



OHIO DEPARTMENT OF TRANSPORTATION

CENTRAL OFFICE • 1980 WEST BROAD STREET • COLUMBUS, OH 43223

TED STRICKLAND, GOVERNOR • JOLENE M. MOLITORIS, DIRECTOR

June 23, 2010

Thomas P. Charles
Inspector General
Office of the Inspector General
30 East Broad Street, Suite 1820
Columbus, Ohio 43215-3414

Re: IG File No. 2010107

Dear Inspector General Charles:

Thank you for your review of the Ohio Department of Transportation's (ODOT) proposal to pay for the preparation of responsive preliminary design concepts ("PPRPDC") to the unsuccessful design-build teams competing for the Cleveland Innerbelt Bridge Project. While ODOT has authority to pay PPRPDC, your report indicates that you had concerns about the criteria and procedures for the payment on this project.

Since the issuance of your report and after consultation with your staff, ODOT has revised its PPRPDC proposal note for the Innerbelt bridge project to clarify the criteria and procedures for the payment of PPRPDC. We discussed our revisions with your staff and, having received confirmation that the revisions addressed your concerns regarding documentation of actual costs and expenses, ODOT published an addendum to Project No. 10300, PID # 85531 on June 2, 2010. The relevant portion of the addendum is attached to this letter for your reference.

In summary, the addendum now states that after the award of the design-build contract and upon the submission of complete and acceptable documentation of all actual costs of preparing a responsive preliminary design concept, the remaining eligible DBTs may receive payment up to \$1 million dollars, or the DBT's actual costs of preparing the preliminary design concept, *whichever is less*. The proposal note clarifies that "[e]xcept for that intellectual property developed apart from or prior to [DBT] commencing work on the Technical Proposal for this project, the Department shall retain an undivided joint interest in all rights and intellectual property submitted with the Technical Proposal including any intellectual property derived in the [Alternative Technical Concept(s)] submitted to the Department as part of the Technical Proposal."

Regarding the evaluation of the preliminary design concepts, over thirty technical professionals in various specialty areas from both ODOT and the City of Cleveland will be involved as part of six groups assigned to score the preliminary design concepts within specific portions of each Technical Proposal. The recommendations from each of the six groups will then be further evaluated by a five member executive-level group. A responsive Technical Proposal for the Cleveland Innerbelt Project must address the following issues: sustainability, design management, design of the viaduct bridge and 14 other bridge structures, design of retaining walls, analysis of the proposed drainage scheme, proposed concepts for maintaining traffic, evaluation of utility facility relocations, methods for achieving project and public safety, construction techniques, quality control methods and the proposed means to achieve or exceed schedule requirements.

The final Technical Proposal scores will be combined with the price proposal per the established scoring criteria formula to come up with a best value score upon which the Director will award the Design-Build contract. ODOT will make the payment only if the remaining eligible DBTs submit a Technical Proposal that is judged to be responsive to the Request for Proposal and upon submission of proper documentation. If one of the remaining DBTs is deemed non-responsive (e.g., fails to achieve a minimum score of 70 percent), they will not be eligible to receive the PPRPDC.

The primary value the State receives by pledging to pay for PPRPDC is in the quality of proposals submitted for review. States across the country have recognized that making partial payment to contractors for PPRPDC increases the investment those contractors are willing to make in preparing those proposals. Payment for a portion of the documented costs these prospective teams have incurred incentivizes them to invest more time and resources in their proposals. In addition, while impossible to quantify, once the decision has been made to pay for PPRPDC, ODOT will also receive rights to the intellectual property for use by the State on the specific project for which the PPRPDC were created or for future ODOT projects.

Additionally, ODOT would like to offer the following combined response to the recommendations found in the report:

RECOMMENDATION 1: Assuming that ODOT wants to pay [PPRPDC] on future design-build projects, it should seek explicit statutory authority to pay the [PPRPDC], or, at a minimum, draft and implement criteria and procedures for determining when [PPRPDC] will be used and the amount of such [PPRPDC].

RECOMMENDATION 2: ODOT should not pay any [PPRPDC] until it has first: a) obtained expense forms or other documentation of the unsuccessful bidders' actual costs and expense; and b) evaluated the utility and economic value of the bidders' designs and verified that they can be used on the Innerbelt Bridge project or on future projects.

RECOMMENDATION 3: ODOT should ensure that the [PPRPDC], if paid, do not exceed the bidders' actual cost and expenses and the value of the design.

RESPONSE: ODOT's draft Design Build policy is being enhanced to address the concerns identified in the IG's report. Further as we complete the policy and its accompanying standard procedure, we will be reviewing both with our business partners and other interested stakeholders. We anticipate that the final policy and procedures will contain at least the following:

1. **Criteria for determining which projects would benefit from use of a PPRPDC.** To be eligible for PPRPDC consideration, projects must be significant in size or sufficient in complexity to benefit from Value-Based Design-Build contracting. These types of projects typically include: major/signature bridges, multi-phase maintenance of traffic schemes, roadway reconfigurations, and/or unique design or construction challenges.
2. **A calculation for the dollar value of the PPRPDC.** FHWA recommends a payment for the preparation of responsive preliminary design concepts, in order to receive the benefits to the State noted above, one-third to ½ percent of the design costs for a project. Some other states DOTs use between 0.75 percent and 1 percent of the total construction cost. ODOT intends to continue to use a conservative approach in establishing a standard and reasonable range of approximately ¼ of one percent to 1% of the total projected construction cost of a project. If a District or Division proposes to deviate from the standard percentage, written justification


shall be submitted to the Director for approval and must include an analysis of similar projects in Ohio or other states in which a payment for PPRPDC has been made and any other supporting documentation for the suggested percentage.

By way of illustration, the current construction cost estimate for the Cleveland Innerbelt project is \$450 million. Total design costs for this project are estimated to be between 3 and 6 percent of the construction cost, or \$13.5 to \$27 million. Approximately 30 percent of the total design work for the project will have been completed by ODOT prior to the Request for Proposals. It is expected that each short-listed DBT will need to increase this design development by at least an additional 35 percent in order to develop their Technical Proposal and to determine reasonably accurate quantities for their Price Proposal. This development is estimated to cost between \$4.7 million and \$9.5 million (35 percent of the anticipated design costs). Following FHWA's recommendation, a PPRPDC of \$1.6 to \$4.8 million (one-third of \$4.7 million to one-half of 9.5 million) could easily be justified for the Cleveland Innerbelt project. However, ODOT chose a conservative approach for the Innerbelt project establishing a standard and reasonable range of approximately $\frac{1}{4}$ of one percent of the total projected construction cost of the project.

3. **Defined acceptable methods for determining the bidder's actual costs.** Bidders costs may be incurred by both design and construction personnel. Design costs will be submitted in accordance with ODOT's specifications for consultant services in place at the time as well as Federal regulations set forth in the Federal Acquisition Regulations Part 31 or other applicable federal and state accounting practices. Contractor costs will be submitted in accordance with the procedures set forth in the version of the ODOT Construction and Materials Specifications in effect at the time.
4. **Ensure that a value analysis of each bidder's Technical Proposal is performed as part of the Design-Build selection process.** The scoring criteria for the Technical Proposals will be developed during preparation of a project's bidding documents (e.g., Project Scope) and will focus on areas critical to the specific project's overall success. Each bidder's Technical Proposal will be scored by a team of technical experts from the Department (and other local governments or agencies, as appropriate). The scoring criteria will allow the Department to receive the best overall project, not necessarily based on the lowest price. A bidder whose Technical Proposal is deemed non-responsive (e.g., fails to achieve a minimum score of 70 percent) will not be eligible for the PPRPDC.
5. **The use of PPRPDC payments will continue to be subject to Controlling Board approval.**

Again, I would like to thank you for consulting with our staff as we developed our response to the report and the review of the addendum before we published it.

Sincerely,


Jolene M. Molitoris
Director

cc: Winston Ford, Deputy Inspector General

NEW NOTE - PAYMENT FOR PREPARATION OF RESPONSIVE PRELIMINARY DESIGN CONCEPT

Subject to the conditions listed in this note, the Department will provide a payment of \$1,000,000 or the DBT's actual costs of preparing the preliminary design concept, whichever is less, to each nonwinning short-listed DBT. The successful bidder will not receive a separate payment. The term "payment" as used in this section shall mean \$1,000,000 or the DBT's actual costs of preparing the preliminary design concept, whichever is less.

After award, each non-winning short-listed DBT shall submit complete documentation of all actual costs of preparing the preliminary design concept. The Department will initiate payment after validation of the actual costs submitted and approval of the Controlling Board.

By submitting its Technical Proposal for this Project, the DBT forms a contract and agreement for its technical proposal and conceptual design with the Department, the terms and conditions of which are outlined in the documents referenced in Revised Specification 105.04. Furthermore, by submitting its Technical Proposal for this Project, the DBT acknowledges that it is eligible for payment if the DBT's proposal is not selected. The payment will be payable by the Department to the DBT within 90 days of award of the Contract, unless payment is waived by the unsuccessful DBT.

The payment shall be due only if the DBT submits a Technical Proposal that is responsive to the RFP as defined in Section 3 of the Selection Criteria. The payment shall be full and final consideration for all documents submitted in the Technical Proposal. Except for that intellectual property developed apart from or prior to DBT commencing work on the Technical Proposal for this project, the Department shall retain an undivided joint interest in all rights and intellectual property submitted with the Technical Proposal including any intellectual property derived in the ATC(s) submitted to the Department as part of the Technical Proposal.

If Technical Proposals have been submitted, but the Department does not award the contract, all responsive short-listed DBTs shall receive a payment, unless payment is waived by the DBT. If the Department withdraws the contract prior to Technical Proposal submission, no fee will be paid. In order to receive a payment, the DBT will be required to have a State of Ohio Vendor's Code number. Information on Vendor Codes may be obtained from the Ohio Department of Transportation's Office of Accounting. The unsuccessful DBTs must submit an invoice and all supporting documentation within 30 days of contract award.

Unsuccessful DBTs who otherwise qualify for the payment may elect to waive the fee and refuse payment within 10 days of the Department Contract award decision and retain any available rights to its Technical Proposal and ATCs contained therein.

The DBT's actual costs of preparing the preliminary design concept shall be calculated as described below. Eligible costs must have been incurred between 12/1/2009 and the date the Technical and Price Proposal is submitted to ODOT. The DBT bears the burden to document and support claimed costs.

Consultants

Actual costs shall be determined in conformance with applicable provisions of the Department's policies and directives, the FHWA's Federal-Aid Policy Guide, and the principles and procedures set forth in FAR Part 31. When specific Department and FHWA policies differ from FAR Part 31, the Department and FHWA policy shall prevail. Direct costs must be properly supported by time records and/or copies of receipts or other acceptable evidence of expenditures.

No mark-up of actual costs is permitted to compensate the consultant for profit.

Contractors

Actual costs shall be determined in accordance with sections 109.05.C.1, 109.05.C.2 and 109.05.C.3 of ODOT's *Construction and Materials Specification* (CMS) manual (Dated 1/1/2010), with the following modifications –

109.05.C.1:

1. Completion of a Daily Force Account Record is not required. However, labor documentation requirements set forth in section 109.05.C.2 apply.
2. Equipment costs are not allowable or reimbursable.
3. Actual subcontractor and consultant costs are reimbursable, without mark-up, if required for this project, The Contractor must provide copies of paid invoices from the subcontractors and consultants demonstrating the actual costs incurred and paid by the Contractor for this project.

109.05.C.2:

4. Costs associated with profit sharing, bonuses (in any form), and incentives are not reimbursable.
5. Workers' Compensation Premiums for other states, if incurred for this project, are reimbursable.
6. Restriction on personnel categories shall not apply.
7. Travel costs shall be calculated in accordance with the State of Ohio's most current travel reimbursement policy in effect at the time travel was incurred.

109.05.C.3:

8. Actual material costs are allowable, with no additional mark-up. The Contractor must provide paid invoices from the vendor demonstrating the actual material costs incurred and paid by the Contractor for this project.

All payments are subject to approval of the Controlling Board under Section 127.16 of the Ohio Revised Code.