



BRIEFING: NOVEMBER 15, 2017 BOARD MEETING AGENDA ITEM #2

TO: Chairman Richard and Board Members

FROM: Thomas Fellenz, Interim Chief Executive Officer

DATE: November 15, 2017

RE: Consider Awarding the Contract for Early Train Operator Services – Supplemental Memorandum

Summary of Recommended Action

California High-Speed Rail Authority (Authority) staff evaluated four Early Train Operator (ETO) proposals pursuant to the criteria contained in the Request for Proposals (RFP) approved by the Board in June 2017. DB Engineering & Consulting USA is the highest scoring proposer and the Evaluation Selection Committee recommends they be awarded the contract. Staff requests Board approval to negotiate and execute a contract with DB Engineering & Consulting USA (DB) for ETO services.

One of the four proposers submitted a protest in October of the Authority's Notice of Proposed Award to DB. After review, the Authority's Protest Official concluded that there were no improprieties in the procurement or the procurement process and has rejected the protest. The Protest Official determined that the Technical Proposal, Cost Proposal and Discussion portions from the four Proposers were scored solely per the terms and criteria of the RFP. The Protest Official also found no improprieties in how the evaluation was conducted. Accordingly, any critique of the results, including a critique that the highest-scoring proposer on the Technical Proposal was not the highest-scoring proposer after all areas were scored, would be a critique of the structure of the RFP itself and not a critique of its implementation. This would be outside the permissible grounds for a protest under this RFP. The structure of the RFP followed industry best practices including a two-step review and was developed through collaboration between Authority procurement staff, legal advisors, commercial advisors and rail advisors.

Background

This memorandum is to provide information regarding the protest that was filed on this procurement, the grounds for denying the protest, and associated questions that were raised. The October 19, 2017 Board memorandum detailing the background regarding the procurement process and reasons for the staff recommendation is attached; it stands as submitted and remains unchanged. That recommendation was postponed pending resolution of the protest described below.

Discussion Regarding Protest

Protest Timeline

RENFE, one of the four proposers, filed a timely protest on Monday, October 16, 2017. Pursuant to the Request for Proposals¹ (RFP) protest procedures, the other proposers could submit a response to RENFE's protest within seven (7) days. DB, the only proposer to respond, submitted a letter on October 20, 2017, which was provided to RENFE and the Protest Official. RENFE submitted a response to DB's letter to the Authority's Protest Official on October 30, 2017. The Authority's Protest Official issued a written decision to RENFE on November 3, 2017 that the protest had been denied. A copy of the decision was also provided to the other proposers. RENFE responded to the decision via letter on November 6, 2017. All five of these documents are attached to this memorandum.

Authority's Protest Process

The Protest Official reviewed and ruled upon the protest with support from assigned members of the Authority's Legal Office (collectively, the Protest Team). No member of the Protest Team was involved in the ETO procurement or evaluation. Authority staff also established a controlled firewall between the Protest Team and those individuals who were involved in the procurement and evaluation; the Protest Team was provided a list of such individuals, and such individuals were instructed not to discuss the procurement with the Protest Team unless responding to specific questions or providing documentation as requested by the Protest Team.

RENFE's Stated Grounds for Protest and Protest Official's Decision

Per RFP16-13, Section 7.1(C), protests at this stage are permissible only for "[a]llegations of improprieties in the procurement or the procurement process which can only be apparent after submission of Proposals or the Authority's contract award recommendation." RENFE's protest rests on the assertion that it deserved a higher score for its Discussion because its scores in the Technical Proposal and Cost Proposal of the RFP were high. Specifically, the protest states that "the Discussion score assigned by the Authority to RENFE...bears little relationship to the scores awarded for the Technical and Cost presentations made by each of the proposers."

RENFE asserts that the Discussion score should bear a close relationship to the Technical Proposal and Cost Proposal scores because the Discussion is intended to provide an oral explanation of the written proposal and to answer any questions the Authority may have about that written proposal. RENFE asserted that it was difficult to believe that the difference between RENFE's Discussion responses and the winning bidder were as substantial as the scoring suggested, given that RENFE's written Technical Proposal received the highest score.

In accordance with the RFP criteria and protest procedures, the Protest Official was required to determine whether the Authority followed the requirements of the RFP and its own policies and

¹ All references in this memorandum to the Request for Proposals (RFP) are to the Request for Proposals for Early Train Operator, RFP No. 16-13, released on June 16, 2017.

procedures in scoring the Discussion portion of the evaluation. Specifically, the Protest Official evaluated whether the Authority's Evaluation Selection Committee scored each Proposer's Discussion based only on the criteria set forth in the RFP, Attachment C, Criteria for Awarding Points for the Discussion and Total Score Worksheet. RFP Attachment C is attached to this memorandum.

The Protest Official determined that there is no evidence that the Authority did not follow the RFP criteria in its ETO evaluation. Specifically, as relevant to RENFE's protest, the Protest Official determined that there is no evidence the Authority did not evaluate all Discussions according to the criteria set forth in the RFP nor is there any evidence that any other criteria was used, therefore supporting the conclusion that there were no improprieties in the procurement or the procurement process.

A component of RENFE's protest about the score it received on the Discussion portion states that RENFE was surprised that points available in the Questions and Answers portion of the Discussion represented 50 percent of the total available in the Discussion (*i.e.*, 175 out of 350) because RFP Attachment C Criteria for Awarding Points for the Discussion and Total Score Worksheet did not imply such a weighting. The RFP did not list how the 350 points would be weighted across the three elements of the Discussion. It was not required to do so. RENFE did not submit a Request for Information or protest² this element about weighting when it was preparing its RFP submittal. The Protest Official found the proposals were evaluated in compliance with the RFP criteria in effect when the proposers submitted their proposals.

Authority staff also notes that all Proposers were informed by letter on September 15, 2017, that the Discussions would occur over a two hour and 30-minute period with 40 minutes assigned to the Presentation and Procurement Term Sheets combined and 75 minutes assigned for the Question and Answer period,³ thereby signaling the high importance the Authority would place on the Question and Answer period. All Proposers were also informed that the teams were limited to ten (10) participants total, but attendance by the four (4) Key Personnel was mandatory. On September 25, 2017, all Proposers were sent the same set of advance six questions.

RENFE's Assertion of an Organizational Conflict of Interest

RENFE responded to the Authority's Protest Official decision via letter dated November 6, 2017. That letter alleged a potential conflict of interest between DB and high-speed train manufacturer Siemens, given that the ETO will be involved in the Authority's trainset procurement and Siemens may bid on that procurement.

Siemens is not part of the DB team. Siemens is a conglomerate company and not an affiliate of DB or Deutsche Bahn AG.

² Pursuant to Section 7.3 of the RFP, protests to RFP terms were due no later than twenty days prior to the Proposal deadline, and the failure to submit a timely protest precludes consideration of the issue.

³ The remaining time was for set-up, authority introductions and a short break.

Discussion Regarding RFP Scoring Structure

Although the grounds asserted in the protest were denied – i.e., the Protest Official found no improprieties in staff’s evaluation – the Board may still have questions regarding the RFP scoring structure.

Differences Between Technical, Cost Proposal and Discussion Scoring

The RFP is not structured to preclude a high scorer in the Technical Proposal and/or Cost Proposal of the evaluation from also achieving a high Discussion score. Nor is it structured to assure that a high scorer in the Technical Proposal and/or Cost Proposal portions of the evaluation will also achieve a high Discussion score. Each of the three categories is separate. Indicative of that, a breakdown of ranking by category shows no one team had a clear consistent lead across all categories in the Technical and Cost Proposal. The rankings on the Discussion section demonstrate that two teams (DB and China HSR ETO Consortium) improved on their respective rankings compared to those from the Technical Proposal scoring, and two teams (DB and RENFE) improved on their respective rankings compared to those from the Cost Proposal scoring.

Ranking by Category

	CHINA HSR ETO CONSORTIUM	DB ENG & CONSULTING	FS FIRST RAIL GROUP	RENFE
TECHNICAL PROPOSAL				
Performance of Work, Mobilization and Integration Plan for the First Phase and Key Deliverable 1	4	1	3	2
Establishment of the Train Operating Company and Key Deliverables 5-8	4	1	3	2
Interim Financial Plan (Key Deliverable 10) and Key Deliverables 2-4 and 9	4	2	3	1
Small Business Utilization Plan	4	2	3	1
OVERALL TECHNICAL SCORE	4	2	3	1
COST PROPOSAL				
	2	4	1	3
DISCUSSION				
Presentation	3	1	4	2
Procurement Term Sheets	3	1	4	2
Questions and Answers	3	1	4	2
OVERALL DISCUSSION SCORE	3	1	4	2

Differences Between the Technical Proposal and Discussions

There are key fundamental differences between the two scoring elements. The Technical Proposal is a written document, submitted by a team without identifying the authors. The Discussions are an oral presentation and dialogue between the Authority and the Proposer. The Key Personnel were required to participate as those four individuals will be based in Sacramento within the Authority's offices for the next six years.

Difference in Topics

As noted in the October Board memorandum and in the RFP, there are eleven Key Deliverables the ETO will be responsible for delivering. For scoring purposes, Key Deliverables 1-10 were required to be addressed in the Technical Proposal.

Key Deliverable 11, which is specific to the procurement of the trainsets and track and systems, was reserved as a topic for the Discussion only and listed in Attachment C, Criteria for Awarding Points for the Discussion and Total Score Worksheet.

Difference in How Elements Were Scored Between Technical and Discussion

The approach to scoring was different for the different portions of the evaluation. Pursuant to Section 5.5.2. of the RFP, the Technical Proposals were scored on the basis of the Proposers' approach and methodology on how the ETO would address Key Deliverables 1-10, including how relevant past experience would be applied.

Pursuant to Section 6.2.4., the Discussions were separately scored using the criteria in RFP Attachment C. Topics included: delivering services for the First and Second Phases; clear path to reaching the Second Phase; the term sheets; the Business Plan; and questions sent in advance. That scoring criteria looked at a demonstrated understanding of the challenges of this project; participation of the Key Personnel in their subject areas; the effectiveness of that communication; the ability to provide clear and responsive answers to questions asked; and the other factors listed.⁴

Attachments

- Draft Resolution #HSRA 17-21
- October 19, 2017 Memorandum “Consider Awarding the Contract for ETO Services”
- Protest documents: October 16 RENFE protest, October 20 DB response, October 30 RENFE response, November 3 decision of Protest Official and November 6 RENFE response.
- Attachment C, Criteria for Awarding Points for the Discussion and Total Score Worksheet

⁴ Within its protest letter, RENFE requested clarifications about whether certain topics (e.g. the communication skills of the Team, personal knowledge and experience of Team Members, experience of the team working together) were used in the scoring. These were used in scoring in the Request for Qualifications (RFQ16-13) that allowed RENFE and the other RFP proposers to qualify to respond to the RFP, but were not part of the RFP Discussion criteria.