

Presentation
for
Special Session of the National Council for Public-Private
Partnerships/Water Institute

“Putting the Deal Together -
Structuring the Contract and Costs”

Design-Build Odyssey
Water and Wastewater Projects

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Options for Public-Private Partnerships

- Public Ownership and Finance, Private Design, Construction and/or Operation
- Private Ownership, Finance, Design, Construction, and Operation
- Combinations of the above

Why Consider a Public-Private Partnership?

- Potential Cost Savings
 - Design/Construction of Capital Improvements
 - Operations
- Risk Reduction
- Improved Performance
- Need for Alternative Financing

Risk Shifting with D/B and D/B/O

- One-party responsibility, single-point guarantee for services
- Substantial technical guarantees, opportunity to shift significant technical risk to contractor, e.g.:
 - Fixed price for construction
 - Fixed O&M service fee with indexed escalator (if it breaks, they fix it)
 - Guaranteed schedule for design, construction, acceptance
 - Guaranteed performance-treatment, flow, environmental performance
 - Maintain condition of facility, less normal wear and tear (concept of asset management)

Good Procurement: Pre-requisite to Successful Deal

- Start with attitude of “Trust” necessary for a successful partnership
- Adopt an honest/sincere approach conveying that contract will be let as a result of the procurement process
- Demonstrate that there is a fair and even playing field for all proposers; i.e., no favorites, no exclusionary evaluation criteria biased toward a particular vendor

Good Procurement (continued)

- Provide setting for an attractive business relationship for both buyer and seller
 - long-term contract (15 years plus)
 - realistic terms and conditions for contract; e.g., well-defined work scope and division of responsibility, attainable performance guarantees, equitable risk sharing, realistic conditions for defaults and remedies, and fair termination clauses
 - financial terms that keep both buyer and seller financially whole

Content of RFP: A Good RFP Facilitates Successful Contract Negotiations

- Introduction-background/objectives
- Facility/asset description (existing/proposed)
- Scope of supply/service, including performance specifications/guarantees
- Schedule requirements for supply/service
- Draft contract or key terms and conditions of such

Content of RFP (continued)

- Procurement process and schedule
- Instructions to respondents: content of proposals to be submitted (technical and cost proposals)
- Rights of party requesting proposals
- Evaluation process/evaluation criteria
- Appendices (key information describing existing facilities)

Key Elements of a Successful Deal

- Comprehensive, fair and impartial procurement - assure a competitive procurement process
- Well-defined work scope and division of responsibilities
- Attainable performance guarantees

Key Elements of a Successful Deal (continued)

- Equitable risk sharing
 - performance risk
 - “as-is” and asset management risk
 - environmental risk
 - schedule risk
 - cost risk
 - design/construction price
 - operating cost
 - uncontrollable circumstances/change-in-law

Key Elements of a Successful Deal (continued)

- financial security
 - performance and payment bonds
 - letter of credit
 - guarantor's limits of liability
- penalties - liquidated damages
- termination and damages
 - party at fault
 - limits for change-in-law, uncontrollable circumstances
 - for convenience

Protecting Your Investments and Facilities with D/B and D/B/O

- Establish clear design, construction and performance standards in your RFP
- Establish clear and detailed contract requirements for design, construction and performance. Also establish clear contract requirements for design review, construction monitoring, acceptance, and operations and maintenance monitoring

Protecting Your Investments and Facilities with D/B and D/B/O (continued)

- Include clause in contract for termination for convenience
- Assess and include limits in contract with adequate payment to municipality if contractor defaults, allowing municipality to remedy default if contract is terminated

Protecting Your Investments and Facilities with D/B and D/B/O (continued)

- Establish an acceptance protocol and specific test requirements
- Have an independent engineer, as the owner's representative, providing design review and construction monitoring services
- Adhere strictly to the acceptance requirements, with pre-established penalties for nonperformance

Protecting Your Investments and Facilities with D/B and D/B/O

(continued)

- Establish the condition of existing and new facilities and inventory all site materials prior to the contractor being responsible for services. Have contractor sign off on said condition and inventory
- Establish standards for normal wear and tear or asset value

Protecting Your Investments and Facilities with D/B and D/B/O

(continued)

- Establish predictive and preventative maintenance schedules. Establish equipment repair and replacement schedules and, potentially, have contractor set up escrow account for same
- Have independent engineer and contractor conduct annual audits of the facilities' condition, with pre-established penalties or ability to withhold payment for nonperformance.

Protecting Your Investments and Facilities with D/B and D/B/O

(continued)

- Compare contractor activities with agreed to maintenance schedules and contract standards for acceptable plant conditions.
- Have full access to facilities and data at all times and right to performance test at any time.
- Have independent financial consultant conduct annual reviews to assess flow of funds and assure proper record keeping.

Protecting Your Investments and Facilities with D/B and D/B/O

(continued)

- Have independent engineer and contractor conduct comprehensive facility inspection two to three years prior to end of contract to establish facilities' condition, and identify steps necessary, if any, to bring facilities up to agreed to standards

Protecting Your Investments and Facilities with D/B and D/B/O (continued)

- Have independent engineer and contractor conduct final facility inspection and inventory prior to municipality resuming control of facility or turning facility over to new contractor
- Establish and empower community “watch dog” group, have penalty payment or withhold payment to contractor, if there is a deficiency