

## P3 Update for California High-Speed Rail – Authority Issues Request for Expressions of Interest

by Philip Jonathan Tendler

*On February 8, 2011, the California High-Speed Rail Authority issued a Request for Expressions of Interest (RFEI) from entities that might be interested in participating in the procurement process for the California High-Speed Rail project. Responses to the RFEI are non-binding on respondents and are not a prerequisite for participating in the project. Clients should be aware that submittals in response to the RFEI are subject to open government laws<sup>1</sup> and therefore they should not expect their submittals to be treated confidentially. Responses are due no later than 12:00 PM on March 16, 2011 to the Authority.*

The RFEI does not target specific types of firms and may be of interest to clients in the following fields:

- Advisory (Financial and Consulting)
- Construction
- Engineering
- Equipment Supply
- Finance
- Operation

### Scope of RFEI

The RFEI applies to two separate aspects of procurement planning for the project:



<sup>1</sup> Collectively, the California Public Records Act (Ca. Gov. Code §§ 6250 et seq.), the Bagley-Keene Open Meeting Act (Ca. Gov. Code §§ 11120 et seq.) and the Ralph M. Brown Act (Ca. Gov. Code §§ 54950 et seq.).

1. the design and construction of an approximately 120-mile “Initial Construction Section” (ICS) from Fresno to Shafter; and
2. the design, construction, financing, operation and/or maintenance of the “Phase I” alignment from San Francisco to Los Angeles/Anaheim.

### ICS – Project Delivery Through One or More Design-Build Contracts

The Authority estimates the cost to construct the ICS to be approximately \$5.5 billion, which it indicates could be paid for using a combination of federal and state funds. Assuming the availability of these funding sources, the Authority anticipates that the design and construction of the ICS will be procured through a design-build project delivery method. The RFEI also indicates that the Authority may seek to award multiple design-build contracts for the ICS.

Under a design-build project delivery method, ownership of the ICS would remain in the public sector, with the Authority qualifying and contracting with a design-builder for both the design and construction of the ICS. A design-build firm may be both the designer and the builder, it may subcontract one or both roles to other parties, or it may be a consortium of parties capable of providing all design-build services. In the universe of private-public-partnerships (P3s), the design-build project delivery method is one where public sector involvement is perceived to be relatively high because the government is generally responsible for owning, financing, operating and maintaining the project and bears the residual risks and rewards of the enterprise.

The Authority would like respondents to address a number of issues relating to the ICS in the RFEI, including the following:

- how federal requirements applicable to a project funded by the American Recovery and Reinvestment Act of 2009 and the Passenger Rail Investment and Improvement Act of 2008 might impact a respondent’s approach to the ICS;
- factors influencing a respondent’s ability to take on risks such as construction cost, construction delay, construction performance and construction delivery;
- anticipated principal construction risks and potential mitigation measures;
- assessments and recommendations regarding owner-controlled insurance programs and contractor-furnished insurance programs;
- payment and performance security instruments suitable to a design-build contract for the ICS; and
- under what circumstances and to what extent a design-build contractor would accept right-of-way risk.

### Phase I – Project Delivery Method Not Determined

The Authority has not determined the project delivery method for the components of Phase I. Accordingly, it is seeking broad input from respondents to the RFEI on an array of project scope, structuring (including identification of relevant market precedent), risk allocation, incentive options, commercial, legal and other issues that will impact the Authority’s plan for Phase I procurement.

The Authority would like respondents to address a number of issues relating to Phase I in the RFEI, including the following:

- the type and scope of concession agreement that would be most attractive to a respondent, ranging from an operations and maintenance (O&M) concession to one that also includes a design-build-finance (DBFO) scope;
- depending on the type of concession, the amount of equity that a respondent might invest in the legal entity to which a concession might be awarded;
- whether an O&M concessionaire would be willing to supply rolling stock or maintenance facilities as part of its equity investment;
- whether an O&M concessionaire would be willing to take some or all ridership risk and the relevant terms for accepting such risk;
- the use of availability and milestone payments with deductions for underperformance; and
- recommended approaches for dispute resolution mechanisms, including the use of dispute resolution boards, mediation, and/or binding/nonbinding arbitration.

### Conclusion – A “First Step,” But Not So Fast

The RFEI has been billed by the Authority as “a first step in the procurement process”<sup>2</sup> for the project. However, based on the broad scope of input sought from respondents to the RFEI, it is clear that the Authority has yet to define the procurement process – all options appear to be on the table, and it is not clear that any one option is more viable than the next, or that any one option is viable at all. With the RFEI, the Authority is challenging the private sector (including, foreign, state-sponsored consortia in countries with existing high-speed rail networks) to come up with solutions for issues that the Authority has yet to solve.

While the RFEI is not likely to provide any firm answers to these questions, it is likely to help the Authority define a set of pre-qualifying criteria applicable to design-build firms and P3 developers that wish to respond to a forthcoming request for qualifications (RFQ) for the ICS and Phase I, respectively. Accordingly, clients should consider responding the RFEI to share their views on the process that will unfold for the “biggest public works project in the country.”<sup>3</sup>

A copy of the RFEI can be accessed through the following link:

<http://www.cahighspeedrail.ca.gov/RFEI.aspx>

If you have any questions about the content of this client alert, please contact the Pillsbury attorney with whom you regularly work or the attorneys below.

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<sup>2</sup> [http://www.cahighspeedrail.ca.gov/pr\\_rfei.aspx](http://www.cahighspeedrail.ca.gov/pr_rfei.aspx)

<sup>3</sup> <http://www.cahighspeedrail.ca.gov/WorkArea/DownloadAsset.aspx?id=896>

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