

CHANGES TO BF TEMPLATE – INFRASTRUCTURE ONTARIO

Last December, Infrastructure Ontario signalled its intention to develop a template project agreement for its Build-Finance (BF) projects. Over the past year, the OGCA, along with the Ontario Association of Architects, the Consulting Engineers of Ontario and the Surety Association of Canada, participated in consultations, both through written submissions and a number of face-to-face meetings. Recently, a meeting was held to provide an update on the template documents, and further discuss issues of importance to the construction industry.

As a result of the efforts of these associations, key changes have been made to the BF template documents. Key to the OGCA were the following:

Environmental Matters

The Project Agreement has been amended in relation to environmental conditions such that the project team is now only obligated for those matters that are: "properly inferable, readily apparent or readily discoverable from the Site Information or would have been properly inferable, readily apparent or readily discoverable from inspections of the Site carried out by Project Co during the Request for Proposals process prior to the Submission Date."

The scope of those inspections permitted during Site Visits and Additional Site Visits during the RFP period is now set out in the Data Sheet to each BF RFP.

Previously, the project team was also responsible for those inspections that *should have* been carried out during the RFP process, and the scope of the site visits during the RFP period were undefined.

Remediation of Hazardous Substances

The Project Agreement has been amended to address the extent to which the project team is obligated to remediate hazardous substances on the owner's land.

Specifically, "Project Co shall take all reasonable steps to ensure that all necessary steps are taken in accordance with legal requirements, to dispose of, store or otherwise render harmless Disclosed Hazardous Substances, save and except those not found on or affecting the area of the Work on the Site, unless otherwise expressly required pursuant to the Contract Documents."

The qualifier: "save and except those not found on or affecting the area of the Work on the Site, unless otherwise expressly required pursuant to the Contract Documents" was added as a result of comments made by the OGCA.

Bond Forms

Changes to the bond form have been made such that the Surety Association of Canada recommends its use with the September version of the BF template documents.

Award Period

For BF projects, Infrastructure Ontario now issues letters to proponents that are not "Negotiations Proponents" once the evaluation of bids has been completed. In other words, a proponent will receive notice if it is not a 1st or 2nd place proponent shortly after RFP close. Although the notification does not formally release the proposal, it will help proponents assess the likelihood of their proposal being called upon during the 120 day proposal validity period.

These and other changes were reflected in the Ottawa Cancer Centre project documents. An updated version of the template will be available in the new year, and will be used on BF projects that are currently at the RFQ stage, including Lakeridge Health, Royal Victoria Hospital, and the Windsor Regional Hospital. For a copy of the September 2007 version of the template documents, please contact the OGCA (mary@ogca.ca).

It should be noted that these are living documents, and changes may be made from project to project. Moreover, the OGCA would still like to caution members that as this is a new process. They need to read and assess the documents carefully to fully understand their risks and responsibilities.

Finally, IO has provided an outline of how design and bid fees will work on its Design-Build-Finance-Maintain projects. Please refer to the attached document for further information.

Clive Thurston, President of the OGCA, commended the IO staff for their cooperation in resolving these and other issues. It is only through a true spirit of consultation that the industry can succeed in delivering projects today.

We look forward to continuing the dialogue with the IO corporation, working together to ensure that the Ontario Infrastructure goals are achieved.

Clive Thurston, President
Suite 703, 6299 Airport Road,
Mississauga, ON L4V 1N3

TEL: (905)671-3969
FAX: (905)671-8212
clive@ogca.ca

INFRASTRUCTURE ONTARIO DESIGN AND BID FEE FRAMEWORK

Projects assigned to Infrastructure Ontario (IO) by the Province may provide for the payment of design and bid fees in the following circumstances and subject to the following conditions:

- Design and bid fees will only be applied to Infrastructure Ontario's Design-Build-Finance-Maintain (DBFM) projects.
- Only pre-qualified, losing bidders who submit a full and proper competitive bid in the RFP stage will be eligible.
- The design and bid fee will be based upon an estimate of respondent bid costs (up to a maximum 50%) and not upon actual costs incurred.
- The value of a design fee will be based on the size and complexity of the project, as well as the bid preparation and submission requirements imposed on the bidders by IO.
- Payment of the design and bid fee will be conditional on licensing to the Province of design intellectual property by the bidder.
- Payment of the design and bid fee may be made through the winning bidder by requiring each respondent to carry in their bid prices the total compensation to be paid to losing bidders.
- Infrastructure Ontario will inform the winning bidder of who is eligible to receive a design and bid fee.
- The winning bidder will, no later than 10 days following written instruction at financial close, pay the design and bid fee amount to each of the losing bidders.
- Infrastructure Ontario will be responsible for ensuring that prior to payment of the design and bid fee that the design intellectual property has been licensed to the Province.
- The terms and conditions of design and bid fee payment will be established in the RFP.