

Mr. Al Alonzi
Assistant Division Administrator
Federal Highway Administration
300 East 8 h Street, Room 826
Austin, Texas 78701

Attention: Justin Ham, P.E.

March 16, 2012

RE: Special Experiment Project - 14: ATC Process

Texas Design-Build and Comprehensive Development Agreement Programs

Dear Mr. Alonzi:

The Texas Department of Transportation (TxDOT) has legislative authority pursuant to Transportation Code 371, 223, etc., to develop and implement design-build contracting methods under both its design-build and comprehensive development agreement (CDA) programs. [CDA contracting can be either design-build or public-private partnership (P3) contracting.] Based upon the fundamentals of the federal design-build regulations, TxDOT has developed a methodology for implementing alternative technical concepts (ATCs) on contracts procured under TxDOT's design-build and CDA programs that we believe enhances the effectiveness of the process described in 23 CFR 636.

TxDOT proposes to allow proposers to submit ATCs in connection with federally funded design-build and CDA procurements, consistent with 23 CFR 636.209, for review and approval (or disapproval) by TxDOT during the pre-proposal period. The ATCs will only be approved if they meet specific minimum requirements and are otherwise acceptable to TxDOT. 23 CFR 636.209 permits 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." 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.

TxDOT hereby requests that the requirement to submit separate proposals for the base and the alternative technical concepts be waived on federally funded contracts that are subject to the federal design-build rule and that TxDOT procures under its design-build and CDA programs. This waiver would apply to the SH 99 Grand Parkway, IH 35E Managed Lanes, and Horseshoe projects which TxDOT is currently procuring, as well as, to any future design-build or CDA projects.

This waiver would allow each proposer the opportunity to submit ATCs to TxDOT for pre-approval and then to submit a proposal with or without ATCs. In allowing the practice of including pre-approved ATCs in proposals, TxDOT 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

TxDOT the ability to factor the proposers' technical solutions into the selection process, allowing a true "best value" selection, and giving TxDOT access to solutions from all proposers. It also would give 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.

Given TxDOT's specific ATC process (see Attachment 1), we are concerned that compliance with the current federal requirement for the proposers to submit separate proposals imposes an unnecessary burden on both the proposers and TxDOT, and likely deters proposers from submitting ATCs. TxDOT has addressed the underlying concern regarding fairness by including minimum criteria for ATCs in its programmatic RFPs for design-build and CDA projects. The deviations that will be allowed will not result in a reduction of scope, performance, reliability or quality. In addition, deviations that extend the project will not be allowed. Given these protections, TxDOT believes that a waiver of the requirement is appropriate.

The following is information supporting TxDOT's waiver request:

- a) Review process and requirements. Attachment 1 is an excerpt of the ATC provisions ("ATC Provisions") included in the programmatic instructions to proposers ("ITP") for TxDOT's design-build and CDA contracts.
 - Section 3.1 sets forth TxDOT'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 TxDOT 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 require an increase in the amount of time required for substantial completion of the project work.
 - Section 3.2 sets forth the detailed submittal requirements/contents of an ATC.
 - Sections 3.2 and 3.3 lay out the specific submittal and review process for ATCs, including actions that may be taken by TxDOT.
 - Section 3.3 outlines the determinations that may be made by TxDOT on submitted ATCs, including adjustments based on TxDOT's increased costs. It also provides a notice to all proposers that approval of an ATC constitutes preapproval of a change from specific requirements of the design-build or public-private partnership CDA contract documents (as applicable) that would otherwise apply.
 - Section 3.3 also includes an acknowledgement by each proposer submitting a proposal that the opportunity to submit ATCs was offered to all proposers. • Section 3.4 authorizes proposers to incorporate pre-approved ATCs into their proposals.
 - Section 3.5 addresses the confidential nature 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. Attachment 2 which describes TxDOT's approach concerning one-on-one meetings during design-build and CDA procurements, further reinforces the confidentiality of the ATC process.

- 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 evaluated against the same technical evaluation factors, and a best value determination is made in the same manner with certain adjustments for TxDOT'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.
- c) What happens if ATC is not feasible? TxDOT's programmatic contract documents for design-build and CDA projects include provisions making it clear that the Developer is responsible for (i) designing the project in conformance with all contract requirements (including ATCs included in its proposal), and (ii) for obtaining all third party approvals required for ATCs. Provisions also clarify the Developer must conform to original RFP requirements if it is unable to obtain approvals or if the concept otherwise proves infeasible.
- d) Timeline for ATC approvals. Section 3.3 of the ATC Provisions sets forth the process for TxDOT's review and approval (or disapproval) of pre-proposal ATC submittals.
- e) Quality Enhancements. As noted above, TxDOT 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.

If you should have any questions or require additional information, please feel free to contact me at (512) 936-0965.

Attachment

Sincerely,
Edward P. Pensock, Jr., P.E.
Interim Director, Strategic Projects Division
Texas Department of Transportation

ATTACHMENT 1:

SAMPLE ATC PROVISIONS INCLUDED IN PROGRAMMATIC ITP FOR DESIGN-BUILD AND CDA PROJECTS

SECTION 3.0 ALTERNATIVE TECHNICAL CONCEPTS

3.1. Alternative Technical Concepts

Sections 3.1 through 3.5 set forth a process for pre-Proposal review of ATCs conflicting with the requirements for design, construction, and capital maintenance of the Project, or otherwise requiring a modification of the Technical Provisions. This process is intended to allow Proposers to incorporate innovation and creativity into the Proposals, in turn allowing the Texas Department of Transportation (TxDOT) to consider Proposer ATCs in making the selection decision, to avoid delays and potential conflicts in the design associated with deferring of reviews of ATCs to the post-award period, and, ultimately, to obtain the best value for the public.

ATCs eligible for consideration hereunder shall be limited to those deviations from the requirements of the as-issued [Contract Documents/GOA] that result in performance and quality of the end product that is equal to or better than the performance and quality of the end product absent the deviation, as determined by TxDOT in its sole discretion. A concept is not eligible for consideration as an ATC if, in TxDOT's sole judgment, it is premised upon or would require (a) a change in the aesthetic or landscaping provisions set forth in Volume II, Book 2 of the RFP, (b) a reduction in Project scope, performance or reliability; (c) an increase in the amount of time required for Substantial Completion of the Work under the [Contract Documents/GOA], or (d) an increase in the Development Price under the [Contract Documents/GOA]. ATCs that, if implemented, would require further environmental evaluation of the Project, may be allowed, provided that Developer will bear the schedule and cost risk associated with such additional environmental evaluation. If Developer is not able to obtain the approvals necessary to implement the ATC, Developer will be obligated to develop the Project in accordance with existing approvals without additional cost or extension of time.

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

If a Proposer is unsure whether a concept is consistent with the requirements of the RFP or if that concept would be considered an ATC by TxDOT, TxDOT recommends that Proposer submit such concept for review as an ATC.

3.2. Pre-Proposal Submission of ATCs

Proposer may submit ATCs for review to TxDOT's Authorized Representative specified in [the RFP], until the applicable last date and time for submittal of ATCs identified in [the RFP]. All ATCs shall be submitted in writing, with a cover sheet identifying Proposer and stating "[Project Name] - Confidential ATCs." Proposer shall clearly identify the submittal as a request for review of an ATC under this ITP. If Proposer does not clearly designate its submittal as an ATC, the submission will not be treated as an ATC

by TxDOT. ATC submittals shall include five copies of a narrative description of the ATC and technical information, including drawings, as described below.

3.2.1 Pre-Proposal ATC Submittal Requirements

Pre-Proposal ATC submissions shall include:

- a) a sequential ATC number identifying Proposer and the ATC number (multi-part or multi-option ATCs shall be submitted as separate individual ATCs with unique sequential numbers);
- b) a description and conceptual drawings of the configuration of the ATC or other appropriate descriptive information, including a traffic operational analysis, if appropriate;
- c) the locations where, and an explanation of how, the ATC will be used on the Project;
- d) any changes in roadway requirements associated with the ATC, including ease of operations;
- e) any changes in routine or capital maintenance requirements associated with the ATC, including ease of maintenance;
- f) any changes in the capital maintenance transition requirements associated with the ATC;
- g) any changes in the anticipated life of the item(s) comprising the ATC;
- h) any reduction in the time period necessary to design and construct the Project resulting from implementing the ATC, including, as appropriate, a description of method and commitments;
- i) references to requirements of the RFP which are inconsistent with the proposed ATC, an explanation of the nature of the deviations from said requirements, and a request for approval of such deviations;
- j) the analysis justifying use of the ATC and why the deviation, if any, from the requirements of the RFP should be allowed;
- k) a preliminary analysis and quantitative discussion of potential impacts on vehicular traffic (both during and after construction), environmental permitting, community impact, safety, and life-cycle Project and infrastructure costs, including impacts on the cost of repair, maintenance and operation;
- l) if and what additional right of way will be required to implement the ATC (and Proposers are advised that they shall (i) be solely responsible for the acquisition of any such right of way, including the cost thereof and obtaining any necessary Environmental Approvals; (ii) not be entitled to any Change Order for time or money as a result of Site conditions (i.e., Hazardous Materials, Differing Site Conditions, geotechnical issues, Utilities, etc.) on such additional right of way; and (iii) not be entitled to any Change Order for time or money as a result of any delay, inability or cost associated with the acquisition of such right of way);
- m) a description of other projects where the ATC has been used, the degree of success or failure of such usage and names and contact information including phone numbers and e-mail addresses for project owner representatives that can confirm such statements;
- n) a description of added risks to TxDOT or third parties associated with implementing the ATC;
- o) an estimate of any additional TxDOT, Developer and third-party costs associated with implementation of the ATC;

- p) an estimate of the Price adjustment should the ATC be approved and implemented; and
- q) an analysis of how the ATC is equal or better in quality and performance than the requirements of the [Contract Documents/CDA, as applicable].

3.2.2 Proposer shall not make any public announcement or disclosure to third parties concerning any ATC until after pre-approval (including conditional pre-approval) has been obtained. Following pre-approval (including conditional pre-approval), if a Proposer wishes to make any such announcement or disclosure, it must first notify TxDOT in writing of its intent to take such action, including details as to date and participants, and obtain TxDOT's prior written consent, in its sole discretion, to do so.

3.2.3 If implementation of an ATC will require approval by a third party (e.g., a governmental authority), Proposer shall have full responsibility for, and bear the full risk of, obtaining any such approvals after award of the Development Agreement and the Capital Maintenance Agreement (CMA) and submission of data; provided, however that TxDOT shall retain its role as liaison with any governmental authorities as more particularly described in the [Contract Documents/CDA, as applicable]. If any required third-party approval is not subsequently granted with the result that Proposer must comply with the requirements of the original RFP, Proposer will not be entitled to a Change Order for additional compensation or time under the [Contract Documents/CDA, as applicable].

3.2.4 If TxDOT determines, based on a proposed ATC or otherwise, that the RFP contains an error, ambiguity or mistake, TxDOT reserves the right to modify the RFP to correct the error, ambiguity or mistake, regardless of any impact on a proposed ATC.

3.3. TxDOT Review of Pre-Proposal Submission of ATCs

TxDOT may request additional information regarding proposed ATCs at any time and will, in each case, return responses to each Proposer regarding its ATC on or before the applicable last date set forth in [the RFP], provided that TxDOT has received all required and requested information regarding such ATC.

TxDOT's responses will be limited to one of the following statements:

- (a) the ATC is acceptable for inclusion in the Proposal;
- (b) the ATC is not acceptable for inclusion in the Proposal;
- (c) the ATC is not acceptable in its present form, but may be acceptable upon the satisfaction, in TxDOT's sole discretion, of certain identified conditions which must be met or clarifications or modifications that must be made; or
- (d) the submittal does not qualify as an ATC but may be included in Proposer's Proposal because it appears to be within the requirements of the RFP requirements; or
- (e) the submittal does not qualify as an ATC and may not be included in the Proposer's Proposal.

In addition, if TxDOT determines that implementation of the ATC will decrease overall project costs but will result in an increase in TxDOT's costs, TxDOT will provide in the ATC approval letter the amount of such increased TxDOT's costs as estimated by TxDOT. Such amount shall be the ATC cost adjustment for evaluation purposes only in accordance with [the RFP].

TxDOT will make a preliminary determination on whether to accept and approve an ATC for submission. However, Proposer will be responsible for ensuring that the final submittal complies with the requirements of the RFP.

Approval of an ATC will constitute a change in the specific requirements of the Development Agreement Documents or CMA Documents, as applicable, associated with the approved ATC for that specific Proposer. 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 TxDOT's determinations regarding acceptability of ATCs and any ATC cost adjustments made in accordance with this Section 3.3 and [the RFP].

TxDOT's rejection of a pre-Proposal submission of an ATC will not entitle Proposer to an extension of the Proposal Due Date or the date that the ATCs are due; provided, however, that the foregoing shall not limit TxDOT's absolute and sole right to modify the Proposal Due Date or any other date in connection with this procurement.

TxDOT anticipates that its comments provided to a Proposer will be sufficient to enable Proposer to make any necessary changes to its ATCs. However, if a Proposer wishes additional clarifications regarding necessary changes, Proposer may provide a written request for clarifications.

3.4. Incorporation of ATCs in the Development Agreement Documents and CMA Documents

Following conditional award of the Development Agreement and the CMA, the ATCs that were pre-approved by TxDOT and incorporated in the Proposal by the successful Proposer shall be included in the Development Agreement Documents or the CMA Documents, as applicable. If TxDOT responded to any ATC by stating that it would be acceptable if certain conditions were met, those conditions will become part of the Development Agreement Documents and CMA Documents, as applicable. The Development Agreement Documents and CMA Documents will be conformed after conditional award, but prior to execution of the Development Agreement and CMA, to reflect the ATCs, including any TxDOT conditions thereto. Notwithstanding anything to the contrary herein, if Developer does not comply with one or more TxDOT conditions of pre-approval for an ATC or Developer fails to obtain a required third party approval for an ATC, Developer will be required to comply with the original requirements of the RFP without additional cost or extension of time as set forth in the Development Agreement or CMA, as applicable.

Prior to execution of the [Contract Documents/CDA], ATCs from unsuccessful Proposers may, in TxDOT's sole discretion, be presented to the selected Developer for possible incorporation in the [Contract Documents/CDA], as applicable, during negotiation of the final terms of the [Contract Documents/CDA]. In addition, following execution of the [Contract Documents/CDA], ATCs from unsuccessful Proposers

may, in TxDOT's sole discretion, be presented to the selected Developer as a TxDOT Change Order in accordance with the [Contract Documents/CDA, as applicable].

3.5. Confidentiality

Subject to the provisions of the Act and the Rules, ATCs and all communications regarding ATCs will remain confidential until a decision is made to select a Proposer or cancel the procurement, at which time all confidentiality rights, if any, shall be of no further force and effect except as otherwise allowed under the Act, applicable Law, and [the RFP]. By submitting a Proposal, Proposer agrees, if it is not selected, to disclosure of its work product to the successful Proposer.

ATTACHMENT 2:

ONE-ON-ONE MEETINGS DURING DESIGN-BUILD AND CDA PROCUREMENTS

One-on-One Meetings

TxDOT intends to conduct one-on-one meetings with each Proposer on the dates set forth in the ITP, and on such other dates designated by TxDOT in writing to the Proposers, to discuss issues and clarifications regarding the RFP and the Proposer's ATCs. TxDOT reserves the right to disclose to all Proposers any issues raised during the one-on-one meetings, except to the extent that TxDOT determines, in its sole discretion, such disclosure would impair the confidentiality of an ATC, or would reveal a Proposer's confidential business strategies. Participation at such meetings by the Proposers shall be mandatory. FHWA may also participate in all one-on-one meetings.

- The one-on-one meetings are subject to the following rules:
- The meetings are intended to provide Proposers with a better understanding of the RFP.
- TxDOT will not discuss with any Proposer any Proposal or ATC other than its own.
- The Proposers shall not seek to obtain commitments from TxDOT in the meetings or otherwise seek to obtain an unfair competitive advantage over any other Proposer.
- No aspect of these meetings is intended to provide any Proposer with access to information that is not similarly available to other Proposers, and no part of the evaluation of Proposals will be based on the conduct or discussions that occur during these meetings.

Persons attending the one-on-one meetings will be required to sign an acknowledgment of the foregoing rules and to identify all participants from the Proposer whether attending in person or by phone.