



Memorandum

Subject: SEP-14 Request Waiver for
23 CFR 636.209 (b)

Date: August 31, 2012

From: 
Bob Lee
Sr. Division Administrator

In Reply Refer To:
HAD-SC

To: David Nicol
Director, Office of Program Administration (HIP-10)

Attached is the South Carolina Department of Transportation's (SCDOT) request for approval to allow design/build proposals to incorporate an alternative technical concept (ATC) as a substitution, not a supplement, to the base proposal. This request falls under FHWA's SEP-14 program because a waiver of the requirement stipulated in 23 CFR 636.209(b) would be necessary.

SCDOT has utilized the design/build procurement method for well over a decade and has successfully completed numerous high profile projects ahead of schedule and on budget. Recently, as part of the *Every Day Counts* initiative, SCDOT has looked for ways to both increase opportunities for innovation and enhance the quality of its design/build projects. While several changes have already been implemented, SCDOT will be incorporating an ATC provision for the first time in an upcoming design/build bridge project.

The Division Office has worked closely with SCDOT during the development of the ATC provision and fully supports SCDOT's waiver request. We feel the ATC provision has been written to permit open and fair competition while allowing SCDOT to select the "best value" proposal. Also, we affirm SCDOT's position that requiring two separate proposals will result in unnecessary work in both the proposal development and evaluation processes and may in fact discourage ATC submissions. Finally, we believe that SCDOT's request is similar to that of several other States which were subsequently granted the waiver.

Please contact Thaddeus Kitowicz at 803-253-3882 if you require additional information.

Attachment



South Carolina
Department of Transportation

August 21, 2012

RECEIVED
Federal Highway Administration

AUG 23 2012

DIVISION OFFICE
COLUMBIA S.C.

Mr. Robert L. Lee
SC FHWA Division Administrator
Strom Thurmond Federal Building
1835 Assembly Street, Suite 1270
Columbia, South Carolina 29201

RE: Alternative Technical Concept Waiver of 23 CFR 636

Dear Mr. Lee:

As you are aware, in 2006, the South Carolina General Assembly passed Section 57-5-1625, S.C. Code of Laws, authorizing the South Carolina Department of Transportation (SCDOT) to use design-build contracting methods for awarding highway construction contracts. Since then SCDOT, in cooperation with FHWA, has developed design build contracting methods which are consistent with the federal design build regulation set forth in 23 CFR 636. Under the federal regulations, 23 CFR 636.209, the use of alternative technical concepts (ATCs) in design build contracting is allowed. Over the past several months, SCDOT has developed a methodology for implementing ATCs on contracts procured under SCDOT's design-build method that enhances the effectiveness of the process described in 23 CFR 636.

SCDOT's ATC process (enclosed) provides for the submission of ATCs during the design build procurement pre-proposal period. As detailed in the procedures, ATCs will only be approved if they meet specific minimum requirements and are otherwise acceptable to SCDOT. Federal provisions under 23 CFR 636.209 permit ATCs for design-build procurements, but states, "[a]lternative technical concept proposals may supplement, but not substitute for base proposals that respond to the Request for Proposal (RFP) requirements." SCDOT understands that the purpose underlying this requirement is to ensure fair and open competition and to make sure that all proposers are competing for the same project. SCDOT believes that its ATC process meets the purpose of the federal regulation.

SCDOT hereby requests that the requirement to submit separate proposals for the base and the alternative technical concepts be waived on projects procured under SCDOT's design build process. At this time, this waiver would apply to the Package B Project for Federal Aid Bridge Replacement in Cherokee, Chester, Fairfield, Lancaster and York Counties, S.C. File No.112.039094, which SCDOT is currently procuring. However, SCDOT would like this waiver to apply to all future design-build projects which allow the submission of ATCs.

This waiver would allow each proposer the opportunity to submit ATCs to SCDOT for pre-approval and then to submit a proposal with or without ATCs. In allowing the practice of including pre-approved ATCs in proposals, SCDOT has carefully crafted and implemented a procedure to avoid any unfairness. Pre-approval of deviations (from design requirements that otherwise would be deferred until after the contract is awarded) would be required as part of this process. The proposed ATC process would give SCDOT the ability to factor the proposers' technical solutions into the selection process, allowing a true "best value" selection, and giving SCDOT access to solutions from all proposers. It also would give



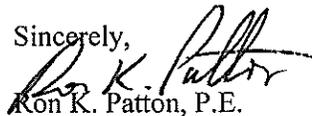
Robert L. Lee
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the successful proposer a head start on implementation of its ATCs; thereby, avoiding unnecessary costs and diversion of resources required for proposers to advance a base design that will ultimately not be used.

SCDOT believes that requiring proposers to submit two separate proposals imposes an unnecessary burden on both the proposers and SCDOT, and may deter proposers from submitting ATCs. Given SCDOT's specific ATC process and the enclosed supporting documentation, SCDOT has addressed the underlying concern regarding fairness of the process by including minimum criteria for ATCs submissions. SCDOT's ATC process provides that design deviations will not result in a reduction of scope, performance, reliability or quality. In addition, deviations that change the scope of the project or alter environmental commitments will not be allowed. Given these protections, SCDOT believes that a waiver of the requirement is appropriate.

Thank you in advance for your consideration of SCDOT's request to waive the provision of 23 CFR 636.209, requiring submission of separate proposals for the base and the alternative technical concepts on a design-build contract. If you should have any questions or require additional information please feel free to contact Matt Lifsey at (803) 737-1598.

Sincerely,



Ron K. Patton, P.E.

Chief Engineering for Planning, Location, and Design

RKP:gg

Enclosures: Attachment 1: SUPPORTING DOCUMENTATION OF WAIVER REQUEST
Attachment 2: ATC PROVISIONS FOR DESIGN BUILD PROJECTS

ec: Robert J. St. Onge, Jr., Secretary of Transportation
Tad Kitowicz, FHWA Operations Engineer
John V. Walsh, Deputy Secretary for Engineering
Matthew R. Lifsey, Regional Production Engineer-Lowcountry

File: PC/MRL

Attachment 1:
SUPPORTING DOCUMENTATION OF WAIVER REQUEST
SUMMARY OF ATC PROVISIONS

The following summary is information supporting SCDOT's waiver request:

- I. Review process and requirements. Attachment 2 is the ATC provisions ("ATC Provisions") included in the RFP Information Package to proposers for SCDOT's design-build projects.
- The first paragraph sets forth SCDOT's rationale behind the use of ATCs - This process is intended to allow proposers to incorporate innovation and creativity into the proposals, in turn allowing SCDOT to consider proposer ATCs in making the selection decision, to avoid delays and potential conflicts in the design associated with deferring reviews of ATCs to the post-award period, and, ultimately, to obtain the best value for the public. It also clearly cites the approval criteria of "equal to or better" and describes concepts that would not be eligible for consideration as ATCs, including those that would delete scope, lower performance requirements, lower standards, conflict with environmental commitments or reduce contract requirements.
 - Section 1 sets forth the detailed submittal requirements, which includes a preliminary concept stage.
 - Section 2 sets forth the content requirements for an ATC submittal.
 - Section 3 lays out the specific review process for ATCs, including actions that may be taken by SCDOT.
 - Section 4 outlines the determinations that may be made by SCDOT on submitted ATCs.
 - Section 5 authorizes proposers to incorporate pre-approved ATCs into their proposals.
 - Section 6 provides that an approved ATC will not be considered a pre-approved value engineering change.
 - Section 7 discusses the abandonment of an ATC by the proposer
 - Section 8 provides for SCDOT's use of the ATC submitted by the successful proposer and discusses the payment of stipends to the unsuccessful proposers.
 - Section 9 outlines the successful proposers obligations if the ATC is used, including the requirement to obtain and pay the cost of obtaining any 3rd party approvals required to implement any approved ATC.

- II. 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 evaluated against the same technical evaluation factors, and a best value determination is made in the same manner with certain adjustments for SCDOT's increased costs due to ATCs. A pre-approved ATC may or may not result in higher quality (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 to facilitate both the outcomes of higher quality and lower price.
- III. What happens if ATC is not feasible? SCDOT's ATC Procedures, which are included in the RFP and are part of the contract documents for design-build projects, include provisions making it clear that the Proposer is responsible for (i) designing the project in conformance with all contract requirements, and (ii) for obtaining all third party approvals required for ATCs. Provisions also clarify the Proposer must conform to original RFP requirements if it is unable to obtain approvals or if the concept otherwise proves infeasible.
- IV. Timeline for ATC approvals. Section 3 of the ATC Procedures sets forth the process for SCDOT's review and approval (or disapproval) of pre-proposal ATC submittals.
- V. Quality Enhancements. SCDOT 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.

Attachment 2:
ATC PROVISIONS FOR DESIGN BUILD PROJECTS
(Included in Request for Proposal)

Alternative Technical Concepts

An Alternative Technical Concept (ATC) is a confidential request by a Proposer to modify a contract requirement, specifically for that Proposer, prior to the Proposal due date. The ATC process provides an opportunity for design-build proposals to promote innovation, find the best solutions, and to maintain flexibility in the procurement process. ATC's are evaluated for approval or denial by SCDOT within the deadline set forth in the RFP Milestone Schedule. In order to be approved, an ATC must be deemed, in SCDOT's sole discretion, to provide a project that is "equal or better" on an overall basis than the project would be without the proposed ATC. Concepts that simply delete scope, lower performance requirements, lower standards, conflict with environmental commitments, or reduce contract requirements are not acceptable as ATC's. SCDOT reserves the right in its sole discretion to reject any ATC.

1. Submittal of ATCs:

- a. Preliminary Concepts: Preliminary concepts may be submitted that present a brief description of the benefits of the concept. Preliminary concepts may be submitted by email to the Project Manager and are intended to be an informal inquiry by the Proposer to explore a concept and a quick method by SCDOT to review and comment on potential development of ATC prior to investment of time and resources by the Proposer. Submission of preliminary concepts does not change or extend the submission deadline of formal ATCs. If a preliminary concept receives a favorable response from SCDOT, Proposer can elect to submit a formal ATC in accordance with these procedures. A favorable response by SCDOT in no way guarantees that the concept will become an approved ATC.
- b. ATC Identification: ATC will be submitted by the Proposer and evaluated by SCDOT as set forth in the RFP Milestone Schedule. All ATCs shall be submitted in writing to the Project Manager identified in the RFP with a cover letter clearly identifying the submittal as a request for review of an ATC under this RFP. If the Proposer does not clearly designate its submittal as an ATC, the submission will not be treated as an ATC by SCDOT.
- c. **A maximum number of three (3) ATCs may be submitted to SCDOT by the PROPOSER for consideration.**

2. Contents of ATC Submittal:

Each ATC submittal shall include ten (10) copies and 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, specifications, construction tolerances, special provisions, proposed bridge types, product details, and a traffic operational analysis);
- b. Usage: Locations where and an explanation of how the ATC would be used on the Project;
- c. Deviations: List in table format, all references to any requirements of the RFP or to any requirements of the Contract Documents that are inconsistent with the proposed ATC. Include 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;
- d. Justification: Justify use of the ATC and why the deviations from the requirements of the RFP should be allowed;
- e. Schedule: Proposed changes to the project schedule; if applicable
- f. Impacts: Identify potential impacts on vehicular traffic, safety, community, utilities, right of way and the environment.
- g. 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;
- h. Risks: A description of added risks to SCDOT and other persons associated with implementing the ATC;
- i. Costs: An estimate of the impact of the ATC on the Proposal Price and the ATC implementation costs to SCDOT, FHWA, contractor, or other person during construction, maintenance and operations.
- j. Quality: A description of how the ATC is equal or better in quality and performance than the requirements of the RFP;
- k. Operations & Maintenance: Any changes in operation or maintenance requirements associated with the ATC,

3. Review of ATCs:

- a. Fourteen Day Review: SCDOT will review each ATC submitted within fourteen (14) calendar days of ATC receipt.
- b. More information Needed: If within seven (7) calendar days of receipt of the ATC SCDOT needs more information to determine whether or not the ATC will be

approved or not approved, SCDOT 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.

- i. Questions: SCDOT may submit written questions to the proposer within seven calendar (7) days of receipt of the ATC. Proposer has three (3) calendar days to remit answers. Within four (4) calendar days of receipt of the answers, SCDOT shall respond to the ATC.
 - ii. One-on-One Meetings: ATC meeting may be scheduled by SCDOT within seven (7) calendar days of receipt of the ATC. One-on-one meeting(s) may be scheduled to fully understand the details of any ATCs. These meetings will be restricted to those persons involved in the review of the ATC and limited to discussions of the Proposer's ATC approach. The purpose of this meeting is to discuss the proposed changes, answer questions, and other relevant issues. Verbal responses are for information only and are not binding. Nothing stated at any ATC meeting(s) will modify the RFP or Contract documents. SCDOT reserves the right to disclose to all Proposers any issues raised during the ATC meeting(s), either in the Final RFP or in an addendum. However, SCDOT will not disclose any information pertaining to an individual Proposer's ATCs or other technical concepts to other Proposers. SCDOT will issue a written response to Proposer regarding its ATC.
- c. No Response from SCDOT: If the Proposer does not receive correspondence from SCDOT within fourteen (14) calendar days of SCDOT's receipt of the ATC, the ATC is deemed rejected by SCDOT, unless written notification to extend this period is given by SCDOT. No ATC shall be included in the proposal unless approved by SCDOT in writing prior to the proposal submission deadline.

4. Determination of SCDOT:

- a. SCDOT will make one of the following written determinations with respect to each properly submitted ATC:
 - i. The ATC is approved;
 - ii. The ATC is not approved;
 - iii. The ATC is not approved in its present form, but may be reconsidered for approval upon satisfaction, in SCDOT's sole discretion, of certain identified conditions that must be met or certain clarifications or modifications that must be made by Proposer. The Proposer shall not have the right to incorporate this ATC into the Proposal unless and until the ATC has been resubmitted within the time limits in the RFP, with the conditions, clarification and modifications satisfied, and SCDOT has unconditionally approved the revised ATC; or

- iv. The submittal does not qualify as an ATC but appears eligible to be included in the Proposal without an ATC (i.e., the concept appears to conform to the basic configuration and to be consistent with other contract requirements).
 - v. The ATC is deemed to take advantage of an error or omission in the RFP, or other documents incorporated into the contract by reference, the ATC will not be considered, and the RFP will be revised to correct the error or omission
 - vi. More than one ATC has been received on the same topic and the Department has elected to exercise its right to revise the RFP.
- b. Once an ATC has been approved, only the entire ATC is eligible for inclusion into the Proposal. The inclusion of partial ATCs into a Proposal is not allowed, unless the individual ATC's have received separate approval by SCDOT
 - c. 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 SCDOT's determinations regarding acceptability of ATCs.

5. Incorporation into Proposal:

- a. A Proposer has the option to include any or all approved ATC's in its Proposal. If SCDOT responded to an ATC by identifying conditions for approval, Proposer may not incorporate such ATC into the Proposal unless all conditions have been met. Copies of SCDOT'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 set forth in the EVALUATION OF PROPOSALS section, and the inclusion of an ATC, including an ATC that provides technical enhancements, may or may not receive a higher technical rating. SCDOT approval of an ATC shall not be considered a guaranty that the proposal incorporating the ATC will be selected. SCDOT's rejection of an ATC will not entitle the proposer to an extension of the Proposal submission deadline on the Milestone Schedule or claim for additional costs or delays, including development costs, loss of anticipated profits, or increased material or labor costs.
- b. The Proposal Price should reflect any incorporated approved ATCs.
- c. Except for incorporating approved ATCs, the Proposal may not otherwise contain exceptions to or deviations from the requirements of the RFP.

6. Value Engineering:

An approved ATC that is not incorporated into the proposal will not be considered a pre-approved value engineering change.

7. Abandonment of ATC by Proposer:

If the approved ATC is abandoned by the Proposer, is unable to obtain required governmental permit approvals, is otherwise proved to be infeasible, or fails to be constructed for any reason, the successful Proposer is obligated and required to complete the project utilizing the original RFP design and scope requirements at the awarded cost, and shall be responsible for any redesign costs.

8. SCDOT's use of Concepts Contained in an ATC :

SCDOT expressly reserves the right to adopt and use any ATC, approved or disapproved, by the successful Proposer on this contract or other contracts administered by SCDOT. By submitting a Proposal, all unsuccessful Proposers acknowledge that upon payment of the designated stipend, all approved or disapproved ATC's may be included in this contract or other contracts administered by SCDOT and shall become the property of SCDOT without restriction on use. Prior to contract execution, limited negotiations may be conducted as necessary to incorporate the ideas and concepts from unsuccessful proposers provided a stipend is accepted by the unsuccessful offerer.

9. Proposer Obligations:

The successful Proposer, in addition to performing all other requirements of the Contract Documents, shall:

- a. Obtain and pay the cost of obtaining all Governmental Approvals including Governmental Approvals required to implement any approved ATC(s) incorporated into the Contract Documents;
- b. Obtain and pay the cost of obtaining any third party approvals required to implement any approved ATC(s) incorporated into the Contract Documents; and
- c. Unless otherwise noted in the Contract, be responsible for all costs and/or delays of any nature associated with the implementation of any approved ATC incorporated into the Contract Documents.
- d. Should SCDOT revise the RFP after a formal ATC has been approved, be solely responsible for reviewing the RFP and determining if the ATC deviates from the revised requirements. If required, the Proposer must submit a request for approval of all additional variances required within seven (7) calendar days of receipt of the revised RFP.