Martin O'Malley, *Governor*
Anthony G. Brown, Lt. *Governor*

State Highway Administration

Darrell B. Mobley, *Acting Secretary*
Melinda B. Peters, *Administrator*

MARYLAND DEPARTMENT OF TRANSPORTATION

September 18, 2012

Mr. Gregory Murrill
Division Administrator
Federal Highway Administration
City Crescent Building
10 South Howard Street, Suite 2450
Baltimore, MD 21201

Attention: Mr. Jitesh Parikh

Dear Mr. Murrill:

The State Highway Administration (SHA) utilizes the "Competitive Sealed Proposals" (CSP) procurement method as defined in the Code of Maryland Regulations (COMAR) 21.05.03 to procure design-build contracts. The intent of this process is to allow SHA to award the contract to the Proposer that submits the Proposal which is determined to be the most advantageous to the State considering the evaluation factors set forth in the Request for Proposals (RFP). The CSP method gives the contractor's team the flexibility to advance beyond the bare minimum approach, offer the best plan for the money, and provide the best value to the State of Maryland.

The SHA allows proposers to submit Alternate Technical Concepts (ATCs), consistent with 23 CFR 636.209, for review and approval (or disapproval) by the SHA during the pre-proposal period. The ATCs will be approved only if they meet certain minimum requirements and are otherwise acceptable to the SHA. 23 CFR 636.209(b) 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.

The SHA has developed a methodology for implementing ATCs that we believe enhances the effectiveness of the process described in 23 CFR 636. The SHA hereby requests a programmatic waiver of the requirement to submit separate proposals for the "base" and "alternate" technical concepts for projects procured utilizing the design-build procurement method. SHA's process allows each proposer the opportunity to submit ATCs for pre-approval and then to submit a proposal with or without ATCs. This process, with prior FHWA approval, has been utilized successfully on multiple previous contracts including the Intercounty

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Connector, I-95 at Contee Road, and US 113 projects. The SHA also intends to utilize this process on three design-build contracts we are currently in the procurement process.

The SHA 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 the SHA the ability to factor the proposers' technical solutions into the selection process, allowing a true "best value" selection; and can give the SHA 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 imposes an unnecessary burden on both the proposers and SHA, and may deter proposers from submitting ATCs. The SHA 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. The SHA therefore believes that a waiver of the requirement is appropriate.

The following is information supporting the waiver request:

(a) Review process and requirements. Attachment 1 is a sample excerpt of the ATC provision from an RFP. This process and requirements would be used for all contracts.
- Section 2.08.02.7 sets forth SHA'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.
- Section 2.08.02.8 lays out the specific submittal and review process for ATCs including timeframes, actions by SHA, the use of one-on-one meetings (if required) and a resubmittal process.
- Section 2.08.02.9 sets forth the detailed submittal requirements/contents of an ATC.
- Section 2.08.02.10 clearly outlines the determinations that may be made by SHA 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. This and the first sentence of Section 2.08.02.12, 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. Section 2.08.02.13 outlines the process for one-on-one meetings, further reinforces the confidentiality of the ATC process.
- Section 2.08.02.11 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 the SHA'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 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

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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 higher quality (technical rating) in a particular evaluation factor, but must 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.

(c) How clauses assign responsibility if an ATC is not feasible. The contract requirements make 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 are also included 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 attached excerpts.

(e) Betterments. As noted above, the SHA 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.

Thank you for consideration of this request for our design-build program. We will, subject to your approval of this request under the Special Experimental Program 14 (SEP-14), provide a short evaluation of the proposed process annually. If you have any questions, please do not hesitate to contact me or Ms. Lisa B. Choplin, Chief, Innovative Contracting Division, SHA at 410-545-8824, toll free 888-228-5003 or via email at lchoplin@sha.state.md.us.

Sincerely,

Melinda B. Peters
Administrator

By: Kirk G. McClelland
Kirk G. McClelland
Director, Office of Highway Development

Attachments

cc: Ms. Lisa B. Choplin, Chief, Innovative Contracting Division
Mr. Jeff Folden, Assistant Division Chief, Innovative Contracting Division

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ATTACHMENT 1
Sample Excerpt from RFP

2.08.02.7 Alternative Technical Concepts

The Administration has chosen to use the alternative technical concept (ATC) process to allow innovation and flexibility to be incorporated into the Proposals and considered in making the selection decision, and to avoid delay's and potential conflicts in the design associated with deferring of technical concept reviews to the post-award period, and ultimately to obtain the best value for the public.

The ATC process allows Proposers to submit for pre-approval proposed alternatives to the RFP requirements. The Administration will not approve any ATC that entails a deviation from the requirements of the as-issued Contract Documents, unless the Administration determines, in its sole discretion, that the proposed end product based on the deviation is equal to or better than the end product absent the deviation and is permitted by the Permit Approvals.

Any ATC that has been pre-approved may be included in the Proposal, subject to the conditions set forth herein.

The ATC process may be used to allow a Proposer to submit technical concepts for review by the Administration to determine if those technical concepts are consistent with the requirements of the RFP documents. The ATC submittal should clearly stipulate this reason for the review.

2.08.02.8 ATC Submittal and Review

The Proposer may submit an ATC for review by the Administration on or before **October 26, 2012 at 4:00 p.m**. (prevailing local time). Inquiries received after that date and time will not be accepted.

All ATCs shall be submitted in writing via email only to D3swmretros@sha.state.md.us, with a cover letter clearly identifying the submittal as a request for review of an ATC. If the Proposer does not clearly designate its submittal as an ATC, the submission will not be treated as an ATC by the Administration

The Administration will review each ATC submitted. If an ATC is summarily approved or not approved, the Administration's comments will inform the Proposer that its technical concept appears to be generally acceptable, or the Administration will identify areas in which the approach appears to be incompatible with the Project requirements. If the Administration needs more information to determine whether or not the ATC will be approved or not approved, the Administration will submit written questions to the Proposer and/or request a one-on-one meeting in order to better understand the details of the ATC. The Administration may conditionally approve an ATC based on required revisions to a portion or portions of the ATC.

If an ATC is not approved or conditionally approved and the Proposer feels that the non-approval or the conditions for approval were due to an incorrect conclusion on the part of the Administration, it may re-submit the ATC for one additional review via email only to D3swmretros@sha.state.md.us. If a re-submittal is made, it shall be accompanied by a

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cover letter clearly identifying such submission as an ATC submitted for an additional review.

The Proposer shall advise the Administration in its ATC if it believes a one-on-one meeting is appropriate.

The Administration will return its approval, non-approval, conditional approval, or additional questions pertaining to any specific ATC no later than two weeks after receipt of that ATC. If the Proposer does not receive a return response from the Administration within two weeks of the Administration's receipt of the ATC, the Proposer shall presume that the Administration has rejected the ATC.

2.08.02.9 Content of ATC Submittal

Each ATC submittal 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 (i.e. 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 any requirements of the RFP Documents or to any elements of the Contract Documents which are inconsistent with the proposed ATC, an explanation of the nature of the proposed deviation and a request for approval of such deviations or a determination that the ATC is consistent with the requirements of the RFP Documents;

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 (favorable and unfavorable) identified on appropriate environmental documents, community impacts, TMDL requirements, 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 under comparable circumstances, 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 the Administration and other Persons associated with implementing the ATC;

H) Costs: An estimate of the ATC implementation costs to the Administration, the Design-Builder and other Persons; and

J) Price: An estimate of the impact of the ATC on the Proposal Price.

2.08.02.10 Determination by the Administration

The Administration will make one of the following determinations with respect to each properly submitted ATC:

A) The ATC is approved.

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B) The ATC is not approved.

C) The ATC is not approved in its present form, but is approved subject to satisfaction, in the Administration's sole judgment, of specified conditions

D) 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 RFP requirements)

E) The submittal does not qualify as an ATC and may not be included in the Proposal.

F) Decision on the ATC is pending receipt of additional information and/or one-on-on meeting

Approval of an ATC will constitute a change in the specific requirements of the Contract Documents associated with the approved ATC and for that specific Proposer. Should the Design-Builder be unable to obtain required approvals for any ATC incorporated into the Contract Documents, or if the concept otherwise proves to be infeasible, the Design-Builder will be required to conform to the original RFP requirements. Each Proposer, by submittal of its Proposal, acknowledges that the opportunity to submit ATCs was offered to all Proposers, and waives any right to object to the Administration's determinations regarding acceptability of ATCs.

2.08.02.11 Incorporation Into Proposal

Proposer may incorporate zero, one or more pre-approved ATCs into its Proposal including conditionally approved ATCs. If the Administration responded to an ATC by identifying conditions to approval, Proposer may not incorporate such ATC into the Proposal unless all conditions have been or will be met. Copies of the Administration's ATC approval letters for each incorporated ATC shall be included in the Proposal. Proposals with or without ATCs will be evaluated against the same technical evaluation factors, and the inclusion of an ATC, including an ATC that provides technical enhancements, may or may not receive a higher technical rating.

Except for incorporating approved ATCs, the Proposal may not otherwise contain exceptions to or deviations from the requirements of the RFP Documents

2.08.02.12 ATC Confidentiality

ATCs properly submitted by a Proposer and all subsequent communications regarding its ATCs will be considered confidential. If a Proposer wishes to make any announcement or disclosure to third parties concerning any ATC, it shall first notify the Administration in writing of its intent to take such action, including details as to date and participants, and obtain tile Administration's prior approval to do so.

2.08.02.13 One-On-One Meetings

Prior to or after submission of ATCs, the Administration may conduct one-on-one meetings with a Proposer to gain information or a better understanding regarding its ATC and to discuss issues and clarifications regarding the ATC. The Administration reserves the right to disclose to all Proposers any issues raised during the one-on-one meetings. However, the Administration will not disclose any information pertaining to an individual Proposer's ATCs or other technical concepts to other Proposers.

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