

## Unsolicited Proposals

Often, private firms can and want to take the initiative. They identify a project with good potential economic and financial returns and conduct a 'feasibility' study. Based on the results of their investigations, they submit an informal proposal to the Government to start the process. Subsequently, Government invites bids through a competitive process that gives some sort of preference to the firm that identified the project.

Experience suggests that the preparatory studies performed by an unsolicited bidder prior to signing the contract are nearly always weak in two areas;

- Incomplete technical and inaccurate cost base of the project
- Inadequate exposure of the risks associated with the project, the outcomes of which may end up being borne by the Government

Policy makers also need to carefully assess the project impact on sector policy and the overall performance on the road system. Even when the selection of the firm is done through a competitive bidding giving some preference to the "originating" firm, governments face the risk that this stated preference may deter competition and in the end reduce incentives for increased efficiency and economy.

The main incentives for a Government to embark on direct negotiations are usually based on the following rather weak reasons:

- A good relationship with the firm and the fear of entrusting the work to another less qualified firm in case of a competitive bidding procedure; However, in the highway sector there are usually many reputable and well run companies.
- The time and costs associated with the competitive process; Experience has shown that often such projects in the early stages go faster but such projects are 'difficult' and take longer overall.
- The lack of financial resources for conducting the preliminary studies required to launch the bidding process. Many governments are setting up revolving funds for project preparation and funding is generally always available from multilaterals/bilaterals for appropriate projects that will follow transparent and competitive tender processes.

In general, unsolicited bids are not encouraged by most countries and distract professional staff from priority projects and clearly facilitate corruption.

A detailed description of current thinking and process if unsolicited bidding is allowed follows.

### Why are there unsolicited proposals?

For private companies, there is a substantial financial attraction in knowing that they will win a bid and thus recoup their bid preparation costs which can be substantial. That is one major reason why there are unsolicited proposals and especially related to already identified government projects.

Private companies also frequently have innovative ideas to solve known problems for which no credible technical or financial solution seems to exist, and/or for which their company has specific technical capability.

The most frequent cases occur in underground projects. Progress in this field has been remarkable as regards the use of huge tunnel-boring machines, but also in the finding of original construction solutions. Tunnel solutions are possibly suited to solving urban congestion problems or for major crossings of sounds or mountain chains for example.

## Problems with Unsolicited Proposals

When the public authorities receive unsolicited proposals, they are confronted with a number of difficult problems;

- **Administrative:** Valuable time and human resources must be spent to establish if the proposal is credible. Staff have to defer work on priority PPP projects; Staff also have to avoid any possibility of corrupt practices which may also lengthen the process.
- **Legal:** From a legal point of view, the laws governing competition generally prohibit the public authorities from awarding works without holding a competitive tender. For EU countries, European guidelines relating to competition are very strict and the Commission is very careful to see that they are applied. In such cases, what should be the procedure to avoid losing the benefit of an idea which may bring considerable improvements to traffic conditions while still observing these rules?
- From a technical point of view the main problems to be examined by the public authorities are generally the following:
- they should first make sure that the problem which the proposal aims to solve is a real problem and that the proposed solution conforms to policy. A frequent problem is that of respecting the major choices as regards balance between modes of transport (private cars on the one hand and public transport on the other).
- they should obtain an expert appraisal of the solution to make sure it is viable. The proposed solutions are in fact often very technically advanced (“state-of-the-art”) and only highly specialized experts are capable of guaranteeing their reliability. They should especially guarantee that the solution satisfies all conditions relating to safety, which are very stringent as regards underground solutions (fire) or major crossings (ship collisions, behavior in very high winds, etc.)
- they should make sure that the new road fits well into the fabric of existing roads.
- lastly, they should organize public debates and meetings necessary to make sure that the project will not raise opposition at a later stage likely to cause it to be abandoned when considerable expense has already been incurred in design work.

## An Updated view on Unsolicited Proposals

When the original toolkit was prepared in 2001 the thinking and experience at that time suggested that although unsolicited proposals could be problematical, there was a proper place for them within the PPP process. To some extent that view still prevails, i.e. there is a place for unsolicited proposals.

However, experience has shown that unsolicited proposals and projects tend to cause difficulties, either real or perceived, because they are associated with lack of competition and lack of transparency. Both these factors have implications for, if not result in, corrupt practices. Corrupt practices generally lead to higher cost solutions for government and often a slower implementation time, not faster.

Unsolicited projects have rarely been successful in the sense that the objective was achieved or that the objective was achieved without financial and political pain to the government. Generally, project preparation and understanding of an unsolicited project on the government side has been weak leading to projects being started and then usually much weaker financial position being revealed, with substantial hidden costs imposed on governments.

Given the limited capacity of governments to process more than a few projects at any one time, unsolicited projects also consume a disproportionate amount of government human resources which should be devoted to both public and/or PPP projects.

The current view therefore is that there is a place for genuine and innovative proposals but these are the exceptional case and that the private sector must put up strong independent analyzed cases for unsolicited proposals at an early stage before governments are sucked in to supporting projects that are financially weak, high risk, will take up significant human resources of the government and will likely take a longer than normal time to implement because of these difficulties.

The Jakarta monorail is one example of a 'difficult' unsolicited project. This went ahead as a type of unsolicited project but soon ran into substantial financial difficulties and eventually needed government guarantees (and thus probable subsequent subsidy) to continue, which was neither foreseen in the government budget nor could be substantiated except by the economic/political 'crisis' caused by the project to government.

On the other hand, the I 495 Beltway development in Virginia, USA was an unsolicited project that has provided needed investment with innovation. However, Virginia Department of Transportation is familiar with PPPs and has developed good guidance for both solicited and unsolicited PPP projects.



Public-Private Transportation Act of 1995. The Commonwealth of Virginia.

The Capital Beltway (I-495) is part of the USA's Interstate Highway system and the busiest corridor in the National Capital Region and is probably the second most congested roadway in the USA. This major transportation road has reached capacity and was in need of significant preservation and upgrade. Recently, Virginia partnered with

Fluor-Transurban, Inc. under an unsolicited bid to increase capacity including through new High Occupancy Toll (HOT) Lanes. Under this partnership agreement, Virginia will retain ownership of the 14 miles of new lanes while Fluor-Transurban will design, build, maintain, operate, and finance the project over a 75-year concession period.



The Capital Beltway And Public-Private Partnerships; Prepared for: The National Council for Public-Private Partnerships. By: Matthew T. Brown, Timothy P. Cronin, Saurabh Lall, Joseph R. Lataille, Margaret Sacks, December 2007

Under various criteria of the NCPPT, this report states that the tender for the unsolicited bid has been a success.

This project will provide a 14-mile, free-flowing network for buses, carpoolers and sluggers on the Capital Beltway. Two new HOT lanes will be added in each direction on the I-495 beltway.

Vehicles carrying three or more people, motorcycles, buses and emergency vehicles will use the HOT lanes free of charge. Vehicles carrying one to two people can either travel on the general purpose lanes for free or pay a toll to ride the HOT lanes.

This project is made possible through a public-private partnership between VDOT and Fluor-Transurban.



VirginiaHOTLanes.com has more detailed information on the project and construction.

The following box shows some key details.

FACT SHEET Date: July 2008 on Interstate 493 Virginia USA

Funding, Key Business Terms and Procurement

Project benefits

- New travel choices, including first-time transit lanes and dedicated high occupancy vehicle (HOV) lanes
- First capacity enhancement in the Beltway in a generation
- Congestion relief
- Improved safety and performance
- Replacement of aging infrastructure
- Project funding

By partnering with the private sector, the Commonwealth can advance improvements more quickly than traditional methods. With vast, competing transportation needs, the Commonwealth does not have sufficient funding to improve the Beltway. This one project would consume more than a year of all construction funding available statewide.

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Key business terms

The Commonwealth negotiated a fair agreement with Fluor-Transurban under the Public Private Transportation Act that benefits Virginia while providing the private partners an opportunity to earn a reasonable rate of return on their investment. Key business terms of the 80-year agreement include:

VDOT retains ownership and oversight rights to ensure project is constructed, operated and maintained in accordance with agreed-upon standards

VDOT has right to terminate contract if terms and standards are not met

The Commonwealth is not prevented from building any other transportation capacity, but the private partner will have the first right to fund and build additional toll lanes on the Beltway if congestion warrants

If the HOT lanes are a financial success, the Commonwealth will share in that success through revenue sharing – enabling the Commonwealth to earn up to 30 percent of earned annual gross revenue after agreed upon benchmarks

All design and construction will be completed under a fixed price contract - traditional public sector construction risks have been shifted to the private sector, with the exception of pre-existing hazardous materials and right-of-way costs

75-year operating term, 5-year construction term

Vehicles with three or more passengers and transit must ride free

Project will use variably priced tolls to keep lanes free flowing, with tolls based on levels of congestion

To ensure HOV-3 will be free and that there is no disincentive for carpool and transit use on the HOT lanes, the Commonwealth will make partial payments to the Concessionaire in the unlikely event that HOV use exceeds mutually agreed upon numbers

Once complete, HOT lanes must be operated to maintain free-flow traffic conditions in accordance with federal requirements

Commonwealth will have the right to suspend tolling during emergencies or to manage traffic congestion – under certain circumstances, the Commonwealth will reimburse the private partners for lost toll revenues

At the end of the term, the HOT lanes must be handed back to the Commonwealth at an agreed-upon level of quality

The private sector is solely responsible for project debt - the Commonwealth is not responsible for any debt repayment for the life of the project.

## Bidding Systems for dealing with Unsolicited Proposals

If unsolicited proposals are accepted, the most common systems governments use to manage them are:

- **Bonus system:** Bonus points (usually a maximum of 10%) are awarded in the tender to the original proponent. Used in Chile, Korea and Indonesia.
- **Swiss Challenge:** A third party can bid on a project during a designated period but the original proponent can counter match any superior offer. Used for example in the Philippines and Taiwan.

- **Best and Final Offer System:** This is a variation or hybrid of the first two systems, the key element being multiple bidding rounds. Used in S Africa, Argentina and Costa Rica.

These systems are well documented with examples in the WB/PPIAF report noted below.

It should be noted that if the bonus or advantage given is excessive (and 20% say might be considered excessive) the advantage given to the original proponent may be too high and the competitive aspect either blunted or even eliminated.

In all cases the projects must be tendered competitively.

## Policy and Related Choices

If governments decide to allow unsolicited proposals in their PPP policy framework, they must make decisions on a number of issues;

- General presumption against unsolicited tenders except in very special circumstances
- System to be used
- Reimbursement of project development costs
- Establishing time constraints
- Appropriate Incentives
- Inter-ministerial coordination procedures
- Effective sector planning

## Summary

The governments' proposed approach to unsolicited proposals should be described in the national/local PPP policy framework.

At a minimum, all unsolicited proposals should be subject to a thorough transparent and competitive process in which all challengers have a fair chance of winning.

All the main systems have been demonstrated to be effective but are effective only to the extent that the country's PPP system is effective.

In general, the current thinking is that it is probably both neither desirable nor possible to stop all unsolicited proposals. However, the disadvantages are very considerable. Therefore, the policy on unsolicited proposals should be clear, should discourage in general and only allow those few that have genuine merit to be analyzed by government through a robust and effective system.



Unsolicited Infrastructure Proposals: How some countries introduce Competition and Transparency. Hodges and Dellacha. Working Paper No. 1. WB/PPIAF. 2007.