Questions and Answers:

Q1: The ineligible firms that Submitters are not allowed to discuss any aspect of the Project with are clearly defined within the RFQ document. However, the Selection Committee, which can also not be contacted by the Submitters, is not defined. Will the Selection Committee be defined so Submitters can ensure no inadvertent contact is made?

A1: The City will not disclose the names of the RFQ selection committee members. The RFQ states that all inquiries and questions regarding this RFQ shall be directed to the Contract Administrator. The project shall not be discussed with any other City staff.

Q2: The Project Quality Manager “shall be completely independent from the design and construction production team”. Does the Project Quality Manager have to be an employee of an independent third-party firm?

A2: Yes.

Q3: Will the City consider removing the Litigation portion of the RFQ from the sections counted within the 30-page limit?

A3: The litigation response will not be counted in the 30-page limit (see Addendum #3, Question #12).

Q4: Consequential Damages: Bidder notes that the Contract Documents do not contain a mutual waiver of consequential damages. Examples of consequential damages that could arise from a design build scope are (1) damages that the City may owe an actual or prospective property developer if the Work is not completed on time or if there are defects in the Work; or (2) damages that the City may owe existing business owners along the route of the Work arising from relocation which extends beyond the planned date, or other considerations promised by the City to such landowners. Bidder maintains that neither the City nor the Contractor should be liable for damages which are not foreseeable at the time of contracting or which do not flow directly from a breach of the Contract by either party. Please consider adding the following provision:

Neither Party (including its subcontractors, agents, assignees, affiliates and vendors) shall be liable to the other for loss of profits or revenues, loss of use, loss of opportunity, loss of goodwill, cost of substitute facilities, goods or services, or cost of capital, regardless of whether any of the foregoing are
judged to be direct or indirect, nor for any special, consequential, indirect, punitive, exemplary or incidental damages of any kind arising out of or related to the performance or non-performance of the Contract, and regardless of whether such losses, damages or liability arises from breach of contract or warranty, tort (including negligence), strict liability or otherwise.

A4: After consultation with the City Attorney’s office, the proposed language will not be considered.

Q5: Overall Limit of Liability: Bidder notes that the Contract Documents do not contain a provision that would limit the Contractor’s overall liability to the City related to the Work. It is industry standard for a design-build contract to include such an overall limitation of liability, typically equal 30-40% of compensation paid to Contractor. Please consider adding the following provision:

Notwithstanding any provision to the contrary herein, Contractor’s total aggregate liability under the Agreement including without limitation those relative to (a) all obligations undertaking by Contractor; or (b) claims which may be asserted against Contractor; or (c) damages which may be incurred or accrue against Contractor, arising from actions or inactions undertaken by Contractor relative to the Agreement, shall be limited to [thirty percent (30%) of the Contract. This limitation covers all claims, regardless of whether the claims arise in contract, tort, strict liability or otherwise.

A5: After consultation with the City Attorney’s office, the proposed language will not be considered.

Q6: Money Damages for Delay: Bidder notes that delays resulting from any causes other than the acts or omissions of the City (even those delays which are not the responsibility of Contractor) shall be compensated only by a time extension, but no monetary recovery (see General Contract Conditions Section 603.1). Contractor submits that it should be compensated for its additional costs which result from delays which are not its responsibility, including delays caused by the acts or omissions of the City’s other contractors, discovery of differing site conditions (including pre-existing hazardous materials or items of historical or archaeological significance) and any other event or circumstance described in General Contract Conditions Sections 1103.1 and 1105.2. Please consider removing General Conditions Section 603.1.

A6: After consultation with the City Attorney’s office, the proposed revision to the General Conditions will not be considered.

Q7: Differing Site Conditions – conflicting language: Bidder notes that Sections 1401 and 1402 of the General Contract Conditions include conflicting provisions regarding differing site conditions. Section 1401 requires Contractor to notify the City if it discovers subsurface or latent physical conditions at the Work site which differ materially from those indicated in the Contract Documents, and if after investigation the City finds that such actual conditions do materially differ and could not be discovered or reasonably inferred from the Contract Documents (which term includes the Technical Specifications), the City shall issue a Field Order/Change Directive to the extent such actual conditions cause an increase or decrease in the Contract Amount or Contract Time.

However, Section 1402 includes a provision whereby Contractor agrees that it will make no claims against the City if it finds that the actual conditions encountered to not conform with those indicated in the geotechnical data, which is part of the Technical Specifications. These two sections conflict with one another. Contractor should be entitled to rely upon the accuracy and completeness of the geotechnical information which is included in the Technical Specifications.
Please consider revising Section 1402 accordingly.

A7: Information provided by the City as Reference Documents to the Contract Documents are solely for the Contractor’s reference. The Contractor is responsible for design and construction of the project, including all due diligence. The City shall have no liability or obligation as a result of the conceptual design Work contained in the Reference Documents.

Q8: No Termination for Default based on delay until liquidated damages are exhausted: Bidder notes that Section 4 of the Design Build Contract Main Contract Form specifies liquidated damages as the sole remedy for Contractor’s failure to achieve the specified Contractual Milestones, and such Section supersedes Section 602 of the General Contract Conditions. The Main Contract specifies a daily rate for liquidated damages but does not cap the maximum amount of liquidated damages that can accrue. However, Section 2201.1 of the General Contract Conditions allows the City to terminate Contractor for default if the performance of the Work is unnecessarily delayed (subsection F), or if the Work is not completed with the times specified for its completion (subsection G). The City’s ability to terminate for default based on delay is in conflict with the liquidated damages as exclusive remedy language in the Main Contract. The City should not be able to terminate Contractor for delay unless and until Contractor has accrued the maximum amount of liquidated damages for delay.

Please consider including a maximum amount of delay liquidated damages which can accrue, and please consider revising Section 2201.1 to clarify that termination for default on the basis of delay is only an available remedy for the City when such maximum amount has accrued.

A8: After consultation with the City Attorney’s office, the proposed revision to the General Conditions will not be considered.

End of Addendum #8