

QUESTIONS & ANSWERS

1. **Question:** Do the Scores from the proposal evaluation carry over to the interview to be combined with the final score, or do they start fresh once the firm has been shortlisted?

Answer: Please see Section 3 of Addendum 1 posted on March 17, 2009.

2. **Question:** The RFQ doesn't state outright if the Project Manager or the other key personnel have to be registered PEs. Can you clarify if they need to be?

Answer: The Project Manager is not required to be a registered PE. Of the other key personnel cited in the RFQ, the Design Manager must be a registered PE.

3. **Question:** Can we receive the latest project information produced by your two current consultants, Parsons Brinkerhoff (PB) and Parsons Transportation Group (PTG)?

Answer: The most recent and current project information is available on the RCTC website under "Reference Material" for this solicitation.

(The following question was added on March 31, 2009)

4. **Question:** Pursuant to Addendum 1, page 4 and the requirement of a separate Right-of-Way (ROW) organization chart, our ROW subconsultant will have numerous second tier subconsultants, regarding the second tier subconsultants, are we required to submit all the forms for the second tier subconsultants on our ROW subconsultant's team? They are naming numerous subconsultants to them in the roles of Potholing, Title and Escrow, Real Estate & Appraisal Review subs, etc.

Answer: The Right of Way Organization Chart should reflect the entire Right of Way team.

Forms should be submitted for the Project Prime Consultant's first tier subcontractors.

MODEL AGREEMENT - COMMENTS & RESPONSES

1. Section 3.2.1.2 – Post-Award Audit

Comment: Section 3.2.1.2 discusses the possibility of a Post-Award Audit. Since pre-award audits have been submitted as part of the RFQ, please confirm a "Limited Notice to Proceed" automatically triggers a post-award audit. We would like an opportunity to explore alternate language allowing both the Consultant and Commission an opportunity to address the Caltrans audit recommendations and provide either party the ability to terminate the agreement for convenience on 10 days notice to the other party.

Response: A “Limited Notice to Proceed” does not automatically trigger a post-award audit. In addition:

- (i) The Commission intends to complete a pre-award audit;
- (ii) The Commission does not foresee issuing a limited notice to proceed related to these Services without completing negotiations with the selected Consultant and approval of the award and Agreement by the Commission;
- (iii) The Commission will retain full rights to conduct periodic audits of the selected Consultant during the term of the Agreement, and will provide the selected Consultant reasonable notice of its intent to conduct such audit. The pre-award and any other audits requested by the Commission will be conducted by private auditing firms.

As to the second part of the request, the Commission is not willing to incorporate additional language allowing the selected Consultant to terminate the Agreement for convenience in light of any Caltrans audit recommendations.

2. Section 3.9 – Standard of Care; Licenses

Comment: Section 3.7 discusses the determination of “standard of care”. We suggest further dialogue and discussion to derive mutually agreeable language. We suggest the basis for discussions be the California Code of Regulations as adopted by the California Board of Professional Engineers and Land Surveyors.

Response: The Commission will not make the proposed change to the standard of care. The language in the agreement setting the standard of care as the standard “generally recognized as being employed by professionals in the same discipline in the State of California” sufficiently covers the standard for Services to be provided by the selected Consultant under the Agreement.

3. Section 3.10 – Opportunity to Cure

Comment: Section 3.10 provides that the Consultant shall correct all errors and omissions disclosed during Project implementation at no cost to the Commission. We suggest the language be modified to add the words “to the extent the errors or omissions are the result of Consultant’s failure to perform the work in accordance with the standard of care” to the end of the first sentence of Section 3.10, therefore matching Section 3.9. We also respectfully request an opportunity to remedy and make right any errors and omissions, and therefore, request that the word “may” be changed to “will” in the first Paragraph.

Response: The Commission will not make either of these requested changes. If there is an error or omission in the Services provided by the selected Consultant, the Commission may provide the Consultant an opportunity to cure such error or omission, regardless of the cause. The Commission will not bind itself to provide the selected Consultant an opportunity to cure an error or omission.

4. Section 3.13 – Laws and Regulations

Comment: In Section 3.13 in the fifth sentence which begins “For Consultant ...” the word “For” seems to be incorrect. Request deletion. We suggest that the words “in connection with Services” be deleted and the words “arising from Consultant’s failure to comply with such laws” be substituted for the deleted words.

Response:

- (i) The word “For” will be changed to “The”.
- (ii) Regarding the second request to include the phrase “arising from Consultant’s failure to comply with such laws” as a substitute for “in connection with Services”, the Commission will not make this requested change.

5. Section 3.14.4 – Effect of Termination for Cause

Comment: Section 3.14.1 requires the Consultant to reimburse the Commission for the cost incurred to revise work upon termination for cause. Suggest discussing mutually agreeable language that the Consultant should be obligated to reimburse the Commission in this circumstance only if the work is defective as a result of a failure of the Consultant to perform the work in accordance with the standard of care.

Response: The reference in the comment is to 3.14.1, but it appears that the section at issue is Section 3.14.4. The Commission will not make the requested change. The concern expressed in this comment is already sufficiently addressed in this section of the Agreement.

6. Section 3.14.7 – Waivers

Comment: Section 3.14.7 requires the Consultant to waive any claim it may have that arise from Commission’s termination of the agreement. Request an opportunity to discuss alternate language to protect the rights of both parties.

Response: The Commission will not delete or materially change this provision, but will consider a separate provision allowing for limited costs associated with implementation of a termination for convenience. This will be addressed during contract negotiations.

7. Section 3.18.2 – Intellectual Property

Comment: Section 3.18.2 discusses assignment of rights in intellectual property. We request additional dialogue of this Section to further clarify and define what intellectual property rights the Consultant is obligated to assign to the Commission.

Response: The Commission may consider, during contract negotiations, minor changes to this provision to address specific concerns.

8. Section 3.19 – Indemnification

Comment: Section 3.19 discusses Indemnification, including volunteers. Request an opportunity to discuss this section.

Response: The Commission is willing to remove the term “volunteers” from the indemnification clause. Pursuant to the Contract Documents, questions must be referenced in detail. The only detail that has been included is the reference to volunteers.

9. Section 3.20.2(B) – Minimum Limits of Insurance

Comment: Section 3.20.2 (B) requires general liability insurance with limits of \$25 million per occurrence and \$50 million in aggregate. We would like further discuss these limits as they may require purchase of a project specific policy at additional cost.

Response:

- (i) The \$25 million general liability for Phase 2 should be changed to \$10 million.
- (ii) The language requiring the general aggregate limit to be twice the per occurrence limit for the Phase 2 general liability coverage should be deleted. The Commission anticipates that the \$10 million policy limit for Phase 2 will be met as follows:

- (a) Provision of a standard primary general liability policy with the following limits: \$1 million per occurrence, \$2 million aggregate for the primary general liability (unless the aggregate limit is dedicated to the project, in which case an aggregate limit of \$1 million would be acceptable);

- (b) Provision of an umbrella/excess liability policy with the following limits: at least \$9 million per occurrence, \$9 million aggregate.

This will result in a total of at least \$10 million per occurrence and \$10 million aggregate (if the primary general liability limit is dedicated to the project, or an \$11 million aggregate if not).

- (iii) The Commission is also open to discussing, during contract negotiations, a Project specific insurance policy for Phase 2.

10. Section 3.20.3 – Professional Liability

Comment: Section 3.20.3 requires that the subconsultant’s maintain Professional Liability insurance with limits of \$10 million per claim. This requirement may preclude most DBE firms from participating in this project. We would like to further discuss these limits.

Response: The \$10 million professional liability policy requirement applies only to the selected Consultant. Subconsultants of the selected Consultant completing modest duties such as preliminary engineering work and environmental studies will be required to maintain professional liability insurance with limits of at least \$1 million.

11. Section 3.20.8 – Verification of Coverage

Comment: Section 3.20.8 requires that Consultant provide copies of its insurance policy if requested by the Commission. Offeror considers its insurance policies to be highly confidential and due to public information legislation, the Commission may have to disclose this information if the Commission has possession of the policies. For this reason Offeror will permit the Commission to review the insurance policies if requested but will not provide copies.

Response: The Commission will agree not to require copies of the Consultant’s insurance policies, provided that the Commission shall be permitted to review the insurance policies at a local office of the Consultant.

12. Section 3.21 – Safety

Comment: Section 3.21 discusses Safety. Recommend further discussion so that safety compliance, safety monitoring and work performance are defined and allocated to the appropriate party (for example, we cannot “ensure” the design-builder is in compliance with OSHA and other requirements as the PMC does not control the work, however, we would monitor and report compliance and non-compliance).

Response: The safety provisions contained in this section apply only to the Consultant in relation to the performance of the Services, and not the work of the design-build contractor. Therefore, the Commission will not make any changes to this section.

Please note that Appendix A, Scope of Work of the RFQ, Section 3.K indicates specific responsibilities with regard to both the design-build contractor and the selected Consultant. This section does not require the selected Consultant to "ensure" design-build contractor safety. It requires the selected Consultant to "ensure" design-build contractor compliance with regulatory requirements, that the design-build contractor implements and follows its own safety program, that regular safety meetings are conducted and documented by the design-build contractor, and that accidents are investigated and lessons learned implemented.

13. Section 3.22.3(a)(2) – Additional Work

Comment: Section 3.22.3(a)(2) provides that a change may be made in order to “reflect definitive letter contracts.” The “definitive letter contracts” is not understood and we request an opportunity to further discuss and define.

Response: The Commission will delete the reference to “definitive letter contracts”.

14. Section 3.24 – Accounting Records

Comment: Section 3.24 describes compliance with Federal accounting requirements. We suggest that an additional sentence be added: “c) The principles of 23 CFR Part 172.7 apply to audits and accounting records required by the Agreement.”

Response: The Commission notes that the selected Consultant and its subconsultants shall comply with Federal audit and accounting principles. The Commission does not intend to specifically follow 23 CFR Part 172 unless required to do so by a funding agency, and will not make the requested change.

15. Exhibit C – Compensation and Payment, Section 1.1.2 – Multiplier

Comment: We suggest that the language of Exhibit C, Section 1.1.2 be modified to provide an alternate optional method to calculate the multiplier as the sum of direct labor plus the overhead rate accepted by the Consultant’s cognizant agency as provided in 23 CFR Part 172.7 if the Consultant has obtained a letter from a cognizant agency.

Response: It is within the Commission’s sole discretion as to whether cognizant audits performed by the selected Consultant or its subconsultants’ cognizant agencies are applicable, timely, or of acceptable methodology. The Commission will not make the requested change.

16. Section 3.9 – Standard of Care; Licenses

Comment: “Warrants” places an unnecessarily high legal duty on Consultant for the circumstances. Also, a reasonable time limit should be set for the discovery of errors and omissions. Replace the first “warrants” with “represents”. Delete the phrase “and warrants”. Also, add the following language to the above stated language, “provided such errors are uncovered within twelve (12) months of completion of the Services.”

Response:

- (i) The Commission is willing to change “warrants” to “represents”
- (ii) The Commission will not impose a 12 month time limitation for discovery of errors and omissions.

17. Section 3.10 – Opportunity to Cure

Comment: We request that the Commission have an affirmative duty to allow the Consultant to cure, and that said items to cure be more specifically defined as caused by negligence. Modify Section 3.10 to read as follows: “Commission shall provide Consultant an opportunity to cure, at Consultant’s expense, all errors and omissions resulting from Consultant’s negligence which may be disclosed during Project implementation.”

Response: The Commission will not make either of these requested changes. If there is an error or omission in the Services provided by the selected Consultant, the Commission may provide the Consultant an opportunity to cure such error or omission, regardless of the cause (presumably “errors or omissions” result from negligence). The Commission will not bind itself to provide the selected Consultant an opportunity to cure an error or omission.

18. Section 3.14.1 – Terms – Termination – Notice; Reason

Comment: The agreement does not provide for sufficient advance notice in the event of termination. Insert “ten (10) days” into Section 3.16.1’s first sentence, so that it reads: *Commission may, by written notice to Consultant, terminate this Agreement, in whole or in part, at any time by giving ten (10) days written notice to Consultant of such termination, and specifying the effective date thereof (“Notice of Termination”).*

Response: The Commission is willing to include a requirement in the Agreement that 10 days written notice be provided prior to termination.

19. Section 3.14.1 – Terms – Termination – Notice; Reason

Comment: The agreement does not provide Consultant with the opportunity to cure alleged defaults. Add the following sentence to the end of Section 3.14.1: *In the case of termination for default, said notice will allow Consultant a reasonable opportunity to cure.*

Response: The Commission is willing to include a 10 day cure period following written notice of default.

20. Section 3.14.3 – Terms –Termination – Effect of Termination for Convenience

Comment: The agreement does not provide for reasonable termination costs. Add the language underscored below to Section 3.14.1’s first sentence, causing it to read: *If the termination is to be for the convenience of the Commission, the Commission shall compensate Consultant for services fully and adequately provided through the effective date of termination including reasonable termination costs allowed by 48 CFR Subparts 49.2 and 49.3.*

Response: The Commission is willing to discuss limited costs associated with implementation of a termination for convenience. This issue will be further discussed during contract negotiations.

21. Section 3.14.7 – Waivers

Comment: This Section provides that “Consultant, in executing this Agreement, shall be deemed to have waived any and all claims for damages which may otherwise arise from the Commission’s termination of this Agreement, for convenience or cause, as provided in this Section.” Consultant needs to reserve these claims in case the termination is wrongful or the fault of a third party. Delete Section 3.14.7 in its entirety.

Response: The Commission will not delete or materially change this provision, but will consider a separate provision allowing for limited termination costs related to a termination for convenience, as noted above.

22. Section 3.18.2 – Ownership of Materials/Confidentiality - Intellectual Property

Comment: The agreement should protect Consultant against unintended uses of its work product. Add the following sentence to the end of Section 3.18.2: *Any use of Consultant’s work product for purposes other than those intended by this Agreement shall be at the sole risk of*

Commission, and Commission shall indemnify, defend and hold Consultant harmless against any losses or injuries arising from such use.

Response: The Commission will not agree to indemnify, defend or hold harmless the selected Consultant related to use of Consultant's work product for purposes not within the scope of the Agreement. The Agreement already provides that such use is at Commission's sole risk.

23. Section 3.19 – Terms – Indemnification, para. 2

Comment: "Volunteers" is too broad a category to identify properly as a class, for the Consultant's risk management purposes. Delete all five references to volunteers.

Response: The Commission is willing to remove the term "volunteers" from the indemnification clause.

24. Section 3.19 – Terms – Indemnification, para. 2

Comment: The amount of potential damages for which Consultant is responsible, including consequential damages, should be limited. Remove "to the fullest extent permitted by law." Remove the text, "in any manner arising out of or incident to any alleged" and replace with "*but only to the proportionate extent caused by or resulting from*". Also, delete "consequential damages" and the "and" before "Attorneys fees," so that the end of the sentence shall read: *...the payment of all expert witness fees, and reasonable attorneys' fees and other related costs and expenses.* Remove the phrase, "Consultant shall defend, at Consultant's own cost, expense and risk, any and all such aforesaid suits, actions or other legal proceedings of every kind that may be brought or instituted against Commission, its directors, officials, officers, employees, consultants, agents, or volunteers", and replace with: "*To the extent Consultant is adjudicated negligent, Consultant shall pay and satisfy its share of expense and risk for any judgment,...*"

Response:

(i) The Commission will not remove the following language: "to the fullest extent permitted by law"

(ii) The Commission will not remove the following language: "in any manner arising out of or incident to any alleged" and will not replace this language with the following "but only to the proportionate extent caused by or resulting from".

(iii) Regarding consequential damages – the Commission is willing to consider some form of cap on consequential damages, to be further discussed during contract negotiations.

(iv) The Commission will not remove the requirement for the selected Consultant to provide an up-front legal defense of the Commission, nor will the Commission add the language requested to replace this requirement.

25. Section 3.19 – Terms – Indemnification

Comment: Third party entities that have a reasonable relationship with the services that Consultant provides should indemnify Consultant. Add the following sentence to the end of Section 3.19: *Commission shall require its construction contractor(s) to indemnify Consultant to the same extent and manner that Commission is indemnified by the construction contractor.*

Response: The Commission plans to require the construction contractor(s) to indemnify the consultants of the Commission.

26. Section 3.20.2(B) & 3.20.3 – Terms – Insurance- Minimum Requirements

Comment: This clause would require \$25 million per occurrence and \$50 million in general aggregate, for Consultant's General Liability insurance, which is very unusual for CM work, and consultant will have a difficult time finding subconsultants who have these insurance limits. Also, Consultant will have a difficult time finding subconsultants who can meet these high limits for the Professional Liability requirement of \$10 million.

Does RCTC really intend these Phase 2 insurance limit figures? If so, RCTC is strongly advised to reconsider. In the alternative, we recommend that RCTC consider a project wrap-up insurance program to cover all project participants, including the design-build contractor.

Response:

- (i) The \$25 million general liability for Phase 2 should be changed to \$10 million.
- (ii) The language requiring the general aggregate limit to be twice the per occurrence limit for the Phase 2 general liability coverage should be deleted. The Commission anticipates that the \$10 million policy limit for Phase 2 will be met as follows:

- (a) Provision of a standard primary general liability policy with the following limits: \$1 million per occurrence, \$2 million aggregate for the primary general liability (unless the aggregate limit is dedicated to the project, in which case an aggregate limit of \$1 million would be acceptable);

- (b) Provision of an umbrella/excess liability policy with the following limits: at least \$9 million per occurrence, \$9 million aggregate.

This will result in a total of at least \$10 million per occurrence and \$10 million aggregate (if the primary general liability limit is dedicated to the project, or an \$11 million aggregate if not).

- (iii) The Commission is also open to discussing, during contract negotiations, a Project specific insurance policy for Phase 2.

- (iv) The \$10 million professional liability policy requirement applies only to the selected Consultant. Subconsultants of the Consultant completing modest duties such as preliminary engineering work and environmental studies will be required to maintain professional liability insurance with limits of at least \$1 million.

27. Section 3.20.5(D) – Insurance - All Coverages

Comment: Most insurance policies have the 30-day notice provision but only in the event of cancellation, and a 10-day notice for nonpayment of the premium. We request that the above section be modified to read: *“Each insurance policy required by this Agreement shall be endorsed to state that: (A) coverage shall not be canceled except after thirty (30) days prior written notice by first-class mail, except 10-day notice for nonpayment of the premium.”*

Response: This requested modification to allow 10-day notice prior to cancellation for nonpayment of the premium is acceptable.

28. Section 3.20.8 – Verification of Coverage

Comment: Most companies do not distribute copies of their insurance policies to third parties. However, the Commission is welcome to review the policies at our and our subconsultants’ offices. Replace “require” with “review” so that the provision reads: *The commission reserves the right to review complete, certified copies of all required insurance policies, at any time.*

Response: The Commission will agree not to require copies of the Consultant’s insurance policies, provided that the Commission shall be permitted to review the insurance policies at a local office of the Consultant.

29. Section 3.20.9 - Other Insurance

Comment: If the Commission chooses to require additional coverages, it could impact the Consultant, and its subconsultants’ premiums. Add the following sentence at the end of the section *“If such change results in additional cost to the Consultant, the Commission and Consultant will negotiate additional compensation.”*

Response: The Commission is willing to add the requested language providing that if changes in the insurance requirements require additional costs to the selected Consultant, the Commission and the Consultant will negotiate additional compensation.

30. Section 3.21 – Safety

Comment: This provision must clarify that the D/B contractor is ultimately responsible for jobsite safety, and Consultant monitors the safety program. Add the following sentence to the end of Section 3.21: *while consultant will monitor the construction contractor(s) safety procedures, the construction contractor(s) will be required to assume sole and complete responsibility for job site conditions during the course of construction of the project, including safety of all persons and property, and that this requirement shall be made to apply continuously and not be limited to normal working hours.*

Response: The safety provisions contained in this section apply only to the Consultant in relation to the performance of the Services, and not the work of the design-build contractor. Therefore, the Commission will not make any changes to this section.

Please note that Appendix A, Scope of Work of the RFQ, Section 3.K indicates specific responsibilities with regard to both the design-build contractor and the selected Consultant. This section does not require the selected Consultant to "ensure" design-build contractor safety. It requires the selected Consultant to "ensure" design-build contractor compliance with regulatory requirements, that the design-build contractor implements and follows its own safety program, that regular safety meetings are conducted and documented by the design-build contractor, and that accidents are investigated and lessons learned implemented.

31. Section 3.22.1 – Terms – Fees and Payment – Compensation

Comment: This exhibit provides, in part: “The total compensation shall be on the basis of direct costs plus a fixed fee as further set forth in Exhibit “C” and shall not exceed the maximum amount of” The RFP states that payment be via Cost Plus Incentive Fee. Please verify which statement is correct.

Response: The Commission’s standard form Exhibit “C” was included as part of the RFQ documents. This form is subject to change during the contract negotiation phase, and has not been customized for this particular contract. As part of the RFQ, the Commission has asked the Offerors to propose potential incentive provisions that will be subject to negotiation.

32. Section 3.27 – Governing Law

Comment: The agreement does not provide for binding arbitration, which is many agencies preferred method of dispute resolution. Add an arbitration clause, beginning with a new paragraph, to the end of Section 3.23.

Response: The Commission will not agree to binding arbitration.

33. Section 3.29 – Terms – Time of Essence

Comment: “Time is of the essence” clauses make every schedule a material part of the agreement, and thus Consultant’s failure to meet any schedule, even a non-critical one, could be construed as a material breach. Delete the title and body of Section 3.24.

Response: The Commission will not delete this section.

34. Section 3.34 – Terms – Entire Agreement

Comment: The agreement lacks a provision that would prohibit third parties from suing to enforce the agreement. Add the following provision to the end of Section 3.34: *the parties enter into this Agreement for the sole benefit of the parties, to the exclusion of any third party, and no third party beneficiary is intended or created by the execution of this Agreement.*

Response: The Commission will include a standard “no third party beneficiaries” clause in the Agreement.

35. Section 3.38 –Terms- New Provision.

Comment: The agreement doesn't limit the amount of damages that the parties may claim of each other. Add the following new provision as new Section 3.38: *3.38. Damages. The parties agree to waive any rights to incidental or consequential and punitive damages arising out of performance under this Agreement whether in torts or in contracts and in law or equity.*

Response: The Commission will not add the requested language to the Agreement regarding incidental, consequential and punitive damages. As noted previously the Commission will consider a cap on consequential damages.

36. Exhibit “D” Federal Department of Transportation and Caltrans Requirements – Section 3 –Release of Retainage

Comment: Retainage is not appropriate in qualifications-based contracts, where the consultant is selected based on its fitness to perform. Delete Section 3 in its entirety. In the alternative, we would propose an escrow account or letter of credit in lieu of retainage.

Response: The Commission disagrees that retainage is not appropriate in a qualifications-based contract. If the Commission decides to require retainage, this is still to be determined, the Commission will consider an escrow account or other alternatives in lieu of retainage.

37. Payment Terms:

Comment: Offeror proposes payment on a cost-reimbursable basis with RCTC compensating all costs incurred by Offeror in performing the Services or complying with the terms of the Agreement, including costs that may be incurred after Final Acceptance, except those obligations expressly excluded in the Agreement. Offeror proposes payment upon performance of Services and receipt of a proper invoice without any other condition, including but not limited to the discretion of Commission's Representative as currently required under Section 3.22.4.

Response: The Commission does not agree to the proposal that payment be made “without any other condition”. Regarding reimbursable expenses in particular (Section 3.22.4) those approved expenses will be specified in Exhibit “C”, and all other reimbursable expenses must be approved as set forth in Section 3.22.4, or shall not be compensated. Further, while it is the intent of the Commission to reimburse the Services on a “cost-reimbursable basis”, such reimbursement shall not, without written approval of the Commission, exceed the total compensation amount set forth in the Agreement. Further, compensation will not be paid for Services provided following termination of the Agreement.

38. Payment Terms:

Comment: Offeror proposes payment of all amounts, except those disputed in good faith, made net thirty days after RCTC's receipt of an appropriate invoice, as opposed to the four to six weeks stated in Exhibit C-4, Section 4. In the event of a not-to-exceed price, as contemplated by Section 3.22, Offeror will not be obligated to continue performing the Services upon expending

the not-to-exceed price. The fee set forth in Exhibit C-4 will be based on the costs incurred, as opposed to a fixed fee.

Response: The Commission will agree to payment of undisputed amounts within thirty (30) days of receipt of an appropriate invoice. It is understood that the selected Consultant will not continue performing Services once the total compensation limit has been reached, except as may be required to correct errors or omissions of the Consultant. Regarding the last comment, if the Offeror is proposing a cost plus percentage of cost contract, the Commission notes that such contract is not allowable under the Commission's proposed federal funding source(s).

39. **Taxes and Duties:**

Comment: Offeror's price will be inclusive of Offeror's corporate income, payroll and other personal taxes only. Any applicable sales, use, gross receipts and other similar taxes due in connection with Offeror's performance of the Services will not be included in the contract price. Offeror will, however, administer the payment of any sales and use taxes which are required in connection with the Services, subject to RCTC's agreement to pay such amounts in advance and to indemnify Offeror for claims arising out of that activity.

Response: The Commission does not agree to Offeror's proposed condition regarding taxes. The Commission shall require that the selected Consultant include all sales and use taxes in the contract price. Further the Commission will not agree to indemnify the selected Consultant regarding claims related to payment of such taxes.

40. **Audit:**

Comment: Offeror will require that any audit right set forth in Section 3.24 exclude the right to audit the derivation of Offeror's fixed multipliers, fixed unit rates, lump sum amounts and the like.

Response: RCTC intends to award a cost plus contract for Engineering and other professional services; as such, RCTC retains the right to require the Consultant to provide sufficient information to determine the reasonableness of the proposed costs. Such information may include, but is not limited to, elements such as labor hours, overhead, materials, etc.

41. **Non-payment:**

Comment: Offeror proposes the right to suspend for non-payment and terminate upon 20 days notice. All late payments will be subject to interest at prime rate plus 2%, compounded monthly.

Response: RCTC rejects the proposal to suspend the agreement for non-payment and terminate upon 20 days notice. RCTC will consider, during negotiations, a penalty for late payment of approved charges on invoices that have been submitted in accordance with the requirements of the contract. However, the Commission does not accept the proposed late payment penalty of interest at prime plus 2%.

42. Exhibit F:

Comment: Additional questions and/or exceptions to the Agreement may be necessary following Offeror's review of Exhibit F, which was not attached to the Agreement.

Response: Exhibit F is a Certificate of the Commission (to be executed by the appropriate representative of the Commission) in the same form and substance as the Certificate of Consultant attached as Exhibit "E". This exhibit does not have any impact on the Offeror, and should not necessitate any additional questions and/or exceptions.

43. Plans of the Commission:

Comment: Offeror proposes the plans of the commission, as referenced in Section 2.4, are provided and incorporated in the Agreement in order for Offeror to represent that it is familiar with such plans.

Response: All plans, including the Scope of Service, the latest project information and current status of the project are available on the RCTC website as part of this solicitation package. The Commission is willing to reference the foregoing documents in the recital provisions of the Agreement.

44. Notice to Proceed:

Comment: Offeror reserves the right to review and approve a Notice to Proceed or Limited Notice to Proceed issued prior to executing the Agreement, as contemplated by Section 3.2.1. Offeror's performance of the Services is subject to mutually agreed upon payment and risk allocation terms.

Response: At this time, RCTC does not foresee issuing a "Notice to Proceed" for this project without completing negotiations with the consultant and approval of the award and contract by the Commission.

45. Post-award Audit:

Comment: In the event the payment terms are revised by Caltrans as contemplated by Section 3.2.1.2, Offeror will require the right to re-negotiate terms of the Agreement, and if negotiations are unsatisfactory, suspend performance until mutual resolution, or terminate the Agreement without default.

Response: The Commission does not agree to the terms set forth by Offeror which would allow Offeror to suspend performance and/or terminate the Agreement for convenience in response to changes required pursuant to Caltrans' audit recommendations.

46. Modification / Addendums:

Comment: Offeror will perform the Services in accordance with the Agreement. Additional questions and/or exceptions may be necessary in response to the Federal Program set out in Section 2.3 and any addendums to the Agreement including but not limited to the anticipated DBE addendum and additional insurance terms as contemplated by Section 3.2.2.

Response: The terms and conditions that have been included in the RFQ package anticipate the requirements of the federal funding program, and the Commission does not anticipate that any significant changes will be required to the Agreement or Scope of Work in regard to the specific federal program ultimately utilized. However, if there are legitimate issues to discuss outside of the current scope of the RFQ, the Commission will be open to such discussions. Further, if there are any changes to the insurance requirements, such changes would be subject to further negotiations.

47. Term and Schedule:

Comment: Offeror proposes industry standards determine timely performance. Offeror is not responsible for impacts to the schedule based on the performance of the design builder and other third parties, including but not limited to performance of services related to Right of Way acquisition and construction. Offeror proposes modification to Section 3.3, Section 3.15, 3.16, and Section 3.29 as they relate to schedule obligations.

Response: In general, the Commission agrees that the selected Consultant will not be responsible for delays caused by unrelated third parties, provided that the selected Consultant has not contributed, either directly or indirectly, to such delays by not performing to industry standards and the standard of care. The Commission reserves its determination as to whether any changes are required to the above referenced sections.

48. Preliminary and Final Review of Work:

Comment: Offeror proposes that RCTC's review of work product as contemplated in Section 3.7 and Section 3.12 is subject to reasonable deadlines and that Offeror is reimbursed for any re-work based on the cost-reimbursable structure of the contract.

Response: The Commission agrees only that out of scope issues that arise in review of draft documents, and that require re-work of such documents, will be reimbursable pursuant to the terms of the Agreement. No reimbursement will be provided for re-work that is required because of the selected Consultant's failure to comply with the standard of care, or to complete the work as specified in the Agreement and/or the Scope of Work.

49. Public Hearings / Legal Opinions:

Comment: Offeror agrees that it will not render any legal opinions as required in Section 3.8 and proposes a release and waiver of any liability that may arise from such a claim. Offeror proposes that RCTC retain exclusive control over final approval and evaluation, implementation and all

other decisions relating to compliance with law, right of way acquisition and other contractors. Offeror, however, reserves the right to participate in legal disputes that involve Offeror interests.

Response: The Commission does not agree to this proposal.

50. Subcontracts:

Comment: Offeror proposes as part of Section 3.17.4 the right to subcontract Services without RCTC's approval to affiliates and to subconsultants and subcontractors who provide Services under a reasonable value. All other subcontracts that require approval will not be unreasonably withheld.

Response: The Commission does not agree to this request, and requires approval of all subconsultants and subcontractors.

51. Intellectual Property:

Comment: As a modification to Section 3.18.2, Offeror does not warrant the right to Intellectual Property if such property is provided by or through RCTC or is used at the direction of RCTC.

Response: The Commission will not require the selected Consultant to warrant the right to Intellectual Property if such property is provided by or through the Commission. Regarding Intellectual Property "used at the direction of the Commission", whether or not the selected Consultant would be required to provide title to the Intellectual Property would depend on the origins of such property.

52. Confidentiality:

Comment: Offeror proposes as part of Section 3.18.3 that all confidential information is marked as confidential. Confidential information will not apply to certain information, including but not limited to information generally available to the public, information independently developed, and information required to be disclosed by the legal process. The obligation to keep information confidential will terminate 3 years after disclosure.

Response: The Commission does not agree to Offeror's proposal that confidential information be marked as such. Per the Agreement, all documents prepared by or provided to the selected Consultant are to be considered confidential, unless otherwise specified by the Commission. The Commission further notes that the Agreement already specifies the exceptions noted above regarding confidentiality. The Commission further rejects Offeror's assertion that the obligation to keep information confidential will terminate 3 years after disclosure (assumedly to the selected Consultant). Documents shall be held confidential as set forth in the Agreement, with no limitation on the term of the confidentiality requirement.

53. Limit of Liability:

Comment: Offeror proposes a general exclusive remedies clause and a reasonable aggregate limit of liability for all damages and claims based on a percentage of the amount paid to Offeror in connection with the Services.

Response: The Commission rejects this proposal and will not agree to a limit of liability for direct damages.

54. Consequential Damages:

Comment: Offeror proposes that the Agreement contain a mutual consequential damages waiver, in contrast with the exposure to consequential damages set out in Section 3.19, specifically waiving any right of recovery against Offeror in connection with the Services of any consequential, special, indirect, exemplary, incidental and punitive damages and for damages arising from loss of use, increased cost of construction, loss of revenue or profit and/or customer claims.

Response: The Commission will not agree to waive consequential damages, but the Commission is willing to consider some form of cap on consequential damages, to be further discussed during contract negotiations. The Commission will not agree to waive or cap punitive damages.

55. Warranty:

Comment: Offeror agrees to perform the Services in accordance with the industry standards. Offeror proposes the warranty set out in Section 3.9 serve as the exclusive warranty and guaranty. Offeror will re-perform the Services performed by Offeror that were not performed according to industry standards for a period of one year from substantial completion of the Service, with a one year re-warranty from the date of the re-performance of such Service, subject to a cap of two years from the date of substantial completion. In no event will Offeror reperform work performed by third parties. Offeror's re-performance will be RCTC's sole and exclusive remedy in connection with non-conforming Services. RCTC's decisions regarding performance are subject to reasonable standards.

Response: The Commission rejects the proposal that Section 3.9 serve as the exclusive warranty and guarantee regarding the Services. The Commission further rejects the Offeror's one year limitation on the obligation to re-perform Services which do not conform to the standard of care set forth in the Agreement, or which are unsatisfactory as a result of the selected Consultant's errors or omissions. The Commission rejects the Offeror's assertion that re-performance of the Services will be the Commission's sole and exclusive remedy in connection with non-conforming Services. The Commission's decision regarding whether the Services are conforming shall be made in the Commission's sole discretion. The Commission does not expect the Offeror to re-perform work performed by third parties (without compensation therefor) unless such re-performance is required because of an act or omission of the Offeror, or a subconsultant of the Offeror.

56. Force Majeure:

Comment: Offeror will require as part of Section 3.16 cost and schedule relief to the extent necessary to protect Offeror from adverse impacts to the performance of its Services due to events of Force Majeure, which include but are not limited to, acts of or a failure to act by governmental body, acts or omissions of RCTC and/or its contractors and third parties delaying or interfering with the Services, changes in laws, acts of God, war, riot, fire, flood, etc., transportation accidents and delays, terrorism, sabotage, theft, strikes or other labor disturbances. Offeror will notify RCTC within a reasonable time following the Force Majeure event.

Response: The Agreement already provides for schedule relief as a result of “excusable delays” as set forth in Section 3.16. The Commission will not provide cost relief as a result of such delays, provided that the Commission may consider, during contract negotiations, reasonable cost relief for delays caused solely by the Commission.

57. Changes:

Comment: Offeror will require cost and schedule relief to account for the adverse impact on its Services due to any changes and delays resulting from others including, but not limited to, utility companies, railroads, property owners, RCTC, its General Counsel and other project team members.

Response: The Commission rejects the requirement to provide cost relief for all delays as specified above, but may consider, during contract negotiations, reasonable cost relief for delays caused solely by the Commission.

58. Hazardous Materials:

Comment: Offeror will require appropriate indemnification from RCTC for any and all liability associated with hazardous materials at the project site. In the event Offeror encounters hazardous materials during its Services at the project site, Offeror will suspend its operations in the affected area and RCTC will retain a qualified environmental contractor to remediate and/or remove the hazardous materials from the project site. Offeror will require cost and schedule relief to account for any such adverse impact on the performance of its Services.

Response: The Commission will not provide indemnity of the selected Consultant under any provision or term of the Agreement. The Commission will not indemnify the selected Consultant from liability associated with hazardous materials at the project site. Further, the Commission anticipates that the selected Consultant shall be required to retain a qualified environmental contractor to remediate and/or remove hazardous materials from certain portions of the right of way to be acquired by the selected Consultant on behalf of the Commission as part of the Services. Cost relief will not be provided in relation to hazardous materials encountered on the Project site.

59. Indemnification:

Comment: Offeror proposes as part of Section 3.19 that the parties agree to reciprocal, proportionate indemnity with respect to third party property damage and personal injuries arising from each party's negligence in connection with the project. Offeror proposes that the indemnity obligation is subject to the waiver of consequential damages.

Response: The Commission will not agree to indemnify the selected Consultant. The Commission may consider some form of cap on consequential damages, to be further discussed during contract negotiations.

60. Insurance:

Comment: Offeror will provide insurance coverages against claims caused by Offeror with limits based on Offeror's standard types and limits and as appropriate to the project. Offeror proposes the deletion of Aircraft Liability Insurance in Section 3.20.4; the deletion of the obligation to provide a bond based on self-insurance or deductible levels; replace "licensed" with "authorized" in Section 3.20.7; the deletion of the requirement to bind coverage in Section 3.20.8; and the deletion of the requirement to provide copies of the Offeror insurance policy in Section 3.20.8. Offeror proposes Offeror assumes that (i) RCTC will provide a builder's risk property insurance policy appropriate for the project ("Builder's Risk Policy"), (ii) deductibles and exclusions in the Builder's Risk Policy will be subject to Offeror's reasonable review and acceptance, and (iii) Offeror and its subconsultants performing any part of the Services will be named as additional insureds under the Builder's Risk Policy and all rights of subrogation will be waived.

Response: Insurance shall be provided in the amounts and types required by the Commission, and not based on Offeror's standard types and limits. The Commission does not agree to delete the Aircraft Liability insurance provision, as the Commission has not yet determined if any flights will be required in conjunction with performance of the Services. This insurance will only be required if applicable. The Commission will delete the bond or self-insurance language only if it has approved the selected Consultant's insurance deductibles. The Commission will determine if a Builder's Risk Policy will be acquired.

61. Suspension:

Comment: Offeror proposes equitable cost and schedule relief to account for the impact of any RCTC suspension.

Response: The Commission is willing to consider cost relief based on suspension of Services during contract negotiations. The Commission will provide schedule relief due to suspension of Services by the Commission.

62. Termination:

Comment: Offeror proposes as part of Section 3.14 the right to a reasonable cure period before RCTC may terminate for cause, which termination is only permitted due to insolvency or repeated failure to perform the Services. All other terminations will be for convenience, including but not limited to, termination arising from an audit or replacing key personnel. Offeror proposes payment for all Services performed up to date of termination and, except for termination for cause, all costs incurred by reason of such termination. Offeror will not be liable for any other costs or damages arising from the cause of the termination or the termination itself and reserves its right to recover for any loss or damage provided by the Agreement despite the termination.

Response: The Commission will include a 10 day cure period following written notice of default. The Commission will not agree to limit termination for cause to reasons of insolvency or “repeated failure” to perform the Services. Termination arising from the results of an audit or the unauthorized replacement of key personnel will be considered termination for cause, as provided in the Agreement. The Commission shall only pay for Services adequately performed up to the date of a termination. The Commission is willing to consider, during contract negotiations, reasonable termination costs arising from a termination for convenience. The Commission shall not delete the waiver provisions regarding termination contained in Section 3.14.7 of the Agreement. The Commission does not agree that the selected Consultant shall not be liable for costs or damages arising from a termination. As stated in Section 3.14.4, regarding termination for cause, the selected Consultant shall “be liable to the Commission for any reasonable additional costs incurred by the Commission to revise work for which the Commission has compensated Consultant under this Agreement, but which the Commission has determined in its sole discretion needs to be revised, in part, or whole, to complete the Project because it did not meet the standard of care established in Section 3.9.”

63. Cost and Other Opinions:

Comment: Offeror proposes that any cost opinions or estimates provided by Offeror will be on a basis of experience and judgment, but since Offeror has no control over market conditions or bidding procedures, Offeror does not warrant that bids, ultimate construction cost, or project economics will not vary from these opinions or estimates. Neither the Agreement nor any Services will constitute or provide for any legal or financial opinions by Offeror regarding any matter.

Response: The Commission has not required any such warranty. The Commission acknowledges that the Services do not constitute or provide for any legal or financial opinions by Offeror.

64. Applicable Law:

Comment: Offeror agrees to comply with all applicable law. Offeror will require that as part of Section 3.13 that its exclusive liability for any violation of law is to pay the fine or fee and, if applicable, reperform the Services.

Response: The Commission does not agree to this limitation on the Offeror's liability for failure to comply with all applicable law.

65. Dispute Resolution:

Comment: Offeror proposes that the parties attempt to resolve any disputes amicably between the respective management representatives within an established time period before either party may resort to litigation.

Response: The Commission agrees that the parties will attempt to resolve disputes amicably, but does not wish to include any provisions in the Agreement specifying dispute resolution terms and conditions.

66. Prime Contract Terms:

Comment: Offeror agrees that all service, consulting and purchasing contracts will be on RCTC's paper as prime contracts directly between RCTC and the other contractor, consultant or vendor, subject to Offeror's administration and management on RCTC's behalf. Offeror will require that RCTC will include in all contracts with third parties connected to the project, a provision whereby each such third party acknowledges and agrees that Offeror has not assumed any contractual or other duties nor made any representations regarding the third party contract; Offeror's activities are solely for the benefit of RCTC; the third party waives all claims against Offeror; Offeror is acting with RCTC's authority within the four corners of the third party's contract with RCTC; and the third party will not perform any work exceeding those boundaries without the prior written approval of RCTC. The specific prime contract terms will be subject to Offeror's review, input and approval.

Response: The Commission does not agree that services which the selected Consultant are required to perform, or engage consultants to perform, shall be on the Commission's "paper" as prime contracts of the Commission. Such contracts shall be between the selected Consultant and its subcontractors. The Commission intends to require its construction contractor to indemnify the consultants of Commission. The Commission will not require waivers, acknowledgments or other such inclusions in its contracts in relation to the selected Consultant. Aside from the Commission's intention to require indemnification by its construction contractor of the Commission's consultants, the Commission rejects all other statements or requirements contained above.

67. Third Party Advisory Services:

Comment: Offeror will require that RCTC hold harmless, defend and indemnify Offeror for any claims related to Offeror's third party advisory role services. Offeror will perform according to the industry standards, but will not warrant, except for the performance of Offeror, its subcontractors and their personnel, the safety, security, or compliance with laws and project requirements at the project site. Offeror will provide recommendations, but all approvals and final decisions will be rendered by RCTC or Caltrans and Offeror will be held harmless. Quality

assurance and oversight efforts will include monitoring, advising, and reporting but do not include a guarantee by Offeror of the performance of third party contractors.

Response: The Commission will not hold harmless, defend or indemnify the selected Consultant in relation to the Agreement or the Services. The Commission rejects all statements, qualifications and assertions above. Regarding compliance with laws and project requirements at the project site, the Commission points out that the Scope of Work specifically requires the selected Consultant to "ensure" design-build contractor compliance with regulatory requirements, that the design-build contractor implements and follows its own safety program, that regular safety meetings are conducted and documented by the design-build contractor, and that accidents are investigated and lessons learned implemented. (See Appendix A, Scope of Work of the RFQ, Section 3.K.)

68. Reliance on Data Provided by RCTC:

Comment: Offeror will require that it be able to rely on the accuracy and completeness of all data provided by RCTC.

Response: The Commission agrees that the selected Consultant shall be able to rely on the accuracy and completeness of data provided by the Commission, unless, based on the circumstances, such reliance is not reasonable.