

May 10, 2019

Christopher Millington, PE
Federal Highway Administration
Leo W. O'Brien Federal Building
11A Clinton Avenue, Suite 719
Albany, NY 12207

Re: Alternative Contracting SEP-14 Request

Dear Mr. Millington:

NYSDOT seeks FHWA concurrence to use Federal-funding for "Best Value" selection of design-bid-build construction contracts through the Federal "Alternative Contracting" SEP-14 program. The recent reauthorization of the New York State Infrastructure Investment Act allows NYSDOT to continue to use alternative project delivery/procurement methods until April, 2021. Enclosed, to support our request are the following documents:

- Work Plan for SEP-14 Alternative Contracting - Utilizing Best Value Selection for Capital Construction Contracts (April 2019).
- Infrastructure Investment Act as amended by the 2019 reauthorization.

In addition, the 2018/2019 SEP-14 Annual Report is enclosed for your records. The Annual Report provides information on projects that used Best-Value as part of the selection process for design-bid-build projects from April 1, 2018 to March 31, 2019.

The Department seeks your approval for alternative contracting utilizing Best Value selection. Should you have any questions regarding this request or any of the attachments, please contact Carlos Rivera at 518-457-9837 or Janet Simson at 518-485-5401.

Sincerely,

/S/

Eric G. Celia, P.E.
Director, Project Management Office /
Design-Build Program Director

cc: W. Albert, Chief Engineer, e-mail only
M. Bromirski, Contract Management, e-mail only
D. Wood, FHWA, e-mail only

Work Plan for Special Experimental Project No. 14 (SEP-14)
Alternate Contracting - Utilizing Best Value Selection for Capital Construction Contracts
April 2019

Introduction

The New York State Department of Transportation (NYSDOT) submits this work plan for review and approval as a Best Value Alternate bidding procedure under the provisions of Special Experimental Project No. 14 (SEP-14) for use of alternative (innovative) bidding practices.

New York State had enacted Chapter 56 of the Laws of 2011, known as the Infrastructure Investment Act of 2011. This Act authorized a variety of innovative contracting methods including best value, design-build, lump sum, guaranteed maximum price and prequalification. That Act expired in December 2014. In April of 2015 the Infrastructure Investment Act was passed and was in effect in New York State until March of 2017. The Infrastructure Investment Act was reauthorized in April, 2017 and was in effect in New York State until the end of March 2019. In April of 2019, the Infrastructure Investment Act was reauthorized and is in effect in New York State until the end of March 2021. This two-year legislation allows for the same Alternative Delivery Methods as did the original Infrastructure Act of 2011. A copy of the new legislated Infrastructure Investment Act is attached to this work plan.

The proposed best value bidding procedure is an innovative process which will be used by NYSDOT in our capital construction program. As described further in the work plan, this bidding procedure should result in more efficient construction in terms of both overall costs and schedules.

Historically NYSDOT has used the design-bid-build method, with projects being awarded to the lowest responsible bidder. The increasing demand on available highway funds has prompted the State to actively pursue methods to optimize quality, cost and efficiency. Projects will be selected consistent with the intent of this.

The Process - Background

NYSDOT is requesting approval to solicit full and open competitive bids (bid price and best value submittal via an Invitation for Bids - IFB). The traditional construction plans, proposal, bid items and quantities make up one part of the IFB. A description of the technical evaluation factors, their relative weights, the weighting of price vs. technical evaluation factors and the instructions to the Bidders make up the other part of the IFB. The bidders approach to the project (technical qualifications) are not publically opened or read. Bid prices and technical qualifications are reviewed and scored separately, and then the scores are combined in accordance with the Best Value Scoring Criteria and the Best Value Bidder is recommended for award.

NYSDOT uses the IFB process without the additional quality based submission for its routine projects. NYSDOT plans to solicit full and open competition using an IFB as the procurement method with the addition of Best Value Selection Scoring Criteria on select projects. Over the past six years, NYSDOT has only used this IFB process on fourteen projects. The IFB may include as applicable to the specific project several components (criteria) in which respondents to the solicitation must include within their submittals such as: price, qualifications, schedule, and construction approach as examples. The IFB also includes language, via a Special Note in the Contract Proposal, which informs the bidders as to the order of importance of each of the specified criteria. In essence, all of the critical aspects of the project are evaluated to determine what bidder

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is truly the overall best value to be awarded the project. Price is still a major factor; however, a bidder that has the lowest overall price may not be awarded the project if their submittal does not adequately address all of the critical aspects of the project as described in the IFB.

Process Advantages/Disadvantages

We plan to continue to explore the advantages and disadvantages of awarding using a best value contract.

Advantages

Reduces risk to NYSDOT:

Since NYSDOT is selecting a contractor based on their complete and written understanding of all of the critical aspects of the project (price, quality, schedule, experience, capability, and understanding of project), rather than just price alone, NYSDOT has increased its potential for selecting and awarding to the best contractor available. By selecting a contractor through this process, NYSDOT anticipates an increased chance for success, and reduced overall risk for an unsuccessful project.

IFB process is flexible:

By using a two component (price and quality based criteria) Invitation for Bid (IFB) process, it gives the flexibility to evaluate all bidders that meet the minimum quality based ranking points after submittal evaluations (The normal approved method of using sealed bids does not allow for consideration of quality criteria.). This is important when dealing with projects that are on a tight budget and/or schedule. Secondly, this process allows NYSDOT to express to the contractor community in a competitive environment, the most important or critical aspects of the project, and have the contractor community inform NYSDOT in the form of submittals how they plan to resolve these issues and the related cost.

Best Value:

The evaluation process allows NYSDOT to evaluate all the critical aspects of the project rather than just price. Price will still be a major factor, but this process allows NYSDOT to consider other critical aspects of the project. As an example, Schedule will often be critical. Bidders will be required to submit detailed schedules for review. A firm that submits a schedule that is lacking sufficient detail, most likely will not score as high as a firm that submits a schedule that contains complete detail proving they are intimately familiar and completely understand the critical elements of the project. The contractor who best demonstrates their complete understanding of project, has a fair price, and is qualified through their submission, most likely will be selected through this highly competitive process as the Best Value. Contractors can put their best effort forward not having to worry about foregoing quality for a low price. NYSDOT benefits by awarding the contract to a contractor that has proven capabilities and a fair price.

Disadvantages

Preparation and submission cost:

The submission preparation process by the contractor's is more time consuming and costly. Some firms are not inclined to put forth the effort for such projects. There is some risk in receiving fewer competitors.

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Increased Evaluation and Award Process:

The submission evaluation process takes approximately two weeks. The extra time is required to be able to evaluate and select the best value contractor. However, these days will be more than made up in improved day to day project administration.

Scope

The purpose of this work plan is to provide a format to evaluate the use of Federal aid for capital construction contracts awarded via a Best Value selection process. With approval of this work plan, NYSDOT will use Federal aid for Best Value capital construction contracts under the Federal "alternative contracting" SEP-I4 program.

Current Method

The clear majority of NYSDOT's capital construction contracts are selected through a low bid process and awarded to the lowest responsible bidder. NYSDOT has also utilized A + B bidding on a variety of construction contracts.

Opportunities for Improvement

NYSDOT believes that the use of Best Value selection methods for traditional design-bid-build construction contracts has the potential for significant benefits in terms of shorter timeframes to complete work, improved work quality, and safety.

NCHRP Report 561 "Best-Value Procurement Methods for Highway Construction Contracts" states that several governmental organizations including the Army Corps of Engineers have used the best value method to award construction contracts. The General Services Administration Public Building Services procures 100% of its new buildings and renovations through best value procurement. Several State DOTs have also used Best Value for construction contracting.

NYSDOT anticipates that approximately three to five construction contracts per calendar year would be selected and awarded via the Best Value method. These would be jobs of various sizes and work types, and in different Regions. For each contract, Head Office staff would work with the Regions to determine the qualification-based selection factors to be used, their respective weights, and their weight in relation to the bid price. The most likely qualification-based selection factors would be past experience and performance, key personnel, safety record, schedule, and ability to meet DBE goals. Please see the accompanying NYSDOT Procedure, "Procedures for Selection and Award of Construction Contracts Using Best Value Selection".

A selection committee of NYSDOT experts will evaluate and score the qualification-based selection factors. This committee would be strictly separated from and have no knowledge of the bid prices, which will be verified and reviewed by NYSDOT in the usual manner. Subsequent to the qualification-based evaluation and scoring, oral presentations from all bidders may be held (if applicable). When both qualifications, oral presentations (if held), and cost reviews are completed, NYSDOT's Contract Management Bureau will summarize and prepare a memo recommending the Best Value proposal to the Chief Engineer.

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As candidate projects are identified and developed, NYSDOT will forward their project specific special notes and rationale for selection to FHWA for review and comment.

Schedule

NYSDOT is requesting approval to use this alternative contracting on selected projects for an approximate two-year evaluation period; for projects advertised for bids between May, 2019 to April, 2021.

Measures

During the period between advertisement and completion of construction for contracts selected through Best Value, NYSDOT will evaluate the effectiveness of the Best Value selections. Interviews may be conducted with staff involved with the letting and execution of Best Value contracts, along with contractors, to determine how the best value selected contracts compared to the traditional contracts selected by the traditional low bid method.

By using the "Best Value" method for capital projects, NYSDOT expects to be able to measure, as a minimum, three primary objectives; (1) cost savings, (2) time, and (3) improved quality as follows:

Cost Savings:

The cost savings that are anticipated to be realized on best value projects are in the areas of lower number of change orders, with resultant improved efficiencies. Since the evaluation criteria may also include the evaluation of such items as; qualifications, project understanding and approach, schedule, quality control and traffic plans, through this process we anticipate hiring a quality contractor that has proven they completely understand the project. Therefore, NYSDOT anticipates receiving quality work and a better understanding of the project which may lead to less change orders.

Quality:

As stated above, using the "Best Value" approach, NYSDOT may evaluate each firm's past performance, experience, and capabilities in a competitive process. With all things being equal, a firm that is able to put the best team together should result in improved quality at a lower than average cost. The cost savings anticipated are less change orders, increased project efficiency (repetitive work should be rare), and a project that is completed either on time or earlier than expected.

Time:

This should be the easiest of all to measure. NYSDOT anticipates shorter project durations, by asking for and evaluating project schedules as part of the best value process. As an example, most projects that are awarded using sealed bidding give the timeframe the contractors are to complete the work. In our proposed best value process, NYSDOT provides the bidders with the contract completion date. NYSDOT evaluates and scores higher the bidder that submits a schedule which results in shorter completion dates and can demonstrate that their schedule is realistic through experience and construction project approach.

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Reporting

Project Reports –

For each project, we will prepare two reports of this alternate contracting proposal. An interim report (approximately one page) will be prepared shortly after contract award and will address the Best Value selection process and results. A final report will be prepared within six months after completion of the project work and will address the entire project and all evaluation measures for the Best Value selection process.

Yearly Report –

NYSDOT will prepare a yearly report to capture the status of the Best Value selection process. These reports shall be provided each July.

Final Best Value Program Report –

Upon completion of the last project to be constructed under the authority granted by FHWA, NYSDOT will prepare a final report (no later than six months after last project completion) summarizing the SEP-14 Best Value findings associated with the individual projects.

2015 Infrastructure Investment Act as amended by the 2017 and 2019 reauthorizations. The bold/yellow highlighted text was added in 2017. The bold underlined / yellow highlighted text on page 6 was added in 2019.

Section 1. This act shall be known and may be cited as the "Infrastructure investment act".

§ 2. For the purposes of this act:

(a) (i) "authorized state entity" shall mean the New York state thruway authority, the department of transportation, the office of parks, recreation and historic preservation, the department of environmental conservation and the New York state bridge authority.

(ii) Notwithstanding the provisions of subdivision 26 of section 1678 of the public authorities law, section 8 of the public buildings law, sections 8 and 9 of section 1 of chapter 359 of the laws of 1968 as amended, section 103 of the general municipal law, and the provisions of any other law to the contrary, the term "authorized state entity" shall also refer to only those agencies or authorities identified below solely in connection with the following authorized projects, provided that such an authorized state entity may utilize the alternative delivery method referred to as design-build contracts solely in connection with the following authorized projects should the total cost of each such project not be less than five million dollars (\$5,000,000):

Authorized Projects

1. Frontier Town

2. Life Sciences Laboratory

3. Whiteface Transformative Projects

4. Gore Transformative Projects

5. Belleayre Transformative Projects

6. Mt. Van Hoevenberg Transformative Projects

7. State Fair Revitalization Projects

8. State Police Forensic Laboratory

Authorized State Entity

Urban Development Corporation

Dormitory Authority & Urban Development Corporation

New York State Olympic Regional Development Authority

New York State Olympic Regional Development Authority

New York State Olympic Regional Development Authority

New York State Olympic Regional Development Authority

Office of General Services

Office of General Services

Notwithstanding any provision of law to the contrary, all rights or benefits, including terms and conditions of employment, and protection of civil service and collective bargaining status of all existing employees of authorized state entities solely in connection with the authorized projects listed above, shall be preserved and protected.

Nothing in this section shall result in the: (1) displacement of any currently employed worker or loss of position (including partial displacement such as a reduction in the hours of non-overtime work, wages, or employment benefits) or result in the impairment of existing collective bargaining agreements; and (2) transfer of existing duties and functions related to maintenance and operations currently performed by existing employees of authorized state entities to a contracting entity. Nothing contained herein shall be construed to affect (A) the existing rights of employees pursuant to an existing collective bargaining agreement, and (B) the existing representational relationships among employee organizations or the bargaining relationships between the employer and an employee organization.

If otherwise applicable, authorized projects undertaken by the authorized state entities listed above solely in connection with the provisions of this act shall be subject to section 135 of the state finance law, section 101 of the general municipal law, and section 222 of the labor law; provided, however, that an authorized state entity may fulfill its obligations under section 135 of the state finance law or section 101 of the general municipal law by requiring the contractor to prepare separate specifications in accordance with section 135 of the state finance law or section 101 of the general municipal law, as the case may be.

(b) "best value" shall mean the basis for awarding contracts for services to the offerer that optimize quality, cost and efficiency, price and performance criteria, which may include, but is not limited to:

1. The quality of the contractor's performance on previous projects;
2. The timeliness of the contractor's performance on previous projects;
3. The level of customer satisfaction with the contractor's performance on previous projects;
4. The contractor's record of performing previous projects on budget and ability to minimize cost overruns;
5. The contractor's ability to limit change orders;
6. The contractor's ability to prepare appropriate project plans;
7. The contractor's technical capacities;
8. The individual qualifications of the contractor's key personnel;
9. The contractor's ability to assess and manage risk and minimize risk impact; and
10. The contractor's past record of compliance with article 15-A of the executive law.

Such basis shall reflect, wherever possible, objective and quantifiable analysis.

(c) "capital project" shall have the same meaning as such term is defined by subdivision 2-a of section 2 of the state finance law.

(d) "cost plus" shall mean compensating a contractor for the cost to complete a contract by reimbursing actual costs for labor, equipment and materials plus an additional amount for overhead and profit.

(e) "design-build contract" shall mean a contract for the design and construction of a capital project with a single entity, which may be a team comprised of separate entities.

(f) "procurement record" means documentation of the decisions made and the approach taken in the procurement process.

§ 3. Notwithstanding the provisions of section 38 of the highway law,

section 136-a of the state finance law, section 359 of the public authorities law, section 7210 of the education law, and the provisions of any other law to the contrary, and in conformity with the requirements of this act, an authorized state entity may utilize the alternative delivery method referred to as design-build contracts, in consultation with relevant local labor organizations and construction industry, for capital projects related to the state's physical infrastructure, including, but not limited to, the state's highways, bridges, dams, flood control projects, canals, and parks, including, but not limited to, to repair damage caused by natural disaster, to correct health and safety defects, to comply with federal and state laws, standards, and regulations, to extend the useful life of or replace the state's highways, bridges, dams, flood control projects, canals, and parks or to improve or add to the state's highways, bridges, dams, flood control projects, canals, and parks; provided that for the contracts executed by the department of transportation, the office of parks, recreation and historic preservation, or the department of environmental conservation, the total cost of each such project shall not be less than **ten million dollars \$10,000,000**).

§ 4. An entity selected by an authorized state entity to enter into a design-build contract shall be selected through a two-step method, as follows:

(a) Step one. Generation of a list of entities that have demonstrated the general capability to perform the design-build contract. Such list shall consist of a specified number of entities, as determined by an authorized state entity, and shall be generated based upon the authorized state entity's review of responses to a publicly advertised request for qualifications. The authorized state entity's request for qualifications shall include a general description of the project, the maximum number of entities to be included on the list, the selection criteria to be used **and the relative weight of each criteria** in generating the list. Such selection criteria shall include the qualifications and experience of the design and construction team, organization, demonstrated responsibility, ability of the team or of a member or members of the team to comply with applicable requirements, including the provisions of articles 145, 147 and 148 of the education law, past record of compliance with the labor law, and such other qualifications the authorized state entity deems appropriate which may include but are not limited to project understanding, financial capability and record of past performance. The authorized state entity shall evaluate and rate all entities responding to the request for qualifications. Based upon such ratings, the authorized state entity shall list the entities that shall receive a request for proposals in accordance with subdivision (b) of this section. To the extent consistent with applicable federal law, the authorized state entity shall consider, when awarding any contract pursuant to this section, the participation of: (i) firms certified pursuant to article 15-A of the executive law as minority or women-owned businesses and the ability of other businesses under consideration to work with minority and women-owned businesses so as to promote and assist participation by such businesses; and (ii) small business concerns identified pursuant to subdivision (b) of section 139-g of the state finance law.

(b) Step two. Selection of the proposal which is the best value to the **authorized state entity**. The authorized state entity shall issue a request for proposals to the entities listed pursuant to subdivision (a) of this section. If such an entity consists of a team of separate entities, the entities that comprise such a team must remain unchanged from the entity as listed pursuant to subdivision (a) of this section unless otherwise approved

by the authorized state entity. The request for proposals shall set forth the project's scope of work, and other requirements, as determined by the authorized state entity. The request for proposals shall specify the criteria to be used to evaluate the responses and the relative weight of each such criteria. Such criteria shall include the proposal's cost, the quality of the proposal's solution, the qualifications and experience of the design-build entity, and other factors deemed pertinent by the authorized state entity, which may include, but shall not be limited to, the proposal's project implementation, ability to complete the work in a timely and satisfactory manner, maintenance costs of the completed project, maintenance of traffic approach, and community impact. Any contract awarded pursuant to this act shall be awarded to a responsive and responsible entity that submits the proposal, which, in consideration of these and other specified criteria deemed pertinent to the project, offers the best value to the **authorized state entity**, as determined by the authorized state entity. **The request for proposals shall include a statement that entities shall designate in writing those portions of the proposal that contain trade secrets or other proprietary information that are to remain confidential; that the material designated as confidential shall be readily separable from the entity's proposal.** Nothing herein shall be construed to prohibit the authorized entity from negotiating final contract terms and conditions including cost. **All proposals submitted shall be scored according to the criteria listed in the request for proposals and such final scores shall be published on the authorized state entity's website.**

§ 5. Any contract entered into pursuant to this act shall include a clause requiring that any professional services regulated by articles 145, 147 and 148 of the education law shall be performed and stamped and sealed, where appropriate, by a professional licensed in accordance with such articles.

§ 6. Construction for each capital project undertaken by the authorized state entity pursuant to this act shall be deemed a "public work" to be performed in accordance with the provisions of article 8 of the labor law, as well as subject to sections 200, 240, 241 and 242 of the labor law and enforcement of prevailing wage requirements by the New York state department of labor.

§ 7. If otherwise applicable, capital projects undertaken by the authorized state entity pursuant to this act shall be subject to section 135 of the state finance law and section 222 of the labor law.

§ 8. Each contract entered into by the authorized state entity pursuant to this section shall comply with the objectives and goals of minority and women-owned business enterprises pursuant to article 15-A of the executive law or, for projects receiving federal aid, shall comply with applicable federal requirements for disadvantaged business enterprises.

§ 9. Capital projects undertaken by the authorized state entity pursuant to this act shall be subject to the requirements of article 8 of the environmental conservation law, and, where applicable, the requirements of the national environmental policy act.

§ 10. If otherwise applicable, capital projects under taken by the authorized state entity pursuant to this act shall be governed by sections 139-d, 139-j, 139-k, paragraph f of subdivision 1 and paragraph g of subdivision 9 of section 163 of the state finance law.

§ 11. The submission of a proposal or responses or the execution of a

design-build contract pursuant to this act shall not be construed to be a violation of section 6512 of the education law.

§ 12. Nothing contained in this act shall limit the right or obligation of the authorized state entity to comply with the provisions of any existing contract, including any existing contract with or for the benefit of the holders of the obligations of the authorized state entity, or to award contracts as otherwise provided by law.

§ 13. Alternative construction awarding processes. (a) Notwithstanding the provisions of any other law to the contrary, the authorized state entity may award a construction contract:

1. To the contractor offering the best value; or

2. Utilizing a cost-plus not to exceed guaranteed maximum price form of contract in which the authorized state entity shall be entitled to monitor and audit all project costs. In establishing the schedule and process for determining a guaranteed maximum price, the contract between the authorized state entity and the contractor shall:

(i) describe the scope of the work and the cost of performing such work;

(ii) include a detailed line item cost breakdown;

(iii) include a list of all drawings, specifications and other information on which the guaranteed maximum price is based;

(iv) include the dates for substantial and final completion on which the guaranteed maximum price is based; and

(v) include a schedule of unit prices; or

3. Utilizing a lump sum contract in which the contractor agrees to accept a set dollar amount for a contract which comprises a single bid without providing a cost breakdown for all costs such as for equipment, labor, materials, as well as such contractor's profit for completing all items of work comprising the project.

(b) Capital projects undertaken by an authorized state entity may include an incentive clause in the contract for various performance objectives, but the incentive clause shall not include an incentive that exceeds the quantifiable value of the benefit received by the **authorized state entity**. The authorized state entity shall establish such performance and payment bonds as it deems necessary.

§ 14. Prequalified contractors. (a) Notwithstanding any other provision of law, the authorized state entity may maintain a list of prequalified contractors who are eligible to submit a proposal pursuant to this act and entry into such list shall be continuously available. Prospective contractors may be prequalified as contractors to provide particular types of construction, in accordance with general criteria established by the authorized state entity which may include, but shall not be limited to, the experience, past performance, ability to undertake the type and complexity of work, financial capability, responsibility, compliance with equal employment opportunity requirements and anti-discrimination laws, and reliability. Such prequalification may be by categories designed by size and other factors.

(b) A contractor who is denied prequalification or whose prequalification is revoked or suspended by the authorized state entity may appeal such decision to the authorized state entity. If such a suspension extends for more than three months, it shall be deemed a revocation of the prequalification. The authorized state entity may proceed with the contract award during any appeal.

§ 15. Nothing in this act shall affect existing powers of New York state public entities to use alternative project delivery methods.

§ 16. A report shall be submitted on or no later than June 30, 2016 to the governor, the temporary president of the senate and the speaker of the assembly by the New York state urban development corporation containing information on each authorized state entity that has entered into a design-build contract pursuant to this act, which shall include, but not be limited to, a description of each project, procurement information including the short list of qualified bidders, the total cost of each project, the estimated cost and schedule savings of each project, an explanation of how the savings were determined, and whether a project labor agreement was used, and if applicable, the justification for using a project labor agreement.

§ 17. This act shall take effect immediately and shall expire and be deemed repealed **6¹** years after such date, provided that, projects with requests for qualifications issued prior to such repeal shall be permitted to continue under this act notwithstanding such repeal.

¹ **Commented [KN (1):** In 2017, the 2015 authorization was given a four-year window. In 2019, the four-year window was struck and replaced with a six-year window, meaning the authorization expires March 31, 2021.