
North Carolina Department of Transportation

Public Private Partnerships Policy & Procedures



June 4, 2009

PUBLIC PRIVATE PARTNERSHIPS POLICY & PROCEDURES

PURPOSE

This document establishes the Department's process for soliciting, evaluating, selecting, procuring and administering contracts that include a partnership with one or more private entities that wish to develop, design, establish, enhance, finance, construct, operate, and/or maintain a transportation facility. The primary purpose of public private partnerships is to leverage public funds or other resources with private investment to accelerate, enhance, or otherwise improve the delivery, operation, or maintenance of public transportation infrastructure.

This policy is not intended to supercede or replace Department policies enabling private or public entities from funding transportation projects with no further financial interest upon completion of the project. These procedures are not intended to limit or otherwise apply to the Department's procurement of goods and services in the ordinary course of its operations. This policy document is independent of the policy adopted by the North Carolina Turnpike Authority.

SCOPE

This procedure affects all offices, departments, units, etc., associated with the planning, development, design, construction, operation or maintenance of roads, bridges, highways, or other Department of Transportation infrastructure.

AUTHORITY

Session Law 2008-164

Session Law 2007-357

Session Law 2007-439

General Statute §136-18(39)

General Statute §136-28.1(l)

General Statute §136-28.1(m)

General Statute §143B-350(f)(12a)

BACKGROUND

Session Law 2006-230 first authorized the Department to enter into agreements with private entities to finance the cost of acquiring, constructing, equipping, maintaining, and operating highways, roads, streets, and bridges, subject to the approval of the Board of Transportation. In the 2007 Legislative Session, this provision was revised to clarify that agreements may be made with private entities for transportation infrastructure projects, with priority given to highways, roads, streets and bridges. Session Law 2007-439 further requires that the Department report concurrently to the Board of Transportation and

to the Chairs of the Joint Legislative Transportation Oversight Committee, the Chairs of the House of Representatives Appropriations Subcommittee on Transportation, and the Chairs of the Senate Appropriations Committee on Transportation regarding any such proposed agreement. Session Law 2008-164 expanded the Department's authority to expressly permit the Department to enter into agreements to plan, design, develop, acquire, construct, equip, maintain, and operate highways, roads, streets, bridges, and existing rail, as well as properties adjoining existing rail lines in this State. Furthermore, Session Law 2008-164 stipulates that any contracts for construction of highways, roads, streets, and bridges which are awarded pursuant to such an agreement entered shall comply with the competitive bidding requirements of Article 2 of Chapter 136 of the General Statutes.

Session Law 2007-439 specifically permits the use of Public Private Partnerships for two pilot projects for internet access at rest areas and two pilot projects for litter removal.

DEFINITIONS

Competitive Negotiation: A process commonly used in the selection and procurement of design services for transportation projects. Competitive negotiation involves the selection of a Proposer or Proposers based on technical merit or qualifications with or without regard to cost, followed by a period of negotiation with the selected Proposer(s).

Comprehensive Agreement: The assemblage of all contract documents and requirements, as defined below and incorporated by reference, the final finance arrangements, and other ancillary operating or encroachment agreements as may be executed by the Department and one or more private entities. The document may also be referred to as a Development Agreement or a Comprehensive Development Agreement. These agreements may include provisions for the lease of rights-of-way in, and airspace over and under, highways, public streets, rail or related facilities.

Contract: The assemblage of all contractual documents and requirements that include the Request for Proposals, all addenda, a Proposal (both technical and financial), applicable NCDOT Standard Specifications and Drawings, and other documents as referenced in the Request for Proposals.

Design-Build: A project delivery method that combines construction and preconstruction services into one contract that may be suitable for public private partnerships. Design-Build may combine into a single contract the preconstruction, construction, construction engineering, operation, maintenance, inspection requirements and testing requirements for a project.

Design-Build Team: Any company, partnership, corporation, association, joint venture, or other legal entity permitted by law to practice engineering, architecture, and construction contracting, as appropriate, in the State of North Carolina.

Interim Agreement:	An initial agreement that may be entered into by the Department and the successful Proposer upon completion of initial negotiations. This agreement typically defines the preconstruction activities and any compensation therefor that may be necessary to further the development of a Comprehensive Agreement.
Letter of Interest:	A written response that is solicited from potential Proposers through advertisements. It is often employed in pre-qualifying Proposers for specific services, based on their resources and experience, before issuing a Request for Proposals.
Project:	The project to be planned, developed, designed, constructed, operated and/or maintained in accordance with the Contract.
Proposal:	The document submitted by a Proposer that may combine technical details and cost in a negotiation or competitive negotiation procurement process or may be comprised of a separate Technical Proposal and Price Proposal in a competitive sealed bid procurement process.
Price Proposal:	The sealed “bid” in a competitive sealed bid procurement process that constitutes the Proposer’s price to complete the activities required by the Request for Proposals and the Proposer’s Technical Proposal.
Request for Proposals:	A document that describes the procurement process, provides the scope of services and requirements for the project, and may be used by the Proposer to submit their Price Proposal. The Request for Proposals typically forms the basis for the Contract and the Agreement.
Request for Qualifications:	A document issued by the Department that solicits Statements of Qualifications or Letters of Interest from Proposers.
Statements of Qualification:	A document that is requested from a potential Proposer that describes the Proposer’s qualifications to perform certain types of work including previous experience, licenses, certifications, personnel, equipment, etc. The Statement of Qualifications may also contain or include specific examples of previous work or financial/bonding capacity of the Proposer.
Technical Proposal:	The proposal as set forth by the Proposer that conveys its design, construction approach, services proposed, schedule, or other items as required by the Request for Proposals in a competitive sealed bid procurement process. The Technical Proposal is made a part of the Contract.
Project Manager:	The Department staff member assigned to coordinate the development of a project’s Request for Proposals and the review of the Proposer’s submittals. The Department may also elect to utilize a General Engineering Consultant or other such technical expert to serve as the Project Manager.

PROJECT SELECTION

OVERSIGHT

An Oversight Committee will be maintained to guide the evaluation and selection of Public Private Partnership projects. The membership of the Oversight Committee will mimic that of the Design-Build Executive Committee and include such Executive Department Staff such as the State Highway Administrator's office, Chief Engineer's Office, Administrator of the Technical Services Division, Preconstruction Branch Manager, Design Branch Manager, State Transportation Program Management Engineer, etc. This Oversight Committee will also be responsible for general oversight of the Public Private Partnership Program, procedures, and performance measures.

APPLICABLE PROJECTS

The appropriate selection of projects for a Public Private Partnership is extremely important. Typically, Public Private Partnership projects may be considered if they fall into at least one of the following broad categories:

- 1) Projects where design and construction need to be expedited for the public good.
- 2) Projects affording opportunities for innovation in design, construction, operation, maintenance, or financing of the transportation infrastructure.
- 3) Unusual projects that do not lend themselves to normal design-bid-build procedures.
- 4) Projects where significant Department resources, which may include rights-of-way or air rights, are available to leverage with private investment.
- 5) Projects conducive to significant private investment.
- 6) Projects for which private investment would fulfill a critical financial need to complete the project.
- 7) Projects that may provide access to new private capital to deliver other critical transportation projects.
- 8) Projects need to be on local long range transportation plans and/or have demonstrated local support.
- 9) Projects for which a business case demonstrates that a Public Private Partnership can deliver the best value to the traveling public.

PROPOSAL SOLICITATION

The Department may solicit interested parties for participation in a Public Private Partnership for any project presuming the project selection criteria includes public need, technical and financial feasibility, transportation efficiency or efficacy, cost effectiveness, available resources, or project acceleration. The selection process must appreciate economy and potential savings to the public, but selection of the successful Proposer will also consider the quality and technical merit of the proposal.

The Department must provide, to the greatest extent possible, for the solicitation of competitive proposals prior to entering into a Private Public Partnership agreement. Furthermore, in accordance with Session Law 2008-164, any contracts for construction of highways, roads, streets, and bridges which are awarded pursuant to such an agreement shall comply with the competitive bidding requirements of Article 2 of this Chapter 136 of the General Statutes.

The Department is not required to respond in any manner to unsolicited proposals and shall not do so formally as a matter of policy. The Department does, however, encourage interested parties to suggest potential projects for Public Private Partnerships. If the Department elects to pursue a project, regardless

of the manner in which it is suggested, the Department will issue a formal advertisement and/or Request for Proposals in accordance with this policy.

EVALUATION PROCESS

The Department may use a one-step or two-step process to evaluate Proposals and select a Proposer with which the Department intends to enter into an agreement to execute a project. The evaluation of Statements of Qualifications, Letters of Interest, and Proposals will be done by an Evaluation Committee selected on a project specific basis.

EVALUATION COMMITTEE

The Evaluation Committee is a critical element of the Proposer evaluation and selection process. The Evaluation Committee will be composed of at least five Department employees. To the greatest extent possible, the Evaluation Committee members should have significant NCDOT experience and a thorough understanding of Department procedures. These members will represent major areas of the project planning, design, construction, finance, and/or operation. The Evaluation Committee may also include third party representatives with legal, financial, or otherwise specialized expertise. The Evaluation Committee will serve as a selection committee and is responsible for the evaluation of both (1) the Statements of Qualifications or Letters of Interest for the purpose of shortlisting and (2) the Proposals for the purpose of determining a committee consensus of the Proposal that addresses the price and performance that will provide the greatest overall benefit under the specified selection criteria. A confidentiality agreement will be signed by all members of the Evaluation Committee that limits their discussion on the Proposals to only those Department personnel or Proposer references that they deem necessary to assist in the evaluation.

ONE-STEP PROCESS

The one-step process will include the distribution of a Request for Proposals. The evaluation of Proposals and the selection of the successful Proposer under a one-step process will be consistent with that of the second step of the two-step process as outlined below. Generally, a one-step process will be reserved for projects that are specialized in nature or do not require substantial investment to generate a Proposal.

TWO-STEP PROCESS

The two-step process entails the issuance of a Request for Qualifications (RFQ), the development of a short list of Proposers, the issuance of a Request for Proposals, and the determination of the successful Proposer.

REQUEST FOR QUALIFICATIONS

The Request for Qualifications will provide a general description of the work and the Proposers' responsibilities, and will include the prequalification requirements, any pre-Proposal conferences, Department point of contact, additional technical qualifications desired, and the timeframe for Statements of Qualification or Letters of Interest to be submitted to the Department. Requirements in the Request for Qualifications shall be general and not require Proposers to provide technical evaluation or detailed scheduling of project specifics. Each project's Request for Qualifications should be modified to fit the unique needs of that project.

The Request for Qualifications will set forth basic evaluation criteria such as professional experience, technical competence, resources, staffing, management stability, legal contracting entity, organizational structure, and the financial capability and stability necessary to complete a project. The Request for Qualifications may also request other information deemed necessary by the Department.

The Request for Qualifications will include all weighted evaluation criteria to be used in assessing the Letters of Interest or Statements of Qualifications. The Evaluation Committee will review the responses to the Request for Qualifications and will identify those Proposers that are best suited for further consideration. This “shortlist” of Proposers will be invited to submit a conceptual or detailed Proposal in response to the Request for Proposals provided to them. The shortlist will typically consist of three Proposers but the Department may elect to shortlist as many as five Proposers.

At the Department’s discretion, one additional Proposer may be designated by the Evaluation Committee as the shortlist alternate. In the event a shortlisted Proposer withdraws from further consideration on the project, the Department may invite the shortlist alternate to submit a Proposal. In this event, all previously shortlisted Teams will be made aware of this invitation.

Unless specialized services are otherwise stipulated in the RFQ, the Department's standard pre-qualification requirements apply to each entity providing professional engineering services. Likewise, the standard contractor pre-qualification requirements apply to each contractor entity within or utilized by the Proposer. Unless otherwise approved by the Department, each entity must be pre-qualified prior to the deadline for the submittal of the Statements of Qualification.

Any consultant engineers under contract, or previously under contract, with the Department to prepare preliminary plans, planning reports or other project development products for a project will not be allowed to participate in any capacity with the Proposer selected to complete that project. Exceptions to this policy may be granted by the Department, upon written request from the specific firm, if it is determined that the firm’s involvement is in the best interest of the public and does not constitute an unfair advantage.

REQUEST FOR PROPOSALS

The Request for Proposals (RFP) document contains the directives and scope description for any given project. Any desired project elements, design and construction requirements, guiding documents, responsibilities of the Proposer, responsibilities of the Department, payment or compensation terms, as applicable, and the procurement process to be used for Proposer selection are typically stipulated within this document.

A draft Request for Proposals may be distributed to the shortlisted Proposers. If so designated by the Department, one or more meetings will be afforded to each shortlisted Proposer to address any questions it may have about the project, the requirements of the Request for Proposals, or the selection process. The meetings will be conducted individually with each Proposer. As a result of these meetings, the Request for Proposals may be modified and a Final Request for Proposals issued to all shortlisted Proposers. Addenda to this Final Request for Proposals may be issued as needed to further refine the requirements of the Contract.

The Request for Proposals will solicit conceptual or detailed Proposals and designate the required contents of responsive Proposals, which may include, but not be limited to, the following information:

- (1) Additional information regarding the Proposer's qualifications and demonstrated technical competence.
- (2) A discussion on the feasibility of developing the project as proposed.
- (3) Environmental documentation (NEPA, permitting, etc.) responsibilities
- (4) Detailed engineering or architectural designs.
- (5) Project Schedule and the Proposer's ability to maintain progress.
- (6) A detailed financial plan, including costing methodology, cost proposals, and project financing approach.
- (7) Ongoing or long term operation and maintenance issues related to the infrastructure.
- (8) Any other information the Department deems relevant or necessary.

REQUEST FOR PROPOSALS CONTENTS

The contents of the RFP vary on a project specific basis. However, the RFP, as a minimum should address the items outlined below:

- (1) Estimated Procurement Schedule
- (2) Instructions on Proposal Completion, Submission and Execution
- (3) Department Point of Contact During Procurement Phase
- (4) Notification of any Pre-Proposal Conferences
- (5) Proposal Evaluation Criteria
- (6) Proposer Selection Process
- (7) DBE or MB/WB Goals and Reporting Requirements
- (8) Oral Presentation Requirements
- (9) Planning, Design and Other Preconstruction Services Required
- (10) Submittal Requirements
- (11) Permits (as applicable)
- (12) Construction Services Required
- (13) Third Party Involvement or Restrictions
- (14) Information or Services to be Provided by the Department
- (15) Professional Insurance and Bonding
- (16) Payment/compensation terms, as applicable

SELECTION PROCESS

The selection process will generally consist of two phases. For a competitive sealed bid procurement process, these phases will consist of complete evaluation of the Technical Proposals followed by a determination of the most beneficial Proposal using a predetermined algorithm that combines Technical Score and Price. For a negotiation or competitive negotiation procurement process, the phases will consist of evaluation of the Proposals, followed by a period of negotiation.

PROPOSAL EVALUATION CRITERIA

The Request for Proposals will clearly outline the criteria to be used to evaluate the Proposals, regardless of procurement process. These criteria may include, but are not limited to:

- 1) Financial plan credibility
- 2) Project schedule, milestones, and credibility thereof
- 3) Reasonableness of assumptions, including those related to ownership, legal liability, law enforcement, and operation and maintenance of the project

- 4) Financial exposure and benefit to the Department and the public
- 5) Forecasts
- 6) Compatibility with other existing or planned facilities
- 7) Compliance with DBE or MB/WB goals or good faith efforts
- 8) Proposer's demonstrated capabilities and past performance
- 9) Design features
- 10) Likelihood of obtaining necessary third party approvals or support
- 11) Cost and pricing, including user fees and projected usage
- 12) Innovation in planning, development, design, construction, maintenance, or financing
- 13) Liability insurance provisions
- 14) Staffing and project coordination capabilities, including governmental liaison
- 15) Long term operations and maintenance considerations and life cycle costs
- 16) Traffic control
- 17) Safety records and plan
- 18) Quality control methods and/or project guarantees
- 19) Natural environment responsibility
- 20) Oral presentation

REVIEW OF PROPOSALS

The Evaluation Committee will first determine whether the Proposals are responsive to the requirements of the Request for Proposals. If any of the Proposals are considered non-responsive, the Department will notify the Proposer of that fact.

Each Proposal found to be responsive will be evaluated by the Evaluation Committee. The Evaluation Committee may be provided tools to assist in the evaluation of the Proposals. The Evaluation Committee may solicit input from other Department employees, independent third party technical advisors, or Proposer references regarding specific information that may be needed outside their experience or expertise.

A Department employee will serve as a facilitator to assist in the evaluation process. The facilitator serves in an ex officio capacity and facilitates the Evaluation Committee's discussion. The facilitator may answer questions regarding the evaluation criteria and process as well as specific questions about Proposal contents. The role of the facilitator is to ensure that (1) the evaluation process occurs in a systematic and consistent manner, (2) false or irrelevant data is not used in the evaluation process, (3) to the greatest extent possible, the overall evaluations are properly valued as relates to the size and complexity of the project and (4) the Evaluation Committee understands the confidential nature and outcome of its work.

Based on the evaluation process and evaluation criteria outlined in the Request for Proposals, the Evaluation Committee will score or rank the Proposals.

Competitive Sealed Bid Procurement Process

For projects using a competitive sealed bid procurement process, the evaluation of the Technical Proposals will result in a consensus Technical Score for each Proposal and will be conducted in accordance with the Department's current Design-Build Policy and Procedures at the time of the project advertisement. For certain projects and if outlined in the RFP, the Department may use other recognized means of combining technical quality and price in the determination of the most beneficial Proposal.

Negotiated or Competitively Negotiated Procurement Process

For projects using a negotiated or competitively negotiated procurement process, the Evaluation Committee will rank the Proposals and will recommend for selection the Proposer whose Proposal offers the best value to the Department.

The Department will issue written notification to each Proposer regarding its rank and the rank order of Proposers will be made public.

NEGOTIATIONS

The Department may pursue a negotiated procurement process, competitive negotiations, or competitive sealed bidding on select projects. The Request for Qualifications and/or Request for Proposals will outline the type of procurement to be used in the determination of the successful Proposer.

Competitive Sealed Bid Procurement Process

For a competitive sealed bid procurement process, no negotiations will occur prior to contract award. This provision in no way negates the Department's ability to pursue a Best and Final Offer as outlined in the Design-Build Policy and Procedures, issue addenda any time prior to contract award or enact alterations of work after contract award as allowed by the Department's Standard Specifications for Roads and Structures.

Negotiated Procurement Process

Under the negotiated procurement process, the Department will attempt to negotiate an interim agreement, comprehensive development agreement, or other such operating and finance agreement with the Proposer with the highest ranked Proposal. Such negotiations may include modifications to the Proposal. If any such agreement cannot be successfully negotiated with the Proposer with the highest ranked Proposal to the satisfaction of the Department, or if, in the course of negotiations, the Department deems that the highest ranked Proposal will not provide the Department with the anticipated benefit, the Department will formally end negotiations with the Proposer and, in the Department's sole discretion, either:

- 1) Reject all Proposals
- 2) Modify the Request for Proposals and request a new submission of Proposals
- 3) Attempt to negotiate an agreement to the Proposer with the next highest ranked Proposal
- 4) Discontinue the project indefinitely

Competitively Negotiated Procurement Process

The use of a competitively negotiated procurement process will typically be divulged in the Request for Proposals; however, in the event that (1) multiple Proposers have provided Proposals that are deemed comparable in value by the Evaluation Committee, or (2) the Department deems that it is in the best interest of the Department or the public to do so, the Department may elect to competitively negotiate with two or more Proposers any time after the evaluations of the Proposals. Such negotiations may include modifications to the Proposals. The Department may competitively negotiate with all Proposers or with only those deemed by the Evaluation Committee to be within a competitive range.

AGREEMENTS

The Department may enter into one or more agreements with the successful Proposer. The agreements may be interim, covering primarily project development or preconstruction activities, comprehensive development agreements, financing agreements, operating agreements, or any other agreement appropriate to the project.

The Department may seek policy, legal, financial, and/or technical advice as may be needed to successfully negotiate or execute the agreement(s).

The agreements may include, but not be limited to the following items:

- 1) Appropriation of responsibilities among parties
- 2) Allocation of risk among parties
- 3) Allocation of resources and costs among parties
- 4) Allocation of cost overruns
- 5) Penalties for non-performance
- 6) Incentives for performance
- 7) Invoicing and payment procedures
- 8) Bonding and insurance requirements
- 9) Limitations on user fees
- 10) Revenue sharing
- 11) Encroachment agreements
- 12) Environmental documentation (NEPA, permitting, etc.) requirements
- 13) Asset management requirements
- 14) Hand back provisions and expectations
- 15) Costs for third party constraints such as railroads and utility companies
- 16) Cooperation with other existing or planned facilities
- 17) Rights-of-Way dedicated and the Department's use of eminent domain
- 18) Planning, development, design, construction, operation and maintenance standards
- 19) Submittal requirements
- 20) Inspection requirements and rights
- 21) Terms of reimbursement for services provided by the Department
- 22) Maximum rate or return on investment
- 23) Default of contract provisions
- 24) Force Majeure
- 25) Liability for personal injury, facility repair and unknown hazardous waste remediation
- 26) Record retention and audit requirements
- 27) Submission and review of financial statements
- 28) Other requirements suitable to the type, size, complexity, and duration of the contract

Execution of the agreement(s) shall be subject to the concurrence of the Secretary of Transportation and the Board of Transportation. Execution of the Agreement(s) is also dependent on all necessary federal actions.

STIPEND

If applicable, the notice of a stipend and the amount of the stipend will be made available to all prospective Proposers. This stipend may be made as partial compensation for each unsuccessful shortlisted Proposer that submits a responsive Proposal. The stipend will be determined on a project

specific basis and will be based on both the project size and complexity. No additional compensation will be made by the Department for the development of Letters of Interest, Statements of Qualifications, Proposals, Negotiations, or any type of agreement.

PROTECTION AGAINST DISCLOSURE

All Statements of Qualifications, Letters of Interest and Proposals submitted to the Department become the property of the Department upon their submission and may be, except as provided by North Carolina law, subject to the Public Records Act. If a Proposer wishes to provide the Department with information that the Proposer believes constitutes a trade secret, proprietary information or other information exempt from disclosure, the Proposer shall specifically designate that information as such in its Proposal. Further, the Proposer shall identify the statute on which the confidential status is claimed as well as the specific material that the Proposer believes is confidential under that statute.

The Proposer's designation shall not be determinative of the trade secret, proprietary, or exempted nature of the information so designated as a matter of law.

RESERVATIONS

The Department reserves all rights available to it by law in administering these policies and procedures, including without limitation the right in its sole discretion to:

- 1) Withdraw a Request for Qualifications or a Request for Proposals at any time and either issue a new request or suspend the solicitation indefinitely.
- 2) Reject any and all Statements of Qualifications, Letters of Interest or Proposals at any time.
- 3) Terminate evaluation of any and all Statements of Qualifications, Letters of Interest, or Proposals at any time.
- 4) Issue a Request for Qualifications and Request for Proposals for competing proposals for any project presented to the Department in the form of an Unsolicited Proposal.
- 5) Suspend, discontinue, or terminate negotiations with any Proposer at any time prior to the actual authorized execution of a final development agreement by all parties.
- 6) Negotiate with a Proposer or Proposers without being bound by any provision in its Proposal.
- 7) Negotiate with a Proposer to include in the development agreement any aspect of unsuccessful Proposals.
- 8) Request or obtain additional information about any Technical Proposal from any source at any time.
- 9) Modify or issue addenda to any Request for Qualifications or Request for Proposals at any time, including after review of competing Proposals.
- 10) Permit or request clarifications or supplements to Statements of Qualifications and Proposals, either for responsive or non-responsive Proposals.
- 11) Information provided to Proposers is done so for convenience and is without representation or warranty of any kind.
- 12) Amend, supercede, or supplement any part of these Policy and Procedures, provided the amendment or supplement is clearly denoted in the Request for Qualifications or Request for Proposals as appropriate.