Kosciuszko Bridge Replacement Project – Phase 1
Contract D900011
General Q&A from One-on-One Meetings (Part 2)

Question 1.
Funding. The Information to Proposers (ITP) states that: “The execution and performance of a Contract ... is contingent upon sufficient appropriations and authorizations being made by the Legislature of New York, or the Congress of the United States if federal funds are involved, for performance of a Contract between the successful Proposer and the Department.” (ITP Section 9.3; see also DB Agreement, Article 1.2; and NYS Standard Clauses, Appendix A, Section 1).

*What is the status of current appropriations and authorizations from the State and Federal government?*

**Answer:** State and Federal funding for the Project have been authorized.

Question 2.
DBE Utilization (*cont’d*). NYSDOT’s responses to questions #18 and #76 of the “Kosciuszko Bridge Project Final RFQ Questions and Responses; Responses to Questions” restricts second tier subcontracting participation to only 4 instances where the primary subcontract exceeds $50 million dollars. The Code of Federal Regulations Title 49 CFR Part 26 (which applies to this Contract), does not prohibit second tier subcontracting. NYSDOT’s interpretation appears to be contrary to 49 CFR Part 26 and creates an obstacle to the purpose of the DBE program: fostering small business participation and attaining maximum participation. *Removing the restriction on second tier subcontracting does not, in any way, limit the requirement that the DBE perform a commercially useful function. Will the Department remove the restriction on second tier subcontracting to conform to 49 CFR Part 26? If not, please clarify the basis for the determination.*

**Answer:** Second tier subcontracting is permitted. In instances where a first tier subcontractor is not a DBE, but the second tier subcontractor is a DBE, the amount of the second tier contract to the DBE will be counted toward the DBE goal.

Question 3.
Utilities and “Consequential Damages”. The Project Requirements currently state that “All utilities must be maintained, supported and protected during construction. ... The Design-
Builder shall make good any damage and consequential damages to those utilities caused by his operations.” (Part 3 – Project Requirements, Section 9 Utilities, Sub-section 9.3 General Requirements). The phrase “consequential damages” creates substantial potential liability to the Utilities, beyond that which may have been intended, and which may require substantial contingencies that will increase costs to the State. We request that this phrase be deleted and that reimbursement to Utilities be limited to actual, direct costs to repair damaged utilities.

Answer: The following language has been added to the RFP by Addendum.

“Claims for Consequential Damages.
As set forth herein, the Department waives claims for consequential damages against the Design-Builder arising out of or resulting from the Work under this Contract in the following instances: consequential damages incurred by the Owner for rental expenses, for loss of use, income, profit, or reputation, for business interruption, for interest and financing charges, for depreciation, and for loss of management or employee productivity.

The waiver of consequential damages does not include any damages other than those set forth above, or any damage or assessment provisions set forth elsewhere in this Contract, including but not limited to: consequential and other damages in the event of default by the Design-Builder or termination of the Design-Builder for cause; liquidated damages; engineering charges; lane rental charges; incentive or disincentive payments; or third-party claims for consequential damages. For the purposes of clarity, the waiver of claims set forth herein shall not limit the Indemnification requirements set forth in this Contract, and thus the requirement to indemnify against “damages . . . of every name and description,” including consequential damages, remains undisturbed.”

Question 4.
Consequential Damages (cont’d). While on the subject of consequential damages, the Contract bars Design-Builder from recovering consequential damages in numerous provisions (DB 109-10.2(C)(5); DB 105-7.10), but does not similarly limit the Department. We request that a mutual waiver of all consequential damages be included in the Contract.

Answer: See above.

Question 5.
Codes and Guidelines. The “Codes, standards and/or manuals in effect on the date of Contract execution shall be applicable to the Project.” (Part 3 – Project Requirements, Section 1, Sub-section 1.5 Design Codes and Manuals). In the same Section, the Contract indicates that “Design-Builder shall perform the Work in conformance with all NYSDOT Engineering Manuals and Guidelines current at the time of award.” First, “the time of award” and “date of Contract execution” are likely to differ, perhaps significantly. Please consider making these provisions consistent. Second, award or Contract execution by the Department may not occur until many months after the Proposal and Price has been submitted. If the Codes, standards, and/or manuals or NYSDOT Engineering Manuals and Guidelines are changed after submittal of the Proposal and Price, or after award or Contract execution, please confirm that the Department will provide an equitable adjustment in time and cost.

Answer: The Design-Builder shall perform the Work in conformance with all codes, standards and manuals in effect on the Proposal due date. This change has been issued by Addendum.

Question 6.

Environmental Approvals. “For those Environmental Approvals not secured as of the date of this Contract, the Design-Builder shall cooperate with and assist the Department in securing the approvals....” (Part 3 – Project Requirements, Section 3, Sub-section 3.2.1) If Environmental Approvals secured after submittal of the Proposal and Price, or after the date of this Contract, change requirements or otherwise adversely impact the Project, please confirm that the Department will provide an equitable adjustment in time and cost.

Answer: This would have to be reviewed on a case by case basis. Some permits, such as the OCMC permit could be revised based on the Design-Builder’s performance, therefore the Design-Builder would be held responsible. If permit requirements are changed at no fault of the Design-Builder, the Design-Builder would not be responsible for the schedule and cost implications.
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Question 7.
Project Labor Agreement (PLA). The Department is seeking FHWA approval to include a PLA on this Project, which, if approved, would be provided to the Proposers as an Addendum (ITP Para.1.17). Please update us on the status of FHWA’s approval of the PLA. Is a draft form of PLA available for Proposer review?

Answer: Updates regarding the PLA will be provided by Addendum.

Question 8.
Partnering. The Contract states that: “Any cost associated with effectuating partnering will be agreed to by both the Design-Build and the Department and will be shared equally with no change in the Contract Price. The Design-Build shall pay all costs and submit paid invoices to the Department for 50% reimbursement.” Rather than having the numerous Proposers on this Project carrying different amounts for this currently unquantifiable item, would the Department consider specifying an allowance for partnering costs?

Answer: The Department will prepare a fixed lump sum Force Account Item that will constitute a draw down account to provide an allowance for partnering costs. This shall be issued by Addendum.

Question 9.
Non-Payment. Design Build Agreement Section 109-5.4 (“No Payment on Design-Build’s Non-Compliance”) states that “So long as the Design-Build does not comply with any lawful or proper direction concerning the Work or Material given by the Commissioner of Transportation, or his/her representative, the Design-Build shall not be entitled to have any interim payment made for non-complying Work, nor shall any interim payment be rendered for Work done or Material furnished until such lawful or proper direction aforesaid has been fully and satisfactorily complied with.” Please clarify whether the Department intends to stop all payments to the Design-Build, or only payment as it relates to the non-complying Work.
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Answer: The Department intends to stop all payments to the Design-Builders.

Question 10.
Value Engineering Change Proposals (VECP). The Contract states: “All VECPs, whether or not approved by the Department for use in this Contract, apply only to this Contract and become the property of the Department and will contain no restrictions imposed by the Design-Builders on their use or disclosure. The Department will have the right to use, duplicate, and disclose in whole or in part any data necessary for the utilization of the VECP. The Department retains the right to utilize any proposed VECP or part thereof on any other project without any obligation to the Design-Builders submitting the same.” Will the Department provide a release to Design-Builders for the Department’s use of Design-Builders’ VECP Proposals on other projects?
Answer: Any future work that utilizes a concept from the DB team would be stamped by the person responsible for the final design and the DB team would not be responsible.

Question 11.
Differing Site Conditions (cont’d). In addition, DB 104-5B severely limits the typical definition of DSC for Type 2 by attributing constructive knowledge to contractor for “reasonable site investigation, exploration and desktop exploratory study during the preconstruction phase.”
a. Please explain what the Department is referring to as the “preconstruction phase”. (does this mean pre-Proposal? post-award but prior to construction? or some other period?)
Answer: The Design-Builders is expected to gather as much information as possible pre-Proposal and continue any required additional studies post-award and prior to construction.

b. Please clarify what the Department means by “desktop exploratory study”.
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Answer: “Desktop exploratory study” refers to reviewing anything that doesn’t require field work such as city records, ROW records, legal records, public records published by NYSDEC, an internet search, etc.

c. Given that the Design-Builder must price the Work now, and given the limited time to prepare the Proposal, it seems unfair to require “exploration” and “desktop exploratory study,” as this attribution of constructive knowledge changes the typical DSC clause, reducing its effectiveness, which will require contingencies to be put into the Proposal.
Answer: The Design-Builder has the responsibility to do a reasonable walk through and desktop exploratory study to be familiar with known conditions.

Question 12.
Indemnification. DB Agreement Article 18 Indemnification requires the Design-Builder to be “responsible for all damage to life and property due to negligent or otherwise tortious acts, errors or omissions…” and to indemnify, hold harmless and release the Department, etc. Design-Builder should not be responsible for third party “tortious acts ...” as this could be construed to extend to criminal wrongdoing and intentional acts.
Answer: The Design-Builder’s scope of indemnification covers tortious acts related to the Work and services under the Contract. To the extent this includes criminal wrongdoing and intentional acts, it is covered by the indemnification.

Question 13.
“Claims” by the Public. General Provisions, DB 107-26. 4, “Prompt Response to Claim by Public” and DB 107-30 “Design Builder’s Responsibility for the Traveling Public” expose the Design-Builder to default and other remedies if it “fails to provide satisfactory resolution through a timely claims adjustment process or denies a claim without proper cause and justification ....” Design-Builder can neither accept nor deny a claim and has no authority to pay a claim.
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Answer: As set forth in both DB 107-26.4 and DB 107-30:
“There should be an interval of no more than ten (10) working days between receipt of a written claim by the Design-Builder and receipt by the carrier. The Design-Builder and/or the Insurance Carrier are expected to investigate, determine and adjust such claims promptly and fairly with notice to the Project Manager.”

Failure to abide by these provisions gives the Department discretion to invoke DB 108-8 or other remedies.

Question 14.
Laurel Hill Site Management Plan. The Draft RFP indicated that the Site Management Plan (SMP) for the Laurel Hill Site was under review by NYSDEC and was to be provided with the Final RFP (Part 3 – Project Requirements, Section 3.2.5 Contaminated Materials Management, Sub-section E); but the Final RFP now indicates it will be provided later, by Addendum. *When can Proposers anticipate receipt of the Laurel Hill Site SMP?*

Answer: The Draft SMP has been posted to the Project website. The Draft SMP is under review by NYSDEC. The Final SMP will be provided to Proposers by Addendum.

Question 15.
National Grid Utility Agreement. Similarly, the Draft RFP indicated that the Preliminary Utility Agreement between the Department and National Grid would be included in the Final RFP (Part 3 – Project Requirements, Section 9 Utilities, Sub-section 9.3.1 Utility Relocation Agreements); but the Final RFP now indicates it will be provided later, by Addendum. *When can Proposers anticipate receipt of the executed National Grid Preliminary Utility Agreement?*

Answer: The Department is coordinating with National Grid to finalize the agreement. The Final Agreement will be provided to Proposers by Addendum.
Question 16.
Timing of Selection of Base Project or Base Project plus Option. Regarding the “Best Value Determination,” the Department’s Selection Committee will recommend to the Selection Official the overall Best Value Proposal between the highest-ranked Base Project Proposal and the highest ranked Base Project plus Option Proposal, followed by identification of Project Scope (Base Project or Base Project plus Option) and name of selected Proposer/Design-Build Team, per ITP 7.5 (see also ITP 7.1.3). Just to confirm, the Department will make its determination/selection of Base Project or Base Project plus Option prior to Award (as opposed to awarding the Base, with later addition of the Option)?

Answer: The selection of best value will either be Base or Base plus Option. When the winning DB team is selected they will be notified if the scope is the Base or the Base plus Option.