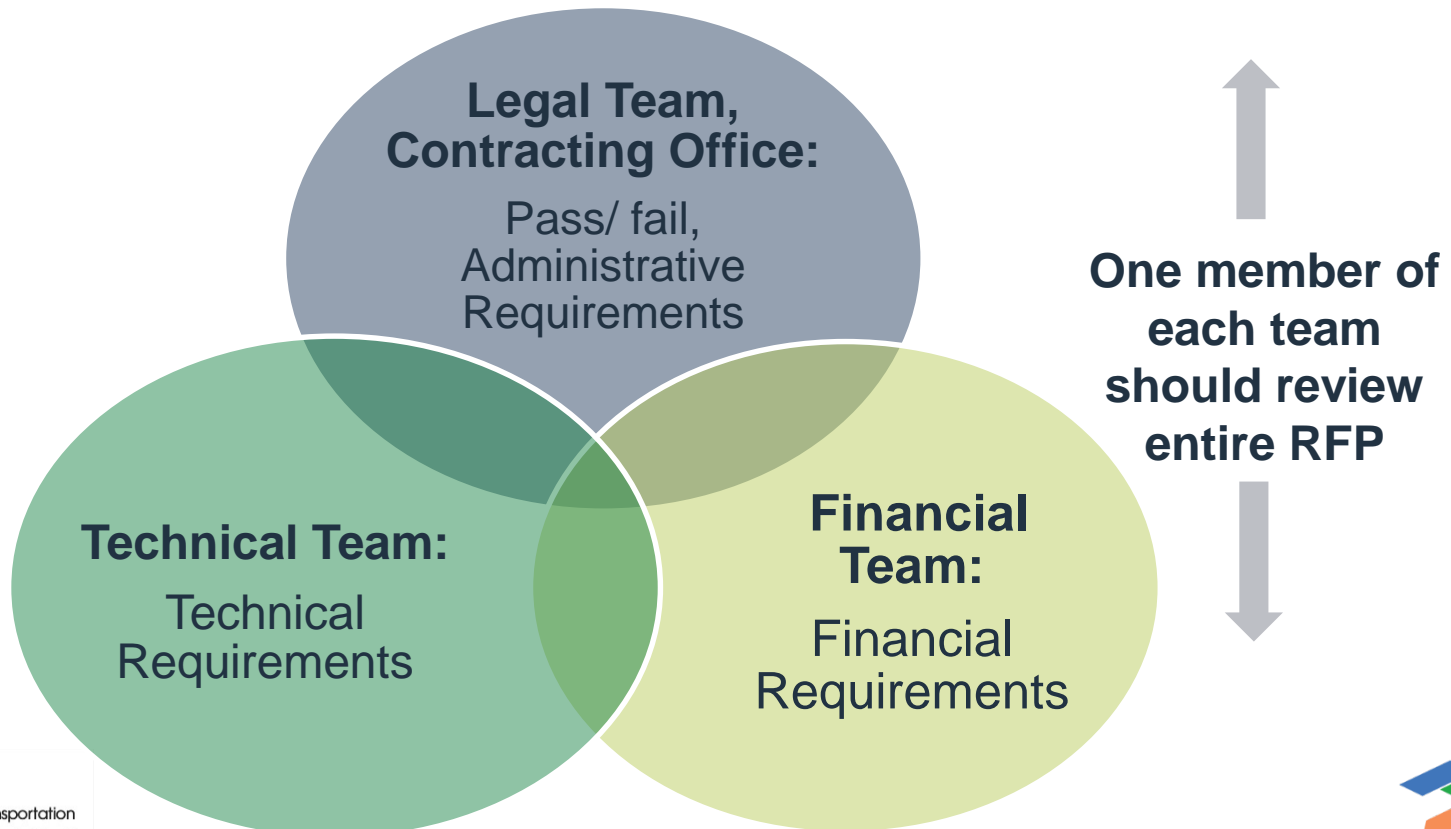
Evaluation Criteria

- P3 evaluation criteria and relative weightings should be determined at agency's executive level
- Consistent with the agency's goals
 - Indicate how criteria are tied to the agency's goals and objectives in procurement document
- Pass/fail criteria should incorporate standards used to determine contractor responsibility for other procurements and project-specific requirements



Submittal Requirements

- Developed by procurement team to match evaluation criteria and contractual requirements



Evaluation Criteria and Submittal Requirements: Examples

Texas, North Tarrant Express Maryland, Purple Line

- Proposal security
- Information demonstrating proposer's financial capability to complete, operate, and maintain the project over the long term
- Commitments from sureties that will issue payment and performance bonds covering design and construction of the project.

Texas, North Tarrant Express

- Requirement that proposals not exceed the available public fund amount

Affordability (or Upset) limits

- Requirement that the maximum price (or portion thereof) provided in the financial proposal not exceed a specified limit.
 - Requires proposers to focus on ways to match the agency's cash flow
 - Financial proposals exceeding the stated parameters may be rejected



Affordability (or Upset) limits: Examples

Texas, North Tarrant Express

- TxDOT aimed to get as much project as possible for the specified maximum public funds amount.
- RFP specified a maximum amount of public funds (\$600 M), a specified mandatory scope and up to nine optional improvements

Texas, I-635

- RFP specified an affordability limit of \$700 M for the public funding component
- Proposers had the option of submitting a proposal that exceeded the available public funds amount

Florida

- Many FDOT RFPs for P3 projects include upset limits



Options

- Procurement asks for **separate pricing for a “base” project and elements that the sponsoring agency has the option to include in the scope**, the sponsoring agency must consider how to factor the options into the selection process.
 - Option pricing is given less weight than the base project pricing.
 - If agency fails to consider option pricing, a cost analysis must be performed to justify the price.



Options (continued)

- FTA requires the agency to undertake a market value comparison before exercising any option and limits rolling stock options to 7 years following contract award.

See FTA's Contract Term Limitations Frequently Asked Questions, available at: <https://www.transit.dot.gov/funding/procurement/third-party-procurement/contract-term-limitations>.

Options - Examples

Texas, North Tarrant Express

- Required pricing for a number of potential options for “**ultimate scope**” improvements; proposer was unable to accommodate within its price for base scope.
- Successful proposer included some of the options within its base scope, leaving three options for different capacity improvements to be included in the as-awarded contract.

Denver, Eagle

- Included priced options for rolling stock, a storm sewer project, a grade separation project, and a bridge project
- The option pricing received 2 points out of the 60 points allocated to the financial proposal.
- The concession agreement specified a five-year deadline for exercising the rolling stock option.



1-C. Ensuring Full, Fair and Open Competition



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Ensuring Full, Fair and Open Competition

Steps that sponsoring agencies should consider to ensure that the P3 competition meets requirements for full, fair, and open competition for federally funded projects, as well as to comply with similar State law requirements.

- Preserving Competitive Interest
- Ensuring Fairness and Transparency
- Public Access to Information or Open Records



FTA Best Practices Procurement Manual (BPPM)

- **Primary purpose:** obtain the best quality and service for the least cost.
- **Secondary purpose:** guard against favoritism and profiteering at public's expense, provide equal opportunities for all qualified offerors to participate in public business opportunities.
- Recipients of Federal assistance must use third party procurement procedures that provide full and open competition.
- ✓ **Lack of advance planning is not an acceptable justification for use of noncompetitive procurement procedures.**
- Recipients must constantly seek to permit and encourage meaningful interest and offers from all qualified entities and limit or rule out offerors only for business reasons that generally include cost, quality, and delivery.



Preserving Competitive Interest

*In most cases, the **number of firms potentially interested in proposing for a P3 contract is significantly less than the number of firms likely to respond to a DBB procurement or even a DB procurement...***

- High level of complexity and long-term nature of P3 projects.
- Transfer of risk to the private sector.
- Requirements for equity investment and borrowing.
- Limitations on bonding capacity.
- Level of investment required to propose.

..However the market is maturing.



Preserving Competitive Interest

Limiting Competition

- Shortlist no more than four firms
- FHWA's Design-Build Rule:
 - Maximum of 5 shortlisted teams.
 - “Open” competition does not require the agency to allow all qualified firms to compete.
- Ensure only most highly qualified teams participate in the procurement
- Keep in mind that one or more of the firms might decide to drop out of the competition



Preserving Competitive Interest

Maintaining Confidentiality

- Commitment to confidentiality included in both RFQ and the RFP
 - Non-disclosure is critical for ATCs and AFCs
- Information leakage prevention measures
- Under some circumstances, the agency may be compelled to disclose information relating to ATCs.



Preserving Competitive Interest

One-on One Meetings

- Enhances competition
 - Allows proposers to better understand agency's goals and project needs
 - Improves quality of the proposals
- Levels playing field for new firms
- Enables agency to improve quality of RFP documents based on comments from proposers



Preserving Competitive Interest

Stipends to Unsuccessful Proposers

- Recognizes effort since P3 proposals
 - Require significant resources for a cost and date certain proposal with committed financing
- In exchange agency receives the right to use technical concepts and other intellectual property
- Amount depends upon size and complexity of project
 - Cover part costs of unsuccessful proposal
 - Typically 0.15 - 0.48 percent of contract cost
 - May be higher for lower priced projects due to fixed costs of proposing

Ensuring Fairness and Transparency

- Agencies should provide information about the project and selection methodology for proposers to:
 - Better understand agency requirements
 - Provide their best offers in response to the RFP
- However, too much information about factors and subfactor weightings may lead proposers to:
 - Focus on the criteria that have a significant effect on scoring
 - Ignore lower weighted criteria

Ensuring Fairness and Transparency (continued)

FHWA's Design-Build Rule

Sec. 636.209 requires that solicitation include:

- ☐ Requirements of technical proposal
- ☐ Requirements of price proposal
- ☐ All factors that will affect contract award
- ☐ Significant subfactors that will affect contract award
- ☐ Relative importance of factors and subfactors



Public Access to Information and Open Records

- Agency may choose to disclose RFP and RFQ documents to public
- Information provided by private proposer is confidential until after award
 - TxDOT and VDOT websites include copies of procurement packages as well as the signed contracts

Prior to Issuance of RFP

After RFP Issuance

Agencies typically limit distribution of the industry review documents to the shortlisted proposers only

Agencies may post the procurement package



1-D. Organizational Conflicts of Interest



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Organizational Conflicts of Interest

FTA and FHWA requirements include taking appropriate steps to avoid OCI (including perceived OCI)

State OCI requirements may also apply.

OCI policy

- improves confidence of the proposers that the procurement will be fair
- promotes public confidence in the integrity of government procurements.



Organizational Conflicts of Interest Policy Decisions

- Extent to which existing agency consultants may be allowed to participate on proposer teams

FHWA's Design-Build Rule

- Prohibits firms who assist in preparation of an RFP document from participating on proposer teams unless
 - The role of the consultant or sub-consultant was limited to provision of preliminary design, reports, or similar “low-level” RFP documents; Not assistance in development of instructions to offerors or evaluation criteria, or
 - Where all documents and reports delivered to the agency by the consultant or sub-consultant are made available to all offerors



Organizational Conflicts of Interest Policy Decisions (continued)

- Special requirements apply to consultants working on NEPA documents
 - Ensure decisions made under NEPA are not influenced by a consultant's interest in future work

If NEPA Completed Prior to Issuance of RFP

Contracting agency may allow a consultant or subconsultant who prepared the NEPA document to submit a proposal in response to the RFP.

If NEPA not Completed Prior to Issuance of RFP

Contracting agency may allow only if the contracting agency releases such subconsultant from further responsibilities towards preparation of the NEPA document



Organizational Conflicts of Interest

Issues Relating to Proposer's Organization

- Proposers must be aware of the potential consequences of failing to identify organizational conflicts
- Individual team members in proposer's organization should identify
 - prior assignments relating to the project and business
 - personal relationships with individuals who are part of the sponsoring agency's team for the project



Organizational Conflicts of Interest Issues Relating to Agency Team Members

- Agency team member
 - Married or otherwise related to an individual employed by one of the proposer team members
 - Formerly employed by a proposer team member whose retirement plan owns stock in the company
 - Married to a consultant who works for one of the proposer team members
- Timely, proper disclosure
 - Agency will have the ability to remove the member from the solicitation process



1-E. Developing Evaluation Structure and Procedures

Developing Evaluation Structure and Procedures

- Evaluation Teams
- Selection Committee and Selection Official
- Evaluation Manuals
- Training
- Communications with Proposers
- Document Control



Evaluation Teams

- Perform pass/fail and qualitative evaluations of SOQ/proposals for :
 - Compliance with administrative requirements.
 - Technical elements.
 - Financial elements.
- Subject to oversight by leadership
- All individuals involved in the evaluations are required to sign confidentiality commitments
- **Subcommittees may include specialized consultants (“advisors”)**



Selection Committee

- Receives reports and detailed evaluation information from the evaluation subcommittee chairs
- Decides whether to accept the ratings recommended by each subcommittee
- May include one or more of the subcommittee chairs
- Includes members with knowledge of both technical and financial aspects of project development and operations
- **Almost always exclusively staffed by public agency employees**



Evaluation Manuals

- Best to develop before issuance of RFP (or RFQ)
- Should include
 - explanation of evaluation process
 - list of evaluators
 - protocol for communications among evaluation team members
 - other pertinent information about the procurement
 - checklists of submittal requirements and evaluation forms



Training



- Conducted before the start of evaluation
 - Overview of the procurement
 - Identify purpose of the evaluation process
 - Walk through the evaluation manual
 - Discuss process to be followed in rating submittals
 - Emphasize importance of maintaining confidentiality
 - Ensures everyone associated with the evaluation understands rules of the game
- **Even if individual has been part of a similar procurement, training should be encouraged.**



1-F. Developing the RFQ



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Developing Request for Qualifications

- Key considerations
- Communicating requirements to proposers
- Rules of the game (teaming/ contract)
- Obtain necessary approvals to issue RFQ



RFQ Development: Key Considerations

- **Quality**

- Rely on P3 structure, contract terms and conditions for incentives to provide a high-quality project

- **Cost and Accelerated Delivery**

- Best value selection allows agency to consider cost, schedule and quality in proposer selection.

- **Track Record**

- Firms with relevant P3 experience may not have much local experience
- Include evaluation criteria encouraging teaming with local firms, as appropriate



SOQ Technical and Financial Criteria

Criteria Category		Evaluation Parameters
Technical Criteria	Organizational Capacity	<ul style="list-style-type: none"> • Project team organization. • Key team members and their qualifications. • Key subcontractors and their qualifications. • Staff/resource capacity and availability. • Specialized capabilities (design/ construction/ operations/ maintenance) relevant to the project. • Quality assurance organization and approach. • Approach and understanding of project. • Understanding of local context.
	Past Technical Performance	<ul style="list-style-type: none"> • Experience with P3 projects. • Experience with similar type of projects. • Specialized expertise in risk mitigation and management on other P3 projects of projects of comparable complexity. • Quality performance. • Safety record. • Experience working with the procuring agency and/or local subcontractors. • References
	Project-specific	<ul style="list-style-type: none"> • Technical approach. • Understanding of project and local context.



SOQ Technical and Financial Criteria

Criteria Category		Evaluation Parameters
Financial Criteria	Financial Capacity	<ul style="list-style-type: none">Financial capacity of the proposers (ability to raise equity).Bonding record or proof of bonding capability.Legal and financial disclosures.
	Past Financial Performance	<ul style="list-style-type: none">Past performance on awarded contracts completion, liquidated damages, quality, claims, fines, schedule).History of performance (unsubstantiated claims, fines, suits, quality, accuracy, schedule).
	Project-specific	<ul style="list-style-type: none">Financial approach.

RFQ - Rules of the Game

■ Teaming

- Different teams may include same or related firms
- Merger may require team to re-form or withdraw
- If affiliates are sufficiently separate, agency may allow both teams to proceed
- Limited subcontractors/expertise and exclusivity

■ Rules of Contact

- RFQ should identify the agency's point of contact
- prohibit contact with the agency or stakeholders

RULES

1. you CAN....
2. you CAN'T...
3. you CAN....
4. you CAN'T



Test Your Knowledge

Check the statement that is incorrect:

- The Procurement Strategy Workshop should:
 - ☐ Focus on the goals and objectives of the project and aim to develop a procurement strategy for the project
 - ☐ Include industry participants who are likely to propose on the project
 - ☐ Include discussion about selection methodology and evaluation criteria
 - ☐ Require all attendees to sign confidentiality agreements

Test Your Knowledge

Check the statement that is incorrect:

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Test Your Knowledge

- What strategies can the agency adopt to preserve competitive interest:
 - ☐ Limiting competition by shortlisting no more than 4-5 firms
 - ☐ Holding one-on-one meetings with proposers
 - ☐ Offering stipends to unsuccessful proposers
 - ☐ Stating commitment to confidentiality in both the RFP and RFQ

Test Your Knowledge

- What strategies can the agency adopt to preserve competitive interest:
 - ✓ Limiting competition by shortlisting no more than 4-5 firms
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Questions?



BREAK



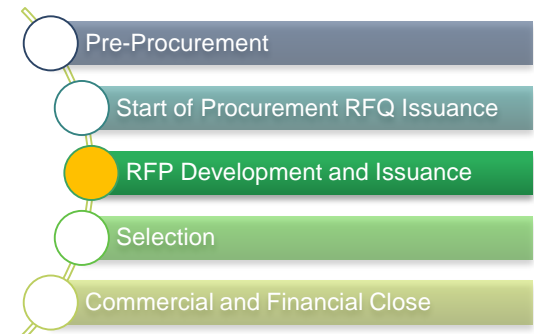
Part 2. Developing the RFP



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Goals and Activities for Final RFP Development

- **Goal: Develop draft RFP**
 - Develop draft RFP procurement terms
 - Develop draft RFP contract terms
- **Goal: Develop final RFP**
 - Industry review process
 - Develop final RFP procurement terms
 - Develop final RFP contract terms
 - Continued project due diligence

Developing RFP

- A. Establish procurement schedule and submittal requirements
- B. Develop draft RFP contract terms and commercial terms
- C. Industry review process and developing final RFP



2-A. Establish procurement schedule and submittal requirement

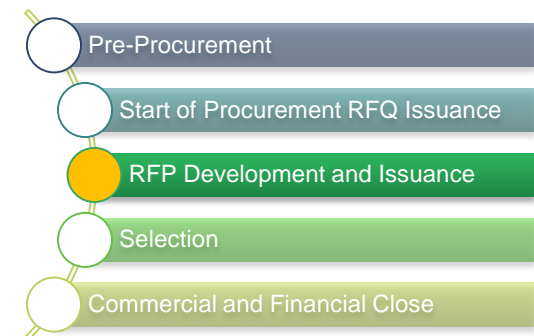


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RFP Schedule Drivers

Key Schedule Drivers (Procurement Phase)	Potential for Schedule Risk
Approval of elected officials	High
Federal agency approvals	Medium
Federal funding/ financing (e.g. TIFIA) application (if relevant)	High
Interactive one-on-one sessions with shortlisted proposers and ATC and AFC meetings.	Medium
Negotiations on final P3 agreement.	Medium-High
Commercial close	Medium
Financial close	Medium-High

RFP Development Key Considerations

RFP development is significantly more complex than RFQ development

- Submittal requirements
- Cost and pricing data
- DBE/SBE requirement
- Technical/ financial and administrative proposals
- Financial model
- Evaluation and selection process
- Pre-award process



RFP Development Key Considerations (continued)

- Flexibility for innovation
- Special purpose entity – changes in teams and key staff
- Proposal security
- Bid validity period
- Soliciting teams for multiple project delivery structures

2-B. Developing Draft RFP Contract terms and Commercial terms

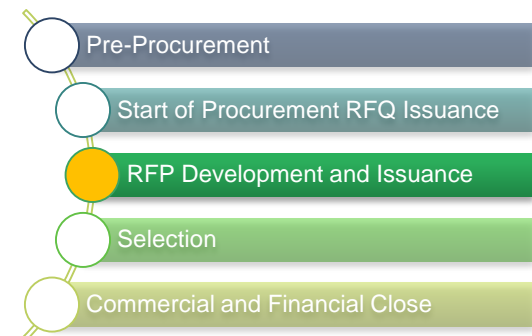


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Agency Decisions: Commercial Terms

- Scope and term of the concession
- Payments by the public agency
- Requirements relating to financial close
- Financing issues
- Requirements for design, construction, equipment supply, operations and maintenance.
- Requirements relating to property acquisition, hazardous materials, site conditions, utility relocations, and third parties

Agency Decisions: Commercial Terms (continued)

- Agency changes, including the possibility of changes in required service
- Requirements to be met at handback
- Labor-related requirements
- DBE and subcontracting requirements
- Ethical requirements
- Indemnification
- Default provisions.
- Compensation upon termination.

Agency Decisions: Commercial Terms (continued)

- Dispute resolution
- Changes in ownership
- Insurance and performance security requirements (bonds, letters of credit, parent company guaranties)
- Limitations on liability (consequential damages and caps on liability)
- For revenue risk projects, provisions assuring the concessionaire that future revenues will not be adversely impacted by future projects
- Relief events and remedies

Agency Decisions: Risk Allocation

- **Hold a risk workshop** early in the procurement process
 - E.g. high cost of delays in project completion due to Concessionaire's finance-related obligations
- **Risk splitting** between parties
- **Bands** for allocation of risk
- Agency staff/ advisors must be familiar with legal issues affecting risk allocation



Determine Precedent Documents

- Precedent may be
 - Comparable projects undertaken by another agency in the same State
 - Project from another State
 - A recently negotiated and executed P3 contract
- Factors
 - Similarities between the proposed risk allocation and business terms of the proposed P3 and the risk allocation and terms of the precedent documents
 - Level of effort required to modify the precedent documents

Developing Performance Requirements

- Identifying stakeholder expectation
 - E.g., operational goal: reducing life-cycle cost, improving mobility, or increasing ridership.
- Defining the essential function required to achieve that goal
- Developing performance requirements to meet the essential function.
 - Developing performance criteria or measures or metrics to evaluate performance.

Strategic Highway Research Program (SHRP2) S2 R07. S. Scott, L. Konrath, and T. Ferragut, Framework for Performance Specifications: Guide for Specification Writers



Developing Draft RFP Reference Documents

- As a matter of information only and not suitable for inclusion in the contract documents
- Reference documents serve to:
 - present potentially useful information to proposers
 - avoid claims that information available to the sponsoring agency was withheld from the proposers
- Historical data versus current investigation

2-C. Industry Review Process and Final RFP



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Industry Review Process and Final RFP



- Ensure robust approach to risk allocation and technical requirements and high-quality competition
- Disadvantages:
 - RFP may be modified based on requests from proposers that are ultimately unsuccessful
- May become less important as market matures



Test Your Knowledge

- Which of the following may be considered a precedent?
 - ☐ Comparable projects undertaken by another agency in the same State
 - ☐ Project from another State
 - ☐ A recently negotiated and executed P3 contract
 - ☐ Any of the above

Test Your Knowledge

- Which of the following may be considered a precedent?
 - ☐ Comparable projects undertaken by another agency in the same State
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 - ☒ Any of the above

Part 3. RFP Issuance through Selection Overview



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Goals and Activities through Selection Process

- **Goal: Revise RFP as Needed**
 - Conduct meetings with proposers
 - Reconsider prior decisions as appropriate
 - Issue addenda
- **Goal: Evaluate Alternative Technical Concepts (ATC) and Alternative Financial Concepts (AFC)**
 - Assess ATCs and AFCs
 - Consider impact of proposed ATCs on the NEPA process

Goals and Activities through Selection Process

- **Goal: Evaluate Proposals**
 - Evaluate proposals based on pre-determined evaluation process and guidelines
 - Select preferred proposal
 - Award (with or without negotiations)
- **Goal: Proposal Revisions, if applicable**
 - Conduct competitive negotiations
 - Receive and evaluate revised proposals (BAFOs)

RFP Issuance through Selection

- A. Continuing dialogue with proposers
- B. ATC and AFC
- C. Evaluation of proposals
- D. Proposal revisions



3-A. Continuing Dialogue with Proposers



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Continuing Dialogue with Proposers

Confidential Meetings with Proposers

- Subject of meetings can range from:
 - Input related to draft documents
 - Discussion of technical / commercial terms
 - ATCs and AFCs
 - Project presentations
- Confidentiality and fairness
- Discussions are not binding
- Need to assess specific laws applicable to the agency



Continuing Dialogue with Proposers

Q&A Process

- Non-confidential and providing both the questions and responses to all proposers
- RFP may allow confidential questions if certain criteria are met but agency may determine that all proposers need to see the response
- Allows agency to:
 - refine and clarify the RFP and ensure a robust and competitive procurement
 - identify and resolve any ambiguities in the P3 agreement documents
 - identify issues that are important to multiple proposers and that may be critical for project feasibility and to maintain competition



Continuing Dialogue with Proposers

Q&A Process – Successful Practices

Proposers	Agency
Provide detail / raise questions they do not have time to discuss in one-on-one meetings	Set Q&A rules in the ITP (format, timeline, number, categorization)
Provide input from their lenders, sureties, insurers identifying potentially problematic requirements, especially if post-selection negotiations are limited	Combine each proposer's questions and agency responses into a single matrix that is issued to all proposers; Clean up the Q&A prior to the proposal due date, and issue a final consolidated set of Q&As



Continuing Dialogue with Proposers

Reconsider Prior Decisions

- Agencies may reevaluate positions taken and prior decisions as a result of proposer input and other factors
- Once the need to change published documents is identified, an addendum will be prepared and issued



Continuing Dialogue with Proposers

Reconsider Prior Decisions - Example

Texas, North Tarrant Express

TxDOT changed the following from as-issued RFP:

- Duration between commercial and financial close based on proposer input about achieving financial close on a TIFIA loan and PAB.
- Scope to match public funding limitation of \$600m (smaller base scope)



3-B. Alternative Technical Concepts (ATCs) and Alternative Financial Concepts (AFCs)



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Alternative Technical Concepts (ATC) Process

FHWA defines ATC as:

“a request by a proposer to modify a contract requirement, specifically for that proposer’s use in gaining competitive benefit during the bidding or proposal process...”

[and] must provide a solution that is equal to or better than the owner’s base design requirements in the invitation for bid (IFB for DBB) or request for proposal (RFP for DB) document”



Alternative Technical Concepts (ATC) Process - Justification

- Encouraging Innovation
 - Particularly relevant if design is advanced or standard specifications may limit innovation
- Obtaining Competitive Pricing for Innovations
 - Incorporation of ATCs from unsuccessful proposers
- Transfer of Liability for Defective Design
 - Concessionaire cannot claim agency provided defective design



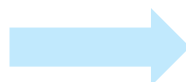
Relationship between ATC and NEPA and Potential Impact

If ATC Is
accepted before
issuance of Draft
NEPA document



Minimal Impact. Notice of Intent may need to be issued if no longer accurate/ complete

If ATC Is accepted
after Draft EIS &
before Final EIS



Moderate Impact.
Supplemental Draft EIS may be required if ATC results in a new alternative/ impact

If ATC Is
accepted after
Final EIS/ ROD



Impact must be assessed.
Examine Final EIS to determine if the changes from ATC result in significant environmental impacts



Strategies to Avoid/ Minimize NEPA Impact of ATC

- Prepare EIS to cover a broader scope
- Anticipate effects of possible ATCs and account for them in the EIS
- If supplemental EIS is required, only activities directly affected by supplement should be suspended
- ***Relatively few ATCs have broad project impacts***



Alternative Financial Concepts (AFCs)

- Allow private sector proposers to submit for pre-approval, on a confidential basis, financial concepts that deviate from the RFP requirements
 - Encourage financial innovation and creativity
- RFP should identify AFC requirements



3-C. Evaluation of Proposals



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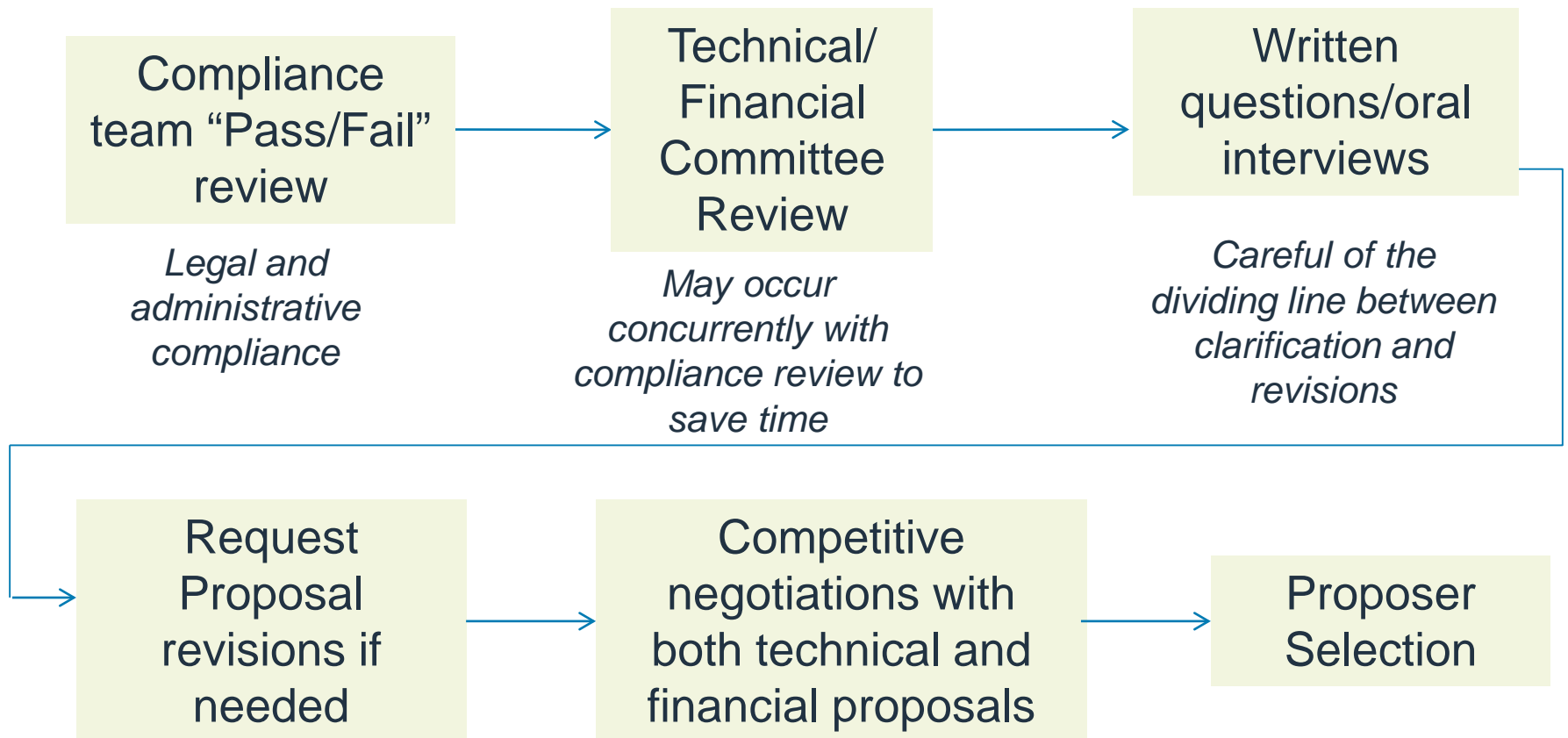
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Proposal Evaluation – Typical Stages



Proposer Selection and Results of Evaluation

- Selection committee's final decision is presented to administrative leadership for final approval
 - Agency's executive director (or equivalent function) may act as the selection official
- Several ways to proceed
 - Award with or without negotiation
 - Discussions and requests for revised proposals from multiple proposers
 - Termination of procurement



Proposer Selection and Results of Evaluation (continued)

- Proposer may be deemed to have violated its obligation to negotiate in good faith in case of
 - Failure to participate in reasonably scheduled negotiation meetings with the agency
 - Insistence upon terms or conditions inconsistent with the RFP
- In absence of satisfactory agreement with best value proposer
 - Require select proposer to adhere to RFP requirement
 - Reject all proposals
 - Issuing RFP revisions to the proposers
 - Proceeding to the next most highly ranked proposal



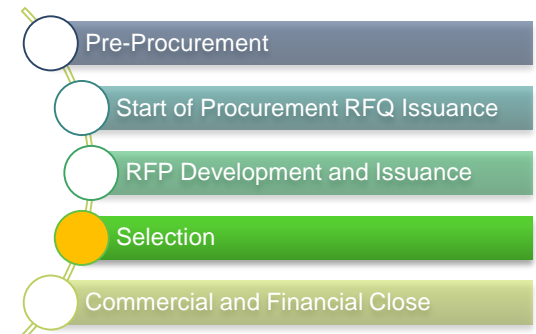
3-D. Proposal Revisions



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Proposal Revisions

- Competitive negotiations
- Establish competitive range
- Discussions
- RFP Revisions/ Best and Final Offers



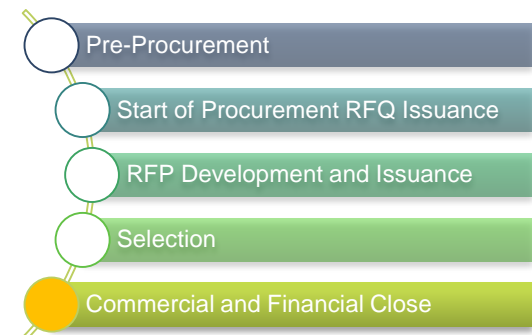
Part 4. Selection to Commercial and Financial Close



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Goals and Activities for Commercial and Financial Close

- **Goal: Commercial and Financial Close**
 - Finalize the P3 agreement with selected proposer
 - Fulfill requirements of award and contract execution
 - Commercial close
 - Financial close

Selection to Commercial and Financial Close

- A. P3 agreement negotiation
- B. Award, contract execution, and contract start-up
- C. Financial close



4-A. P3 Agreement Negotiation



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Negotiation Advantages

- Key Advantage: ***Engage in negotiations following selection of a proposer and prior to award***
 - Enables agency to obtain modifications in key areas
- Competitive leverage to ask selected firm to incorporate ATCs of unsuccessful proposers
 - Agency will advise the selected proposer of the proposed ATC
 - Parties will negotiate any resulting change in price
 - Alternatively may be implemented by post-award Change Order
- Competitive leverage for other deal terms
 - NTE required independent engineer agreement to be finalized before commercial close.



Negotiation Activities

- Identify and incorporate proposal commitments
- Incorporate design and other concepts (e.g. ATC)
- Make adjustments in favor of the agency for any errors or gaps in the base case financial model
- Adjust pricing due to intervening causes
- Other matters at agency's election



4-B. Award, Contract Execution and Contract Start Up



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Typical Requirements for Award and Contract Execution

- Delivery of the project agreement by the proposer
- Delivery of performance security
- Any parent guarantees
- Evidence of insurance
- Evidence of authorization, legal opinions, ancillary documents
- For revenue-positive projects, an upfront payment
- If financial close after commercial close: schedule and financial close security



Other Issues Affecting Commercial Close

- Additional approvals or reviews may be required from either State or Federal agencies
- NTE and LBJ Express projects, State law required:
 - Submittal of the P3 agreements to the State attorney general for a determination of “legal sufficiency.”
 - Submittal to the State’s legislative budget board and the State auditor
 - Publication of certain concessionaire financial information
- ***Agencies should review applicable State and local laws to determine the requirements that may apply with respect to P3 agreements***



Contract Start-up

- Activities related to financial close
- Other activities
 - Agreement may provide a limited NTP with early work at concessionaire's risk or agency cost
 - Submission of deliverables by concessionaire, e.g., detailed project schedule and updates to proposal or final key subcontracts, if not submitted previously
- **Agency should train team for administration of P3 agreement**



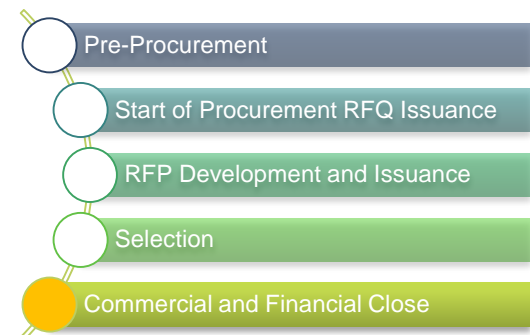
4-C. Financial Close



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Financial Close

Typical Requirements

- Satisfaction of all of conditions to commercial close, including execution of the P3 agreement.
- Executed initial funding and initial security documents.
- Executed lenders' direct agreement
- Legal opinions if not provided at commercial close.
- An update of audit and opinion obtained from independent model auditor regarding suitability of base case financial model that incorporates any agreed-upon proposed amendments



Financial Close

Review of Loan Documents

- Primary concern: ensuring funds, debt are used for authorized purposes and agency's interests are protected
- A P3 agreement may include provisions that:
 - Restrict lenders from obtaining security interest in the agency's interest in the project, ROW or agency's rights
 - Require debt instruments to claim principal and interest owed against concessionaire only and not against the State
 - Acknowledge that lenders have no right to seek damages from the agency



Financial Close

Legal Opinions

- All parties to contracts will need to provide legal opinions:
 - Due authorization
 - Execution, delivery, enforceability
 - Confirmation that all required approvals have been obtained from third parties
 - Disclosure of litigation or other contracts relevant to the transaction

Legal opinions are not normally required for public agency construction contracts, so agency procurement personnel may not be familiar with the underlying issues associated with opinions



Financial Close

Potential Issues

- Financial close often happens months after commercial close in the U.S.
 - In Canada it happens within a day
- P3 agreement or Instructions to Proposers (ITP) will identify excusable circumstances for failure to reach financial close by date specified:
 - Failure to obtain timely NEPA approval
 - Agency's failure to deliver legal opinion in favor of lenders
 - PABs or TIFIA delays for specific reasons
 - Temporary restraining order from court



Financial Close

TIFIA, PABs, Other Lender Requirements

- TIFIA closing may occur simultaneously with rest of the project financing, or may occur separately.
 - U.S. DOT enters an agreement with the borrower, which could be the P3 project sponsor or the P3 project's private sector partner
- PAB closing involves the issuance of the bonds by authorized public entity and transfer of proceeds of the bond issuance to the private sector partner
 - Private partner repays the issuer with revenues
- Agency and lender enter into a “Direct Agreement” describing each party's rights and remedies and process in case of concessionaire default



Test Your Knowledge

- What are the typical requirements of financial close?
 - ☐ Satisfaction of all of conditions to commercial close, including execution of the P3 agreement.
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 - ☐ Executed lenders' direct agreement
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 - ☐ All of the above

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Q&A Panel



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FHWA P3 Toolkit

Fact Sheets	Primers	Guidebooks	Analytical Tools
<ul style="list-style-type: none">▪ FHWA P3 Toolkit▪ Risk Valuation & Allocation▪ Value for Money Analysis▪ Financial Structuring▪ Analytical Studies▪ Conducting Procurements▪ Monitoring & Oversight	<ul style="list-style-type: none">▪ Establishing a P3 Program▪ Risk Assessment▪ Value for Money Assessment▪ Financial Structuring & Assessment	<ul style="list-style-type: none">▪ Risk Assessment▪ Value for Money Assessment▪ Benefit-Cost Analysis for P3 Delivery▪ P3 Project Financing▪ Model Contracts▪ Successful P3 Practices▪ P3 Procurement	<ul style="list-style-type: none">P3-SCREEN<ul style="list-style-type: none">▪ P3 viability evaluation prior to project developmentP3-VALUE<ul style="list-style-type: none">▪ Risk Assessment▪ Value for Money▪ Benefit-Cost Analysis▪ Financial Viability Assessment

Webinar recordings on are also available on the web.

