

January 2019

City and County of Denver

Performance-Based Infrastructure Program

Procurement Guidelines



Contents

	Page
1 Introduction	1
1.1 Purpose	1
1.2 Intended Audiences	2
1.3 Process of the Procurement Stage	2
2 Commitment to Transparency	4
3 Procurement Preparation	6
3.1 Procurement Team	6
3.2 Procurement Strategy	7
3.3 Procurement Plan	8
3.4 Procurement Schedule	9
3.5 Interaction with the Private Sector	9
4 The Term Sheet	10
5 Request for Information	12
5.1 Development of RFI	12
5.2 Issuance of RFI	13
5.3 Evaluation of RFI Responses	13
6 Request for Qualifications	13
6.1 Development of the RFQ	14
6.2 Issuance of the RFQ	16
6.3 Short-List Selection	16
6.4 Project Agreement	17
7 Request for Proposals	19
7.1 Development of the RFP	19
7.2 Issuance of the RFP	20
7.3 Evaluation of Proposals	21
8 Contract Award and Closing	23
8.1 Further Clarifications	23
8.2 Negotiations	24
8.3 Value for Money Update	24
8.4 Contract Approval	25
8.5 Contract Award	25
8.6 Commercial Close	26

9	Financial Close	26
10	Co-development Bid Solicitation	27

Tables

Table 1: Public disclosure examples by phase

Table 2: Model procurement schedule

Table 3: Information typically required at each procurement phase

Figures

Figure 1: Procurement Stage of the PBI Program

Figure 2: Procurement Stage process flow diagram

Appendices

Appendix A

Procurement Checklist

Appendix B

Glossary and Abbreviations

1 Introduction

1.1 Purpose

These guidelines apply to the procurement process, which takes place once the project has passed Gateway 2: PBI Business Case Evaluation. These guidelines are most relevant to those with responsibility for the PBI procurement process under the City and County of Denver’s PBI Program (the Program). This stage of the Program is illustrated in Figure 1.

The Procurement Stage encompasses the development and release of the procurement documents and draft Project Agreement, identification of qualified proposers, submission of proposals, selection of the winning proposer, and signing of the final Project Agreement with that proposer.

Section 1.3 provides a summary of the procurement process with an emphasis on procedures, roles, and responsibilities under the Program. The rest of the document provides best practices for implementing PBI procurements.

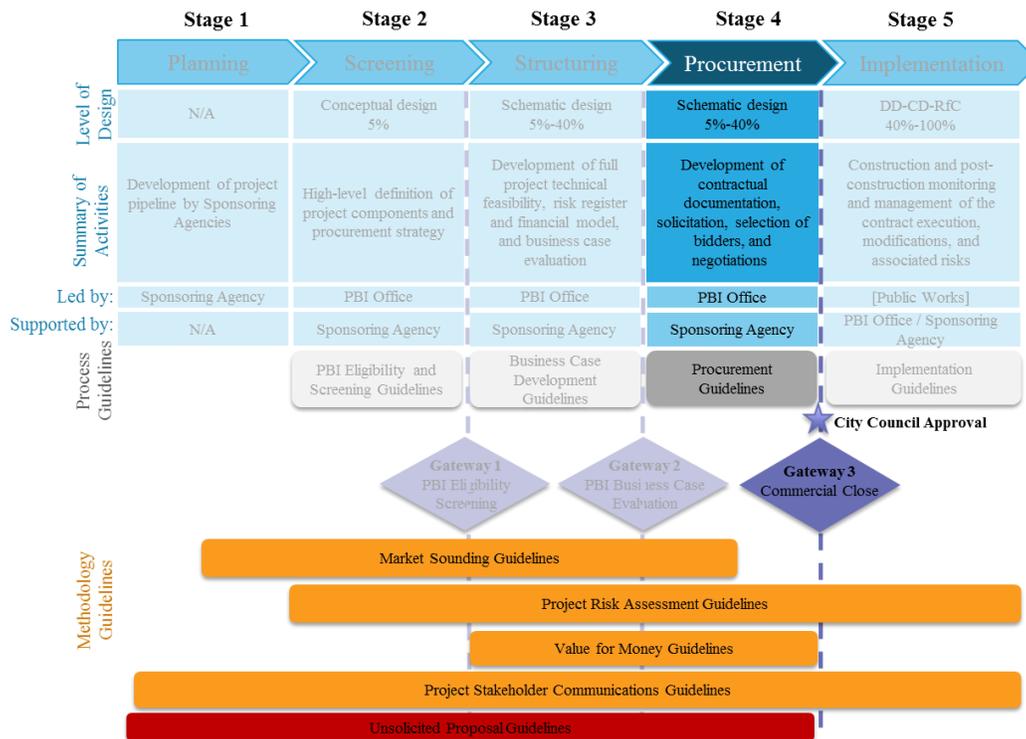


Figure 1: Procurement Stage of the PBI Program

1.2 Intended Audiences

This document is intended to be used by the following audiences:

- The PBI Office and Procurement Team, as a guide for conducting the procurement of PBI projects — it is expected that the PBI Office will take the lead in this stage through its involvement in the Procurement Team
- Sponsoring Agencies and developers, as an explanation of the process that they will be participating in
- The general public and other project stakeholders, as an overview of the process by which PBI projects are brought to the market and awarded

1.3 Process of the Procurement Stage

The Procurement Team is responsible for leading the procurement efforts. The Procurement Team first determines the procurement strategy and schedule. A procurement plan with a draft Term Sheet, based on the business case, as well as a request for information (RFI) may be prepared and discussed with the Performance Infrastructure Committee (PIC).

If an RFI is used, the Procurement Team shares it with the market, engages in market sounding, and incorporates findings/feedback into the development of subsequent procurement documents, such as the request for qualifications (RFQ), if one is developed.

After issue of the RFQ, the Procurement Team accepts questions from proposers and publishes the answers as applicable. The Procurement Team selects a short list of two to four proposers, which are provided with the request for proposals (RFP) and draft Project Agreement for comment. The draft Project Agreement is prepared by the City Attorney's Office (CAO).

The Procurement Team and the CAO may incorporate comments received through the RFQ process into the RFP. The CAO reviews the final RFP and accompanying Project Agreement.

The Procurement Team then issues the RFP to the short-listed proposers and engages with them in a group workshop and in one-on-one meetings during the response period. Proposers prepare both a technical and a financial proposal in response to the RFP.

The Procurement Team assembles a single or separate panels to review aspects of the technical and financial proposals. The Procurement Team, after consultation with the proposal review panels, may seek further clarifications from the proposers prior to selecting the Preferred Proposer based on best value. The CAO reviews any proposed edits to the Project Agreement by the proposers. Once clarifications are completed, the Procurement Team completes its evaluation and selects the Preferred Proposer. The Procurement Team, with the involvement of

the PIC as necessary, may then engage in negotiations with the Preferred Proposer.

When negotiations are complete, the Procurement Team makes its final recommendation of a Preferred Proposer to the PIC. An updated value for money analysis — to confirm that the proposal, as negotiated, provides better value for money than the Public Sector Comparator — is required with the Procurement Team’s recommendation.

The PIC, in consultation with the Procurement Team members, makes the final recommendation on the Preferred Proposer and notifies the Mayor before the PBI Office seeks contract approval from City Council.

The PBI Office provides the Mayor and City Council a summary of the evaluation and the proposed contract for execution. Contract approval and execution follows existing City procedures.

Projects pass through Gateway 3: Commercial Close when the Project Agreement is executed by the Preferred Proposer and the City. Once Commercial Close occurs, the private partner assumes responsibility for executing the financing in most instances (this milestone is referred to as Financial Close).

Prior to the start of project work, the Procurement Team may recommend to the Mayor changes to the Implementation Team named in Stage 3.

The Market Sounding Guidelines should be consulted for best practices during the RFI, RFQ, and RFP periods of the procurement.

Figure 2 illustrates the procurement process in a flow diagram, with optional steps surrounded by a dotted line.

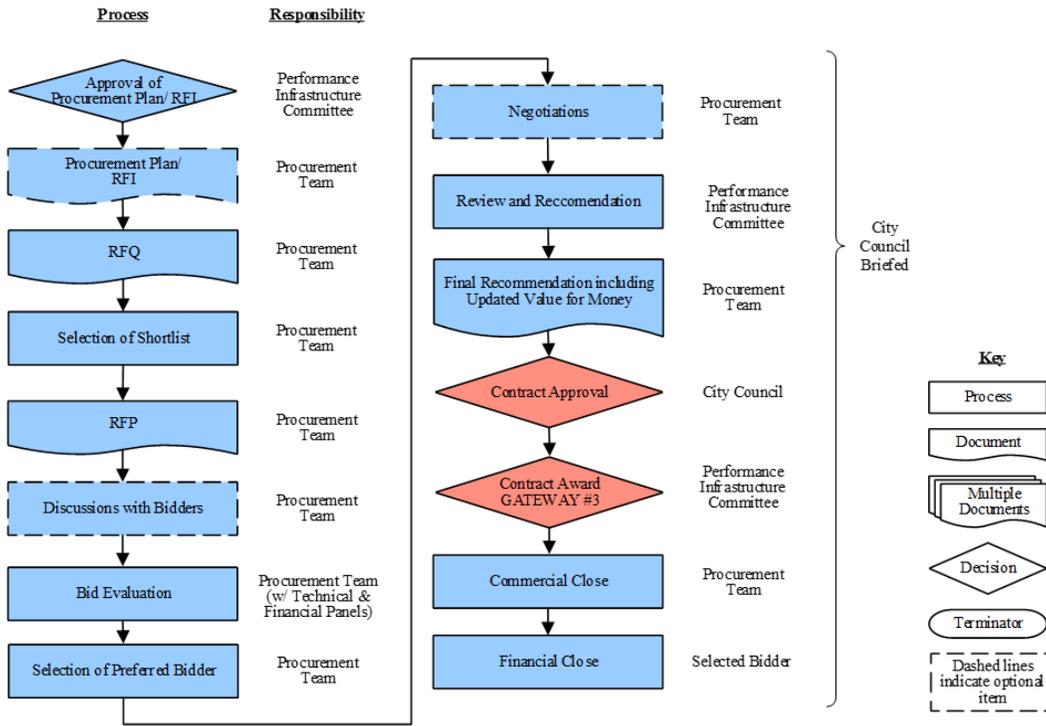


Figure 2: Procurement Stage process flow diagram

2 Commitment to Transparency

Throughout the procurement process, the PBI Office promotes transparent competition among proposers. It regularly publishes upcoming procurements on the PBI Office website. Example of disclosures of documents, requirements, and other information are noted in Table 1.

Table 1: Public disclosure examples by phase

Procurement phase	Public disclosure
Expression of Interest (EOI) and/or Request for Information (RFI)	Issue a request for EOI. RFI includes project information, as specified in Section 5.
Request for Qualifications (RFQ)	RFQ includes project information and clear evaluation criteria, as specified in Section 6. For addressing questions from interested parties, when applicable, disclose the questions and responses, without linking these to any of the parties. Disclose number of respondents. Do not disclose identity of respondents. Disclose number and names of short-listed teams, including the companies forming the teams.

Procurement phase	Public disclosure
Request for Proposals (RFP)	Disclose RFP to the public, not only to short-listed parties. RFP includes project information and clear scoring criteria, as specified in Section 7. Do not disclose Project Agreement to the public until executed. For addressing questions from shortlisted proposers, when applicable, disclose the questions and responses, without linking these to any of the parties. Do not disclose proposals before giving proposers a chance to redact to protect proprietary and sensitive commercial information. Disclose name of selected proposer. This should be timed to avoid impacting the Procurement Team’s negotiating position.
Contract Award	Disclose final Project Agreement (may be redacted to protect the proprietary and sensitive commercial information).

The City is committed to transparency and open government. The City complies with the Colorado Open Records Act, C.R.S. § 24-72-201, *et seq.* (CORA).

All submissions and other materials provided to the City or produced during a procurement are subject to CORA. Each proposer should review CORA’s disclosure requirements. If the proposer believes that any information, data, process information, or other material in its proposal is confidential or proprietary in accordance with CORA, the proposer should mark those items as confidential or proprietary. The proposer should provide a list in its proposal or other procurement materials of those confidential items, specifying the page and paragraph, and on what basis it believes the material is confidential or proprietary.

The City is not bound by the proposer’s determination as to whether materials are subject to disclosure under CORA and reserves the right to independently determine whether the materials are required to be made available for inspection or otherwise produced under CORA.

If the City receives a request for a proposer’s records, it will advise the proposer of the request. If the City agrees with the proposer’s determination that specific materials should remain confidential or proprietary, the City will withhold those materials from inspection or disclosure under CORA. If the City disagrees with the proposer’s determination, it will notify the proposer of its intent to make the materials available under CORA. The proposer may then object in a timely manner by seeking a court order to prevent disclosure. Failure to do so results in waiver of claims and privilege.

In the event of the filing of a lawsuit to prevent or compel disclosure, the City may tender all responsive materials to the court for judicial determination of the issue of disclosure. The proposer agrees to the following:

1. To intervene in any lawsuit arising out of a request for its materials to protect and assert its claims of privilege against disclosure of such material,

2. That its failure to object or intervene and assert claims of privilege against disclosure in relation to its proprietary or confidential information results in waiver the same, and
3. To release and defend, indemnify, and save and hold harmless the City, its officers, agents, and employees from any claim, damages, expense, loss, or costs, including reasonable attorneys' fees, arising out of or in any way relating to requests for disclosure of material provided or produced in response to a City procurement.

3 Procurement Preparation

Before the procurement process begins, several actions must be taken to ensure the process is well planned and proceeds smoothly. These actions are described in the following sub-sections.

3.1 Procurement Team

The PBI Office, with support from the Sponsoring Agency, coordinates the formation of a team of professionals responsible for leading the procurement efforts. The Procurement Team is led by the assigned PBI Office Project Liaison, with contributions from the Sponsoring Agency, Department of Finance, Public Works, and CAO staff. Depending on the project and Procurement Team determined at the end of Stage 3, Public Works may play a key role in the procurement.

The Procurement Team is complemented with external advisors and specialized consultants, as appropriate. Key participants in the Structuring Stage should be retained for the Procurement Stage.

The Procurement Team consists of the following:

- Project Manager / PBI Office Project Liaison. This individual is critical to the procurement process and consequently should have relevant sector experience (e.g., roadways, social infrastructure), as well as experience in the PBI project development and marketing process.
- Specialists in relevant financial, technical, and legal topics with experience in the PBI project development and marketing process. If necessary, this may include external advisors and consultants.

The key roles of the Procurement Team are as follows:

- Develop and implement a procurement plan for the PBI project
- Identify whether there is a need for external advisors, define the scope of the services of the advisors, and coordinate the various advisors during the procurement

- Coordinate and engage with the Sponsoring Agency and other public agencies as necessary, regarding questions, approvals, follow-up, and actions related to the project
- Lead interactions with the private sector
- Develop the procurement documentation and the Project Agreement, with input from external advisors

The Procurement Team reports to the PBI Office Executive Director, who reports to the PIC.

3.2 Procurement Strategy

There are several approaches to a solicited procurement strategy, which can be broadly divided into two categories:

- **Firm-Bid Solicitation Process** – The Procurement Team issues procurement documents; interested parties respond with a firm bid, generally including firm price and financing commitments; and, proposals are reviewed by the Procurement Team to select a private partner. This process can have one step, consisting solely of an RFP, or two steps, consisting of an RFQ and an RFP. A two-step process is recommended for PBI projects because it attracts more competitive proposers by expanding market awareness of the project and procurement. RFIs and other means of engaging the private sector are encouraged as part of this process. This process is the primary focus of this guide.
- **Co-development Bid Solicitation Process** – The Procurement Team plans to select a private partner with whom to co-develop the project based on the performance requirements of a Predevelopment Agreement or similar document. The selection can be done based on an RFQ and/or RFP. This process is addressed specifically in Section 10.

Within the firm-bid process, the technical aspects of the project are presented as performance specifications and objectives. This enables the proposers to use innovative strategies to develop fully integrated technical and financial proposals with the total asset lifecycle performance in mind at the most competitive price. The Procurement Team evaluates price, scope, quality, and innovation in the proposal, selecting the winner based on best value to the City. This approach encourages innovation and appropriate transfer of risk.

In some instances, a more prescriptive approach may be required. Care should be taken to examine whether and how the extent of the prescribed design or other project requirements may influence how the winner is selected. If prescriptive measures are extensive, the Procurement Team may want to consider selection of a Preferred Proposer based on the lowest bid. This approach caps the price at the time of selection of the winner; however, it tends to devalue innovation. The

resulting projects rely on the prescriptive requirements being correctly identified and specified upfront.

The Procurement Team selects the appropriate procurement strategy based on the project profile defined during the previous stages of the project, including the following considerations:

- The institutional capacity of the public agencies involved — the experience of the PBI Office and the Sponsoring Agency with the type of project
- The complexity of the project as pertains to the following:
 - The specifics and limitations of the design and technological solutions brought by the market
 - The absence of local firms with sufficient experience and capacity to take on the project
- Whether the objective of the Sponsoring Agency for the project’s procurement is to obtain the maximum possible scope and quality for a given budget, or to obtain the lowest price for a defined project scope and quality
- The budget and schedule for the procurement process

The PBI Office should maintain consistency in procurement strategies —doing so can reduce uncertainty and proposal costs, enhance transparency in the PBI process, and lead to better procurement process data. Consistency in procurement documentation help reduce transaction costs for the Procurement Team and the Sponsoring Agency.

3.3 Procurement Plan

Regardless of the procurement strategy, a project-specific procurement plan is developed to define the intended process, objectives, and schedule to guide the overall procurement. The procurement plan does not need to be an extensive document, but at a minimum it includes the following:

- A general overview of the project, including Sponsoring Agency, location and objective of the project, etc.
- The chosen mechanism for the selection process
- The timeline for the process — in particular, notification of the proposed date for RFQ issue, which allows the industry time to plan to respond
- Overview of standard disclosure approach, indicating the type and timing of disclosures to the public throughout the procurement process

Other aspects that the procurement plan considers are as follows:

- The activities that will be carried out with the private sector, e.g. market soundings or an industry day

- The anticipated proposer qualification criteria
- The anticipated evaluation criteria (competency factors)

The procurement plan is a living document, updated as necessary to remain valid as changes are required; however, a well-designed procurement plan will likely see a small number of changes.

The draft Term Sheet is developed in parallel with the procurement plan. See Section 4 for the recommended content of the Term Sheet.

3.4 Procurement Schedule

The length of the procurement process will depend on the complexity of the project and how much notification is given prior to the RFP. A well-managed procurement, starting with the issuance of an RFI and ending with signing of a Project Agreement, in most cases takes approximately 6 to 12 months, as shown in Table 2, even with some activities being conducted in parallel.

Schedule extensions can cause significant increases in proposal costs. The Procurement Team should ensure the PBI Office and Sponsoring Agency have the resources necessary to comply with their obligations before releasing the procurement schedule.

The Procurement Team should adhere to timeframes published for a procurement to build market and public sector confidence in the project and the PBI Program.

Table 2: Model procurement schedule

Procurement Phase	Typical Duration (after preceding phase)
Responses to RFI and industry forum	4 weeks
Creation of RFQ	4 weeks
Responses to RFQ	4–6 weeks
Selection of short list	2–6 weeks
Preparation and approval of Project Agreement and RFP	8–12 weeks
Responses to RFP	8–14 weeks
Selection of winner	2–4 weeks
Final works to signing	2–8 weeks

3.5 Interaction with the Private Sector

During the Procurement Stage, the Procurement Team will lead interactions with the market to obtain feedback on various aspects of the project, RFQ, RFP, and/or the Term Sheet and Project Agreement. Resolutions are documented and may take the form of written comments or suggestions, or minutes of meetings between the

Procurement Team and the private sector. To the extent any information is confidential, it must be marked as such.

The Procurement Team plans for organized market engagement and project marketing once the project is well defined. This can take the form of RFIs, an industry forum, and/or road shows during which the Procurement Team presents the project to developers and investors in relevant industry events (e.g., conferences) or events dedicated to the project.

The Procurement Team considers the cost-benefit of this exercise in relation to the complexity or cost of the project, and/or the potential number of proposers.

Engagement with the private sector can also take the form of communication of information on PBI projects via print or digital publications or websites.

The opportunities for local companies are explicitly considered in the procurement plan — particularly in the EOI efforts and the development of the RFQ. Meetings with local contractors, operators, and developers are arranged to determine the interest and capacity within the local market to ensure that local participants are not disadvantaged in the procurement process.

Refer to the Market Sounding Guidelines for more information.

4 The Term Sheet

A draft Term Sheet is developed based on the business case and states as explicitly as possible the technical, financial, commercial, legal, and other key terms (environmental, social, etc.) for the project for the private and public sector. The technical terms are expressed through a Basis of Design and the anticipated key performance indicators. The Basis of Design must include the technical performance requirements.

The draft Term Sheet should be included in the RFQ. A final draft of the Term Sheet should be created based on feedback received through the RFQ process and used to inform the draft Project Agreement. The latter is recommended to accompany the RFP.

To develop the Term Sheet in a reasonable time, the following documentation needs to be available:

- The business case, which provides the justification for the technical, financial, and legal structuring of the project
- The first draft of the Project Agreement, with comments and suggestions from relevant public entities

Table 3 outlines the information required at each procurement phase.

Table 3: Information typically required at each procurement phase

Items	RFI	RFQ	RFP
Project Overview			
Project overview (Sponsoring Agency, location, objective, type of infrastructure project)	x	x	x
Project development status and funding		To the extent available (TEA)	x
Maps of project site, location, and alignment (if applicable)		x	x
City roles and responsibilities	Recommended TEA	TEA	x
The proposed deal structure	Recommended TEA	Recommended TEA	x
Technical			
Scope of project design – construction	Recommended	x	x
Basis of Design	TEA	x	x
Operational and service requirements including the scope of the core and non-core services	TEA	TEA	x
Key performance indicators	TEA	TEA	x
The key deal structure elements, including current and projected demand (many to come from the business case)	Recommended	x	x
Project risk matrix	Recommended	x	x
Regulatory requirements, permits, and licenses	Recommended	x	x
Real estate opportunities, restrictions, and issues	Recommended	x	x
Financial			
Affordability limit - the City's threshold for public contribution (if applicable)	Recommended TEA	TEA	x
Minimum amount of equity		x	x
Grants, as applicable	Recommended TEA	TEA	x
Formulas and indices for adjustments of user-paid fees (e.g., tolls)		TEA	x
Revenue-sharing arrangements		TEA	x

Items	RFI	RFQ	RFP
Expected commissioning date		TEA	x
Tax treatment (as applicable)			TEA
Legal			
Legal framework for the Project Agreement	Recommended TEA	TEA	x
Intergovernmental agreements, affected existing agreements	Recommended TEA	TEA	x
Insurance requirements	Recommended TEA	TEA	x
Prevailing wages	Recommended	x	x
M/D/S/V BE requirements	Recommended	x	x
Easements, leases, and title issues	Recommended TEA	TEA	x
Project Agreement		Draft TEA	x

5 Request for Information

The purpose of the request for information (RFI) is to do the following:

- Formally provide the market with notification of the upcoming project to gauge and stimulate interest
- Provide the market with information on the anticipated procurement timelines and requirements to allow the private sector to start the process of forming teams and plan accordingly
- Obtain feedback from the market on the project definition and business case

RFI responses should be read bearing in mind that respondents may naturally be reluctant to provide candid feedback in a written format. The RFI process may include formal meetings with the respondents to obtain more comprehensive feedback.

5.1 Development of RFI

If an RFI is issued, it can be prepared in tandem with the procurement plan — the level of project and procurement process information should be similar for both.

Appendix A provides a checklist of the information to be included in the RFI, RFQ, and RFP.

5.2 Issuance of RFI

The RFI is issued at a minimum online, and notifications are issued via emails to participants in previous market sounding efforts. Notifications may also be sent to local newspapers and the relevant industry publications.

5.2.1 Approvals

Since the RFI marks the official launch of the procurement process, the PIC must approve the contents of the RFI before issue.

5.2.2 Schedule

The recommended time window in which responses are received is 4 weeks. Face-to-face meetings with market participants to supplement the written responses received may be useful.

5.2.3 Market Q&A

The Procurement Team may host an industry forum and/or one-on-one meetings.

5.3 Evaluation of RFI Responses

Interested proposers submit comments and suggestions in writing. As noted above, meetings with respondents should also be held to ensure constructive criticism is obtained.

The Procurement Team tabulates and analyzes the responses, and produces a summary report of the key findings. These are used as another input to help develop the draft Term Sheet, RFQ, RFP, and/or Project Agreement.

6 Request for Qualifications

The purpose of the RFQ is to select a short list of the appropriately qualified respondents. An RFQ should be included for all PBI projects because it results in a more efficient procurement process and in higher quality responses from the market. The RFQ signals to the private sector the degree of interest that the City has in the project, as well as its capability to manage the procurement.

The RFQ should be tailored to the needs of the project. It should strike the right balance to achieve an adequate level of competition and to attract well-qualified and capable respondent teams.

6.1 Development of the RFQ

In addition to the key findings from the RFI process, the RFQ should include, at a minimum, the following:

- A clear project definition
- A project affordability limit, if one is being considered in coordination with DoF
- An explanation of why the project is moving forward and the authority of the Procurement Team and the Sponsoring Agency
- Clear information on what is required from proposers
- Whether the procurement includes stipends for unsuccessful proposers

The information provided and requested in the RFQ should permit proposers to demonstrate the following:

- General understanding of the key objectives and challenges of the project
- Confirmation of no conflicts of interest
- Technical experience and capacity to develop, finance, and operate PBI projects with similar characteristics
- Adequate financial and commercial capacity

The selected criteria and their importance will vary depending on the project characteristics. The Procurement Team should consider the City's Prequalification Process when developing the RFQ.

Possible proposer requirements are as follows:

- Organization and structure of the firm/consortium
- Experience of the consortium members to work together
- Experience of the firm/consortium in similar types of infrastructure/services and in projects of a similar size and complexity (e.g., meeting specified minimum qualification requirements)
- Past project delivery performance track-record of the firm/consortium (e.g., on-time and on-budget delivery, achieving quality goals, achieving diversity and local hire goals, achieving sustainability goals, etc.)
- Experience of the firm/consortium with PBI projects
- Experience in the execution of fast-track projects
- Experience with formal partnering activities
- Experience in design, construction, and long-term operation and maintenance of similar projects

- Organization of proposed project team
- Information on key project team members meeting specified minimum experience and location requirements
- Staff/resource capacity and availability (project director, financial director, project manager, design manager, construction superintendent, quality manager, etc.)
- Long-term availability of the firm/team and key operations and maintenance staff
- Scheduling and control systems to track and manage projects, including quality control and quality assurance systems
- Specialized design capability for the key project elements
- Specialized construction capability for the key project elements
- Experience with complex construction staging, traffic control, and site conditions
- Quality assurance organization and approach
- Specialized expertise that reduces risk and assures quality of work
- Health and safety track record
- Approach and understanding of the project
- Understanding of the local environment, managing and obtaining permits, knowing and complying with local regulatory requirements, etc.
- Approach to managing environmental permits and track record complying with requirements

The RFQ may request some or all of the following to demonstrate financial qualifications and capacity of the firm/team. Reference should be made to the City's Prequalification Process in developing the RFQ.

- Financial strength and capacity
- Bonding record or proof of bonding ability
- Past financial performance on awarded contracts (completion, liquidated damages, quality, claims, fines, schedule)
- History of performance (unsubstantiated claims, fines, suits, quality, accuracy, schedule)
- A list of lenders they have reached Financial Close with and the general financing amount
- Legal and financial disclosures
- Proposed risk sharing between the members of the consortium

The RFQ should request a minimum number and type of exemplar projects to demonstrate experience and qualifications, without an upper limit. This protects against artificially distorting the true extent of the qualifications of the respondents.

The Procurement Team should focus on the qualifications that are necessary for successful project delivery and avoid specifying how the teams organize themselves, e.g. equity contribution from the developer, contractor, and operator, or the ability of one firm to provide all the services.

6.2 Issuance of the RFQ

The RFQ should be advertised online, and notifications may be sent via emails to respondents to the RFI. Notifications may also be placed in local newspapers and relevant industry publications.

6.2.1 Approvals

The Mayor and PIC should be advised of RFQ issuance but no additional approvals are required to issue an RFQ.

6.2.2 Schedule

The recommended time window in which the RFQ response will be received is 4 to 6 weeks. This period may be modified depending on the size and complexity of the project.

6.2.3 Market Q&A

The RFQ process includes the schedule for respondents to submit clarification comments and questions. The Procurement Team will coordinate responses to these questions with the Sponsoring Agency and external specialists. Responses to questions will be issued publicly and anonymously.

6.3 Short-List Selection

The format of responses is specified to provide an even playing field for proposers. The Procurement Team evaluates the responses.

The review considers objective qualifications and does not consider cost factors. To facilitate the process, the first screening determines whether the responses address all the requirements of the RFQ.

The next step involves scoring the different elements of the responses and ranking the respondents based on the evaluation method defined in the RFQ. The Procurement Team works with an evaluation panel that includes subject matter experts for this purpose.

Typically there should be a minimum of 2 and a maximum of 4 short-listed respondents. The short list is published online and the short-listed and eliminated respondents notified.

Applicants who do not make the short list may request a debrief meeting with the Procurement Team to obtain feedback. This step builds confidence in the market by demonstrating a commitment to transparency and improvement. The Procurement Team will determine the appropriate timing for a debrief.

6.3.1 Fewer than Three Short List Candidates

If there are fewer than three proposers who qualify to be short-listed, the Procurement Team should evaluate the following options in consultation with the CAO:

- Consider a Co-development Bid Solicitation Process
- Modify elements such as timing and scope, and reissue the RFQ
- Terminate the procurement

If this occurs, the Procurement Team should meet with teams who were expected to propose but did not do so to determine why they chose not to respond.

6.4 Project Agreement

The Project Agreement is the key contract (or suite of contracts) designed to govern the relationship between the Private Partner and the City once the project has been awarded and the contract executed. It defines the contractual obligations of the parties and allocates risk. It should be based on industry best practice.

Drafting of the Project Agreement is led by the CAO in consultation with the Procurement Team and draws on the project definition, business case, the Term Sheet, and other key documents. Under a Firm-Bid Solicitation Process, the Procurement Team issues drafts of the Project Agreement and solicits feedback at the following stages:

- Release of the RFP – A draft Project Agreement is issued with the RFP
- Negotiations – Adjustments to the Project Agreement may be required once the City enters negotiations with the Preferred Proposer.

The CAO is responsible for drafting, reviewing, and approving the final Project Agreement (or the Predevelopment Agreement, where applicable), in consultation with the PBI Office, the Sponsoring Agency, and the Procurement Team. At a minimum, the Project Agreement includes the following:

- The contractual term
- Conditions and requirements at the end of the contract, e.g., asset handback conditions, if applicable
- Detailed performance-based technical specifications
- Reporting and monitoring requirements, including requirements for access, use of independent engineers, etc.
- All sources of revenue and associated obligations, e.g. applicable availability payments, royalties, or user-paid fee collection mechanisms
- Key performance indicators and the regime of payment deductions, penalties, and/or incentives associated with meeting the performance requirements throughout the lifecycle of the project
- Breach-of-contract definitions and mechanisms
- Mechanisms for change orders
- Definition of relief and force majeure events, and their corresponding cure and/or compensation mechanisms
- Termination rights for each party for failure to perform, relief events, and force majeure events

The CAO may consider including any of the following components in the Project Agreement:

- Design or construction review procedures
- Obligations or requirements regarding ancillary contracts, e.g. the City's obligation to obtain necessary permits and easements, if applicable
- Pass-through costs
- Incentive structures for performance, e.g. profit-pain sharing
- Liquidated damages
- Dispute resolution mechanisms and provisions, e.g. third-party review panels, use of technical experts, governing law, and process for mediation and/or arbitration proceedings
- The right to step in for project lenders and the City
- The impacts (if any) of debt refinancing or resale of equity and control, including up-side sharing, if applicable
- Debt refinancing provisions

Under a Co-development Bid Solicitation Process, the Procurement Team issues a Predevelopment Agreement (or similar document) with the RFP. This document dictates the process for drafting and negotiating the Project Agreement with the Preferred Proposer. See Section 10 for more information on the Co-development Bid Solicitation Process.

7 Request for Proposals

The purpose of a request for proposals (RFP) is to ensure the best value for the public through competition among the most qualified proposers.

The scoring and ranking results of the RFQ phase is not considered when evaluating the responses to the RFP.

7.1 Development of the RFP

The three main components of the RFP are as follows:

- Clear project definition and performance requirements
- Clear evaluation criteria and instructions to proposers
- The proposed Project Agreement

All three components are more comprehensive versions of documents produced in earlier stages of the procurement and are updated considering comments received during the procurement process.

The RFP sets out in detail the basis of the selection — best value, lowest bid, lowest total lifecycle cost, or lowest public subsidy — and the evaluation criteria. Subjective criteria should be avoided as much as possible.

In the case of projects relying on availability payments as a revenue source, a project affordability limit may be used. If used, this is established in the Stage 3: Structuring and is included in the RFP.

If a stipend for unsuccessful proposers is to be used, then the amount, conditions, and source of payments are defined in the RFP.

The following are recommended elements for inclusion in the RFP:

- Presentation of preliminary due diligence reports from the investors, covering technical, legal, and financial aspects of the project
- Explanation and justification of alternative technical concepts (when proposed), explained in further detail in Section 7.2.3 Request for underwriting letters from lenders (e.g., banks and/or bond underwriters) and suppliers of equity capital

- Development of a financial model that supports the financial offer, including the assumptions of costs (both CapEx and OpEx including lifecycle), income, capital structure, and financing structure and costs

7.2 Issuance of the RFP

Only the short-listed proposers from the RFQ process are invited to respond to the RFP.

7.2.1 Schedule

The RFP is typically the longest phase of the procurement process. Given that the preparation of a proposal requires a significant level of effort in terms of time and money on the part of short-listed proposers, the Procurement Team establishes a schedule tailored to the project's complexity and service requirements

The schedule should allow time for issuance of addenda to the RFP in response to feedback from proposers or other reasons.

7.2.2 Market Q&A

The RFP is often amended via addenda issued based on feedback from proposers. A schedule is developed for submitting comments and questions, which is included in the RFP.

A workshop should be held with proposers early in process to clarify the RFP's components, including technical requirements and performance specifications, and to receive feedback from the proposers (e.g., regarding the level of effort and cost of proposal development).

The Procurement Team also holds meetings with each proposer to discuss commercial terms of the RFP, as well as any alternative technical concepts they wish to propose. Possible changes resulting from these meetings are formalized and updates are issued to all proposers.

7.2.3 Alternative Technical Concepts

The RFP states whether alternative technical concepts are permitted. The proposers are free to develop, on a confidential basis, alternatives to the technical requirements. The goal is to incentivize proposers to deliver a higher quality project for the same cost, or achieve a lower cost without reducing quality. The incentive for proposers is to gain a competitive advantage in the RFP process.

In these cases, the proposer will submit at a minimum the following information:

- A description of the proposed alternative

- An explanation of how it differs from the RFP requirements and how it is equivalent or better than the RFP requirements
- An explanation of how it would fit with the other project requirements
- Justification of why it should be accepted by the Procurement Team
- The implications on cost, schedule, quality, operations and maintenance requirements, and project element lifespan, and the analysis to support these conclusions
- Environmental, safety, and community impacts and implications for other permits

The proposer is responsible for obtaining necessary external approvals for the proposed change.

One-on-one meetings with proposers are held so they can explain their proposal to the Procurement Team. Although the Procurement Team may provide verbal feedback, the official response is provided in writing within a timeframe set out in the RFP. Evaluation and acceptance of alternative technical concepts by the Procurement Team's technical panel is typically done prior to submission of the final proposals.

In some cases, the proposed change may necessitate an addendum to the RFP. This is typically avoided in order not to weaken incentives for proposers to develop alternative technical concepts that may otherwise be beneficial for the City. In those cases, the proposers are notified of this possibility in the RFP.

7.3 Evaluation of Proposals

Proposals may be submitted as an integrated proposal or in two parts: a technical component and a financial component. In the second case, the financial and technical proposals are evaluated separately so that one does not influence the other. This is the preferred practice in most cases.

In preparation for the evaluation, the Procurement Team does the following:

- Defines a committee to evaluate the proposals, which may be subdivided into a technical committee and a financial committee per above
- If there are two committees, establishes the type of interaction between the committee that evaluates the technical proposals and the committee that evaluates the financial proposals. The two evaluations should be conducted independently, and the Procurement Team is responsible for coordinating consistency in the evaluation of each aspect.
- Coordinates with the team of advisors (from the Procurement Stage and the Structuring Stage) regarding the assistance that they will be providing during the evaluation of the proposals

- Establishes a protocol to request clarifications and additional information from the proposers and a schedule for the evaluation and adjudication, both of which will form part of the RFP and will be communicated to the proposers in advance

The first screening determines whether the proposals are responsive and address all the requirements of the RFP. The next step involves a detailed proposal review and evaluation, in accordance with the evaluation criteria defined in the RFP. On this basis, the proposals can be ranked.

Review of the technical proposals is conducted first. As noted above, any proposed alternative technical concepts are reviewed and either accepted or rejected previously, during the RFP process. Depending on the project and procurement method, the following criteria may be used to evaluate the technical proposal:

- Design solution
- Construction approach and techniques
- Proposed schedule
- Operations and maintenance approach
- Levels of service offered
- QA/QC approach
- Considerations of social and environmental impacts
- Public engagement plan
- Other investments or additional services

The evaluation requirements for the financial proposal vary significantly depending on the project delivery method, the project components the proposer is required to finance, and market conditions. Minimizing the need for a public sector contribution of public funds is a primary objective in evaluating financial proposals. The following items may be included:

- Duration of the contract
- Availability payments or other contributions of public funds from the City, if applicable
- Project revenues
- In the case of project revenues based on user-paid fees, the tariff level(s) and increases over time
- The risk assumed by the proposer, with respect to the cost of the project, delivery risks, and project revenues
- Financing terms and/or financial support letters

- Security package
- Bid security

The timeline for evaluation should be at least 4 weeks. Additional time may be necessary based on the complexity of the project. The evaluation process concludes with a ranking of the proposers based on the combined best value results of the technical and financial proposals. In most cases this results in the selection of the Preferred Proposer; however, in some cases the Procurement Team may determine a need for further discussions. In certain cases, it may be necessary to reject all proposals.

Refer to Section 8 for further information on announcement of the Preferred Proposer. An evaluation report is produced by the Procurement Team to request necessary approvals.

7.3.1 One Candidate

If only one proposal is received or only one proposal meets the evaluation criteria, the Procurement Team evaluates the proposal to determine whether it provides greater value than the Public Sector Comparator. The Procurement Team selects from the following options:

- Make the respondent the Preferred Proposer and initiate negotiations
- Modify the terms of the RFP and/or the Project Agreement, and reissue them
- Terminate the procurement

If this occurs, the Procurement Team should meet with the short-listed proposers to determine why they chose not to respond and/or did not meet the RFP requirements.

8 Contract Award and Closing

Ranking of the RFP responses is completed confidentially by the Procurement Team. Prior to the announcement of the results, additional steps may be necessary, as outlined in this section.

During this phase, the City Council is briefed on the status of the project, the Project Agreement, and selection of the Preferred Proposer.

8.1 Further Clarifications

If additional engagement with proposers is necessary, one-on-one meetings with proposers are formal, confidential, and in good faith. The Procurement Team and/or PIC should not share information on other proposers' proposals or prices. To ensure fairness, the proposers should be given suitable notice ahead of their

one-on-one meetings. To ensure accountability, written minutes of the meeting are kept. The main objective of the meetings is to provide the proposers with a better understanding of the RFP requirements and/or the Procurement Team with a better understanding of the proposals.

If these discussions in any way impact the RFP responses, addenda are prepared and issued to them. Respondents are permitted sufficient time to evaluate and react to the impact on their proposals. Depending on the circumstances, the Procurement Team may evaluate the need to request revised proposals and to restart the proposal evaluation process.

Following this process, the Procurement Team may request a “best and final offer,” which may include changes to the technical or financial proposals, or both. Best and final offers, if utilized, are the proposers’ formal response to the changes and, in this case, are the basis for selection of the Preferred Proposer.

8.2 Negotiations

Under a Firm-Bid Solicitation Process, the Procurement Team may enter negotiations with the Preferred Proposer. The negotiations should be carefully managed to avoid delays in the process and potential changes in cost. This can be achieved by both parties agreeing to a negotiation schedule. Commercial issues should be resolved before legal specialists are brought in to adjust the contract wording.

The other proposers’ bids are valid only for a period of time, typically 4 to 6 months from proposal submission but can be shorter if deemed necessary. If an agreement is not reached with the Preferred Proposer, then the second-ranked proposal is considered the Preferred Proposer and negotiations restart.

Under a Co-development Bid Solicitation Process, the Procurement Team enters into negotiations with the Preferred Proposer under a Pre-development Agreement (or similar document). These negotiations can be significant.

The Pre-development Agreement should have, among other things, performance milestones for both parties to keep the negotiations on schedule and provide “off-ramps” if negotiations stall. Please refer to section 10 for more detail on the Co-development Bid Solicitation Process.

8.3 Value for Money Update

As part of the evaluation process, and prior to announcement of the winner, the Procurement Team updates the value for money analysis with the inputs from the best value proposal. Updates are made to both the PBI financial model and the Public Sector Comparator.

If the updated VfM shows that the best value proposal provides better value for money than the Public Sector Comparator, then the procurement can proceed to the next step.

8.4 Contract Approval

In advance of selecting the Preferred Proposer, the Procurement Team should ensure that the following agencies review and comment on any changes to the Project Agreement as a result of the negotiations, in line with their areas of competency:

- Sponsoring Agency
- Department of Finance
- Risk Management Office
- City Attorney's Office
- Mayor's Office

The CAO must review any changes to the Project Agreement resulting from the negotiations.

Once all negotiations are concluded and any changes to the Project Agreement have been reviewed, the Procurement Team recommends the Preferred Proposer to the PIC, including the evaluation report.

The PIC, in consultation with the Procurement Team, makes the final recommendation on the Preferred Proposer and notifies the Mayor before the PBI Office seeks contract approval from the City Council.

Contract approval and execution must follow existing City procedures. For each project seeking contract execution, the PBI Office must provide the Mayor and City Council a summary of the evaluation and the proposed contract for execution. The PBI Office is responsible for briefing City Council and moving the project through the formal contract approval process with City Council.

8.5 Contract Award

Once City Council approves the Project Agreement, the PIC notifies all proposers of the decision in writing. The notice of intent of award is then published online.

Unsuccessful applicants may request a debrief meeting with the Procurement Team to obtain feedback. No debriefs will occur until after Commercial Close.

Unsuccessful proposers who submitted valid proposals may be awarded a stipend, if allowed for in the RFP.

8.6 Commercial Close

Projects pass through Gateway 3: Commercial Close when the Project Agreement is executed by the Preferred Proposer and the City.

Commercial Close should be achieved within the established timeframe. The Procurement Team is responsible for finalizing the Project Agreement terms. By signing the Project Agreement, the City and the Preferred Proposer agree to comply with the conditions and requirements established in the final Project Agreement, including two critical aspects:

- The financial model of the project — audited by a third party contracted by the proposer, and reviewed by the Department of Finance’s financial advisor, and conforming to the requirements established in the RFP — will be included in the Project Agreement and used in future contractual negotiations and whenever the economic/financial equilibrium is reestablished.
- Performance guarantees — to ensure the Preferred Proposer complies with project obligations as determined in the RFP and through negotiations (if applicable).

Once fully executed, the Project Agreement is published online in the public domain. The Procurement Team may consider redactions as necessary.

9 Financial Close

Financial Close is typically led by the Preferred Proposer, who is required to provide timely updates to the Procurement Team throughout this period. Some changes to the Project Agreement may be necessary as a result of requests from lenders.

The Procurement Team, in consultation with the PBI Office, Sponsoring Agency, and CAO, will review the requested changes and use their discretion in permitting them. The CAO is responsible to make any changes to the Project Agreement. To ensure fairness, those changes that would have disqualified the proposer or prevented them from being the “best value proposal” will be rejected.

Once the terms are finalized, a final update to the value for money analysis is conducted by the Procurement Team to confirm whether the project still delivers best value to the City. This is provided, along with other due diligence documents, to the Procurement Team.

Financial Close should be accomplished within the timeframes established in the Project Agreement; however, it is the Procurement Team’s discretion, in consultation with the PBI Office and Sponsoring Agency, to permit extensions requested by the Preferred Proposer. If Financial Close is not reached by the target date due to delays caused by the Preferred Proposer, then the bid security may be triggered.

10 Co-development Bid Solicitation

In some cases, an alternative procurement approach to the one outlined above may be followed. This approach is more suited to certain types of projects, such as social infrastructure projects, where there may be a variety of options for design and development that are not well-suited to a Firm-Bid Solicitation Process.

In a co-development procurement process, the aim of the RFP is to identify and select a proposer with whom to exclusively develop the project, within a pre-defined time period.

The RFP in this case is less prescriptive than the RFP for a Firm-Bid Solicitation Process — the project definition, technical specifications, and/or deal structure have more flexibility, leaving room for planning, design, development of performance specifications, and development of innovative approaches to the project (e.g., site master planning, design processes requiring extensive stakeholder and community outreach, deal structuring, innovative strategies for meeting sustainability objectives, etc.).

The RFP contains a detailed Predevelopment Agreement (PDA) that sets out key terms of engagement after a Preferred Proposer is selected. This includes a milestone schedule with deliverables for the Procurement Team and the Preferred Proposer. Inclusion of an affordability limit, or similar, in the RFQ/RFP and the PDA is recommended to provide appropriate cost guidance to the proposers.

The goals of the negotiations, governed by the PDA, are as follows:

- Preferred Proposer develops the design and construction proposals to a sufficient level so that a fixed-price proposal, tied to the affordability limit (if applicable), can be achieved
- Both parties advance commercial negotiations so that a Project Agreement can be developed and executed

The following key items are usually addressed in the PDA:

- The City's affordability limit for the project, if applicable per above
- A stipend for termination of the PDA process, including scenarios such as requirements for the Preferred Proposer to pay the Procurement Team for its transaction costs in certain circumstances
- Intellectual property rights and confidentiality – the Preferred Proposer will need to provide the Procurement Team with detailed economic and financial feasibility information to make an informed decision on the content of the Project Agreement. See Section 2 for requirements.

- Schedule of performance milestones, culminating in a fixed price and agreed-upon Project Agreement. These milestones may include the following:
 - Further due diligence and design studies conducted by the Preferred Proposer to develop a master plan, schematic design, and construction cost and schedule studies
 - Negotiations on the Term Sheet and Project Agreement
 - Environmental compliance
 - Community and stakeholder outreach

The following topics may also be addressed:

- Division of responsibility for obtaining entitlements, permits, and approvals
- Proposed changes to the project if requested by regulatory authorities or if they are believed to be in the best interest of the City
- Community outreach program proposed by the private partner
- Project publicity
- Limitation of the Preferred Proposer's ability to influence ballot and legislative measures
- Other standard contractual considerations, including obligations of each party, default terms, indemnity, temporary project site entry, retention of discretion on the part of the City, and any standard requirements for complying with the City's social ordinances.

The PDA does not guarantee that the Preferred Proposer will be selected for an award of contract. The PBI Office retains the right to terminate the partnership if the Preferred Proposer fails to meet performance milestones, for convenience or other reasons, or at the end of the PDA time period.

Appendix A

Procurement Checklist

A1 Checklist RFI, RFQ, RFP Contents

Items	RFI	RFQ	RFP
Term sheet	Draft to the extent available (TEA)	TEA	x
Timeline for the project marketing process	x	x	x
Marketing activities carried out with the private sector (market soundings / road shows)	TEA	x	
Timing for presentation of questions and comments on the project	x	x	x
Overview of type and timing of anticipated public disclosures throughout the procurement process	x	x	x
Selection process mechanism (performance vs. design approach, target number of short-listed applicants following RFQ, etc.)	x	x	x
Sponsoring Agency capacity	Recommended	x	x
RFI: response submission information (form, number of copies, location, deadline)	x		
RFI: information on how responses will be used	x		
RFQ: response submission information (form, number of copies, location, deadline, other rules around conflict of interest, communications, and confidentiality)	Prelim version recommended TEA	x	
RFQ: technical qualification criteria	Prelim version recommended TEA	x	
RFQ: financial qualification criteria	Prelim version recommended TEA	x	
RFP: response submission information (form, number of copies, location, deadline, bid security requirements)		Prelim version recommended TEA	x
RFP: method and criteria for evaluation of technical component		Prelim version recommended TEA	x
RFP: parameters and criteria for evaluation of financial component		Prelim version recommended TEA	x
Mechanism for evaluation of proposals and definition of the competition factors in the selection process, including process diagrams as appropriate		Prelim version recommended TEA	x

Appendix B

Glossary and Abbreviations

B1 Glossary

Term	Definition
City	City and County of Denver.
Co-development Solicitation Process	Solicitation process in which the Procurement Team plans to select a private partner with whom to co-develop the project based on the performance requirements of a Predevelopment Agreement or similar document. The selection can be done based on an RFQ and/or RFP. See Section 10 of the Procurement Guidelines for more details.
Firm-Bid Solicitation Process	A solicitation process in which the Procurement Team issues procurement documents; interested parties respond with a firm bid, generally including firm price and financing commitments; and, proposals are reviewed by the Procurement Team to select a private partner. See the Procurement Guidelines for more details.
Implementation Team	The staff and consultants assigned by the City to manage the implementation of a PBI project following execution of its Project Agreement.
Intent to Submit Form	Form that should be submitted by the Sponsoring Agency once the project passes Gateway 2, indicating their intention to prepare and submit a business case.
Notice of Intent to Procure PBI Services	Notification issued by the PIC to the Mayor / City Council once the PBI Office has reviewed the business case and considers the project suitable and ready for PBI procurement.
PBI Model	The financial model developed by the PBI Office to evaluate the risk-adjusted cash flows of a PBI procurement method during Stage 3: Structuring. It is used to develop the project's business case and the value for money analysis. At Stage 4: Procurement it is updated based on the proposals received and/or the Preferred Proposer's proposal. It may also be used to support evaluation of the financial models received from the proposers.
PBI Pipeline	The portfolio of projects approved by the PIC for evaluation as PBIs.
PBI Screening Application	Form submitted by Sponsoring Agencies along with the CIP Discretionary Funding Form, indicating whether the project passes PBI qualification criteria.
Preferred Proposer	The highest ranked proposer selected by the City after RFP responses are received and evaluated.
Private Partner	The private development partner after execution of the project agreement.
Procurement Team	The staff and consultants assigned by the City to manage the PBI procurement process.

Term	Definition
Project Agreement	The PBI contract signed by the City and the Preferred Proposer.
Project Liaison	The staff responsible for facilitating coordination between the different entities involved in the project development process such as, but not limited to, the PIC, CAO, and the PBI Office.
Public Sector Comparator	A hypothetical scenario representing the standard government procurement method that would be used to deliver a project in the absence of a PBI procurement option.
Term Sheet	The legal document that lays out the key terms of the project. Refer to the Procurement Guidelines for more information on the contents of the Term Sheet.
Sponsoring Agency	The applicable City entity that develops and identifies potential PBI projects during the screening stage. It coordinates with and supports the PBI Office during the project screening, structuring, and procurement stages. And it leads implementation of the PBI project after execution of the project agreement. During the implementation stage it may be referred to as Implementation Agency in instances when the agency in charge of implementing the project is different from the Sponsoring Agency in prior stages.

B2 Abbreviations

Abbreviation	Description
CAO	City Attorney's Office
CapEx	capital expenditure
CAPM	capital asset pricing model
CIP	Capital Improvement Plan
CORA	Colorado Open Records Act
CPP	Capital Planning and Programming
CPR	Capital Project Request Form
DoF	Department of Finance
DSRA	debt service reserve account

Abbreviation	Description
KPI	key performance indicator
MMRA	major maintenance reserve account
NPV	net present value
OpEx	operational expenditure
PBI	performance-based infrastructure
PDA	Predevelopment Agreement
PERT	Program Evaluation and Review Technique
PIC	Performance Infrastructure Committee
PSA	PBI Screening Application
PSC	Public Sector Comparator
PW	Public Works
RFAP	request for alternative proposals
RFAQ	request for alternative qualifications
RFDP	request for detailed proposal
RFI	request for information
RFP	request for proposals
RFQ	request for qualifications
USP	unsolicited proposal
VfM	value for money
WACC	weighted average cost of capital