

FTBA

Contractor Finance Forum

Q and A

Orlando - November 2, 2011

No.	Question	Answer [NOTE: While most of these answers track what was verbally communicated at the forum, several responses indicate updated agency policy directions as of November 16, 2011.]
1	<p>On regular bid FDOT projects, the advertisement does not list the actual FDOT estimate. On Contractor financed projects, it is imperative that the contractor know exactly the Department's estimate (cash availability). If and when a contractor obtains a lender, the contractor must quickly determine if his designer can build and his lender can finance the project for the true FDOT budget. The contractor cannot afford to get too far along in this expensive process only to determine his design, build, finance budget exceeds the Department's budget. Alternatively, a contractor should not be put in a position of dropping out of the process because he felt he could not meet the budget only to find out later the true cash availability was higher than advertised. Will this information be available and when?</p>	<p>The Advertisement and the Request for Proposals (RFP) will include the Cash Availability Schedule, which will also reflect the total funding FDOT has available for the project.</p>
2	<p>What happens if FDOT has underfunded a project and no one can design, build and finance it for FDOT's estimate?</p>	<p>FDOT has determined that sufficient funds are available for certain projects and for others will include bid alternates to ensure the ultimate scope of awarded work can be accomplished given the available funds as set forth in the Cash Availability Schedule for the project.</p> <p>Currently, two or more bid alternates are planned for each project to ensure the ultimate scope of awarded work can be accomplished given the available funds as set forth in the Cash Availability Schedule for the projects</p>
3	<p>Will and, if so, when will FDOT publish a list of the GAP financed projects showing when initial payout will commence and how much will the payout be per quarter until total payout is made?</p>	<p>The list of CONTRACTOR FINANCED projects and draft Cash Availability Schedules have been provided, and are available at: http://www.dot.state.fl.us/financialplanning/finance/private_transportation_facilities.shtm FDOT will publish any project specific Cash Availability Schedule updates in the advertisement.</p>
4	<p>I understand there is no guarantee on when funds will be appropriated in the future to pay for completed GAP financed projects. Even if funds do get appropriated, there is no guarantee State will have funds to actually pay for the completed GAP projects. If they have limited funds in the future and are forced to choose between live projects that address current needs and previously done GAP jobs, what happens? Neither the Contractor nor the Bank has any leverage with the State to pressure them on either of these items. What assurance can FDOT give Industry that the money will be there? What recourse does Industry have if the money is not there?</p>	<p>FDOT will contractually commit on each CONTRACTOR FINANCED project to prioritize the respective Cash Availability Schedule funds in the development and updating of the tentative work program as a priority for payment prior to funding any new capacity project(s). Further, per Section 334.30(13), F.S., FDOT's total P3 funding commitments cannot exceed 15% of its total federal and state STTF funding, in any year.</p>

No.	Question	Answer [NOTE: While most of these answers track what was verbally communicated at the forum, several responses indicate updated agency policy directions as of November 16, 2011.]
5	Construction projects often have delays. If a major delay occurred on a Contractor Financed project that was not the fault of the contractor would FDOT maintain the payment schedule outlined in the contract documents or would payments be delayed?	The Cash Availability Schedule remains the same and the payments would continue to be based on money earned for work completed, per the certified monthly estimate process.
6	What amount or percentage equity are lenders and surety looking for the contractor to post?	Not directed to FDOT.
7	Are Sureties going to require a Letter of Credit if the Contractor self-finances?	Not directed to FDOT
8	Would FDOT accept other forms of security instead of surety?	No, all of the proposed CONTRACTOR FINANCED projects will require 100% payment and performance bonds.
9	How will change orders be handled?	FDOT will retain the right to make a change order specific determination, based on the particular circumstances of that change order, whether FDOT will pay for the change order work on an as-incurred basis (similar to regular FDOT design-build projects), or whether FDOT will fund the change order work under a change order specific Cash Availability Schedule. However, FDOT's internal policy preference is and has been on all P3 projects to date, and going forward on each of the proposed CONTRACTOR FINANCED projects, to make payments for change orders on an as-incurred basis; and FDOT has been able to do so to date. However, FDOT must contractually retain the right to make the decision on a change order by change order basis. This is consistent with FDOT P3 projects, including CONTRACTOR FINANCED projects, contracted to date.
10	Will GAP projects contain a stipend? If so, will FDOT increase the stipend amount recognizing additional expense of contractors lining up financing be included in the stipend?	The Department has revised its policy as communicated at the forum and will not be providing stipends.
11	If a bid is submitted by a Joint Venture (JV) or Special Purpose Entity (SPE) will FDOT require the JV or SPE to be prequalified or will the individual prequalification of the JV or SPE members suffice?	FDOT will not allow an SPE or Special Purpose Vehicle (SPV) on any of the proposed CONTRACTOR FINANCED projects. The prequalification of JV members will have to collectively meet the required work classes as set forth in the advertisement.
12	Could a financial firm be a Joint Venture partner on a project?	No.

No.	Question	Answer
13	<p>FDOT refusal to assign the funds is a huge impediment to getting non-recourse financing. Lenders are aware of FDOT's willingness to pay into an escrow account but that is unacceptable to them. Why can't FDOT make assignment of the payout? The main key issue right now from the bank is for FDOT to acknowledge an assignment of the payment stream by the contractor to the escrow/lender.</p>	<p>[NOTE: While most of these answers track what was verbally communicated at the forum, several responses indicate updated agency policy directions as of November 16, 2011.]</p> <p>FDOT's Project Specific Escrow Account (PSEA) mechanism, fully allows for the flexibility of the Contractor, Lender and Surety entities to decide ("below the PSEA") how to address between them any recourse/non-recourse, assignment of certified monthly estimate payments upon deposit in the PSEA, any power of attorney rights to be granted by Contractor, primary and secondary priorities to PSEA funds, etc. Feedback from numerous Lender representatives during the FTBA Forum indicates such PSEA flexibility should meet Lender requirements. This is particularly so, when viewed in combination with FDOT's agreement to both prioritize Cash Availability Payments over any funding for new capital projects and to also not offset against any otherwise due Cash Availability Scheduled payment as to any invoiced previously certified monthly estimate due to either revised quantities or rejected or defected work.</p>
14	<p>Will FDOT make payment into an escrow account?</p>	<p>FDOT will make payment into a Project Specific Escrow Account, pursuant to FDOT's established PSEA format. FDOT will not agree to any alternative form or structure of escrow account, as between FDOT and the Contractor.</p>
15	<p>In light of Florida's inability to accept assignment of the receivable under UCC, we believe that the proposed escrow structure does alleviate flow of funds concerns; however, for this work around to be palatable to the lending community there needs to be a mechanism to alleviate enforcement issues. The Lender will argue that if there is a situation of non-payment, then the Lender does not want to rely on the Contractor to enforce its rights. If there were a mechanism that allows for a third party to be the contracting entity and payee (i.e. SPV controlled by Contractor) then the bank could be given step-in rights to that entity and thus allow it to enforce its right without reliance on the Contractor. This would make the transaction look more like a PPP transaction and offer lenders the protections they seek. Is this possible?</p>	<p>FDOT will not allow an SPV or SPE vehicle as the party to contract with FDOT. As referenced in response to Question #13 above, such concerns as between the Contractor and Lender may be addressed below the PSEA, whether by use of a power of attorney or other legal mechanism.</p>

No.	Question	Answer [NOTE: While most of these answers track what was verbally communicated at the forum, several responses indicate updated agency policy directions as of November 16, 2011.]
16	<p>The FDOT insistence on a right of offset against the funds is another big problem for lenders I am told. This places an unacceptable construction risk on the lender they are not willing to accept. Once the money is paid by the lender to the contractor, the lender wants those invoices assigned directly to them. They feel that gives them the protection they are due and assures the lender the repayment of the funds they have advanced the contractor. The lender wants these assigned invoices protected by FDOT with the lender having sole right to the money. The key is money due and assigned needs to be protected from others making a claim against those funds. The concern is if there were warranty, liquidated damages or other issues, FDOT would attempt to hold back (offset) those monies already approved and assigned to the lender. This is no different than when FDOT approves and pays estimates now. For all paid amounts it would be difficult for the lender to allow FDOT to take back those payments. Problem is with Contractor Finance the Department still has the money for some time after the job will be completed and could hold back or offset any issue it desired to, thus reducing the monies the lender believes belong to him. The banks we have talked to have indicated they will not accept any construction risks; those belong with the contractor and surety</p>	<p>FDOT will contractually agree on each of the proposed CONTRACTOR FINANCED projects to not offset against any otherwise due Cash Availability Schedule payment, as to any previously certified monthly or final estimate properly invoiced, on account of subsequently revised quantities, defected work, warranty, liquidated damages or other such issues. In such instances, FDOT will continue to reserve and retain all its rights directly against the Contractor, Surety, Value-added or Warranty Contractor or subcontractor, and as otherwise may exist at law. FDOT will, of course, retain the contractual right to make quantity revisions, adjust for overpayment, defective work, and the like, on any subsequent monthly or final estimate that has not yet been certified as earned by FDOT.</p>
17	<p>Lenders tell me that FDOT's unwillingness to designate a line item for interest expense in the invoicing of the work is a problem for them. They feel that potential for argument and additional risk is magnified without this interest line item.</p>	<p>No pay item for interest or finance costs will be included on these CONTRACTOR FINANCED projects. At the same time, this in no way limits the flexibility of the Contractor and Lender (and/or Surety) agreeing at either the PSEA Escrow Agreement level as between Contactor, Lender and Surety), or below the PSEA level in the loan agreement or any number of other agreements or terms, as to exactly what the interest or finance costs are.</p>
18	<p>How does a contractor budget for the interest expense carried over an uncertain timeframe (5+ years)? This fixed expense burden could affect the financial viability of the contractor in the future.</p>	<p>Not directed to FDOT.</p>
19	<p>Would you consider adding standard language stipulating change orders will be paid in full and not part of the finance requirement?</p>	<p>See response to Question #9 above.</p>
20	<p>Would you consider allowing assignment after construction has been final accepted?</p>	<p>No. This can be handled below the PSEA level. See responses to Questions 9, 13, 15 & 16.</p>
21	<p>Does the CFO have any liability for the attestation?</p>	<p>Yes, same as for any "attestation" in similar form.</p>

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22	What is an adequate contingency for time and cost overruns that need to be financed? Should this be included in the financial plan?	See response to Question #9.
23	Will Contractor financial statements submitted as part of the Financial Plan be subject to public disclosure?	Pursuant to Section 119.071(1)(c), F.S., financial statements are exempt from public disclosure.
24	Will the Cash Availability schedule for each contract be “locked in” at the time of advertisement?	Yes. See also the response to Question #1 above.
25	Is the Financial Plan a “means and methods” that can be changed like other aspects of the Design Build process?	No. The financial plan should be submitted to the Department once. It will be submitted with the technical proposal on DBF projects and with the bid on BF projects. If the apparent low proposer’s financial plan requires debt financing as a source of funds, the proposer will ultimately be required to submit, as appropriate, final letters of commitment, final letters of line of credit or a statement of no change.
26	What did Mr. Blanchard mean when he said FDOT would hold the contractor financed projects harmless?	Mr. Blanchard was not speaking in the legal context of “hold harmless” or “indemnify, defend and hold harmless” contractual provisions. FDOT does not have statutory authority to do so in this context in any case. Rather, Mr. Blanchard was simply intending to speak in the context of the practical result of FDOT’s agreement to (i) prioritize the Cash Availability Schedule payments over any new capacity project funding and also (ii) agree to make no offsets against any certified monthly or final estimate when presented for payment per the Cash Availability Schedule, is that the funding for these projects are reasonably protected and the Contractor’s payments shouldn’t be harmed by future potential work program shortfalls.
27	If shortlisted team cannot complete its financial plan by the time the Technical Proposal is due, will its proposal be found non-responsive?	Yes.
28	Due to financial restrictions on Quarterly Available Funds how does the Department plan to encourage early completion?	Early completion will be left solely to the Contractor and Lenders discretion.
29	Are the Financing costs to be included as part of the bid cost?	Yes.
30	When will the projects be advertised?	Not yet determined. DOT will provide this information on the web site included in the response to Question #3.
31	Depending on project size, project specific E&O coverage can be very expensive. Will FDOT review this and consider thresholds for higher value projects and waive/eliminate the requirement on smaller projects?	No.
32	Will CAS requirements now drive extended warranties required by FDOT?	No.
33	Will a design firm be allowed to be part of a JV?	Yes, as long as the firm is prequalified.
34	Will the CEI be a separate contract with the Department (paid normally with no financing required) or will they be included in Contractor’s proposal?	CEI will be contracted for and paid directly by FDOT similar to regular construction contracts.

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35	Is the Washington/Holmes County project being bid as one project or four? Please explain.	The SR 79 project will be bid as one Contract, with multiple bid alternates included as well.
36	Will the Department allow non-shortlisted teams to submit bids on the Design-Build Finance projects?	The Department has modified its policy regarding the means of procurement on Design/Build projects since the Forum to a Two Phase Technical Proposal Adjusted Score Process. Only shortlisted firms will be allowed to submit their technical and price proposals.
37	Upon termination for convenience will the Department pay all breakage cost?	No.
38	Will FDOT pay for directed acceleration?	Yes, but solely in the instance of FDOT expressly directing the Contractor to accelerate (see Div. 1, FDOT Standard Specifications, Section 5-12.10(e), for example). See response to Question #9 above regarding FDOT reserving the right to determine funding timing for compensation for change orders.
39	If DBF is bid under PPP statute will it include standard FL PPP language (financial breakage, project prioritization)?	No. But, see also responses to Questions 4, 5 & 16 above.
40	If entity proposes on multiple projects, will same finance package be allowed?	Each project's financial proposal must be project specific. If an entity uses the same sources of funding for more than one project, they do so at their own risk. See also response to Question 41.
41	If the Lender fails to submit a final commitment letter and bid is rejected will the bid bond be forfeited or will bid bonds be required?	Yes, bid bonds will be required; and, yes, the bid bond will be forfeited in such instance, subject to FDOT's inherent right to exercise discretion in a particular circumstance as applicable in regular project procurements.
42	Will the FDOT payments to the Contractor be subject to the 3% withholding?	If the law is in place, contractors will be subject to the 3% withholding.
43	Why is another bonding letter required beyond the letter submitted during the prequalification process?	Because there is always the potential that the Surety commitment may change due to any number of factors or eventualities occurring as to the project specific work-out necessary between the Contractor, Lender and Surety interests.
44	Will the bond be statutory?	Yes, but based on Section 337.18, F.S., not Section 255.05, F.S.
45	Will the CPPR process remain on these projects?	Yes.
46	With regard to financing, please explain what appears to be a dichotomy between indifference about what happens "below the line" and FDOT's request for a "comfort check" (a project financial plan)?	FDOT's requirements for certain financial plan submittals as part of its procurement process on these CONTRACTOR FINANCED projects is due diligence as required of FDOT pursuant to Section 334.30, F.S., and directed to reasonable assurance the Contractor has the financial capability, as well as the technical capability to timely complete the project-- and, therefore, "above the line"; whereas, the various other specific Lender/Contractor documents, agreements, and other details uniquely and directly as between the Contractor and the Lender to effectuate the financing of the Contractor's financial plan (and the Surety, if applicable) is not required to be reviewed by FDOT nor is FDOT a party thereto—and, therefore, "below the line."

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47	Will FDOT consider an alternate proposal involving FDOT providing the financing?	No.
48	Will all subs and suppliers be paid throughout the project with no exposure to the financing GAP on the jobs?	FDOT fully expects that Contractors on CONTRACTOR FINANCED project will pay all subs and suppliers upon the Contractor receiving its draw from the Lender based on an FDOT certified monthly estimate, or according to its own self-financed cash-flow finance plan, and that subs and suppliers would not be asked to participate in the financing. This is not dissimilar from the process on regular FDOT projects where subs and suppliers are required to be paid following the Contractor receiving a monthly progress estimate payment (i.e. draw) from FDOT. Of course, this is always a subject of the Contractor/subcontractor or supplier agreement; and, while a Contractor may consider interjecting such lower tier financing issues at its own risk, one should carefully consider both the up and down sides to doing so internally and with any Lender or Surety.
49	What effect do these contracts have on the Certification of Payments required from the Contractor?	Certifications will be required as per normal construction projects.
50	How are subs/suppliers protected from Prime Contractor going out of business and not paying?	Similar to regular FDOT projects, the Prime Contractor must provide a 100% Payment and Performance bond.
51	Would Department honor a contractor/consultant JV in which there is a contractual limitation of liability between the JV partners, thus negating Joint & Several?	This is a two-part response. First, by law, as to FDOT being in direct contract with a Contractor/Consultant JV, each JV partner is jointly and severally liable for 100% of any JV liability, and any agreement as between the two JV partners otherwise is unenforceable as to FDOT. Second, however, if such JV partners were to, solely as between themselves, agree that in the event either of them is required to pay monies on a joint and several JV liability an amount in excess of an agreed percentage the other will be liable to reimburse the paying partner any excess thereof, such is likely permissible under law (but, you must get your own legal advice on this matter). Based on clarification provided by the originator of this Question, it is the latter scenario to which his Question was intended.
52	Will there be a separate pre-qualification for the Design-Build Finance projects?	No.

Additional comments received from non-FDOT panel participants:

Comments from Edward Gallagher:

Q. Construction projects often have delays. If a major delay occurred on a Contractor Financed project that was not the fault of the contractor would FDOT maintain the payment schedule outlined in the contract documents or would payments be delayed?

A. The contractor will be paid for work satisfactorily performed subject to the funds availability schedule in the contract. The availability of funds is not tied to the work schedule. Therefore, a delay in the project will not delay availability of funds although it could delay the contractor's completion of enough satisfactory work to earn all of the funds that are available.

Q. What amount or percentage equity are lenders and surety looking for the contractor to post?

A. These projects do not require "equity" in the way a long term operate and maintain PPP would. The contractor will need capital to perform the work, and like any project the surety will want to be sure the contractor has sufficient capital to meet its obligations. Each surety will make its own underwriting decision as to what amount of capital is sufficient in light of the contractor's financing plan, lender commitments, work program and other obligations.

Q. Are Sureties going to require a Letter of Credit if the Contractor self-finances?

A. A surety would prefer that the contractor's financial position and other capabilities enable the surety to provide the bonds without a letter of credit or other collateral. If the surety cannot do so, however, sometimes a letter of credit or other collateral can bridge the gap and enable the surety to provide the bonds. Any letter of credit requirement would be an underwriting consideration specific to a contractor and its surety.

Q. The FDOT insistence on a right of offset against the funds is another big problem for lenders I am told. This places an unacceptable construction risk on the lender they are not willing to accept. Once the money is paid by the lender to the contractor the lender wants those invoices assigned directly to them. They feel that gives them the protection they are due and assures the lender the repayment of the funds they have advanced the contractor. The lender wants these assigned invoices protected by FDOT with the lender having sole right to the money. The key is money due and assigned needs to be protected from others making a claim against those funds. The concern is if there were warranty, liquidated damages or other issues, FDOT would attempt to hold back (offset) those monies already approved and assigned to the lender. This is no different than when FDOT approves and pays estimates now. For all paid amounts it would be difficult for the lender to allow FDOT to take back those payments. Problem is with Contractor Finance the Department still has the money for some time after the job will be completed and could hold back or offset any issue it desired to, thus reducing the monies the lender believes belong to him. The banks we have talked to have indicated they will not accept any construction risks; those belong with the contractor and surety.

A. Sureties recognize that the lender will not take the construction risk just as the surety will not take the financing risk. The DOT expressed a willingness to agree not to offset against approved requisitions, and sureties may be willing to give up their rights to earned but unpaid contract funds in the event of a default. This would enable the lender to be sure of receipt of the earned, approved payments as the funds become available. In return, however, a surety would want the lender to agree that if the surety takes over performance of the work, the lender would advance money to the surety on the schedule agreed to at the start of the project based on work successfully completed and approved by the DOT and without recourse to the surety. That is, the lender would be assured of repayment from the earned funds without setoff but would have to live up to its financing commitments when the contractor or the surety performs the work. The surety's performance bond obligations run to the DOT but also benefit the lender, and the lender can avoid performance risk if it is willing to assume this financing obligation. There are certainly other ways to allocate the performance and financing risks including the contractor self-financing or borrowing the needed funds on normal commercial terms and use of a Special Purpose Vehicle to both contract with the DOT and hold the loan. From the discussion on November 2, however, problems were identified with some of these alternatives while the DOT expressed a willingness to give up its right to set off against payments earned once the work is inspected and approved.

Comments from Jim Marran:

Q. What amount or percentage equity are lenders and surety looking for the contractor to post?

A. The surety will not looking for a specific level of equity to be applied to the project. Their primary underwriting focus will be the terms/conditions of the loan facility and the skills, qualifications and balance sheet strength of the interested contractor.

Q. Are Sureties going to require a Letter of Credit if the Contractor self-finances?

A. Terms/conditions that are established by the sureties will largely depend on the balance sheet strength of the contractor and the structure of the loan facility.

Comments from Jim Ferrell:

Q. How does a contractor budget for the interest expense carried over an uncertain timeframe (5+ years)? This fixed expense burden could affect the financial viability of the contractor in the future.

A. We would hedge and fix the cost

Q. What is an adequate contingency for time and cost overruns that need to be financed? Should this be included in the financial plan?

A. Each contractor must determine this.