

## **Summary of Legal Opinion on Use of “Trinidad Qualifications-Based Transit Procurement Process” in the United States**

### **Issue:**

For development of the Trinidad Rapid Transit System, an innovative project delivery method is being used wherein a “design-build-operate-maintain (“DBOM”) team is being selected based solely on qualifications, prior to the preliminary engineering phase of the project, with the team later tendering a fixed-price proposal for final design, construction and operation & maintenance, after the preliminary engineering is complete. Similar project delivery methods have been used on past international transit projects, including the Vancouver “SkyTrain” and the Calgary LRT system. Recently, State laws in Virginia and Georgia were enacted permitting similar procurement strategies in those states. Increasingly, qualifications-type procurements are being used for very large scale infrastructure projects worldwide, including for Olympic facilities in London for the 2012 Summer Olympics.

The rationale for this approach is that by making an early selection of the Private Sector partner and early partnering with the public sector on such a large-scale project, an improved and more streamlined (faster) effort of preliminary engineering can occur that will result in less risk, a better overall price, a higher project quality and a project with less chance of significant claims and associated cost and schedule overruns.

The issue for analysis herein is whether the Federal Transit Administration Regulations and Guidelines related to its New Starts Program permit such a project delivery system similar to Trinidad’s.

More specifically, the issue is whether FTA would permit a local jurisdiction to select a technology partner based on qualifications prior or during preliminary engineering.

### **Executive Summary Response:**

The short answer to the issue presented above is that the New Starts Regulations and Guidelines do not address mandatory procurement practices for use by sponsoring state or local agencies. However the guidelines emphasize the need for preliminary engineering to include a final project scope, a highly accurate cost estimate and a solid financial plan, which all seem to support the concept of an early partnering with a private sector partner who is in the best position to achieve these goals. It is also noted that statements by the new Federal Department of Transportation Secretary and the FTA Administrator all support the use of public-private partnerships and innovative procurement strategies.

In order to utilize any design/build project delivery system, there must be a local statutory or regulatory basis to do so. It is noted that Honolulu’s 1991 attempt at implementing

rapid transit did use the design/build delivery method. Additionally, any contract award based on criteria that do not include price also must be authorized by local statute or regulation. Accordingly, the answer to the issue raised will depend on the laws in any jurisdiction that receives funding under the New Starts Program.

The City and County of Honolulu, if it wishes to consider a procurement strategy as discussed above, should research existing City and State ordinances and laws to determine whether any new legislation would be required to implement such a strategy.

## **Detailed Analysis**

### **I. The Federal New Starts Program**

The New Starts Program was amended by the Safe, Accounting, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), signed by President Bush on August 10, 2005. The law is codified in 49 U.S.C.A Section 5309, *et seq.* Implementing regulations appear at 49 CFR Section 611, *et seq.*

On January 19, 2006, the FTA published a Notice of Availability on Guidance on New Starts Policies and Procedures (hereinafter “Guidelines”) and requested comments. On May 22, 2006, the FTA adopted the final Guidelines, which govern New Start submittals received after May 22, 2006.

In sum, the regulations and Guidelines set forth the process that applicants must follow to be considered eligible for capital investment grants and loans for new fixed guideway systems or extensions to existing systems. To be eligible for FTA capital investment funding, a proposed project must be based on the results of alternatives analysis and preliminary engineering. Before FTA will consider a preliminary engineering request, the project sponsor must:

- Obtain FTA’s agreement on the alternative to use as the baseline for analysis
- Demonstrate that the preferred alternative has been adopted into the fiscally constrained Long Range Plan
- Demonstrate the technical capability of the project sponsor to advance into preliminary engineering based on an adequate Project Management Plan (PMP)
- Certify to the assumptions and technical methods used to produce the information submitted
- Submit the required templates and other information supporting the New Starts evaluation measures for project justification and local financial commitment

One new requirement is that a proposed project must progress beyond the scoping phase of the National Environmental Protection Act during the alternatives analysis study and before a New Starts project will be approved for preliminary engineering. However, all of the foregoing requirements pertain to processes that take place before the procurement

process typically begins for entities capable of performing the design, construction and maintenance of a project eligible for New Starts funding.

The New Starts funding level for a particular project is set upon final design approval. However, in order to support a decision on full funding, “preliminary engineering should include a final project scope, a highly accurate cost estimate and a solid financial plan with a substantial portion of the proposed local funding committed.” See Guidelines at page 8. The Guidelines further state that “[i]f the information generated in New Starts preliminary engineering is to be reliable as the basis for decision-making for proposed New Starts projects, the final New Starts preliminary engineering cost estimate and financial plan should have very little likelihood of changing significantly in final design.” FTA, therefore, places a cap on the full funding amount at the point of approval to enter into final design.

The foregoing requirements are very significant in that preliminary engineering contemplates more than the traditional 30% design. **Further, given the severe limitation on funding increases during the final design stage, it is imperative that preliminary engineering be performed in a highly accurate manner.** The New Starts Guidelines, in fact, impose cost overruns on the sponsoring agencies, except in very limited circumstances. These limited circumstances relate to the impact of unforeseen inflationary increases due to unusual occurrences (e.g., Hurricane Katrina.)

Given the above, a sponsoring agency would take an enormous risk by procuring work through a traditional design-bid-build methodology. Only a design-build team could provide the sophisticated design, constructability review, and construction cost estimating that is now required during the preliminary engineering phase of a New Starts project to assure the reasonableness of any cost estimate. Further, it would seem imperative that a technology partner be selected prior to preliminary engineering so that the structural and system elements could be designed together in the most cost effective manner and so that costs could be more accurately predicted.

As set forth above, the statutory and regulatory framework for the New Starts program does not impose specific procurement standards for state and local governments to follow in contracting for design and construction services. Accordingly, it is imperative to consider the nature of existing state and local laws and regulations before proposing to use a qualifications-based procurement system. Otherwise, it will be left to consultants working on a no-risk fee basis, to produce cost estimates for differing technologies without full consideration of total project risks. Such efforts have proven highly unreliable in the past and have fueled transit critics’ claims of massive cost overruns on transit projects.

Design-build contracts are a relatively new concept for U.S. state and local governments, although such was the basis in 1991 for Honolulu’s earlier attempt at constructing a rapid transit system. Further, even where a design-build contract is permitted, procurement laws related to such contracts typically require price competition, if not fixed price bids. Such was the case with the 1991 Honolulu procurement.

In the U.S. state of Georgia, the Northwest Corridor project represents the first-ever contract issued by the Georgia Department of Transportation under the Public Private Initiative (“PPI”) Law, enacted in 2004. Approximately 22 states in the United States have enacted such a law. Under this statute, the State of Georgia may consider both unsolicited and solicited proposals from entities seeking to 1) privately fund and develop public projects, in return for a franchise to operate the project and collect tolls or other remuneration for a period of time; or 2) cooperate in researching, developing, and implementing transportation system projects or services. The unique nature of a PPI proposal permits the award of a contract on a sole source basis.

On the Northwest Corridor project, a contract was awarded to Georgia Transportation Partners (“GTP”) in the amount of \$38.5 million and covers only preliminary engineering, including some participation in the environmental process. GTP had proposed a project to be funded with Federal funds, toll-backed revenue bonds and revenue from other state sources. Once the environmental process is complete, a separate design/build contract is to be negotiated. Either party may elect not to proceed with final design and construction, if it is determined that the project is untenable.

A similar circumstance exists under the Virginia Public Private Partnership Act, related to the WMATA extension to Dulles Airport. This project was approved under the New Starts program for preliminary engineering, although a full funding agreement has not yet been entered into, as the project has only just completed preliminary engineering. Dulles Transit Partners made a proposal to develop the project under the Virginia Public Private Partnership Act and received a contract to do the preliminary engineering. Dulles Transit Partners is now engaged in negotiations for a separate contract governing final design and construction of the first phase of the project.

The latter examples are somewhat unique in that versions of a public-private partnership statute were involved and the contractors each submitted qualifying proposals thereunder. This justified sole source procurement of final design and construction, based on the unique proposals offered.

In order to achieve a “Trinidad-like” procurement, in the absence of comparable use of a public-private partnership statute, state or local law would have to permit award of a contract for preliminary engineering, based on qualifications alone, and thereafter permit the successful awardee to negotiate on a sole source basis for the award of a contract for final design, construction and operation & maintenance. While contracts for the design of a project often are awarded based on qualifications and not price, state and local contracts for construction, or for design-build, are commonly awarded based on some consideration of price. Therefore, it is unlikely that a design-build contractor would be awarded a contract solely based on qualifications without unique legislation authorizing such a process similar to Trinidad’s.

This leaves for consideration the issue of whether a technology partner could be awarded a contract by a public entity or a “Master Builder,” based solely on qualifications, prior to

the commencement or during the execution of preliminary engineering. Again, the answer to this question will depend on the specific law of a local jurisdiction. However, the selection of a specific transportation system for use on a rapid transit project, prior to the commencement of preliminary engineering, would make sense given the distinct need to develop clear and accurate cost estimates during this phase of the work. In any jurisdiction where a New Start application has been submitted and/or the alternatives analysis phase has begun, and the project may entail use of a rapid transit system, it is advisable that a review of the procurement laws of the jurisdiction take place and, if necessary, consider the introduction of legislation to permit the selection of a technology partner, prior to the commencement of preliminary engineering, based solely on qualifications.

## **II. Conclusion**

The Federal New Starts Program does not preclude the participation of either a design/build contractor or a technology partner in the preliminary engineering process. However, whether competition for the final design, construction and operations & maintenance contract will be limited to the contractors who performed the preliminary design contract, with or without consideration of price, will depend on the state or local government law in question.

Selection of a technology partner during the preliminary engineering analysis phase makes particular sense due to the requirement that preliminary engineering produce an accurate estimate of the cost of the work. However, state and local law again must be scrutinized to determine if such selection may be accomplished without consideration of price.