

## **INVEST: Mobilizing Private Investment for Development**

### **Statement of Objectives under RFP INVEST-084: USAID/Asia Bureau Transaction Advisory Fund Procurement Process Structuring for Sainshand Copper Smelter Construction and Operation, Mongolia**

#### **Introduction**

Through INVEST, USAID seeks to unlock the potential of private capital to drive inclusive growth in countries around the world. Increasingly, private investors and businesses are looking to emerging markets for better returns and new market opportunities. Encouraging investment in high-impact areas important to USAID such as agriculture, financial services, infrastructure, energy, clean water, health, and education, requires new forms of collaboration between USAID and the investment and business community.

#### **Background**

##### **Infrastructure Transaction and Assistance Network and the Transaction Advisory Fund:**

The Infrastructure Transaction and Assistance Network (ITAN) is a whole-of-U.S. Government initiative to advance sustainable, transparent, high-quality infrastructure across the Indo-Pacific region. Launched in July 2018, ITAN furthers the U.S. vision for a free and open Indo-Pacific to ensure peace, stability, and growing prosperity in the region. Under ITAN, USAID plays a leading role helping its Indo-Pacific partners to catalyze private sector investment—including from the United States—by strengthening their ability to implement and manage sustainable, transparent, and high-quality infrastructure projects.

In October 2019, the USAID Bureau for Asia (USAID/Asia Bureau), with implementation support from INVEST, launched the Transaction Advisory Fund<sup>1</sup> (TAF), a function of the Infrastructure Transaction and Assistance Network<sup>2</sup> <sup>3</sup>. Under TAF, INVEST responds to host country governments' requests for assistance on infrastructure projects with high quality, best-in-class discrete transaction advisory services—primarily legal and other services for contract negotiation and bid/proposal evaluation—on a rapid response basis.

This Statement of Objectives (SOO) supports the Government of Mongolia's (GOM) plan to enter into an agreement with a partner or partners to construct and operate a copper smelter to refine metals primarily from the Oyu Tolgoi mine in southeastern Mongolia. The total estimated cost of the copper project ranges from \$1.5 to \$3.2 billion USD, and the GOM seeks to identify a private sector partner(s) to complete the required studies and designs for construction and complete construction of the smelter. The GOM has requested TAF support to provide legal advisory services to structure and draft the procurement/partnership documents and provide legal and advisory support throughout the procurement/partnership process to contract the construction partner to build the smelter in Sainshand.

#### **Objectives/Activities**

The purpose of this activity is to provide legal advisory services to the Government of Mongolia to design and structure a request for proposal process and associated documentation for the construction and operation of a copper smelter in Sainshand, Mongolia, in accordance with the GOM public procurement process and related Mongolian laws. The subcontracted firm(s) will provide legal services to support the design and structure of the procurement/partnerships and will deliver initial support to draft and release the

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<sup>1</sup> [US Department of State Article](#)

<sup>2</sup> [USAID: ITAN Fact Sheet](#)

<sup>3</sup> [USASCP March 2019 Fact Sheet](#)

RFP and associated documents. Engineering services will be required, and the selected firm will be expected to subcontract a local Mongolian Engineering firm to provide needed engineering services. The detailed tasks are described below:

### **Transaction Structuring**

In coordination with the relevant GOM counterparts and (if applicable) development institutions likely to be involved with the mine, the selected offeror will establish the structure of the transaction to define the roles and responsibilities of each party, which will be 1) communicated in the request for proposals and 2) codified in the eventual contract agreement. Through discussions with these counterparts and after review of similar types of transactions (in the region and with similar technologies), the selected offeror will establish a recommended approach to procure these services, including:

1. Identification and analysis of applicability of the existing concession legislation and relevant regulations, practices, and precedents in Mongolia related to these types of transactions and international best practices<sup>4</sup> for procurements of this nature. This includes the Law of Mongolia on Concessions (2010)<sup>5</sup> and legislation/regulation related to the “Constitution of Mongolia, the Civil Code, the Law on Budget, the Law on Debt Management, the Law on Government, the Law on State and Local Property, the Law on Foreign Investment, the Law on Information Transparency and Right to Information” and all other relevant legislation as well as all relevant treaties to which Mongolia is party including those related to dispute resolution and recognition and enforcement of foreign arbitral awards, as well as practice regarding implementation of treaties and other national laws.<sup>6</sup>
2. Determination of appropriate risk mitigation and allocation to various parties in the transaction.
3. Establishment of the selection process and how bidders will be evaluated and ranked technically and financially.
4. In coordination with the Ministry of Mining and Heavy Industry, identification of key project stakeholders within Government of Mongolia to serve on the selection committee and provide key technical support including expertise such as copper mining and financial analysis. Should key technical experts be unavailable to serve on selection committee, the legal team will identify these gaps and recommend additional consultancy services as needed.
5. Identification of potential sources of financing for the project.

### **Documentation Drafting**

Based on the information gathered, the successful offeror shall:

1. Draft the procurement calendar and definition of inputs, services, and approvals required at each stage by the GOM, per Mongolian procurement regulations.
2. Draft the Request for Proposal document package including, but not limited to:
  - a. Instructions to bidders with clear, transparent evaluation criteria and bid evaluation process and schedule.
  - b. Draft investment agreement.
  - c. Dispute resolution mechanism.
  - d. Technical Specifications– minimum required specifications to meet the defined output – to be provided by GOM and the engineering subcontractor.

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<sup>4</sup> Including but not limited to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, 2001 (hereinafter the "PFI Guide") and UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, 2003 (UNCITRAL Model Legislative Provisions).

<sup>5</sup> With the purpose of regulating “matters related to the organization of tenders for granting investors concessions over state and local own property, the conclusion, revision and termination of concession agreements, and the settlement of disputes”. (Article 1).

<sup>6</sup> Law on Concessions, Articles 2.1 and 2.2.

- e. Required environmental and social clauses<sup>7</sup>.
- f. Verify the status of the support infrastructure (railway, water, electricity, etc.).

To the extent possible, the Successful Offeror will adapt these documents from existing templates and process utilized by the Government of Mongolia for government procurement. Further, the legal advisor will coordinate and work alongside technical teams from the GOM who will provide oversight and guidance in technical mining and financial matters, including the Ministry of Mining and Heavy Industry.

### **Bidding Process and Transaction Closure**

With the final documentation package prepared, the legal advisor will:

- Assist the GOM in preparing and participating in a bidders' conference in coordination with the GOM technical and financial units;
- Support the GOM in responding to bidders' requests for clarifications on the RFP and in ensuring transparency in the process;
- Share market experience with respect to how to address clarifications or request for amendments from the bidders;
- In coordination with the GOM technical and financial teams, review each round of questions from investors and assist and the GOM with responses;
- Assist in the evaluation of bids including the review and evaluation of both technical and financial proposals;
- Assist with ensuring that the evaluation of bids is transparent and complies with Mongolian law in coordination with a local Mongolian firm; and
- Assist the GOM in signing and closing of transaction. The closing phase will encompass assistance during the signing and negotiation of the Project agreements. This may include general advice to the GOM on potential lawsuits brought forward by competing bidders and support to the GOM in reviewing and drafting any final contractual documents, conducting negotiations and supporting the signing and closing of the contractual documents, including, where relevant, the financial documents.

### **Illustrative Deliverables**

The selected offeror(s) will propose deliverables, based on their technical approach, which will result in the successful delivery of the above described services. The following are illustrative deliverables, but offerors are welcomed to propose alternative deliverables:

- Inception Report and Work Plan.
- Legal Memorandum detailing the existing procurement regulations and procedures in Mongolia and recommendations on how to align with international best practices.
- Transaction Structuring Report with recommendations on the procurement process, identified key stakeholders, and selection committee and technical advisors who will support analysis of bids (GOM or external advisors as necessary).
- Draft Investment Agreement with options on key contractual provisions such as benchmarking, force majeure/sovereign immunity, dispute resolution, exclusive remedies, confidentiality and transparency, and operation and maintenance.
- Request for Proposal package.
- Bidders Conference Presentation.
- Q&A feedback table.

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<sup>7</sup> To assist with this task, the GOM and related private sector entities (if applicable) will provide all environmental and social impact assessments (ESIA) previously completed to-date related to the smelter and any other associated facilities, including any railroads, which may be affected by the smelter.

- Final negotiated agreement.

### **Implementation Timeframe**

It is anticipated that the above listed activities will take 8-12 months. All activities must be completed by July 2022.

### **Place of Performance**

Given the global Covid-19 pandemic and its impact on travel, offerors should plan on conducting this activity remotely, and ensure a local presence, which may include local staff, local expert consultants, or a local partner with necessary credentials to support tasks as detailed in the SOO.

### **Role of INVEST**

INVEST will work closely with the selected offeror(s) during all stages of this work. DAI will subcontract the selected offeror(s) directly and provide review and oversight throughout the life of the activity, in coordination with USAID. The INVEST team will administer periodic check-ins, reporting, deliverable review prior to client presentation and approval, and manage an ongoing monitoring, evaluation and learning framework.

- Subcontractor Onboarding: INVEST will provide the successful offeror(s) with necessary context, and work with the successful offeror(s) to develop the work plan.
- Project Implementation: The successful offeror(s) will implement the work as prescribed by the work plan(s). INVEST will provide management support and ensure periodic check-ins/reporting.
- Ongoing Monitoring, Evaluation, and Learning: INVEST will define indicators during the subcontracting process, collect and review M&E data from subcontractors for requisite reporting to USAID and will conduct data quality assessments as necessary.

**To:** Offerors

**Date:** May 13, 2021

**From:** Procurement and Partnerships Team, INVEST Project; Implemented by DAI Global LLC

**Subject:** Request for Proposals (RFP) INVEST-084: Procurement Process Structuring for Sainshand Copper Smelter Construction and Operation, Mongolia

**Due:** 12:00pm Eastern Daylight Time (EDT) on **June 24, 2021**

Dear Offerors:

Enclosed is a Request for Proposals (RFP) to support the implementation of DAI INVEST's above subject project funded by the United States Agency for International Development (USAID). DAI invites firms and consortia to submit a proposal for work under this USAID Transaction Advisory Fund (TAF) buy-in activity, which is part of the broader Infrastructure Transaction and Assistance Network (ITAN) initiative, to support the Government of Mongolia in identifying private sector partner(s) for the construction and operation of a copper smelter.

- I. **RFP Process and deadlines:** This solicitation will result in the award of a firm fixed price subcontract. We anticipate issuing a single subcontract award expected to range between \$850,000 and \$1,000,000.
  - a. **Submission of Questions** – Questions must be submitted no later than **12:00pm EDT on May 20, 2021** via email to [INVEST\\_Procurement@dai.com](mailto:INVEST_Procurement@dai.com). DAI will respond to these questions in approximately three business days.
  - b. **Bidders Teleconference** – DAI anticipates holding a Bidder's Teleconference on or about **9:00AM EDT on May 27, 2021**. The teleconference will address the submitted questions and provide the opportunity for follow-up questions to ensure clarity around the proposal requirements. Details will follow closer to the date. Please send the email addresses of all participants from your consortium that would be interested in attending. Your team is welcome to forward the invite details to other members of the consortium as needed.
  - c. **Submission of Proposal** – Proposal must be submitted no later than **12:00pm EDT on June 24, 2021** via email to [INVEST\\_Procurement@dai.com](mailto:INVEST_Procurement@dai.com), copying [Carly\\_Gorelick@dai.com](mailto:Carly_Gorelick@dai.com) and [Matthew\\_Mitchell@dai.com](mailto:Matthew_Mitchell@dai.com). The subject line of the email should be your organization name, followed by "Submission under RFP INVEST-084: Procurement Process Structuring for Sainshand Copper Smelter Construction and Operation, Mongolia." Please certify in your submission email a validity period of 60 days for the price(s) provided and include your organization's DUNS number. Please limit file submissions to 10 megabytes or less. Proposals must be submitted in English.
  
- II. **Composition of Proposal:** The proposal should comprise the following submission documents. The Technical Proposal and Price Proposal should be prepared as separate files

for independent evaluation, as follows below. Technical proposals should be submitted as a ten (10) slide presentation, using, at a minimum, 12-point standard font size. Graphics may be included, so long as text is clearly legible. If text or graphics are of poor resolution, the information provided may be excluded from consideration. Submissions in PowerPoint or PDF are acceptable, although PDF is preferred along with an accompanying PowerPoint (.ppt) document. Please provide a copy of your cost proposal in Excel format; offerors should use the attached cost/budget template.

### **Part 1 – Technical Proposal**

Please limit your technical proposal to no more than ten (10) slides. The technical proposal is composed of the following three (3) sections:

1. **Technical Approach** – Offerors will detail their approach to fulfilling the accompanying Statement of Objectives (SOO). The approach will clearly indicate how the proposed activities will result in the successful completion of all deliverables and milestones within the stated timeframe. Offerors should demonstrate clearly how they will perform the work to achieve the stated objectives, including potential local partners (legal and engineering). Given that the COVID-19 pandemic may require remote work, offerors should note how they anticipate providing adequate support to the Government of Mongolia (GOM) and facilitating information sharing remotely.
2. **Institutional Capacity** – Offerors should provide details about the experience, expertise, or capacity of their firm (or firms if a partnering arrangement is being proposed) to recommend the proposed approach and complete the work as described. This should also include past performance information for Mongolia or similar contexts performing services like those requested under this RFP. Offerors should demonstrate their experience providing legal advisory services to host governments in structuring transactions.
3. **Management Plan/Staffing Structure** – Offerors should include information on personnel who will be assigned to the activities described in the technical approach, where they are based, as well as a clear management plan in narrative form that outlines how expected deliverables and milestones will be developed and reviewed. The management plan should also include a timeline of key activities, milestones, and deliverables. Additionally, Offerors are required to have local presence in Mongolia – which may include at least one partner, if multiple firms are engaged, or an individual consultant – given COVID-19 international travel restrictions, as well as provide an alternative plan for implementing the work with relevant ongoing travel restrictions (as applicable).

Offerors are permitted to engage in partnering/consortium arrangements that will provide the best value and capability to achieve the objectives of this RFP. If a partnering arrangement is proposed, please describe the nature of the arrangement, the specific technical value being contributed by each consortium member, and the appropriate management controls to ensure successful project delivery.

In addition to the above, please include the following inputs, which will not be counted as part of the 10-slide limit and format may be PDF or Word:

- One (1) to two (2) examples of past performance relevant to this activity, limited to two (2) pages per example
- CV(s) of any individuals proposed in the staffing plan, limited to two (2) pages per individual.

A cover page will be considered a non-counting page, should offerors choose to include one. No additional annexes or documentation are requested nor should be submitted.

### **Part 2 – Price Proposal**

The contract type for the presumptive work will be fixed price, awarded as a subcontract by DAI Global, LLC. Please include your total proposed fixed price along with details for specific deliverable pricing. Offerors should break down each deliverable's associated costs, including all labor and non-labor costs according to expected levels of effort to accomplish each deliverable according to the objectives as laid out in the SOO or include substantiating price reasonableness documentation/justification. Offerors should use the attached cost/budget template; please limit file submissions to 10 megabytes or less.

**III. Evaluation of Proposal:** DAI will use best value determination for the award of this Request for Proposals. A best value determination means that, in DAI's estimation, the selected offer will provide the greatest overall benefit to USAID in response to the requirements stated in this RFP. DAI may also exclude an offer from consideration if it determines that an Offeror is "not responsible", i.e., that it does not have the management and financial capabilities required to perform the work required. DAI reserves the right to check the past performance, references, and other pertinent offeror information in making award decisions. Proposals will be evaluated against a stated number of factors including: the overall proposed approach, past performance, specific qualifications in the identified approach and sectors, and other evidence substantiating the bidder's ability to deliver, including budget and time frame considerations.

**1. Technical Proposal:** The Technical Proposal will be scored and evaluated separately from the cost proposal. Technical panel reviewers will evaluate offerors on the following factors, consistent with the offerors' technical proposal. The Technical Proposal will be evaluated against the following criteria:

- a. **Technical Approach (30 Points):** Points will be awarded to firms based on their specific approach to addressing the Statement of Objectives (SOO). The offeror will be scored based on its presentation of a clear approach which reflects the requirements of this specific activity but also incorporates the offeror's competencies. The technical approach must clearly indicate how the proposed activities will result in the successful completion of all deliverables and activities within the anticipated implementation timeframe, drawing on local expertise as needed.

- b. **Institutional Capacity (40 Points):** Points for this section will be awarded based on information presented in the corresponding section and any submitted case studies. The offeror should demonstrate its institutional experience providing legal advisory services to host government counterparts structuring procurements/partnerships for infrastructure activities. Previous experience with mining and other commercial construction preferred. The successful offeror should highlight relevant experience in Mongolia or similar contexts. Preference will be given to offerors with relevant experience in Mongolia. Offerors should highlight any prior working relationship with host government. If the offeror does not have previous experience in Mongolia, the successful offeror should demonstrate ability to partner with qualified local firms for expertise, both legal and engineering.
  - c. **Management Plan/Staffing Structure (30 Points):** Points for this section will be awarded based on the qualifications of proposed staff, clear delineation of the roles and responsibilities of each proposed staff and each proposed firm (if firms are partnering), clear description of where firms and staff are located geographically, and the demonstrated efficacy and clarity of the management plan. Local presence in Mongolia is required. If the offeror is submitting a proposal with partners, the proposal should describe the nature of the arrangement (i.e., added technical value), the division of labor among the partners, and the appropriate management controls to ensure successful delivery. The offeror should clearly demonstrate that their proposed staff have the requisite experience advising host governments at varying levels, working with local partners, structuring partnerships and procurements for infrastructure projects, and reviewing and evaluating technical specifications.
2. **Price Proposal:** Price and associated cost build-up will be evaluated separately from the technical approach, with due consideration for realism, price reasonableness, and allowability consistent with US government cost principles. Evaluation for this section will be dependent upon all information presented by the Offeror in their deliverable table and supporting cost information, as well as its alignment with the proposed technical approach.

IV. **Offeror's Agreement with Terms and Conditions:** The completion of all RFP requirements in accordance with the instructions in this RFP and submission to DAI of the technical and price proposals will constitute an offer and indicate the Offeror's agreement to the terms and conditions in this RFP and any attachments hereto. DAI is not required to accept and/or evaluate proposals that do not conform to the instructions of the RFP, and additionally, DAI may reject all proposals and not award a subcontract for this RFP. DAI reserves the right to award a subcontract without discussion and/or negotiation; however, DAI also reserves the right to conduct discussions and/or negotiations, which among other things may require an Offeror(s) to revise its proposal (technical and/or price). By submitting an offer, Offerors agree to comply with the general terms and conditions for an award, including [Representations and Certifications](#) compliance. Offerors must provide full, accurate, and complete information in response to this solicitation. By submitting an offer, Offerors certify that they have not/will not attempt to bribe or make any payment to DAI employees in return for preference. Issuance of this RFP in no way obligates DAI to



award a subcontract, nor does it commit DAI to pay any costs incurred by the Offeror in preparing and submitting the proposal. DAI reserves the right to award a subcontract to one organization or to issue multiple awards to different organizations based on the results of our evaluation.

Thank you,

**DAI INVEST Procurement and Partnerships Team**

[INVEST\\_Procurement@dai.com](mailto:INVEST_Procurement@dai.com)

## Q&A

### **RFP INVEST-084: Procurement Process Structuring for Sainshand Copper Smelter Construction and Operation, Mongolia**

- 1. We note that you require the consortium to provide engineering services as part of the scope of work. As a practical matter whilst we are able to engage a third party engineering firm we are not authorized by our legal regulatory body to provide engineering advice. Can you confirm that the terms of our engagement by DAI Invest would be such so as to take this into account e.g. if there is a need to claim against the providers of the engineering advice the engagement will be structured so that we are effectively a conduit in respect of any such claim but will not be defending such a claim?**

Answer: The liability and quantity of the work to be performed by the engineering firm will be minimized since the GOM will provide facility and process design descriptions as it is anticipated that the technical procurement will be performance based. However, we feel that it is important to the overall procurement that a Mongolian engineering firm be used to assess the reasonableness of the performance requirements as well as the support services (e.g., roads, railway, water, and power) to be provided by the GOM. The liability terms of the contract can be explored with the successful offeror during subcontract negotiations to ensure that the terms reflect the objectives and scope of the subcontract, but we are unable to confirm at the open procurement stage.

- 2. We note that you are very specific in your requirements of having a Mongolian Engineering firm to provide the engineering advice. Whilst we anticipate that that is obviously important, as a practical matter, best engineering practice in terms of providing the minimum specification etc. will best be served by engaging an international engineering firm to provide such advice and international perspective (not least given that there is limited engineering knowledge in Mongolia for smelter developments. Can you clarify if this is something that DAI Invest have considered and if we were to approach an international engineering firm would there be an adjustment to your indicative budget to cover this additional cost.**

Answer: Please review response to Question 1 and 6. Due to travel restrictions and the engineering services required, we feel that it should be done by a Mongolian firm.

- 3. There are many different ways to develop this project. This could be through a government procurement process for selection of a suitable contractor consortium or it could be through the grant of a concession with a right to build and then operate over the term of the concession. There are a number of variations in between. Can you give an indication of whether the Government has a preference to the structure as this will obviously affect the sources of financing - it is not clear from the RFP if there will be GOM funds made available for the project or if the source of funds is entirely from the private sector. Related to this is whether (assuming that the project is intended to be developed under a concession structure) GOM wishes to take an equity interest in the project? It would be helpful therefore to understand if there are any minimum parameters of the Government for the structure so we can assess the viability in the light of those government requirements.**

Answer: A critical part of the services provided by the successful offeror will be recommendations on design of the relationship(s) between the Government of Mongolia and the construction/operation partner. There are indeed a number of possible ways to structure the agreement. The final decision is for the GOM to make, but should be based on a clear understanding of the short and long term viability of the structure in accordance with 1) Mongolian law and regulation; 2) efficiency of the tender process; 3) likelihood of successful completion; and, 4) potential return on investment. The GOM has preferences but is receptive to further analysis and discussion. The GOM intends to make capital investments in infrastructure related to the main project and will potentially provide the site; it is still unclear whether the GOM intends to make direct financial contributions to the construction and operation of the smelter. Offerors should base their estimates of necessary time and resources accordingly.

- 4. If the ultimate structure adopted is one of a private sector development and operation under a concession granted by the GOM, do we assume that when it comes to the financing of the Project that the GOM will**

**deal with the interface with the successful bidder and its lenders directly or is the intention to retain the services of the advisory consortium for this role as well - I raise this as it could be several months after the award of the concession to the winning bidder (when the work anticipated in the RFP will be substantially complete) and any involvement will be advisory in nature rather than driven by deliverables from the advisory consortium.**

Answer: This contract will remain active through the award of the tender for construction of the smelter. We do not anticipate ongoing support beyond the award of the tender.

- 5. Should we assume that the site of the Project will be provided by the Government? On one of my previous involvements advising the GOM, this was a big issue and impacted the successful development of the Project so it is important to understand the land position and ownership structure.**

Answer: It is our understanding that the GOM has permission to own and use the land designated for the construction of the smelter. The selected firm will need to validate that the chosen procurement structure is aligned with the legal basis for the land use.

- 6. Should we assume the project will include a captive power plant in addition to the smelter - noting that the power plants in the location of this project are largely intermittent sources of supply (wind) which will not be suitable for the smelter. If there is the intention to develop also a power plant then has any consideration been given to splitting this into a separate project as the bidders for the smelter are not likely to be interested or skilled in developing the power plant (and vice versa) or is this something that will be raised by the advisory consortium as part of their recommendations on structure in the scope of work of the consortium? This question is asked simply to assess if the proposed budget is feasible - running the development of two projects (smelter and power plant) whether as a single bidder or separate bidding processes (one for the smelter and one for the power plant) would be very difficult to properly achieve with the current proposed budget.**

Answer: The GOM has confirmed to DAI that power is available to run the smelter and support operations. The Mongolian engineering firm will be responsible for verifying if power is available at the site to support the smelter and support operations. This RFP is designed for the smelter only.