

## EXHIBIT O

### **Process for Determining Price and Verifying Price Reasonableness for Self-Performed Work**

Pursuant to 23 CFR 636.302, certain conditions must be met before TxDOT may enter into a federally funded Facility Agreement that provides for self-performed Work, including a determination by TxDOT that the contract price for such Work is reasonable. This Exhibit O describes the planned process for making such determination and includes certain requirements to be satisfied by the Developer relating thereto. All references to self-performed Work in this Exhibit O shall include Work performed by an Affiliate, and all references to the Developer contained in this Exhibit O shall be deemed references to the Affiliate with regard to any Work to be performed by the Affiliate. The Developer shall be responsible for ensuring that its Affiliate complies with all requirements hereof.

#### **A. Overview of Process**

Once the scope of Work, contract terms and necessary pricing assumptions are established, the Developer shall provide its proposed price for the self-performed Work, while TxDOT concurrently develops an estimate of a reasonable price. Each party will have the opportunity to review the other's price breakdown, and to advise the other party regarding any perceived errors. The Developer shall allow TxDOT to examine relevant books and records for the purpose of verifying the amounts proposed by the Developer.

The process for determining a price and verifying price reasonableness will include the following steps unless otherwise approved by TxDOT:

1. Parties establish scope of Work and contract terms.
2. Parties establish assumptions relevant to pricing.
3. Developer provides price proposal; TxDOT concurrently estimates cost of performance of Work, including:
  - (a) price for design and construction of initial phase and any future construction work;
    - "base" price (generally based on estimated quantities, unit prices and markups for overhead and profit, and including a contingency for uncertainties in quantities due to preliminary level of design)
    - price for major risk items
  - (b) land cost (if right-of-way acquisition is included in contract as a Developer expense);

- (c) price for operations and maintenance services; and
  - (d) price for services not fitting into the above categories.
4. Parties meet to address differences, followed by preparation of a revised price proposal/estimate, and TxDOT review of books and records to verify basis for Developer's price.

**[Steps 1 through 4 will be repeated as necessary.]**

**B. Discussion**

**Step 1: Establish scope of work and contract terms.**

The pricing process will commence for self-performed Work once (a) a Facility Implementation Plan for such facility has been approved by TxDOT, (b) preliminary engineering has reached a minimum 20-30% level of completion, and (c) the key contract terms, requirements and conditions are determined. The parties will establish which elements of the preliminary design will be considered part of the contract, identify other specifications, standards, etc. that will govern the design and construction of the facility, and document the requirements in a written scope of work. TxDOT may conduct a value engineering review at this point and may modify the scope of work based on such review.

TxDOT and the Developer will hold one or more joint workshops to discuss the risks involved in developing the facility and to determine how they will be addressed. The workshops will involve the following:

- Identify risks likely to affect development of the facility and determine the type of impact associated with the risk
- Categorize risks based on probability of occurrence and severity of impact
- Develop strategies for managing risks and associated impacts
- Determine appropriate allocation of risk
- Identify cost drivers and develop strategies to address concerns

Through the workshop described above, the parties shall produce a risk matrix, based on a form provided by TxDOT. The matrix will, in turn, form the foundation for development of the contract terms and conditions.

**Step 2: Establish assumptions relevant to pricing.**

The parties shall mutually determine the categories of work to be performed and decide on an estimate form to be used by both parties.

The price shall include the following major components unless otherwise agreed by TxDOT:

- a lump sum amount for design and construction of initial phase and any future construction wWork, with major risk items priced separately from the "base" price, and possibly including unit prices or another form of compensation for specified elements of the Work;
- land cost (if right-of-way acquisition is included in contract as a Developer expense);
- an amount for operations and maintenance services (if any); and
- an amount for other services (if any).

Each price element will be further divided into subcategories, similar to the line or pay items typically included on construction project bid sheets. The Developer's price must be based on the same underlying assumptions that are used by TxDOT.

(a) Assumptions for Design and Construction Price

(i) Base Price

The "base" amount for design, pre-construction services and construction of the facility shall be established based on estimated quantities, much like design-bid-build projects, except as otherwise approved by TxDOT. The pricing form shall identify which work items will be priced based on estimated quantities and which items must be priced on another basis.

The parties must agree on an approach for determining a reasonable markup for profit, taking into account the level and use of public resources. The Developer shall identify its proposed markups for overhead and profit and submit backup justifying the proposed markups which will be subject to review, evaluation and audit by TxDOT.

Escalation shall be factored into the pricing for any Work to be performed in future years, as agreed by the parties.

(ii) Price for Major Risk Items

A separate price will be established for each major risk category, except as otherwise approved by TxDOT. The categories to be priced separately could be identified as part of the risk workshop or could be established at the beginning of the pricing exercise.

If requested by the Developer, TxDOT will consider a different approach to pricing risk.

Due to the difficulties in quantifying risk, and the different estimating methodologies that will be used by the parties in pricing risk, it may not be possible to establish all of the assumptions relevant to pricing of risk in advance of starting the pricing exercise. The parties will, however, need to agree in advance upon the general approach to be used in pricing risk and discuss the issues associated with each risk, so as to allow a meaningful comparison of the Developer's price and TxDOT estimate.

(b) Assumptions for Land Cost

If the Facility Agreement gives the Developer responsibility for paying the land costs, the amount included on the price/estimate form would be based on the estimated cost for those parcels required for the footprint of the facility as shown on the preliminary design and for any anticipated mitigation parcels and other property needed in connection with development of the facility, with a contingency amount to cover any additional parcels that are needed as the design develops, and a contingency to cover changes in land value over the course of the acquisition process.

If TxDOT will pay for land costs directly, the pricing forms will not need to address land cost.

(c) Assumptions for O&M Costs

If the Facility Agreement includes responsibility for operations and maintenance (O&M) services, the process for determining price and verifying price reasonableness set forth in this Exhibit will apply to the O&M services as well as to other work. Accordingly, appropriate line items shall be included in the pricing forms and assumptions established regarding the scope of services associated with each line item. Such amounts may be provided in current dollars, with an escalation factor applied when the work is performed, to allow for changes in costs during the interim period. O&M costs may include capital asset replacement which would be estimated using the same process as for other design and construction work.

(d) Assumptions for Other Costs

Costs for services covered by the Facility Agreement that do not fit into any of the above categories must be identified on the pricing form and appropriate assumptions established, so as to allow them to be priced.

**Step 3: Produce price/estimate.**

Once the scope of work has been established and pricing assumptions set, the parties shall each proceed independently to determine an appropriate price for the work, filling in all blanks on the agreed-upon forms. The Developer shall use its standard estimating procedures to determine the amounts. TxDOT will develop its own estimating procedures.

(a) Design and Construction Price

(i) Base Price

With regard to items that the parties have agreed are suitable for unit pricing, each party will develop quantity estimates and determine appropriate unit prices for those quantities. Risk aspects not covered by separate risk pricing may be addressed by a markup applied to the "base" price.

If requested by TxDOT, the Developer shall submit cost projections and data justifying markups for overhead and profit incorporated into proposed unit prices. If the Developer has recently undergone a federal or state audit, TxDOT may agree to accept the federally or state approved markups for overhead and profit. Otherwise, Developer overhead rate will be determined from actual costs that the Developer is required to document. Developer overhead shall be limited to the actual administrative and supervisory expenses incurred by the Developer at the location where the work is performed. TxDOT shall have no obligation to pay for home office overhead, and the Developer shall not include home office overhead in its proposed overhead rate.

(ii) Price for Major Risk Items

Pricing for risk items will be determined as agreed by the parties. The contract may provide for separate funding for contingency or allowance items and/or other mechanisms for mitigating risk. In that case, the pricing will need to identify the estimated funding amount, and the basis for establishing that amount will be subject to review and negotiation on the same basis as other pricing.

(b) Land Cost

TxDOT may elect to have land costs determined based on a joint effort. If a decision is made to have each party provide separate cost estimates, they would be based on assumptions regarding right-of-way established as provided above.

(c) O&M Costs

Pricing for operations and maintenance will be provided using generally the same process as described above for design and construction costs.

(d) Other Costs

Pricing for any costs not fitting into the above categories will be provided in accordance with the assumptions for such items determined in Step 2 of the process.

**Step 4: Trade pricing information and resolve differences**

Once the Developer has determined a proposed price and TxDOT has developed a price estimate, the Developer and TxDOT will trade information. This step

may be conducted separately for different elements of the price, or could be conducted for combined price elements.

In addition to comparing the Developer's proposed price to the TxDOT estimate, TxDOT shall have the right to review, evaluate and audit the Developer's books, financial data, and other information relevant to the Developer's price. Information to be made available will include all pricing documentation, calculations, risk analyses, quantifications and other information the Developer uses to determine price. This "open book" evaluation will include review of the Developer's underlying assumptions and data associated with pricing, including assumptions as to schedule, composition of equipment spreads, equipment rates, productivity, estimating factors, design and productivity allowance, contingency and indirect costs, as well as any other pricing documentation, calculations, risk analyses, quantifications and other information reasonably required by TxDOT to become satisfied that the Developer's assumptions and pricing are reasonable. The Developer will also have the opportunity to review TxDOT's estimate and to critique the underlying assumptions.

The integrity of the "open book" disclosure is important to the effectiveness of the price negotiation and to TxDOT's ability to determine that the price is reasonable. The Developer shall provide an affidavit to TxDOT certifying as to the completeness and accuracy of all pricing documentation and data it supplies to TxDOT, and affirming that the Developer has not engaged in collusive, price fixing, price gouging or other anti-competitive practices or activities in connection with pricing or contracting for development of the facility. TxDOT may also conduct an audit to verify that the Developer has made a complete and thorough disclosure of its books, records and information used in its pricing determination, including those relevant to risk assessment and mitigation.

An initial meeting may be advisable, prior to the "open book" review, to allow each party to explain the basis for pricing. The parties could also elect to revise their price/cost estimates based on these discussions, before proceeding with the open book review. After the open book review, the parties will meet again to discuss areas requiring revision. Each party will then repeat Step 3 to produce revised price/cost estimates based on the discussions. The parties may also decide to return to Step 1 and modify the scope of work or contract terms to obtain a better price, or could revise the assumptions developed in Step 3. The various steps of the process will be repeated until the parties reach agreement or conclude that it is no longer productive to proceed.

### **C. Additional Support and Documentation**

The Developer shall provide such additional support and documentation as may be reasonably requested by TxDOT in connection with the price reasonableness determination, including providing backup documentation for any reports provided to FHWA relating thereto.