

SELECTING A DEVELOPER FOR HEALTH CARE BUILDING PROJECTS

Selecting the most qualified real estate developer for a health care development project starts with a properly conceived and structured Request for Proposal ("RFP"). Health care real estate projects typically have longer project timelines because there are numerous additional considerations involved in such projects. A properly crafted RFP requires thoughtfulness, foresight and experienced legal counsel. It will seek to accomplish the following four primary objectives: (1) avoidance of unnecessary delay; (2) avoidance of legal/compliance problems; (3) protection of the hospital's interests; and (4) the creation of a competitive environment for selection of the "lowest cost most qualified developer." No two RFPs are the same, but some common key elements include:

1. All responders should be screened to ensure a basic working knowledge of the compliance issues (AKS, Stark and FFCA) common to all health care projects and accounting issues (EITF 97-10).
2. In addition to a summary of the key contractual terms, conditions and restrictions, the hospital should always include samples of its required transaction documents (e.g., development agreement, ground lease, declarations of covenants and form of space lease). Responders should either be: (a) informed that any material variation from the standard documents will not be permitted; or (b) given a chance to submit questions and sample alternative provisions. A good set of transaction documents will be fair and evenhanded, reflecting the experience of the author and the author's track record of successfully completed projects. The documents will also contain all of the material terms needed by the hospital.
3. Each responder's resume should include: (a) a list of projects not completed and the reasons therefor; and (b) a list of projects completed over budget and the reasons therefor.
4. Consider what information responders will be required to include beyond descriptions of their experience and the key personnel they will dedicate to the project.
5. Where is the equity coming from? How reliable is it? Where is the debt coming from? How reliable is it?
6. The hospital should perform basic site due diligence (title search, survey, environmental study, geotechnical borings, etc.) and include all material disclosures in the RFP.
7. The RFP should describe all on- and off-site improvements that must be constructed by the developer and how such improvements will impact the project cost and project rental rate (e.g., parking structures).
8. The hospital must identify its intended occupancy of the project, if any.
9. Will physician ownership of the developer/ground lessee entity be permitted? If so, have the parties considered the legal and compliance ramifications of such ownership?
10. The RFP should describe any known material design requirements.
11. If possible, the RFP should lay out the project's critical path and the critical dates.
12. Consider whether soliciting alternative proposals will be helpful.
13. Will the hospital accept leasing threshold contingencies and financing contingencies?
14. Does the hospital have a preferred general contractor? Design firm?
15. Is confidentiality a concern?
16. Do responses need to be multi-phased?
17. Does the developer understand the local environment for economic incentives, land use approvals and property tax exemptions?

18. The hospital should set forth the terms of any reimbursement agreement should the project not proceed after developer selection.

If you have any questions or would like more information on this topic, please contact Bob Hicks at (317) 977-1433 or rhicks@hallrender.com or your regular Hall Render attorney.