

Title 7—DEPARTMENT OF TRANSPORTATION
Division 10—Missouri Highways and Transportation Commission
Chapter 24—Design-Build Project Contracts

7 CSR 10-24.070 Risk Allocation

PURPOSE: This rule provides for factors to be considered in risk allocation.

(1) The commission will consider, identify, and allocate the risks in the Request for Proposal (RFP) document and define these risks in the contract. Risk will be allocated with consideration given to the party who is in the best position to manage and control a given risk or the impact of a given risk.

(2) Risk allocation will vary according to the type of project and location, however, the following factors should be considered and will be used to the extent the commission considers them appropriate:

(A) Governmental risks, including the potential for delays, modifications, withdrawal, scope changes, or additions that result from multi-level federal, state, and local participation and sponsorship;

(B) Regulatory compliance risks, including environmental and third-party issues, such as permitting, railroad, and utility company risks;

(C) Construction phase risks, including differing site conditions, traffic control, interim drainage, public access, weather issues, and schedule which good engineering and contracting practice would take into account in determining site investigation plan and design, which reflect sub-surface or latent physical conditions which are known, discoverable or which a reasonable person would be on notice to investigate or expect or which are inherent in the type of work and geographic location of the work;

(D) Post-construction risks, including public liability and meeting stipulated performance standards; and

(E) Right-of-way risks including acquisition costs, appraisals, relocation delays, condemnation proceedings, including court costs and others.

(3) Information exchange with industry at an early project stage will occur if it will facilitate understanding of the capabilities of potential proposers. However, any exchange of information must be consistent with state procurement integrity requirements. Information exchanges may take place with potential proposers, end users, acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition.

(4) The purpose of exchanging information is to improve the understanding of the commission requirements and industry capabilities, thereby allowing potential proposers to judge whether or how they can satisfy those requirements, and enhancing commission's ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.

(5) An early exchange of information may identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules. This also includes the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; the availability of reference documents; and any other industry concerns or questions. Some techniques that may be used to promote early exchanges of information are:

(A) Industry or small business conferences;

(B) Public hearings;

(C) Market research;

(D) One-on-one meetings with potential proposers (except that any meetings that are substantially involved with potential contract terms and conditions will include the Missouri Department of Transportation (MoDOT) project manager designated for the project and are subject to the restrictions on disclosure of information set out in section (7) of this rule);

(E) Pre-solicitation notices;

(F) Draft RFPs;

(G) Request for Information (RFI) ;

(H) Pre-solicitation or pre-proposal conferences; and

(I) Site visits.

(6) RFIs may be used when the commission does not intend to award a contract, but wants to obtain price, delivery, other market information, or capabilities for planning purposes. Responses to these notices are not offers and cannot be accepted to form a binding contract. ~~There is no required format for an RFI.~~

(7) When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential proposers, that information ~~shall~~ will be made available to all potential proposers as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage. Information provided to a particular proposer in response to that proposer's request ~~must will~~ not be disclosed if doing so would reveal the potential proposer's confidential business strategy. When a pre-solicitation or pre-proposal conference is conducted, materials distributed at the conference will be made available to all potential proposers, upon request.

AUTHORITY: sections 226.020, RSMo 2000 and 226.030 and 227.107, RSMo Supp. 2004
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**Original authority: 226.020, RSMo 1939; 226.030, RSMo 1939, amended 1965, 2003, 2004;
and 227.107, RSMo 2002.*