Understanding Unsolicited P3 Proposals

The popularity of public-private partnerships (P3s) as a procurement delivery method continues to increase as more and more states encourage the private sector to finance, deliver, or maintain facilities, infrastructure, or services for public use. Many states allowing for the use of P3s are now also accepting unsolicited proposals for P3 projects.

An unsolicited P3 proposal (UPP) refers to a written proposal submitted by a private entity (the offeror) to a public entity for a P3 project that is not in response to any request for proposal issued by the agency. Because the proposal is not submitted in response to any specific request, a private entity can submit a UPP to propose new P3 projects as well as to suggest new ideas to improve current public-private development and technologies. UPPs encourage private entities to be innovative by proposing new, creative ways to deliver public projects or to identify a current unmet need. Unsolicited proposals can also offer more efficient models for public agencies to manage existing projects, services, or programs.

The UPP Framework

While more and more states are allowing private entities to submit unsolicited proposals for P3 projects, this does not mean it is open season for UPPs. For the most part, jurisdictions accepting UPPs have specific guidelines regarding which state or local agencies can accept UPPs, the period of time each calendar year during which submission of UPPs is allowed, the procedure and criteria for the evaluation of UPPs, the procedure for requesting competing proposals (if applicable), the information that must be included in the proposal, and the required fees.

Additionally, the submission of a UPP must be accompanied by sufficient information to allow the relevant agency to properly evaluate the proposal. The factors to be considered are varied and can differ from state to state—and even from one agency to another within a state. Typically, a UPP must include a project description, a feasibility statement, schedule, budget and financing plan, and a statement describing the benefits the private entity can provide in delivering the project. In other words, the private entity must sell itself and the project idea to the public agency.

Upon receipt of a UPP, the public agency must decide whether to pursue the project. Here, again, the evaluation criteria vary from state to state. Some states require the agency to evaluate the proposal based on the needs of the end user—i.e., the public—and determine if the UPP provides a public benefit by promoting a public purpose or meeting a public need. This approach is used in Florida and Georgia. Other states, like Maryland, make their evaluation from the viewpoint of the owner—i.e., the government agency. If the proposal does not meet a need of the agency or is in fact disadvantageous to the agency, the agency will not pursue it.

Protecting Your IP When Submitting Your UPP

The use of UPPs has not escaped criticism. The idea of a public agency dealing directly with only one private entity conflicts with the traditional expectation that public entities engage in open, competitive bidding processes for public procurements. Critics point to the lack of competition and the lack of transparency in the UPP evaluation and negotiation processes. It is for this reason that many states require agencies to give public notice of UPPs and accept competing proposals from other private entities.

Another area of concern is the need to protect the intellectual property rights of the private entities submitting UPPs. UPPs encourage innovation in public procurement. However, when submitting a UPP, private entities must disclose certain confidential and proprietary information. This includes financial and technical data as well as proprietary methodologies and processes. Such information is often necessary to present a persuasive proposal. For the government agency, a direct conflict arises between the agency’s need to remain transparent and accountable to the public when procuring goods and services and the agency’s need to protect confidential and proprietary information of the private entity in order to encourage participation.

The level of IP protection varies from one state to the next. Some states offer no protection at all while others provide statutory protection. Georgia is an example of a state that provides no protection. The Georgia “Partnership for Public Facilities and Infrastructure Act,” was passed this
May, 2015. The Act grants broad authority to state and local governments to enter into public-private partnerships and to either adopt the model guidelines developed by the Guidelines Committee or to develop their own set of guidelines.

In addressing the issue of the offeror’s proprietary information, the Georgia Act expressly states that “[a] private entity assumes all risk in submission of a proposal or unsolicited proposal . . . and a local government shall not incur any obligation to reimburse a private entity for any costs, damages, or loss of intellectual property incurred by a private entity in the creation, development, or submission of a proposal or unsolicited proposal for a qualifying project.” Ga. Code Ann. § 36-91-113(d). Additionally, the Act requires the local government and private entity to comply with Georgia’s Open Records Act. Ga. Code Ann. § 36-91-119(c). In Georgia, therefore, offerors submit UPPs at their own risk.

States that do protect the offeror’s proprietary information often place the responsibility on the offeror to invoke the protection and to clearly identify the data it seeks to protect. In Arizona, for example, the private entity must identify the confidential or proprietary information and then:

1. invoke exclusion on submission of the information;
2. identify the data or other materials “with conspicuous labeling”;
3. state the reasons protection is necessary; and
4. fully comply with any applicable state law with respect to information it contends should be exempt from disclosure.


Arizona and like-minded states may be following the federal government’s lead. The Federal Acquisitions Regulations (FAR) expressly provide that: “Government personnel shall not disclose restrictively marked information included in an unsolicited proposal.” 48 C.F.R. § 15.608. But the regulations place the responsibility on the offeror to clearly identify proprietary information. In fact, in order to protect its proprietary information, the offeror must “mark” the title page as well as “each sheet of data” it wishes to restrict with the required “Use and Disclosure of Data” legend.

Federal courts have strictly applied these marking requirements. In Xerxe Group, Inc. v. United States, 278 F.3d 1357 (Fed. Cir. 2002), the Federal Circuit Court of Appeals found that a contractor failed to comply with the FAR requirements because it marked the title page of its UPP but failed to include the restrictive legend on each sheet of data that it wanted to remain restricted. Sheets missing the restrictive legend were not protected; only the title page was protected. The Court of Federal Claims has followed Xerxe in subsequent rulings. For example, in Grayton v. United States, 92 Fed. Cl. 327 (2010), the court held that a federal agency has no obligation to keep unsolicited proposals confidential when restrictive legends are inadequate or missing.

Conclusion

P3s are still a relatively new procurement delivery method. There is much to be learned about how courts will reconcile a public entity’s general presumption of transparency and obligations under state open records laws with the agency’s obligation, if any, to protect the proprietary information of UPP offerors. As the P3 landscape continues to evolve, a prospective offeror should familiarize itself with the laws of the jurisdiction where it seeks to submit a UPP. An offeror must also be mindful of its responsibilities to ensure that confidential and proprietary information remains confidential.