

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

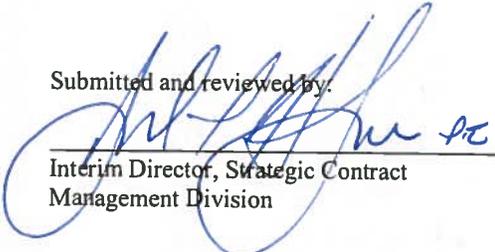
The Texas Transportation Commission (commission) finds it necessary to propose amendments to §§9.150 - 9.153 and §9.155, relating to Design-Build Contracts, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed amendments, attached to this minute order as Exhibits A and B, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the general counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the commission that the amendments to §§9.150 - 9.153 and §9.155 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:


Interim Director, Strategic Contract
Management Division

Recommended by:


Executive Director

114560 APR 28 16

Minute
Number

Date
Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §§9.150 - 9.153 and §9.155, concerning Design-
4 Build Contracts.

5

6 EXPLANATION OF PROPOSED AMENDMENTS

7 House Bill 20, 84th Legislature, 2015, amended Transportation
8 Code, Chapter 223, Subchapter F, which authorizes the department
9 to enter into a design-build contract for a highway project, and
10 prescribes the procurement process to be followed by the
11 department for a design-build contract.

12

13 House Bill 20 made permanent the limitation to entering into no
14 more than three design-build contracts each fiscal year and
15 increased to \$150 million the minimum construction cost estimate
16 for a project to be eligible for delivery under a design-build
17 contract. The bill defined a highway project eligible for
18 delivery under a design-build contract to mean a single highway
19 between two defined points in a corridor or two or more
20 contiguous highway facilities, and precluded the department from
21 including in the procurement documents for a design-build
22 project a schematic design that is more than approximately 30%
23 complete. If maintenance of the project is required, House Bill
24 20 requires the department to require proposers to provide
25 pricing for the maintenance work for each maintenance term.

1

2 In a separate rulemaking, Section 10.5 of the department's
3 rules, relating to ethical conduct by entities doing business
4 with the department, is being amended to expand the definition
5 of impermissible benefits an entity is prohibited from offering,
6 giving, or agreeing to give to a member of the commission or to
7 a department employee. Those changes, and the amendments to
8 §9.155 in this rulemaking, are consistent with the provisions in
9 the department's Ethics Policy that prohibit a department
10 employee from accepting any gift, favor, or service that the
11 employee knows or should know is being offered with the intent
12 to influence the employee's official conduct.

13

14 The amendments to §§9.150 - 9.153 and §9.155 implement changes
15 made by House Bill 20 and implement current department practices
16 regarding gifts and benefits to department officials and
17 employees.

18

19 Section §9.150 is amended because of the changes made in HB 20
20 to the minimum construction cost estimate for a project eligible
21 for delivery under a design-build contract.

22

23 Transportation Code, Chapter 223, Subchapter F, as amended by
24 House Bill 20, authorizes a design-build contract entered into
25 by the department to include a maintenance agreement requiring a

1 design-build contractor to maintain a project for an initial
2 term of not longer than five years, and authorizing the
3 department, in its sole discretion, to exercise options
4 extending the term of the maintenance agreement for additional
5 periods beyond the initial maintenance term, with each
6 additional period being not longer than five years. That
7 subchapter does not limit the maintenance services that may be
8 included in a maintenance agreement.

9
10 Amendments to §9.151 amend the definition of design-build
11 contract to clarify that inclusion of maintenance services is
12 permissive, and to maintenance services other than capital
13 maintenance may be required. The amendments also add the
14 definition of highway project required by House Bill 20.

15
16 Amendments to §9.152 clarify that maintenance services other
17 than capital maintenance may be required.

18
19 Amendments to §9.153 implement changes required by House Bill 20
20 by providing that if maintenance of a highway project is
21 required, the request for proposals must require a proposal to
22 include pricing for the maintenance work for each maintenance
23 term.

24
25 Section 9.155 prohibits a proposer, design-build contractor,

1 consultant, or subconsultant participating in the design-build
2 program, or an affiliate of any of those entities, from, except
3 as provided in that section, offering, giving, or agreeing to
4 give a gift or benefit to a member of the commission or to a
5 department employee whose work for the department includes the
6 performance of procurement services relating to a project under
7 this subchapter, or who participates in the administration of a
8 design-build contract. The amendments to §9.155 remove the
9 exception to that prohibition that allow a consultant or
10 subconsultant, unless a member of a proposer or design-build
11 contractor team, to pay for certain working meals.

12

13 FISCAL NOTE

14 Brian Ragland, Chief Financial Officer, has determined that for
15 each of the first five years in which the amendments as proposed
16 are in effect, there will be fiscal implications for state or
17 local governments as a result of enforcing or administering the
18 amendments. The fiscal impact cannot be quantified with any
19 certainty as it will depend on the number and type of highway
20 projects developed by the department under a design-build
21 contract, and whether maintenance of the project is required.

22

23 Mr. Frank P. Holzmann, P.E., Interim Director, Strategic
24 Contract Management Division, has certified that there will be
25 no significant impact on local economies or overall employment

1 as a result of enforcing or administering the amendments.

2

3 PUBLIC BENEFIT AND COST

4 Mr. Holzmann has also determined that for each year of the first
5 five years in which the sections are in effect, the public
6 benefit anticipated as a result of enforcing or administering
7 the amendments will be to provide an efficient procurement
8 process for design-build contracts, thereby allowing the
9 department to enhance competition in procurements and to obtain
10 the best value for the department, as well as to reduce highway
11 congestion and expedite project delivery. There are no
12 anticipated economic costs for persons required to comply with
13 the sections as proposed. There will be no adverse economic
14 effect on small businesses.

15

16 SUBMITTAL OF COMMENTS

17 Written comments on the proposed amendments to §§9.150 - 9.153
18 and §9.155 may be submitted to Rule Comments, Office of General
19 Counsel, Texas Department of Transportation, 125 East 11th
20 Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov
21 with the subject line "Design-Build Rules." The deadline for
22 receipt of comments is 5:00 p.m. on June 13, 2016. In
23 accordance with Transportation Code, §201.811(a)(5), a person
24 who submits comments must disclose, in writing with the
25 comments, whether the person does business with the department,

1 may benefit monetarily from the proposed amendments, or is an
2 employee of the department.

3

4 STATUTORY AUTHORITY

5 The amendments are proposed under Transportation Code, §201.101,
6 which provides the Texas Transportation Commission (commission)
7 with the authority to establish rules for the conduct of the
8 work of the department.

9

10 CROSS REFERENCE TO STATUTE

11 Transportation Code, Chapter 223, Subchapter F.

1 SUBCHAPTER I. DESIGN-BUILD CONTRACTS

2 §9.150. Purpose. [~~Senate Bill 1420, 82nd Legislature, Regular~~
3 ~~Session, 2011, added~~] Transportation Code, Chapter 223,
4 Subchapter F, authorizes [~~authorizing~~] the department to enter
5 into [~~, in each fiscal year, up to three~~] design-build contracts
6 for highway projects [~~with a construction cost estimate of \$50~~
7 ~~million or more for each project,~~] and prescribes [~~prescribing~~]
8 the requirements for entering into such a [~~design-build~~]
9 contract. This subchapter prescribes the procurement process to
10 be followed by the department for a design-build contract and
11 conditions on private participation in design-build contracts.

12
13 §9.151. Definitions. The following words and terms, when used
14 in this subchapter, have the following meanings, unless the
15 context clearly indicates otherwise.

16 (1) Affiliate--An entity that directly or indirectly
17 controls, is controlled by, or is under common control with a
18 private entity.

19 (2) Commission--The Texas Transportation Commission.

20 (3) Conflict of interest--A circumstance arising out
21 of the existing or past activities, business interests,
22 contractual relationships, or organizational structure of a
23 consultant, proposer, or design-build contractor, where:

1 (A) the private entity is or may be unable to
2 give impartial assistance or advice to the department;

3 (B) the private entity's objectivity in
4 performing the scope of work sought by the department is or
5 might be otherwise impaired;

6 (C) the private entity has an unfair competitive
7 advantage;

8 (D) the private entity's performance of services
9 on behalf of the department provides or may provide an unfair
10 competitive advantage to a third party; or

11 (E) there is a reasonable perception or
12 appearance of impropriety or unfair competitive advantage
13 benefiting the private entity or a third party as a result of
14 the private entity's participation in a design-build project.

15 (4) Consultant--An individual or business entity,
16 including any division or affiliate of the entity, retained by
17 the department to provide consultant services in connection with
18 a design-build project. The term includes an individual or
19 business entity providing or that has provided services under
20 contract to a consultant, either directly or through a
21 subconsultant, at any level.

22 (5) Consultant services--All services provided to the
23 department by an independent contractor under a best value or

1 qualifications based procurement method, including architectural
2 and engineering services, right-of-way acquisition services,
3 environmental services, procurement services, traffic and
4 revenue services, project oversight services, financial services
5 including financial advisory and banking services, and legal
6 services.

7 (6) Control--The possession, directly or indirectly,
8 of the power to cause the direction of the management of the
9 entity, whether through voting securities, by contract, family
10 relationship, or otherwise.

11 (7) Department--The Texas Department of
12 Transportation.

13 (8) Design--Includes planning services, technical
14 assistance, and technical studies provided in support of the
15 environmental review process undertaken with respect to a
16 highway project, as well as surveys, investigations, the
17 development of reports, studies, plans and specifications, and
18 other professional services provided for a highway project.

19 (9) Design-build contract--An agreement that includes
20 both design and construction services for the construction,
21 expansion, extension, [~~related capital maintenance,~~]
22 rehabilitation, alteration, or repair of a highway project, and
23 that may include the maintenance of a highway project.

1 (10) Design-build contractor--A partnership,
2 corporation, or other legal entity or team that includes at a
3 minimum an engineering firm and a construction contractor
4 qualified to engage in the construction of highway projects in
5 Texas.

6 (11) Design-build program--The department's program
7 for the procurement, implementation, and administration of
8 design-build contracts under this subchapter.

9 (12) Environmental services--Some or all of the
10 following services provided to the department with respect to a
11 project developed under a design-build contract:

12 (A) the study and evaluation of alternatives and
13 potential environmental impacts of the proposed project;

14 (B) preparation of environmental analysis and
15 impact documents relating to the project, including facility and
16 corridor analyses and draft and final environmental assessments
17 and environmental impact statements; and

18 (C) planning associated with the environmental
19 approval, permitting, and clearance process for the project.

20 (13) Executive director--The executive director of the
21 department or designee not below the level of a person in a
22 senior leadership position who reports directly to the executive
23 director.

1 (14) Financial services--Some or all of the following
2 services provided to the department with respect to a project
3 developed under a design-build contract:

4 (A) acting in the capacity of financial advisor
5 to the department by providing advice on finance-related issues,
6 including development of short-term or long-term finance
7 strategy and plans of finance for individual projects or on an
8 ongoing basis;

9 (B) identifying and pursuing sources of funds;
10 and

11 (C) acting as underwriter, either lead or co-lead
12 for a revenue bond issuance on a project or facility, but
13 excluding underwriters for bonds that are not related to a
14 project developed under a design-build contract.

15 (15) Gift or benefit--Anything reasonably regarded as
16 pecuniary gain or pecuniary advantage, including any benefit or
17 favor to another person in whose welfare the beneficiary has a
18 direct and substantial interest, regardless of whether the donor
19 is reimbursed. The term includes, but is not limited to, cash,
20 loans, meals, lodging, services, tickets, door prizes, free
21 entry to entertainment or sporting events, transportation, or
22 hunting or fishing trips.

23 (16) Highway project--A single highway facility

1 between two defined points in a corridor, or two or more
2 contiguous highway facilities.

3 (17) [~~(16)~~] Legal services--Some or all of the
4 following services with respect to a project developed under a
5 design-build contract:

6 (A) providing advice on legal issues and
7 strategies relating to project environmental approvals,
8 planning, procurement, financing, contract administration, risk
9 management, and disputes, claims, or litigation; and

10 (B) reviewing, drafting, and negotiating
11 procurement documents, project contracts, and other documents.

12 (18) [~~(17)~~] Preliminary engineering and architectural
13 services--Preparation of preliminary design and architectural
14 documents and reports, utility and right-of-way mapping, and
15 provision of similar technical documents that will be
16 incorporated by others into a request for qualifications or
17 request for proposals, but not including the evaluation or
18 selection of alignments in connection with the development of
19 environmental documents, assistance with development of the
20 solicitation documents, design-build contractor scope of
21 work/technical provisions, evaluation criteria for a
22 procurement, or other items that would constitute environmental
23 services or procurement services.

1 (19) [~~+18+~~] Procurement services--Some or all of the
2 following services provided to the department with respect to a
3 project developed under a design-build contract:

4 (A) development of procurement strategy;

5 (B) development and preparation of the
6 solicitation documents, design-build contractor scope of
7 work/technical provisions, or contract documents;

8 (C) implementation and administration of the
9 solicitation;

10 (D) preparation or implementation of any
11 evaluation criteria, process, or procedures;

12 (E) evaluation of proposer submissions (e.g.,
13 qualification submittals and proposals);

14 (F) negotiation of the contract; and

15 (G) any other activities determined by the
16 department as related to a procurement.

17 (20) [~~+19+~~] Project oversight services--Some or all of
18 the following services provided to the department with respect
19 to a project developed under a design-build contract after award
20 of the contract:

21 (A) design review;

22 (B) construction oversight and inspection;

23 (C) quality control and quality assurance;

1 (D) project management and overview;
2 (E) contract administration;
3 (F) claims management;
4 (G) public relations and community outreach;
5 (H) right of way acquisition services; and
6 (I) appraisal, legal description, condemnation
7 package, and utility assembly review.

8 (21) [~~(20)~~] Proposer--A private entity, including any
9 division or affiliate of the entity, that has submitted a
10 statement of qualifications, proposal, or other submission in
11 order to participate in an ongoing procurement for the design,
12 construction, expansion, extension, related [~~capital~~]
13 maintenance, rehabilitation, alteration, or repair of a project
14 developed under a design-build contract.

15 (22) [~~(21)~~] Request for proposals--A request for
16 submittal of a detailed proposal from private entities to
17 design, develop, construct, expand, extend, provide [~~capital~~]
18 maintenance, rehabilitate, alter, or repair a highway project.

19 (23) [~~(22)~~] Request for qualifications--A request for
20 submission by a private entity of a description of that entity's
21 experience, technical competence and ability to develop a
22 highway project, and such other information as the department
23 considers relevant or necessary.

1 (24) [~~(23)~~] Subconsultant--An individual or business
2 entity that performs or performed work on behalf of a consultant
3 as part of the performance of the consultant's work for the
4 department, either directly or through a subconsultant at any
5 level.

6 (25) [~~(24)~~] Traffic and revenue services--Some or all
7 of the following services provided to the department with
8 respect to a project developed under a design-build contract:

9 (A) conducting draft and investment grade traffic
10 and revenue studies, toll elasticity studies, toll feasibility
11 studies, toll pricing studies, or studies or analyses of a
12 similar nature, including peer review studies; and

13 (B) data mining and preparation of reports,
14 analyses, and projections in connection with the traffic and
15 projected revenues.

16

17 §9.152. General Rules for Design-Build Contracts.

18 (a) Applicability. The rules in this subchapter address the
19 manner by which the department intends to evaluate submissions
20 received from private entities in response to requests for
21 qualifications and requests for proposals issued by the
22 department.

23 (b) Reservation of rights. The department reserves all

1 rights available to it by law in administering this subchapter,
2 including without limitation the right in its sole discretion
3 to:

4 (1) withdraw a request for qualifications or a request
5 for proposals at any time, and issue a new request;

6 (2) reject any and all qualifications submittals or
7 proposals at any time;

8 (3) terminate evaluation of any and all qualifications
9 submittals or proposals at any time;

10 (4) suspend, discontinue, or terminate negotiations
11 with any proposer at any time prior to the actual authorized
12 execution of a design-build contract by all parties;

13 (5) negotiate with a proposer without being bound by
14 any provision in its proposal;

15 (6) negotiate with a proposer to include aspects of
16 unsuccessful proposals for that project in the design-build
17 contract;

18 (7) request or obtain additional information about any
19 proposal from any source;

20 (8) modify, issue addenda to, or cancel any request
21 for qualifications or request for proposals;

22 (9) waive deficiencies in a qualifications submittal
23 or proposal, accept and review a non-conforming qualifications

1 submittal or proposal, or permit clarifications or supplements
2 to a qualifications submittal or proposal; or

3 (10) revise, supplement, or make substitutions for all
4 or any part of this subchapter.

5 (c) Costs incurred by proposers. Except as provided in
6 §9.153(f) of this subchapter (relating to Solicitation of
7 Proposals), under no circumstances will the state, the
8 department, or any of their agents, representatives,
9 consultants, directors, officers, or employees be liable for, or
10 otherwise obligated to reimburse, the costs incurred by
11 proposers, whether or not selected for negotiations, in
12 developing proposals or in negotiating agreements.

13 (d) Department information. Any and all information the
14 department makes available to proposers shall be as a
15 convenience to the proposer and without representation or
16 warranty of any kind except as may be expressly specified in the
17 request for qualifications or request for proposals. Proposers
18 may not rely upon any oral responses to inquiries.

19 (e) Procedure for communications. If a proposer has a
20 question or request for clarification regarding this subchapter
21 or any request for qualifications or request for proposals
22 issued by the department, the proposer shall submit the question
23 or request for clarification in writing to the person

1 responsible for receiving those submissions, as designated in
2 the request for qualifications or request for proposals, and the
3 department will provide the responses in writing. The proposer
4 shall also comply with any other provisions in the request for
5 qualifications or request for proposals regulating
6 communications.

7 (f) Compliance with rules. In submitting any proposal, the
8 proposer shall be deemed to have unconditionally and irrevocably
9 consented and agreed to the foregoing provisions and all other
10 provisions of this subchapter.

11 (g) Proposer information submitted to department. All
12 qualifications submittals or proposals submitted to the
13 department become the property of the department and may be
14 subject to the Public Information Act, Government Code, Chapter
15 552. Proposers should familiarize themselves with the provisions
16 of the Public Information Act. In no event shall the state, the
17 department, or any of their agents, representatives,
18 consultants, directors, officers, or employees be liable to a
19 proposer for the disclosure of all or a portion of a proposal
20 submitted under this subchapter. Except as otherwise expressly
21 specified in the request for qualifications or request for
22 proposals, if the department receives a request for public
23 disclosure of all or any portion of a qualifications submittal

1 or proposal, the department will notify the applicable proposer
2 of the request and inform that proposer that it has an
3 opportunity to assert, in writing, a claimed exception under the
4 Public Information Act or other applicable law within the time
5 period specified in the department's notice and allowed under
6 the Public Information Act. If a proposer has special concerns
7 about information it desires to make available to the
8 department, but which it believes constitutes a trade secret,
9 proprietary information or other information excepted from
10 disclosure, the proposer should specifically and conspicuously
11 designate that information as such in its qualifications
12 submittal or proposal. The proposer's designation shall not be
13 dispositive of the trade secret, proprietary, or exempted nature
14 of the information so designated.

15 (h) Sufficiency of proposal. All proposals, whether
16 solicited or unsolicited, should be as thorough and detailed as
17 possible so that the department may properly evaluate the
18 potential feasibility of the proposed project as well as the
19 capabilities of the proposer and its team members to provide the
20 proposed services and complete the proposed project.

21 (i) Project studies. Studies that the department deems
22 necessary as to route designation, civil engineering,
23 environmental compliance, and any other matters will be

1 assigned, conducted, and paid for as negotiated between the
2 department and the successful proposer and set forth in the
3 design-build contract.

4 (j) Proposer's additional responsibilities. The department,
5 in its sole discretion, may authorize the successful proposer to
6 seek licensing, permitting, approvals, and participation
7 required from other governmental entities and private parties,
8 subject to such oversight and review by the department as
9 specified in the design-build contract.

10 (k) Proposer's work on environmental review of eligible
11 project. The department may solicit proposals in which the
12 proposer is responsible for providing assistance in the
13 environmental review and clearance of an eligible project,
14 including the provision of technical assistance and technical
15 studies to the department or its environmental consultant
16 relating to the environmental review and clearance of the
17 proposed project. The environmental review and the documentation
18 of that review shall at all times be conducted as directed by
19 the department and subject to the oversight of the department,
20 and shall comply with all requirements of state and federal law,
21 applicable federal regulations, and the National Environmental
22 Policy Act (42 U.S.C. §4321 et seq.), if applicable, including
23 but not limited to the study of alternatives to the proposed

1 project and any proposed alignments, procedural requirements,
2 and the completion of any and all environmental documents
3 required to be completed by the department and any federal
4 agency acting as a lead agency. The department:

5 (1) shall determine the scope of work to be performed
6 by the private entity or its consultants or subcontractors;

7 (2) shall specify the level of design and other
8 information to be provided by the private entity or its
9 consultants or subcontractors; and

10 (3) shall independently review any studies and
11 conclusions reached by the private entity or its consultants or
12 subcontractors before their inclusion in an environmental
13 document.

14 (1) Effect of environmental requirements on design-build
15 contract. Completion of the environmental review, including
16 obtaining approvals required under the National Environmental
17 Policy Act, is required before the private entity may be
18 authorized to conduct and complete the final design and start
19 construction of a project. Additionally, all applicable state
20 and federal environmental permits and approvals must be obtained
21 before the private entity may start construction of the portion
22 of a project requiring the permit or approval. Unless and until
23 that occurs, the department is not bound to any further

1 development of the project. The department, and any federal
2 agency acting as a lead agency, may select an alternative other
3 than the one in the proposed project, including the "no-build"
4 alternative. A design-build contract shall provide that the
5 agreement will be modified as necessary to address requirements
6 in the final environmental documents, and shall provide that the
7 agreement may be terminated if the "no-build" alternative is
8 selected or if another alternative is selected that is
9 incompatible with the requirements of the agreement.

10 (m) Public meetings and hearings. All public meetings or
11 hearings required to be held under applicable law or regulation
12 will be directed and overseen by the department, with
13 participation by such other parties as it deems appropriate.

14 (n) Additional matters. Any matter not specifically
15 addressed in this subchapter that pertains to the construction,
16 expansion, extension, related [~~capital~~] maintenance,
17 rehabilitation, alteration, or repair of a highway project
18 pursuant to this subchapter, shall be deemed to be within the
19 primary purview of the commission, and all decisions pertaining
20 thereto, whether or not addressed in this subchapter, shall be
21 as determined by the commission, subject to the provisions of
22 applicable law.

23 (o) Performance and payment security. The department shall

1 require a private entity entering into a design-build contract
2 to provide a performance and payment bond or an alternative form
3 of security, or a combination of bonds and other forms of
4 security, in an amount equal to the cost of constructing the
5 project, unless the department determines that it is
6 impracticable for a private entity to provide security in that
7 amount, in which case the department will set the amount of
8 security. The security will be in the amount that, in the
9 department's sole determination, is sufficient to ensure the
10 proper performance of the agreement, and to protect the
11 department and payment bond beneficiaries supplying labor or
12 materials to the private entity or a subcontractor of the
13 private entity. Bonds and alternate forms of security shall be
14 in the form and contain the provisions required in the request
15 for proposals or the design-build contract, with such changes or
16 modifications as the department determines to be in the best
17 interest of the state. In addition to, or in lieu of,
18 performance and payment bonds, the department may require:

19 (1) a cashier's check drawn on a federally insured
20 financial institution, and drawn to the order of the department;

21 (2) United States bonds or notes, accompanied by a
22 duly executed power of attorney and agreement authorizing the
23 collection or sale of the bonds or notes in the event of the

1 default of the private entity or a subcontractor of the private
2 entity, or such other act or event that, under the terms of the
3 design-build contract, would allow the department to draw upon
4 or access that security;

5 (3) an irrevocable letter of credit issued or
6 confirmed by a financial institution to the benefit of the
7 department, meeting the credit rating and other requirements
8 prescribed by the department, and providing coverage for a
9 period of at least one year following final acceptance of the
10 project or, if there is a warranty period, at least one year
11 following completion of the warranty period;

12 (4) an irrevocable letter signed by a guarantor
13 meeting the net worth or other financial requirements prescribed
14 in the request for proposals or design-build contract, and which
15 guarantees, to the extent required under the request for
16 proposals or design-build contract, the full and prompt payment
17 and performance when due of the private entity's obligations
18 under the design-build contract; or

19 (5) any other form of security deemed suitable by the
20 department.

21 (p) Performance evaluations. The department will evaluate
22 the performance of a private entity that enters into a design-
23 build contract, and will evaluate the performance of the private

1 entity's major team members, consultants, and subcontractors, in
2 accordance with the requirements of this subsection.

3 Evaluations will be conducted annually at twelve month intervals
4 during the term of the design-build contract, upon termination
5 of the design-build contract, and when the department determines
6 that work is materially behind schedule or not being performed
7 according to the requirements of the design-build contract.

8 Optional evaluations may be conducted as provided in the design-
9 build contract. Acts or omissions that are the subject of a
10 good faith dispute will not be considered. After a performance
11 evaluation is conducted, and for at least 30 days before the
12 evaluation becomes final and is used by the department, the
13 department will provide for review and comment a copy of the
14 performance evaluation report to the entity being evaluated and,
15 if that entity is a consultant or subcontractor, to the entity
16 that entered into the design-build contract. The department
17 will consider and take into account any submitted comments
18 before the department finalizes the performance evaluation
19 report. The results of performance evaluations will be provided
20 to the entity that was evaluated and may be used in the
21 evaluation of qualifications submittals and proposals submitted
22 under §9.153 of this subchapter and §27.4 of this title
23 (relating to Solicited Proposals) by proposers that include the

1 major team members, consultants, and subcontractors evaluated.

2

3 §9.153. Solicitation of Proposals.

4 (a) Request for qualifications-notice. If authorized by
5 the commission to issue a request for qualifications for a
6 highway project, the department will set forth the basic
7 criteria for qualifications, experience, technical competence
8 and ability to develop the project, and such other information
9 as the department considers relevant or necessary in the request
10 for qualifications. The department will publish notice
11 advertising the issuance of the request for qualifications in
12 the Texas Register and will post the notice and the request for
13 qualifications on the department's Internet website. The
14 department may also elect to furnish the request for
15 qualifications to businesses in the private sector that the
16 department otherwise believes might be interested and qualified
17 to participate in the project that is the subject of the request
18 for qualifications.

19 (b) Request for qualifications-content. At its sole
20 option, the department may elect to furnish conceptual designs,
21 fundamental details, technical studies and reports or detailed
22 plans of the proposed project in the request for qualifications,
23 and may request conceptual approaches to bringing the project to

1 fruition. A request for qualifications must include:

2 (1) information regarding the proposed project's

3 location, scope, and limits;

4 (2) information regarding funding that may be

5 available for the project;

6 (3) criteria that will be used to evaluate the

7 qualifications submittals;

8 (4) the relative weight to be given to the criteria;

9 (5) the deadline by which qualifications submittals
10 must be received by the department; and

11 (6) any other information the department considers
12 relevant or necessary.

13 (c) Request for qualifications-evaluation. The department,
14 after evaluating the qualification submittals received in
15 response to a request for qualifications, will identify and
16 approve a "short-list" that is composed of those entities that
17 are considered most qualified to submit detailed proposals for a
18 proposed project. In evaluating the qualification submittals,
19 the department will consider the results of performance
20 evaluations conducted by the department under §9.152 of this
21 subchapter (relating to General Rules for Design-Build
22 Contracts) and §27.3 of this title (relating to General Rules
23 for Private Involvement) determined by the department to be

1 relevant to the project, the results of other performance
2 evaluations determined by the department to be relevant to the
3 project, and other objective evaluation criteria that the
4 department considers relevant to the project, including a
5 proposer's qualifications, experience, technical competence, and
6 ability to develop the project, and that may include the private
7 entity's financial condition, management stability, staffing,
8 and organizational structure. The department may interview
9 entities responding to a request for qualifications. The
10 department shall short-list at least two private entities to
11 submit proposals, but may not short-list more private entities
12 than the number of private entities designated in the request
13 for qualifications if a maximum number is designated. The
14 department shall advise each entity providing a qualifications
15 submittal whether it is on the short-list of qualified entities.

16 (d) Requests for proposals. If authorized by the
17 commission, the department will issue a request for proposals
18 from all private entities qualified for the short-list,
19 consisting of the submission of detailed documentation regarding
20 the project. A request for proposals must include:

- 21 (1) information on the overall project goals;
22 (2) publicly available cost estimates for the design-
23 build portion of the project;

- 1 (3) materials specifications;
- 2 (4) special material requirements;
- 3 (5) a schematic design approximately 30 percent
- 4 complete;
- 5 (6) known utilities;
- 6 (7) quality assurance and quality control
- 7 requirements;
- 8 (8) the location of relevant structures;
- 9 (9) notice of any rules or goals adopted by the
- 10 department relating to awarding contracts to disadvantaged
- 11 business enterprises or small business enterprises;
- 12 (10) available geotechnical or other information
- 13 related to the project;
- 14 (11) the status of any environmental review of the
- 15 project;
- 16 (12) detailed instructions for preparing the technical
- 17 proposal, including a description of the form and level of
- 18 completeness of drawings expected;
- 19 (13) the relative weighting of the technical and cost
- 20 proposals and the formula by which the proposals will be
- 21 evaluated and ranked, which must allocate at least 70 percent of
- 22 weighting to the cost proposal;
- 23 (14) the criteria to be used in evaluating the

1 technical proposals, and the relative weighting of those
2 criteria;

3 (15) the proposed form of design-build contract; and
4 (16) any other information the department considers
5 relevant or necessary.

6 (e) Request for proposals-submittal requirements. The
7 request for proposals must require the submission of a sealed
8 technical proposal and a separate sealed cost proposal no later
9 than the 180th day after the issuance of the request for
10 proposals, and that provide information relating to:

11 (1) the feasibility of developing the project as
12 proposed;

13 (2) the proposed solutions to anticipated problems;

14 (3) the ability of the proposer to meet schedules;

15 (4) the engineering design proposed;

16 (5) the cost of delivering the project;

17 (6) if maintenance of the project is required, pricing
18 for the maintenance work for each maintenance term;

19 (7) [+6] the estimated number of days required to
20 complete the project; and

21 (8) [+7] any other information requested by the
22 department.

23 (f) Requests for proposals-payment for work product. The

1 request for proposals shall stipulate an amount of money, as
2 authorized under Transportation Code, §223.249, that the
3 department will pay to an unsuccessful proposer that submits a
4 proposal that is responsive to the requirements of the request
5 for proposals. The commission shall approve the amount of the
6 payment to be stipulated in the request for proposals, which
7 must be a minimum of twenty-five hundredths of one percent of
8 the contract amount. The request for proposals shall provide
9 for the payment of a partial amount in the event the procurement
10 is terminated. In determining the amount of the payment, the
11 commission shall consider:

12 (1) the effect of a payment on the department's
13 ability to attract meaningful proposals and to generate
14 competition;

15 (2) the work product expected to be included in the
16 proposal and the anticipated value of that work product; and

17 (3) the costs anticipated to be incurred by a private
18 entity in preparing a proposal.

19 (g) Request for proposals-evaluation. The proposals will
20 be evaluated by the department based on the results of
21 performance evaluations conducted by the department under §9.152
22 of this subchapter and §27.3 of this title determined by the
23 department to be relevant to the project, the results of other

1 performance evaluations determined by the department to be
2 relevant to the project, and other objective evaluation criteria
3 the department deems appropriate for the project, including
4 those criteria deemed appropriate by the department to maximize
5 the overall performance of the project and the resulting
6 benefits to the state. Specific evaluation criteria and
7 requests for pertinent information will be set forth in the
8 request for proposals. The department shall first open,
9 evaluate, and score each responsive technical proposal, and
10 shall subsequently open, evaluate, and score the cost proposals
11 from proposers that submitted a responsive technical proposal
12 and assign points on the basis of the weighting specified in the
13 request for proposals.

14 (h) Apparent best value proposal. Based on the evaluation
15 using the evaluation criteria described under subsection (g) of
16 this section and set forth in the request for proposals, the
17 department will rank all proposals that are complete, responsive
18 to the request for proposals, and in conformance with the
19 requirements of this subchapter, in accordance with the formula
20 provided in the request for proposals. The department may
21 select the private entity whose proposal offers the apparent
22 best value to the department.

23 (i) Selection of entity. The department shall submit a

1 recommendation to the commission regarding approval of the
2 proposal determined to provide the apparent best value to the
3 department. The commission may approve or disapprove the
4 recommendation, and if approved, will award the design-build
5 contract to the apparent best value proposer. Award may be
6 subject to the successful completion of negotiations, any
7 necessary federal action, execution by the executive director of
8 the design-build contract, and satisfaction of such other
9 conditions that are identified in the request for proposals or
10 by the commission. The proposers will be notified in writing of
11 the department's rankings. The department shall also make the
12 rankings available to the public.

13 (j) Negotiations with selected entity. If authorized by
14 the commission, the department will attempt to negotiate a
15 design-build contract with the apparent best value proposer. If
16 a design-build contract satisfactory to the department cannot be
17 negotiated with that proposer, or if, in the course of
18 negotiations, it appears that the proposal will not provide the
19 department with the overall best value, the department will
20 formally and in writing end negotiations with that proposer and,
21 in its sole discretion, either:

22 (1) reject all proposals;

23 (2) modify the request for proposals and begin again

1 the submission of proposals; or

2 (3) proceed to the next most highly ranked proposal
3 and attempt to negotiate a design-build contract with that
4 entity in accordance with this paragraph.

5

6 §9.155. Conflict of Interest and Ethics Policies.

7 (a) Purpose. This section prescribes ethical standards of
8 conduct applicable to private entities, including consultants
9 and subconsultants, participating in the department's design-
10 build program. A private entity's failure to comply with these
11 standards of conduct may result in the private entity's
12 preclusion from participation in a project or sanctions being
13 imposed under Chapter 10 of this title (relating to Ethical
14 Conduct by Entities Doing Business with the Department).

15 (b) Gifts and benefits. A proposer, design-build
16 contractor, consultant, or subconsultant participating in the
17 design-build program, or an affiliate of any of those entities,
18 may not offer, give, or agree to give a gift or benefit to a
19 member of the commission or to a department employee whose work
20 for the department includes the performance of procurement
21 services relating to a project under this subchapter, or who
22 participates in the administration of a design-build contract.
23 Notwithstanding this prohibition, a consultant or subconsultant,

1 unless a member of a proposer or design-build contractor team,
2 if authorized under subsection (c) of this section may [+]

3 ~~[(1) pay for a working meal on an occasional basis,~~
4 ~~provided that the payment for a working meal is reciprocated to~~
5 ~~the extent practical, and the meal is not lavish or extravagant;~~
6 and]

7 ~~[(2)]~~ offer, give, or agree to give a token item that
8 does not exceed an estimated value of \$25 (excluding cash,
9 checks, stocks, bonds, or similar items), where the item is
10 distributed generally as a normal means of advertising.

11 (c) Conflicts of interest.

12 (1) Purpose. This subsection prescribes department
13 policy on conflicts of interest relating to consultants and
14 subconsultants participating in the design-build program, and
15 thereby:

16 (A) protects the integrity and fairness of the
17 program and all procurements carried out by the department as
18 part of the program;

19 (B) avoids circumstances where a consultant,
20 proposer, or design-build contractor obtains, or appears to
21 obtain, an unfair competitive advantage as a result of work
22 performed by a consultant or subconsultant;

23 (C) provides guidance to private entities so they

1 may assess and make informed business decisions concerning their
2 participation in the program; and

3 (D) protects the department's interests and
4 confidential and sensitive project-specific and programmatic
5 information.

6 (2) Applicability. This subsection applies to all
7 projects undertaken by the department under this subchapter.
8 This subsection applies to consultants and subconsultants, and
9 to individual employees of consultants and subconsultants who
10 participated in the performance of services for the department.
11 A reference in this subsection to a consultant or subconsultant
12 also means individual employees of a consultant or subconsultant
13 who participated in the performance of services for the
14 department. To the extent that the department has previously
15 consented in writing to a consultant's or subconsultant's
16 performance of services that are in conflict with this
17 subsection, participation on a proposer team as an equity owner
18 or team member, acting as a consultant or subconsultant to a
19 proposer, or having a financial interest in a proposer or an
20 equity owner or team member of a proposer, this subsection does
21 not modify or alter the prior consent. The foregoing does not
22 prevent, however, the application of this subsection to the
23 consultant or subconsultant for other projects, including taking

1 into account the performance of services on the project for
2 which consent was obtained. This subsection may by extension
3 prohibit or restrict the ability of a proposer to have a
4 consultant or subconsultant participate on the proposer team as
5 an equity owner or team member, act as a consultant or
6 subconsultant to the proposer, or have a financial interest in
7 the proposer or an equity owner or team member of the proposer.

8 (3) Period in which a conflict of interest applies.

9 If a determination is made under this subsection that the
10 performance of services by a consultant or subconsultant raises
11 a conflict of interest, the resulting prohibition or restriction
12 provided in this subsection continues, both for the private
13 entity and any individual that is an employee of or was employed
14 by the private entity and participated in the performance of
15 services for the department, until the date the performance of
16 services ends and all work product prepared by the entity and
17 other information and data provided to the entity in the
18 performance of services is publicly available, provided that,
19 for a private entity or individual performing procurement
20 services, the resulting prohibition or restriction shall end no
21 earlier than the execution of the design-build contract or
22 cancellation of the procurement for the project for which the
23 private entity or individual is performing services.

1 (4) Application to new firm. If a conflict of
2 interest is determined to apply to an individual under paragraph
3 (3) of this subsection and the individual changes employers, the
4 conflict of interest and prohibition with respect to the
5 individual will not apply to the individual's new employer. If
6 the new employer is otherwise eligible to perform consultant
7 services, the new employer will remain eligible despite the
8 employment of the individual. This paragraph does not apply to
9 an individual employed by an affiliate of its previous employer,
10 and the conflict of interest and prohibition with respect to the
11 individual will apply to that affiliate.

12 (5) Federal requirements. For federal-aid projects,
13 the department must comply with the Federal Highway
14 Administration's organizational conflict of interest regulations
15 (found in 23 C.F.R. §636.116). The requirements of this
16 subsection do not limit, modify, or otherwise alter the effect
17 of those regulations, and will be applied consistent with those
18 regulations.

19 (6) General conflict of interest standards. Except as
20 provided in paragraph (7) of this subsection, a consultant that
21 is providing consultant services to the department with respect
22 to a design-build project may not be a proposer or participate
23 as an equity owner, team member, consultant, or subconsultant of

1 or to a proposer for that project, or have a financial interest
2 in any of the foregoing entities with respect to that project.
3 Subject to the requirements of paragraph (8) of this subsection,
4 a consultant that is performing consultant services for a
5 design-build project will not be prohibited from participating
6 on a different design-build project as a proposer or
7 participating as an equity owner, team member, consultant, or
8 subconsultant of or to a proposer for the different project, or
9 having a financial interest in any of the foregoing entities
10 with respect to the different project.

11 (7) Providing services for the same project. A
12 consultant that is actively providing preliminary engineering
13 and architectural services to the department with respect to a
14 design-build project, or that performed and completed
15 environmental or traffic and revenue services for a design-build
16 project, may be a proposer or participate as an equity owner,
17 team member, consultant, or subconsultant of or to a proposer
18 for the same project, or have a financial interest in any of the
19 foregoing entities with respect to that project, provided:

20 (A) with respect to a consultant providing
21 preliminary engineering and architectural services, all work
22 product prepared by the consultant and other information and
23 data provided to the consultant in the performance of services

1 is made available to all proposers prior to the issuance of the
2 final request for proposals for that project; or

3 (B) the executive director issues a written
4 determination under paragraph (9) of this subsection that:

5 (i) the consultant will not, or in the case
6 of the previous performance of consultant services did not, have
7 access to or obtain knowledge of confidential or sensitive
8 information, procedures, policies, and processes that could
9 provide an unfair competitive advantage with respect to the
10 procurement for that project;

11 (ii) the data and information provided to
12 the consultant in the performance of the consultant services is
13 either irrelevant to the procurement for that project or is
14 available on an equal and timely basis to all proposers;

15 (iii) the work products from the consultant
16 incorporated into or relevant to the procurement for that
17 project are generally available on an equal and timely basis to
18 all proposers; and

19 (iv) with respect to environmental services,
20 a record of decision or finding of no significant impact has
21 been issued for the project.

22 (8) Procurement and financial services. A consultant
23 actively engaged and performing procurement services or

1 financial services with respect to a design-build project may be
2 a proposer or participate as an equity owner, team member,
3 consultant, or subconsultant of or to a proposer for another
4 design-build project, or may have a financial interest in any of
5 the foregoing entities with respect to another design-build
6 project, provided that, beginning at the time that the
7 consultant becomes a proposer or participates as part of or
8 acquires a financial interest in a proposer with respect to the
9 other design-build project, as described by this paragraph, the
10 consultant is prohibited from reviewing alternative technical
11 concepts and proposals for the project for which the consultant
12 is providing services to the department until a contract for the
13 project is entered into, and the consultant must institute
14 ethical walls or other safeguards required by the department.

15 (9) Requests for determinations or exceptions. A
16 consultant, proposer, or design-build contractor may submit a
17 request to the executive director for a determination whether
18 participation in a design-build project or the performance of
19 particular services with respect to a design-build project would
20 constitute a conflict of interest, or for approval of an
21 exception to the applicability of this subsection to those
22 services. A request for approval of an exception may be made if
23 a consultant, proposer, or design-build contractor desires to

1 appeal a previous determination that a conflict of interest
2 exists. The executive director will forward a request to the
3 department's Office of General Counsel for analysis and
4 recommendation prior to issuing a decision. In determining
5 whether a conflict of interest exists, or whether to approve an
6 exception, the executive director shall consider:

7 (A) the extent to which the firm or individual
8 employee obtained access to or the ability to gain knowledge of
9 confidential or sensitive information, procedures, policies, and
10 processes concerning the design-build program or a particular
11 project or procurement that could provide an unfair competitive
12 advantage with respect to the procurement or project at issue;

13 (B) the type of consulting services at issue;

14 (C) the particular circumstances of each
15 procurement;

16 (D) the specialized expertise needed by the
17 department and proposers to implement the procurement;

18 (E) the past, current, or future working
19 relationship between the consultant and the department;

20 (F) the period of time between the potential
21 conflict situation and the project at issue; and

22 (G) the potential impact on the procurement and
23 project at issue, including competition.

1 (10) Multiple services. If a consultant is providing
2 more than one category of consultant services to the department
3 and there are differences in the standards, restrictions, and
4 limitations applicable to those categories, the standards,
5 restrictions, and limitations applicable to a category that are
6 more stringent apply.

7 (11) Participation on proposer or design-build
8 contractor team. A consultant participating with respect to a
9 design-build project as a proposer or design-build contractor,
10 or as an equity owner, team member, consultant, or subconsultant
11 of or to a proposer or design-build contractor, or having a
12 financial interest in any of the foregoing entities, is eligible
13 to provide consultant services to the department for another
14 design-build project, provided that, when the consultant is
15 retained to perform consultant services for the department, the
16 restrictions in this subsection shall apply.

17 (12) Restriction of services and conditions to
18 approvals and exceptions. In instances where a written
19 determination under paragraph (9) of this subsection that a
20 conflict of interest does not exist, including, in particular,
21 where the conditions prescribed in paragraph (7) of this
22 subsection have been met, or that grants an exception to the
23 application of this subsection, the department may still, in its

1 discretion:

2 (A) restrict the scope of services the consultant
3 or subconsultant may be eligible to perform for the department
4 in order to further the intent and goals of this subsection; and

5 (B) condition an approval, determination, or
6 exception as the executive director determines appropriate to
7 further the intent and goals of this subsection, including by
8 requiring the consultant, subconsultant, proposer, or design-
9 build contractor to execute confidentiality agreements,
10 institute ethical walls, or segregate certain personnel from
11 participation in a project or the performance of consultant
12 services.

13 (13) Provisions are nonexclusive. The provisions in
14 this subsection do not address every situation that may arise in
15 the context of the department's design-build program nor require
16 a particular decision or determination when faced with facts
17 similar to those described in this subsection. The department
18 retains the ultimate and sole discretion to determine on a case-
19 by-case basis whether a conflict of interest exists and what
20 actions may be appropriate to avoid, neutralize, or mitigate any
21 actual or potential conflict, or the appearance of any conflict.
22 Except as provided in paragraph (14) of this subsection, the
23 provisions of this subsection shall not be construed to preclude

1 or condone any conduct with regard to projects other than
2 projects under a design-build contract. The department will
3 continue to evaluate other projects based on applicable rules
4 and its traditional conflict of interest standards.

5 (14) Comprehensive development agreement projects. A
6 consultant providing procurement or financial services with
7 respect to a comprehensive development agreement project
8 described in Chapter 27, Subchapter A of this title (relating to
9 Comprehensive Development Agreements) may be a proposer or
10 participate as an equity owner, team member, consultant, or
11 subconsultant of or to a proposer for a design-build project, or
12 may have a financial interest in any of the foregoing entities
13 with respect to a design-build project, under the conditions
14 described in paragraph (8) of this subsection.

15 (d) Rules of contact. In order to provide a fair and
16 unbiased procurement process, a request for qualifications will
17 contain rules of contact regulating communications between
18 proposers or any of its team members and the commission, the
19 department, and third parties involved in the procurement.
20 Communication includes face-to-face, telephone, facsimile,
21 electronic-mail (e-mail), or formal written communication. The
22 rules of contact become effective upon the issuance of the
23 request for qualifications and may be modified in the request

1 for proposals. The rules of contact will include provisions:

2 (1) prohibiting a proposer or any of its team members
3 from communicating with another proposer or its team members
4 with regard to the project, request for qualifications, or
5 request for proposals, or either team's qualifications submittal
6 or proposal;

7 (2) requiring each proposer to designate one or more
8 representatives responsible for contact with the department, and
9 requiring the proposer to correspond with the department
10 regarding the project, request for qualifications, or request
11 for proposals only through the department's authorized
12 representatives and the proposer's designated representatives;

13 (3) prohibiting any ex parte communication regarding
14 the project, request for qualifications, or request for
15 proposals or the procurement with any member of the commission
16 or with any department staff, advisors, contractors, or
17 consultants involved in the procurement until the earliest of
18 the execution and delivery of the design-build contract, the
19 rejection of all qualifications submittals or proposals by the
20 department, or the cancellation of the procurement;

21 (4) permitting communications in exceptional
22 circumstances and designating department personnel authorized to
23 approve those communications, and providing that the

1 restrictions on communications shall not preclude or restrict
2 communications with regard to matters unrelated to the project,
3 request for qualifications or request for proposals, or
4 participation in public meetings of the commission or any public
5 or proposer workshop related to the project, request for
6 qualifications, or request for proposals;

7 (5) designating a department employee not involved in
8 the procurement to act as an ombudsman who is authorized to
9 receive confidential communications, including questions,
10 comments, or complaints regarding the procurement and who, after
11 removing, to the extent practicable, any information identifying
12 the proposer, forwards the communications to the employees
13 designated as the department's authorized representatives; and

14 (6) authorizing the executive director to disqualify a
15 proposer from the procurement and participation in the project
16 at issue or to impose another sanction under Chapter 10 of this
17 title if it is determined that a proposer has engaged in any
18 improper communications in violation of the rules of contact.

19 (e) Exceptions to rules of contact. Notwithstanding
20 subsection (d)(1) of this section:

21 (1) minor or specialty subcontractors that are shared
22 between two or more proposer teams may communicate with members
23 of each of those teams so long as those proposers establish a

1 protocol to ensure that the subcontractor will not act as a
2 conduit of information between the teams; and
3 (2) the prohibition provided by that subsection does
4 not apply to public discussions regarding the project, request
5 for qualifications, or request for proposals at any department
6 sponsored informational meetings.