TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to adopt amendments to §9.30 and §9.31, the repeal of §9.32, and amendments to §§9.33-9.39 and §§9.41-9.43 all relating to Contracting for Architectural, Engineering, and Surveying Services to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted amendments and repeal, 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 §9.30 and §9.31, the repeal of §9.32, and amendments to §§9.33-9.39 and §§9.41-9.43 are adopted and are authorized for filing with the Office of the Secretary of State.

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:

Mark A. Marek

Director, Design Division

Recommended by:

Amadeo Saenz

Executive Director

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Minute Number | Date Passed

Adoption Preamble

The Texas Department of Transportation (department) adopts amendments to §9.30 and §9.31, the repeal of §9.32, and amendments to §§9.33 - 9.39 and §§9.41 - 9.43, concerning contracting for architectural, engineering, and surveying services. The repeal of §9.32 and amendments to §9.30 and §9.31, §§9.33 - 9.39 and §§9.41 - 9.43 are adopted without changes to the proposed text as published in the August 13, 2010 issue of the *Texas Register* (35 TexReg 7019) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS AND REPEAL

Architectural, engineering, and surveying services are procured by the department in accordance with Government Code, Chapter 2254, Subchapter A, and 23 C.F.R. §172.5.

The amendments clarify and refine the language to improve consistency in the interpretation and application of procedures for provider precertification, administrative qualifications, and the selection and evaluation of contracts with architects, engineers, and surveyors. The amendments also recognize an organizational change within the department and identify the role that the regions and regional director perform in the contracting process; clarify who may participate in the short list interview and restrictions on participants; remove

duplicate provisions related to the Historically Underutilized Business/Disadvantaged Business Enterprise (HUB/DBE) program that are located elsewhere in the Texas Administrative Code, and recognize the transfer of the HUB program from the Texas Building and Procurement Commission to the Comptroller of Public Accounts; require an annual update to data in the precertification database to assist in maintaining current employee status and firm contact information; change the deadline for submission of information regarding administrative qualifications; extend the length of time that an audit report will remain in effect from eighteen to twenty-four months, and reduce the administrative qualifications burden on firms with smaller contracts or those that have a smaller participation in larger contracts.

Amendments to §9.30 delete a reference to Transportation Code, §361.032 because the section was repealed by the 79th Texas Legislature, Regular Session, 2005.

Amendments to §9.31 make grammatical changes to the definitions of "administrative qualification," "indefinite deliverable contract," and "team"; delete the definition of "business opportunity programs section of the construction division" as it is no longer used; add definitions for "consultant" and "firm"; revise the definition of "consultant selection team" to clarify

the roles of the team; clarify the definitions of "DBE/HUB goal participation," "debarment certification," "design division," "letter of interest," "long list," "notice of intent," "precertification," "professional engineer," "registered architect," "registered professional land surveyor," "specific deliverable contract," and "request for proposal"; delete the definitions of "DBE/HUB special provision" and "good faith effort" as these are defined in 43 TAC Chapter 9, Subchapter D, Business Opportunity Programs; delete the definition of "FHWA," since it is not referenced in this subchapter; revise the definition of "historically underutilized business" to reflect transfer of the program to the comptroller of public accounts; revise the definition of "managing office" to clarify responsibility and to include a new organization unit within the department; revise the definition of "managing officer" to include the managing officer of the new organization unit within the department; revise the definition of "prime provider" to include both a provider awarded a contract and one that has submitted a letter of interest as the managing firm; make a grammatical change in the definition of "short list," and clarify that the providers on the short list are selected based on the letter of interest score; and revise the definition of "subprovider" to include a provider performing or proposing to perform work through a contractual relationship with the prime provider. Definitions are renumbered for consistency.

Section 9.32 is repealed. The information in subsection (a), relating to the department's use of private sector professional services, is adequately stated in Transportation Code, §223.041. Section 9.32(b) is moved to a more appropriate location in §9.39 and renamed "Projected contracts."

Amendments to §9.33(a)(1)(A) and (2)(A) delete the reference to the term "proposed contract number" and replace it with the term "solicitation number," which is more accurate, since the number used to identify the solicitation may not be used as the actual contract number. Amendments to §9.33(a)(1)(C) add the definite article "the" to the phrase for clarity and change the reference to §9.39 to reflect the change to the section title. Amendments to §9.33(a)(1)(E) and (2)(C) add the time, in addition to the date, to when the letter of interest is due and clarify that this deadline corresponds to when the letter of interest is to be received by the department, not a deadline by which the letter of interest is to be sent. Amendments to §9.33(a)(1)(I) change the reference to the rule regarding the state's HUB program.

Section 9.33(b) is amended to correct punctuation and to remove redundancies. Amendments to §9.33(b)(1) clarify that the letter of interest must be sent prior to the deadline. Letters of

interest must be received by the department before the deadline. Section 9.33(b)(2) is amended to correct a typographical error by changing "LOI" to "NOI," and to eliminate the options to submit a letter of interest by electronic facsimile or by electronic mail. It is the responsibility of the provider to submit the complete letter of interest package including the appropriate number of copies, attachments, and forms by the specified deadline. Currently, a submission by electronic facsimile is allowed for the purpose of meeting the deadline, but the provider is required to submit the originals to be responsive. In response to complaints concerning the accessibility and reliability of this submission method, the department is eliminating this option. Although electronic mail may appear to be a reasonable alternative submission option, it has limitations potentially impacting delivery by the deadline. Examples of common issues with routine electronic mail submission include: 1) the size of the attachments is limited; 2) all incoming electronic mail is subject to evaluation by the department's automated spam and computer virus detection software and may be subjected to quarantine by the software; and 3) problems viewing and printing documents due to incompatibility of software or versions of software used by the department and those used by the provider. Therefore, this option is excluded as a submission option.

Amendments to §9.33(b)(3)(A) and (C) eliminate an exception to precertification for categories of work that are less than 5% of the contract. There are seventy-eight precertification work categories. A typical engineering contract solicitation uses a number of work categories to detail the anticipated work. Because of the number of categories used, the percent of work estimated for many of the categories is less than 5%, allowing the use of non-precertified providers on many of the categories, defeating the purpose for precertification. Therefore, this option is being eliminated. There are circumstances when a subprovider is needed to support work in a precertified work category, but the work that they perform does not have a unique precertified work category of its own. Amendments to §9.33(b)(3)(B) clarify that the attachment is in addition to the maximum pages allowed for the letter of interest. On some larger projects, there is a need for a specialized service that supports precertified or non-listed work categories, but does not have a dedicated precertified work category. These services are performed by specialized subproviders rather than the prime provider. To identify which work category these subproviders are supporting, new language in §9.33(b)(3)(C) requires the identification of the work category being supported in these situations. Subparagraph (C) is further changed to require that the work category that each subprovider supports be identified in the letter of interest. Amendments to §9.33(b)(3)(D)(i)

clarify that the information submitted applies to both the provider and the subprovider and that the attachment is in addition to the maximum number of pages allowed. New §9.33(b)(3)(F) adds a requirement that the provider demonstrate in the letter of interest that it is registered with the appropriate State of Texas licensing board. New subparagraph §9.33(b)(3)(G) clarifies that to be considered, the letter of interest must be received by the department by the deadline indicated in the notice. Amendments to §9.33(b)(4)(A) delete the reference to the term "contract" and replace it with the term "solicitation," which is more accurate, since the number used to identify the solicitation may not be used as the actual contract number. Amendments to §9.33(b)(4)(B)(i) and (ii) clarify that the project manager may only be replaced by a member of the team identified in the letter of interest and who is an employee of the prime provider, and not a team member from a subprovider. Amendments to §9.33(b)(4)(D) clarify the DBE/HUB goal compliance. Amendments to §9.33(b)(4)(E) - (G) rearrange and delete unnecessary requirements.

Section 9.34(a) is restructured. Renumbered §9.34(a)(1)(A) modifies the designation of the consultant selection team chair. Traditionally, the managing officer selected a staff member from the managing office to be the chair of the consultant selection team. With a focus on efficiency and maximizing the use of

limited resources, the department has changed its business model and organizational structure, creating regional centers to support district operations. This change supports the use of a selection team, including the chair, composed of members from multiple managing offices. Amendments to §9.34(a)(2) clarify that at least one of the member of the selection team must be a professional engineer for engineering contracts, a professional engineer or registered or licensed professional land surveyor for surveying contracts, or a registered architect for architectural contracts. Amendments to §9.34(b)(1) and (2) clarify the use of terms. In many cases it is not an individual firm, but a team composed of multiple firms submitting a letter of interest. New §9.34(d)(4) adds new evaluation criterion related to quality assurance and quality control. This criterion has been used as an additional criterion for several years and is now included as a standard criterion. The department will evaluate the provider's quality assurance and quality control at this step in the process or at the proposal step or interview step. The remaining paragraph in the subsection is renumbered.

Amendments to §9.34(f), relating to the short list, clarify that the selection of the short list is based on the letter of interest score. The highest qualified providers are the providers with the highest scores. Amendments to §9.34(g), relating to Notifications, clarify that the department will

notify the prime provider regarding selection or non-selection for the short list. In most cases a letter of interest is submitted by a team, consisting of a number of firms, with a prime provider in the management role and subproviders supporting the effort. The department will notify only the prime provider of selection or non-selection on the short list. New §9.34(h), relating to a short list meeting, is added to this section using current language from §9.35(a) with additional changes. A short list meeting may be held at the discretion of the managing officer, who is most knowledgeable about the complexity of the project. A representative of each provider's team is required to attend the meeting.

Amendments to §9.35 rename the title to "Short List Proposals and Evaluation" to better describe the contents of the section. Subsection 9.35(a) is deleted and relocated to a more appropriate location in §9.34 as new subsection (h). New §9.35(a)(6), (7), and (8) are added to indicate additional information to be provided in the Request for Proposal (RFP). New §9.35(a)(9) identifies the forms required to be submitted with the proposal. Amendments to §9.35(c), relating to receipt of proposals, clarifies that a proposal will not be accepted by electronic mail. It is the responsibility of the provider to submit the complete proposal package including appropriate number of copies, attachments, and forms by the specified

deadline. Although electronic mail may appear to be an attractive alternative submission option, it too has limitations potentially impacting delivery by the deadline. Examples of common issues with routine electronic mail submission include: 1) the size of the attachments is limited; 2) all incoming electronic mail is subject to evaluation by the department's automated spam and computer virus detection software and can be subject to quarantine by the software; and 3) problems viewing and printing documents due to incompatibility of software or versions of software used by the department and those used by the provider. Therefore, this option is excluded as a submission option. New §9.35(d)(5) includes a new evaluation criterion related to quality assurance and quality control. This criterion has been used as an additional criterion for several years and is now included as a standard criterion. The department will evaluate the provider's quality assurance and quality control at the short list determination step, at this step in the process, or at the interview step. Amendments to §9.35(d)(6) require the approval of the Design Division prior to the addition of other criteria for evaluation in the RFP. The purpose is to promote consistency within the department on criteria used to evaluate providers. Amendments to §9.35(e) change the term "scale" to the more correct term "score."

Amendments to §9.36(a) clarify that any proposal and interview

requirements will be contained in the RFP or in the interview and contract guide. This subsection is further amended to delete the suggested option of the use of telephone interviews. Although not precluded, it is not the recommended and preferred format. New §9.36(b) creates interview requirements. New §9.36(b)(3) limits those individuals eligible to participate in the interview to only those team members identified in the letter of interest. New §9.36(b)(4) restricts an individual included as a member on competing teams from participating in multiple interviews. Many providers form teams, consisting of multiple firms, to compete for contracting opportunities. It is common for the same subprovider to participate on multiple competing teams submitting letters of interest. It is also common for the same individual to represent the subprovider on multiple competing teams. If short listed, this individual could potentially participate in multiple interviews for the same contracting opportunity. This provision does not limit a firm from participating on multiple competing teams, but does limit an individual from the firm from participating in multiple interviews. Amendments to §9.36(c)(4), relating to interview and contract guide, change the term "delivered" to "provided" for clarity. New §9.36(c)(7), (8), and (9) are added to indicate additional information to be provided in the interview and contract guide. New §9.36(c)(10) is added to identify forms that are required to be submitted at the interview. The purpose

of the interview is to examine the competence and qualifications of the providers through questioning the provider and evaluating the responses. Section 9.36(d) is amended to provide that a provider team will answer a predetermined written set of questions in the interview. The requirement of the submission of written material to support a presentation for later reference is removed from §9.36(d). The change emphasizes that the evaluation will be based on what the provider's presenter conveys in the allotted time during the presentation. Although allowed, the primary focus of the interview is not on the provider's presentation. Renumbered §9.36(e), relating to "Interview evaluation criteria," is amended to indicate that the consultant selection team will evaluate responses to interview questions and information conveyed in the presentation. With this amendment, §9.36(e)(4) is deleted as it is now redundant. Amendments to §9.36(e)(2) clarify that the project manager and team will be evaluated not only on their experience, but on their demonstrated competence as well. New §9.36(e)(5) is added to include a new evaluation criterion related to quality assurance and quality control. This criterion has been used as an additional criterion for several years and is now being included as a standard criteria. The department will evaluate the provider's quality assurance and quality control at the short list determination step, at the proposal step, or at this step in the process. Amendments to §9.36(e)(6) require the

approval of the Design Division prior to the addition of other criteria for evaluation in the interview and contract guide. The purpose is to promote consistency within the department on criteria used to evaluate providers. Amendments to §9.36(f) change the term "scale" to the more correct term "score."

Amendments to §9.37(c) and (d) correct punctuation errors. The department publishes a list of all selected providers on the department's website; thus, naming the selected providers in the notification letter is redundant. Amendments to §9.37(e)(2) remove the redundancy. Amendments to §9.37(f)(1) and (4) delete language that duplicates the requirements contained in 43 TAC §9.53 and §9.54, relating to Disadvantaged Business Enterprise Program and Historically Underutilized Business (HUB) Program, respectively. Section 9.37(f) is also amended to delete language related to submission of administrative qualifications as it is covered elsewhere in the subchapter. The term "selection" is added to clarify that the selection process complies with the applicable state and federal statutes and regulations. Amendments to §9.37(f)(2)(A) add the term "providers" for clarity and remove the repeated term "automatic extensions." Amendments to §9.37(f)(2)(B)(i) and (ii) clarify that a discretionary extension can only be acted on when it is received. Amendments to §9.37(f)(3)(B) change the reference to the title of §9.39.

Section 9.38 is renamed to "Contract Administration." Subsection (a) is deleted because the language duplicates the requirements contained in 43 TAC §9.53, §9.54, and §9.56 relating to Disadvantaged Business Enterprise Program, Historically Underutilized Business Program, and Contract Compliance, respectively. Amendments to §9.38(b)(1) reorganize the paragraph and clarify the role of the department's and the provider's project managers. Section 9.38(b)(3) - (5), relating to commencement of work, suspension of work, and payment of provider contracts, is deleted because these provisions are contained within and governed by the contract. Renumbered §9.38(c)(1), relating to supplemental agreements, is amended to state that an amendment to the contract will be made through a supplemental agreement. Amendments to §9.38(c)(2) delete the term "original" in reference to the contract, since a supplemental agreement may be used to amend the terms of a previous supplemental. Amendments to §9.38(e)(2)(B) add clarity to the term "products." New subparagraph (H) is added to §9.38 to indicate that an additional condition for contract closeout is the completion and finalization of the final provider performance evaluation. Amendments to §9.38(f)(2) indicate that the project constructability is to be evaluated not less frequently than every 12 months. Amendments to §9.38(f)(4) update citation references.

Section 9.39 is amended to correct grammatical errors and to change the title of the section to "Selection Types, Contract Types, and Projected Contracts." Amendments to §9.39(a)(2)(B) delete the term "randomly." In the case of multiple selections, when there are a greater number of contracts than selected providers, the remaining contracts will be assigned not randomly, but in a logical sequence. Amendments to §9.39(a)(3)(A) clarify that it is the prime provider's project manager that is required to be precertified. Amendments to §9.39(a)(3)(C) clarify the use of terms, substituting the term "provider" for "firm." Amendments to §9.39(b)(1) are made to include the department's new organizational unit, the region. The department created four regional offices, which provide support for multiple districts. New §9.39(c) moves current language from §9.32(b) to this section as a more appropriate location, and renames the subsection "Projected contracts."

Amendments to §9.41(a) clarify that a provider must be precertified to be eligible for selection for a contract and move language from §9.41(a)(2). Section 9.41(a)(1), relating to an exception from precertification when anticipated work for an individual work category less than 5%, is deleted. A typical engineering contract solicitation uses a number of work categories to detail the anticipated work. Because of the

number of categories used, the percent of work estimated for many of the categories is less that 5%, allowing the use of non-precertified providers on many of the categories, defeating the purpose for precertification. Therefore, this option is being eliminated. Amendments to §9.41(c), related to deadline, clarify that the categories are individual work categories. Amendments to §9.41(e)(2) clarify that it is the department that determines whether a firm's employee possesses the skills and experience to meet the precertification requirements. Amendments to §9.41(f)(3) add new subparagraph (D) to indicate that the department will consider any record of unprofessional conduct as a factor in reviewing an application for precertification. This is done to protect the department and the general public.

Amendments to §9.41 add new subsection (h), related to annual renewal, and a new subsection (i), related to inactive status. Currently, each provider is required to maintain its precertification information. If there are any changes, the provider is required to update those changes within 45 days. Currently, there is no mechanism to separate active and inactive firms, firms that no longer exist, or employees that are no longer active. For the information to be correct and current, a method of distinguishing between active and inactive firms is required. New §9.41(h) requires the firm to verify annually

that its information is correct. All firms that respond annually are considered active. New §9.41(i) bars inactive firms from participating in the selection process until they confirm or update their status.

Currently, an exception from administrative qualifications is made for non-engineering firms and provider services in Group 6 - bridge inspection, Group 12 - materials inspection and testing, Group 14 - geotechnical services, Group 15 - surveying and mapping, and Group 16 - architecture. Amendments to §9.42(a) add a list of factors that the department's Audit Office and Design Division will evaluate when exceptions for other provider services are requested. Section 9.42(b) is reworded for clarity and to change the date when the administrative qualifications information is due to the department to the letter of interest due date. Currently, the deadline to submit the information is prior to the execution of the contract, which is the final step in selection process. Because the current deadline is so late in the process, any delay in submission of the information delays contract negotiation, execution, and the ability to commence project work. To minimize the potential for delays in completing the process and initiating work, the deadline is being moved to a point earlier in the process. Amendments to §9.42(c), relating to evaluation factors, clarify that the qualifications being

evaluated are administrative qualifications. Amendments to §9.42(c)(2) delete a reference to deleted §9.42(c)(2)(E). Amendments to §9.42(c)(2)(A) clarify that the accepted auditing standards are government auditing standards and correct the reference to the Federal Acquisition Regulations. Amendments to §9.42(c)(2)(C) modify the reporting period and deadline. This change is intended to assist providers in determining whether existing information is still in effect for a particular solicitation. The length of time that an audit report will remain in effect is extended from eighteen months to twenty-four months from the end of the fiscal period; this extends the time an audit report will remain in effect. Amendments to §9.42(c)(2)(D) reorganize the subparagraph. The changes increase the threshold for the requirement for an indirect cost rate audit from $250,000 to $500,000 for existing firms and for firms in operation for less that one fiscal year. In these cases, to facilitate negotiations, the Audit Office will provide the managing office with an indirect rate, based on indirect cost rates data for providers of comparable size. Section 9.42(c)(2)(E) is deleted. Amendments to §9.42(c)(4) delete the modifiers "other direct" in describing costs. Amendments to §9.42(d) clarify that the Audit Office will only provide the managing office with the administrative qualifications information after the Design Division has notified the Audit Office of the approval of the selection of the provider for the

contract.

Amendments to §9.43(a)(1) clarify that the work categories are the precertification categories.

COMMENTS

No comments on the proposed repeal and amendments were received.

STATUTORY AUTHORITY

The amendments and repeal are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.041, regarding the use by the department of private sector professional services for transportation projects, and Government Code, Chapter 2254, Subchapter A (Professional Services Procurement Act), which sets forth requirements for selection and contracting of architectural and engineering services.

CROSS REFERENCE TO STATUTE

Government Code, Chapter 2254, Subchapter A (Professional Services Procurement Act) and Transportation Code, §223.041.

SUBCHAPTER C. CONTRACTING FOR ARCHITECTURAL, ENGINEERING, AND SURVEYING SERVICES

§9.30. Purpose. This subchapter establishes standard procedures for selection and contract management of architectural, professional engineering, and land surveying service providers in accordance with Government Code, Chapter 2254, Subchapter A, the Professional Services Procurement Act, and Transportation Code, §223.041 [~~, and §361.032~~]. This subchapter only applies to a contract that requires a professional engineer, registered architect, or registered or licensed professional land surveyor. Prime providers and subproviders shall be precertified for contracts that [~~which~~] require architectural, engineering, or surveying services, except as described in §9.33(b)(3) of this subchapter [~~title~~] (relating to Notice of Intent and Letter of Interest).

§9.31. Definitions. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) AASHTO--American Association of State Highway and Transportation Officials.

(2) Administrative qualification--A department process conducted to determine if a prime provider or subprovider [~~can~~]:

(A) can support all the various rates proposed to do the work;

(B) has an indirect cost rate audit that meets department requirements;

(C) has a job cost accounting system adequate for segregating direct and indirect costs; and

(D) is aware of federal cost eligibility and documentation requirements.

(3) Audit Office–-An office of the department whose internal function conducts independent and objective reviews of departmental operations and procedures to ensure that they are functioning as intended and whose external function has the responsibility to audit cost reimbursement/negotiated contracts external to the department including review of indirect cost rate data.

(4) Available personnel--The total number of personnel employed by the provider proposed to be used on the advertised contract.

(5) Border district--One of the geographical areas of the department managed by a district engineer that is headquartered in El Paso, Laredo, or Pharr.

[~~(6) Business opportunity programs section of the Construction Division (CSTB)--The department section that~~

~~certifies DBEs and administers the DBE and HUB programs.~~]

(6) [~~(7)~~] CCIS--Consultant Certification Information System.

(7) [~~(8)~~] Close out--The actions required to close out or complete the contract, including receipt and acceptance of deliverables, resolution of audit findings, receipt of outside approvals if applicable, resolution of other contract-related issues, and issuance of final payment.

(8) Consultant--An individual or entity that provides engineering, architectural, or surveying services.

(9) Consultant selection team (CST)--The department's managing office team that evaluates, scores, and ranks the submitting providers based on demonstrated competence and qualifications [~~selects the long list and short list and evaluates proposals and interviews~~].

(10) Disadvantaged business enterprise (DBE)--Any business certified by the department in accordance with 49 CFR Part 26.

(11) DBE/HUB goal participation--The assigned participation goal for DBE/HUB providers expressed as a percentage of the total cost of the contract.

[~~(12) DBE/HUB special provision--A special provision to the provider contract that identifies DBE/HUB program~~

~~requirements.~~]

(12) [~~(13)~~] Debarment certification--A certification that the provider and its principals are not debarred from participation and are not under consideration for debarment anywhere, and are eligible to perform the contract.

(13) [~~(14)~~] Department--The Texas Department of Transportation.

(14) [~~(15)~~] Department project manager--The department employee designated as the official contact for management of the contract and all correspondence between the department and the provider.

(15) [~~(16)~~] Design Division–-The department division that provides guidance and oversight of [~~responsible for overseeing~~] the contracting process and procedures for [~~professional services, including~~] engineering, architectural, and surveying services.

[~~(17) FHWA--The Federal Highway Administration.~~]

(16) Firm--An individual or entity that provides engineering, architectural, or surveying services.

[~~(18) Good faith effort--A provider must demonstrate to the department's satisfaction, that sufficient effort on its part was made to obtain DBE/HUB participation. Good faith effort is identified in the DBE/HUB Special Provision to the~~

~~contract.~~]

(17) [~~(19)~~] Historically underutilized business (HUB)--Any business so certified by the Comptroller of Public Accounts [~~Texas Building and Procurement Commission~~].

(18) [~~(20)~~] Indefinite deliverable contract--A contract containing a general scope of services that identifies the types of work that will [~~be~~] later be required under work authorizations, but does not identify deliverables, locations, or timing in sufficient detail to define the provider's responsibilities under the contract.

(19) [~~(21)~~] Indirect cost rate guidance--*Uniform Audit and Accounting Guide* for audits of transportation consultants published by AASHTO. This guidance is modified by the *Differences Between TxDOT and AASHTO Requirements* as described on the department's website.

(20) [~~(22)~~] Interview and Contract Guide (ICG)--An instructional document furnished to providers on the short list when a Request for Proposals is not used.

(21) [~~(23)~~] Letter of Interest (LOI)--A letter prepared by [~~from~~] a prime provider [~~to be prepared~~] and submitted in response to and according to instructions in a Notice of Intent.

(22) [~~(24)~~] Licensed state land surveyor--A professional land surveyor described in Occupations Code, Chapter 1071.

(23) [~~(25)~~] Long list--The list of responsive [~~qualified~~] providers submitting an acceptable letter of interest for a contract.

(24) [~~(26)~~] Lower tier debarment certification --A debarment certification form that is completed by subproviders or other lower tier participants.

(25) [~~(27)~~] Lower tier participant--A subprovider or other participant in the contract, other than the state, that is not the prime provider.

(26) [~~(28)~~] Managing office--The division, office, region, or district with the responsibility for selecting the provider [~~awarding~~] and managing the contract.

(27) [~~(29)~~] Managing officer--The division director, office director, regional director, or district engineer of the managing office.

(28) [~~(30)~~] Metropolitan district-- One of the geographical areas of the department managed by a district engineer that is headquartered in Austin, Corpus Christi, Lubbock, Dallas, El Paso, Fort Worth, Houston, Pharr, or San Antonio.

(29) [~~(31)~~] Notice of Intent (NOI)--Formal notice of the department's intent to enter into one or more engineering, architectural, or surveying [~~professional service~~] contracts

with instructions [~~or reference to instructions~~] for preparation and submittal of a Letter of Interest.

(30) [~~(32)~~] Precertification --A review process conducted by the department to determine if a provider [~~prime provider or subprovider~~] meets the minimum technical requirements to perform work identified in a work category.

(31) [~~(33)~~] Prime provider--A provider submitting a letter of interest as the managing firm or that has been awarded a department engineering, architectural, or surveying [~~The provider awarded a department provider~~] contract.

(32) [~~(34)~~] Professional engineer--An individual registered or licensed to practice engineering in the state or states that he or she performs professional services.

(33) [~~(35)~~] Professional services provider (provider)--An individual or entity that provides engineering, architectural, or surveying services.

(34) [~~(36)~~] Registered architect--An individual licensed to practice architecture in the state or states in which [~~that~~] he or she performs professional services.

(35) [~~(37)~~] Registered professional land surveyor--An individual registered or licensed to perform land surveying in the state or states in which [~~that~~] he or she performs professional services.

(36) [~~(38)~~] Request for proposal (RFP)--A request for submittal of a technical proposal from short-listed providers [~~a provider that demonstrates competence and qualifications to perform the requested services, and shows an understanding of the specific contract~~].

(37) [~~(39)~~] Relative importance factor (RIF)--The numerical weight of each evaluation criterion as it relates to a particular contract.

(38) [~~(40)~~] Short List--The list of providers, selected from the long list [~~, selected~~] by the CST, that by score best meet the requirements indicated by the letter of interest.

(39) [~~(41)~~] Short list meeting--A meeting held with the providers on the short list to answer questions regarding the contract and distribute the RFP or ICG prior to submittal of proposals or interviews.

(40) [~~(42)~~] Specific deliverable contract-–A contract containing a specific scope of services that identifies deliverables, locations, and timing in sufficient detail to define the provider's responsibilities under the contract, although additional particulars may later be enumerated in work authorizations, if used.

(41) [~~(43)~~] Subprovider--A provider proposing to perform or performing work through a contractual agreement with the

prime provider.

(42) [~~(44)~~] Team--The provider and all proposed subproviders that [~~who~~] will be working on a particular contract.

[~~§9.32. Provider Services Policy.~~]

[~~(a) Pursuant to Transportation Code, §223.041, it is the policy of the department to use private sector professional services to assist in accomplishing its activities in providing transportation projects. In order to do so, the department may contract the following types of work:~~]

[~~(1) preliminary engineering, design, plan work, specifications, and estimates;~~]

[~~(2) construction engineering and inspection;~~]

[~~(3) bridge inspection and scour analysis services;~~]

[~~(4) environmental engineering, project observation, and inspection;~~]

[~~(5) architectural design, plan work, specifications, and estimates;~~]

[~~(6) architectural observation and inspection;~~]

[~~(7) surveying and mapping; and~~]

[~~(8) other engineering, architectural, or surveying services as defined in Government Code, Chapter 2254, Subchapter~~

~~A.~~]

[~~(b) Organizations. The department will publish quarterly a statewide list of projected contracts for consulting engineering, architectural, and surveying services and will provide upon request, or make available on the department's web site, a copy of each list to community, business, and professional organizations for dissemination to their membership.~~]

§9.33. Notice of Intent and Letter of Interest.

(a) Notice of Intent (NOI).

(1) Electronic notice. Not less than 21 days before the letter of interest due date, the department will post on an electronic bulletin board a notice identifying:

(A) the solicitation [~~proposed contract~~] number;

(B) work category codes;

(C) the type of selection in accordance with §9.39 of this subchapter [~~title~~] (relating to Selection Types, [~~and~~] Contract Types, and Projected Contracts);

(D) the general description of the project and work to be done;

(E) the due date and time [~~for providers to send letters of interest to the department~~];

(F) qualification information if the work type is not an approved category according to §9.43 of this subchapter [~~title~~] (relating to Precertification Requirements);

(G) whether the department has waived the precertification requirement of §9.41 of this subchapter [~~title~~] (relating to Precertification) when the total contract fee for professional services is anticipated to be less than $250,000 on an individual contract;

(H) selection criteria to be used to determine the short list; and

(I) the assigned HUB or DBE participation goal for the contract(s) (The department may assign individual contract DBE or HUB goals pursuant to 49 CFR Part 26 or 34 TAC §20.13 [~~1 TAC §111.13~~], respectively.).

(2) Newspaper notice. Not less than 21 days before the letter of interest due date, the department will publish a notice in a local newspaper within the geographical area of the district, division, or office in which the work will be performed. If the newspaper fails to print the notice, the department will consider the notice posted. The notice will contain:

(A) the solicitation [~~proposed contract~~] number;

(B) the general description of the project and work to

be done;

(C) the due date and time [~~for providers to send letters of interest to the department~~];

(D) the contact person; and

(E) the location of the electronic bulletin board that contains more information.

(b) Letter of interest (LOI).

(1) The provider shall send a letter of interest to the department notifying the department of the provider's interest in the contract prior to [~~not later than~~] the deadline published in the notice.

(2) The following requirements apply unless otherwise specified in the NOI [~~LOI~~]. The letter of interest will consist of a minimum of three and a maximum of five pages plus attachments. The maximum page length will be stated in the notice. Attachments will be restricted to precertification information required in paragraph [~~subsection~~] (b)(3) of this section. The department will not accept a letter of interest by electronic facsimile or electronic mail.

(3) To be considered:

(A) a prime provider or a subprovider[~~,~~] that will be performing work in any individual work category [~~which is 5.0% or more of the contract,~~] must be precertified by the deadline

for receiving the letter of interest in accordance with §9.41 of this subchapter [~~title~~] (relating to Precertification) unless the work category is not approved according to §9.43 of this subchapter [~~title~~] (relating to Precertification Requirements);

(B) a prime provider or subprovider must demonstrate in an attachment to the LOI how it meets the minimum qualifications for work that does not fall within any work category approved according to §9.43 of this subchapter [~~title~~] (The attachment is [~~may be~~] in addition to the maximum pages allowed for the LOI.);

(C) in the LOI, a subprovider that is not precertified must identify both the service to be provided for which there is no dedicated pre-certified work category and the precertified or non-listed work category that the service supports [~~if the work in any individual work category as shown in the notice is less than 5.0% of the contract, a provider or subprovider that is not precertified must demonstrate in an attachment to the LOI how it meets the minimum requirements specified for the work category on the department's web site or how it possesses the knowledge and skill to perform the work in those categories (The attachment may be in addition to the maximum pages allowed for the LOI.)~~];

(D) if the total contract fee for professional services is anticipated to be less than $250,000 on an individual

contract and the department has waived the precertification requirement of §9.41 of this subchapter [~~title~~] (relating to Precertification), then a provider or subprovider that:

(i) is not precertified must submit an attachment with the LOI that [~~which~~] describes how the prime provider or subprovider [~~firm~~] meets the minimum requirements specified for the work category approved according to §9.43(b) of this subchapter [~~title~~] or how it possesses the knowledge and skill to perform the work in those categories (The attachment is [~~may be~~] in addition to the maximum pages allowed for the LOI.); or

(ii) is precertified must submit a LOI, but is not required to submit an attachment describing its qualifications in precertified categories (If the firm proposes to do work in categories in which it has not been precertified, then it must submit an attachment describing how the firm meets the minimum requirements or how it possesses the knowledge and skill to perform the work in those categories.); [~~and~~]

(E) the proposed team must demonstrate that they have a professional engineer, architect, or surveyor registered or licensed in Texas who will sign and/or seal the work to be performed on the contract;[~~.~~]

(F) the provider must demonstrate that it is registered with the appropriate State of Texas licensing board, such as

the:

(i) Texas Board of Professional Engineers;

(ii) Texas Board of Architectural Examiners; or

(iii) Texas Board of Professional Land Surveying; and

(G) the letter of interest is received by the department by the deadline specified in the notice.

(4) The letter of interest shall include:[~~;~~]

(A) the solicitation [~~contract~~] number;

(B) an organizational chart containing:

(i) the prime provider's project manager (who may be replaced during the selection process and before contract execution only by another person proposed in the LOI for the prime provider [~~provider's team~~] and approved by the director of the Design Division); and

(ii) names of the prime provider's and any subprovider's key personnel (who may be replaced during the selection process and before contract execution only by another person from the [~~prime provider's or subprovider's~~] team proposed in the LOI and approved by the CST);

(C) information addressing the criteria stated in the notice;

(D) evidence of compliance with the assigned DBE/HUB goal [~~through the prime provider and subproviders identified on~~

~~the team, or a written commitment to make a good faith effort to meet the assigned goal~~];

(E) name and contact information for references from the department or other entities; and [~~similar project related experience;~~]

(F) other pertinent information addressed in the notice. [~~name and contact information for references from the department or other entities; and~~]

[~~(G) other pertinent information addressed in the notice.~~]

§9.34. Short List Determination.

(a) Composition of the Consultant Selection Team. [~~The CST shall be composed of:~~]

(1) The CST shall be composed of:

(A) [~~(1)~~] the department [~~managing office~~] staff member designated [~~by the managing officer~~] to be the chair;

(B) [~~(2)~~] the department project manager; and

(C) [~~(3)~~] at least one other department employee designated by the managing officer. [~~; and~~]

(2) [~~(4)~~] At least [~~a minimum of~~] one CST member must be a professional engineer for engineering contracts;[~~,~~] a [~~minimum of one~~] professional engineer or registered or licensed

professional land surveyor for surveying contracts; [~~,~~] or [~~and~~] a [~~minimum of one~~] registered architect for architectural contracts.

(b) Qualification for long list.

(1) The department may disqualify a team [~~firm~~] if the department or the team's [~~firm's~~] references have knowledge that a [~~the~~] firm on the team or an employee of a [~~the~~] firm on the team has a record of unprofessional conduct, including being cited by [~~, but not limited to, whether~~] the appropriate licensing board [~~has cited the firm or an employee of the firm~~] for a violation of its rules concerning conduct.

(2) If a team [~~firm~~] is not disqualified under paragraph (1) of this subsection, the CST will review each letter of interest to see if it meets the submittal requirements and precertification requirements of §9.33(b)(3) of this subchapter (relating to Notice of Intent and Letter of Interest).

(c) Long list evaluation. The CST will review the information submitted in the letters of interest and evaluate each team on the long list to determine the short list based on the criteria described in subsection (d) of this section and as listed in the notice.

(d) Criteria. The CST will consider the following criteria in its review of long-listed providers:

(1) project understanding and approach;

(2) the provider project manager's experience with similar projects;

(3) similar project related experience of the task leaders responsible for the major work categories identified in the notice; [~~and~~]

(4) the provider's Quality Assurance/Quality Control program, if not evaluated under §9.35 or §9.36 of this subchapter (relating to Short List Proposals and Evaluation and Short List Interviews and Evaluation, respectively); and

(5) [~~(4)~~] other criteria approved by the Design Division and listed in the notice.

(e) Score. The CST will assign a relative importance factor (RIF) weight to each criterion. The RIF total for all criteria will equal 100. Each criterion will be scored separately on a 0-10 point scale with 10 considered the best qualified. The maximum possible score that a CST member may give is 1000 points.

(f) Short list. Selection of the short list will be made using the LOI score. For individual contract selections, the [~~CST will prepare a~~] short list shall contain [~~containing~~] a minimum of three of the most highly qualified providers, by score, unless fewer than three qualified providers submitted a

letter of interest. For multiple contract selections, the short list shall contain a minimum number of providers equal to the desired number of contracts plus three unless fewer than the desired minimum submitted a letter of interest.

(g) Notification. The department will notify a prime provider [~~firm~~] submitting a letter of interest that it was or was not selected for the short list. If a prime provider [~~firm~~] is selected for the short list, the department will either notify it that a meeting will be held, or if a meeting is not held, the department will provide a Request for Proposal (RFP) or an Interview and Contract Guide (ICG). The department will also notify selected prime providers [~~firms~~] of any additional required reference information and the deadline for submission.

(h) Short list meeting. The managing office may require a short list meeting during the selection process for providers advancing to the short list. A provider will be dropped from further consideration if the provider's representative fails to attend the short list meeting.

§9.35. Short List [~~Meeting,~~] Proposals[~~,~~] and Evaluation.

[~~(a) Short list meeting. The managing office may require a short list meeting which will include an explanation of the proposal and/or the interview format and requirements. The~~

~~department will furnish a Request for Proposal (RFP) or an Interview and Contract Guide (ICG) to providers on the short list either prior to or at the short list meeting. If a short list meeting is held, the department will not accept proposals from or conduct interviews with providers that did not have a representative at the short list meeting.~~]

(a) [~~(b)~~] Request for proposals. If a written proposal is required, the managing office will provide an RFP to the short listed providers. The RFP will include:

(1) instructions for:

(A) a written proposal preparation and/or the interview process; and

(B) submittal of the proposal;

(2) scope of services to be provided by the department;

(3) scope of services to be provided by the provider;

(4) proposed contract duration;

(5) proposed method of payment;

(6) short list meeting information, if applicable;

(7) administrative qualification requirement information;

(8) insurance requirement information;

(9) forms to be submitted with the proposal, if applicable, including:

(A) [~~(6)~~] a debarment certification form;

(B) [~~(7)~~] a lower tier debarment certification form;

(C) [~~(8)~~] a lobbying certification/disclosure form; and

(D) other forms as specified in the RFP;

(10) [~~(9)~~] any special contract requirements; and

(11) [~~(10)~~] the interview format and requirements if interviews are conducted subsequent to the proposal.

(b) [~~(c)~~] Proposal format. When a written proposal is required, the proposal shall be limited to the specific length and information outlined in the RFP.

(c) [~~(d)~~] Receipt of proposals. A proposal must be received by the date, time, and place specified in the RFP. The department will not accept a proposal by electronic facsimile or by electronic mail.

(d) [~~(e)~~] Proposal evaluation criteria. The CST will evaluate proposals based on the following criteria:

(1) understanding of scope of services;

(2) experience of the project manager and project team;

(3) ability to meet the project schedule;

(4) if no interview is required, past performance scores included in the database for department contracts or references identified in the LOI or provided in response to an additional request; [~~and~~]

(5) the provider's Quality Assurance/Quality Control

program, if not evaluated under §9.34 or §9.36 of this subchapter (relating to Short List Determination and Short List Interviews and Evaluation, respectively); and

(6) [~~(5)~~] other criteria approved by the Design Division and listed in the RFP.

(e) [~~(f)~~] Proposal evaluation score [~~scale~~]. The CST will assign a RIF weight to each criterion. The RIF total for all criteria will equal 100. Each criterion will be scored separately on a 0-10 point scale with 10 considered the best qualified. The maximum possible score that a CST member may give is 1000 points.

§9.36. Short List Interviews and Evaluation.

(a) Interviews. The CST may conduct interviews with the providers on the short list if a written proposal is required. If a written proposal is not required, then an interview will be conducted, and the managing office will give participating providers an Interview and Contract Guide. If proposals and interviews will be required, proposal and interview requirements can be included in the RFP or in the Interview and Contract Guide. [~~The CST may elect to perform telephone interviews. In order for a member of the CST to score a provider, the member must be present for all interviews. The prime provider's~~

~~project manager is required to be present for the interview.~~]

(b) Interview attendance.

(1) In order for a member of the CST to score a provider, the member must be present for all interviews.

(2) The prime provider's project manager is required to be present for the interview.

(3) To participate in the interview with the project manager, a team member must be identified in the prime provider's LOI.

(4) An individual who has been proposed as a team member in more than one competing LOI may only participate in one interview.

(c) [~~(b)~~] Interview and Contract Guide. The ICG includes:

(1) a description of the interview format;

(2) instructions for content and subject matter for a provider's presentation, if required;

(3) the scope of services to be provided by the department;

(4) the scope of services to be provided [~~delivered~~] by the provider;

(5) the proposed contract duration;

(6) the proposed method of payment;

(7) short list meeting information, if applicable;

(8) administrative qualification requirement information;

(9) insurance requirement information;

(10) forms to be submitted at the interview, if applicable, including:

(A) [~~(7)~~] a debarment certification form;

(B) [~~(8)~~] a lower tier debarment certification form;

(C) [~~(9)~~] a lobbying certification/disclosure form; and

(D) other forms as specified in the ICG; and

(11) [~~(10)~~] any special contract requirements.

(d) [~~(c)~~] Interview format [~~structure~~]. The interview allows providers to demonstrate their understanding of the project and knowledge of applicable rules, regulations, codes, and special information to be gathered. The CST may allow a provider team to make a presentation [~~with written material for the CST to reference in evaluating the interview~~]. The CST will [~~may~~] require a provider team to answer a predetermined written set of questions in the interview.

(e) [~~(d)~~] Interview evaluation criteria. The CST will evaluate responses to interview questions and information conveyed in the presentation [~~interviews~~] based on the following criteria:

(1) understanding of the scope of services;

(2) experience and demonstrated competence of the project

manager and project team;

(3) ability to meet the project schedule;

[~~(4) responses to interview questions;~~]

(4) [~~(5)~~] past performance scores included in the database for department contracts or references identified in the LOI or provided in response to an additional request; [~~and~~]

(5) the provider's Quality Assurance/Quality Control program, if not evaluated under §9.34 or §9.35 of this subchapter (relating to Short List Determination and Short List Proposals and Evaluation, respectively); and

(6) other criteria approved by the Design Division and listed in the RFP or Interview and Contract Guide [~~ICG~~].

(f) [~~(e)~~] Interview evaluation score [~~scale~~]. The CST will assign a RIF weight to each criterion. The RIF total for all criteria will equal 100. Each criterion will be scored separately on a 0-10 point scale with 10 considered the best qualified. The maximum possible score that a CST member may give is 1000 points.

§9.37. Selection.

(a) Basis of final selection.

(1) If a proposal and interview are both required, the final selection will be made by using the CST proposal score for

30% of the total score and the interview score for 70% of the total score.

(2) If an interview is not required, the final selection will be made by using the written proposal score.

(3) If a written proposal is not required, the final selection will be made by using the interview score.

(b) Tie scores. In the event of a tie, the managing officer will break the tie using the following method.

(1) The first tie breaker, if needed, will be the score for the experience of the project manager and the project team.

(2) The second tie breaker, if needed, will be the score for ability to meet the proposed project schedule.

(3) The third tie breaker, if needed, and if an interview was conducted, will be the score for the responses to interview questions; if proposals were submitted, it will be the score for understanding of scope of services.

(4) The fourth or additional tie breakers, if needed, and if an interview was conducted, will be the next criterion listed; if proposals were submitted, it will be the next criterion listed. The remaining criteria should be compared in the order listed until the tie is broken.

(5) If there is still a tie, the provider will be chosen by random selection.

(c) Selection summary. The CST will prepare a contract evaluation summary containing the scores of the prime providers on the short list[~~,~~] for consideration by the managing officer.

(d) Submittal of selection. The managing officer will submit the contract evaluation summary, evaluation documentation, certification that the procedures provided by this subchapter were used, and recommendation for selection to the Design Division for review. If the procedural review is acceptable, the executive director or the director's designee will concur with the selection.

(e) Notification. The department will:

(1) prepare a letter to notify the provider selected for contract negotiation and arrange a meeting to begin contract negotiations;

(2) prepare a letter to each of the providers remaining on the short list that were not selected[~~, naming the provider that was selected~~]; and

(3) publish the short list and the provider selected for a contract on an electronic bulletin board.

(f) Negotiations.

(1) Selected provider. The department will enter into negotiations with the selected provider. The provider shall submit the information required for the contract. [~~The provider~~

~~shall also provide a list of all suppliers and subproviders contacted relative to this project in accordance with §9.53(d)(5) of this title (relating to Disadvantaged Business Enterprise (DBE) Program). Any information necessary to meet the administrative qualification requirements found in §9.42 of this title (relating to Administrative Qualification), that has not been submitted to the department prior to selection shall be submitted so that the department may determine the fairness and reasonableness of the contract price.~~] This selection process complies with Transportation Code, §223.041, Government Code, Chapter 2254, Subchapter A, and 23 CFR §172.5(a)(4). State funded architectural contracts are based on percentage of construction cost as provided in the General Appropriations Act. Pursuant to 23 CFR §172.5(c), federally funded contracts are not based on percentage of construction cost.

(2) Negotiation period. The provider shall sign the contract within 30 working days from the date of notification to the provider. An extension must be authorized before the expiration of the negotiation period or previous extension. Extensions or schedules will be used as provided in this paragraph.

(A) Automatic extensions. Providers [~~Automatic extensions~~] for multiple contracts selected under one

advertisement in which negotiations will be conducted at the same time are entitled to an automatic extension of the initial negotiation period. For each individual contract that has been awarded as part of a multiple contract package and that is anticipated to be valued at:

(i) $1 million or more each, the initial negotiating period is extended by five working days for each contract; or

(ii) less than $1 million each, the initial negotiating period is extended by five working days for every two contracts.

(B) Discretionary extensions. Discretionary extensions of the initial negotiating period may be granted to providers.

(i) Upon receipt [~~submission by the managing officer~~] of sufficient written justification prepared by the managing officer indicating that adequate progress is being made to conclude successful negotiations, the director of the Design Division will grant an extension not to exceed 30 working days.

(ii) Upon receipt [~~submission by the managing officer~~] of sufficient written justification prepared by the managing officer establishing that additional time to conduct negotiations is necessary due to the uniqueness or complexity of the project scope of services, the executive director or the director's designee not below the level of assistant executive

director may grant additional extensions.

(C) Unique negotiating schedules. The director of the Design Division may approve a unique negotiating schedule submitted by the managing officer prior to the start of negotiations.

(3) Selection of alternative providers. If the department and the selected provider are unable to execute a satisfactory contract containing a fair and reasonable price within the allotted time period, the managing officer shall end negotiations with that provider and commence negotiations with alternative providers.

(A) Single contract selection. If negotiations are ended, the department shall negotiate with the next highest ranked provider and shall follow in this sequence through the third highest ranked provider. If a satisfactory contract containing a fair and reasonable price is not negotiated with any of the three highest-ranked providers within the time frame specified in this section, the proposed contract shall be canceled. If the proposed contract is canceled, it may be readvertised.

(B) Multiple contract selection. Beginning with the next highest ranked provider, after the last provider selected for the multiple contracts, and within the acceptable range of

scores as required by §9.39 of this subchapter (relating to Selection Types, [~~and~~] Contract Types, and Projected Contracts), negotiations shall be undertaken until a satisfactory contract containing a fair and reasonable price is agreed upon. If a satisfactory contract is not negotiated with any of the providers within the acceptable range of scores within the time frame specified in this section, the proposed contract shall be canceled. If the proposed contract is canceled, it may be readvertised.

[~~(4) DBE/HUB goal documentation. The selected provider shall provide information to the department documenting its satisfaction or attempts to satisfy the DBE/HUB goal. The department will cease negotiation with the provider and enter into negotiation with the next provider in the order of preference for this contract if the selected provider fails to submit the required documentation. The selected provider shall submit to the managing officer, through the department's project manager, for review and acceptance:~~]

[~~(A) names and addresses of DBE/HUB firms that will participate in the contract;~~]

[~~(B) a description of the work that each DBE/HUB will perform;~~]

[~~(C) the dollar amount of the participation of each~~

[~~DBE/HUB firm participating;~~]

[~~(D) written documentation of the providers commitment to use a DBE/HUB subprovider whose participation it submits to meet a contract goal;~~]

[~~(E) written confirmation from the DBE/HUB that they will participate; and~~]

[~~(F) when applicable, evidence of good faith efforts.~~]

(g) Appeal. A provider may file a written complaint concerning the selection process with the executive director or the director's designee.

§9.38. Contract Administration [~~Management~~].

[~~(a) DBE/HUB participation.~~]

[~~(1) HUB program goals may be satisfied by a HUB prime provider. DBE prime providers may receive DBE credit for work performed by its own forces or performed by a DBE subprovider, but not by a non-DBE subprovider.~~]

[~~(2) If the prime provider or the subprovider is a DBE/HUB, the DBE/HUB provider and subprovider may subcontract in accordance with §9.56 of this title (relating to Contract Compliance).~~]

(a) [~~(b)~~] Subcontracts. A prime provider shall perform at least 30% of the contracted work with its own work force unless

approved by the director of the Design Division when the work is so specialized that the prime provider cannot perform at least 30% of the work.

(b) [~~(c)~~] Operations.

(1) Management responsibility. [~~The department's project manager will be designated by the managing officer.~~]

(A) The department's project manager is the department's official contact for management of the contract between the department and the provider.

(B) [~~(2) Project manager.~~] The prime provider's project manager is the provider's official contact for management of the contract between the department and the provider. The provider's project manager may not be changed without prior written consent of the department.

[~~(3) Commencement of work. The provider shall not proceed with any contract work until advised in writing by the department to proceed.~~]

[~~(4) Suspension of work. The department may suspend the work by:~~]

[~~(A) verbally notifying the provider; and~~]

[~~(B) providing written notification of the suspension, including:~~]

[~~(i) identifying the reason for suspension; and~~]

[~~(ii) identifying approximate length of suspension and payment based on actual work completed as of the date of suspension.~~]

[~~(5) Payment on provider contracts. Payment for eligible costs will be made within 30 days after receiving a correct invoice. Payment may be withheld pending verification of satisfactory work performed. To receive payment for services, the provider shall submit to the department project manager:~~]

[~~(A) a monthly progress report;~~]

[~~(B) an itemized and certified invoice; and~~]

[~~(C) a DBE/HUB report (The CSTB may require proof of DBE/HUB use, including submittal of canceled checks that are properly identified by department project number or contract number).~~]

(2) [~~(6)~~] Interim audit. The department may perform interim audits.

(c) [~~(d)~~] Supplemental agreements.

(1) An amendment to the contract will be made through a supplemental agreement. [~~The original executed contract will require a supplemental agreement if:~~]

[~~(A) additional funding is required in accordance with terms of the contract;~~]

[~~(B) additional time is needed to complete work in~~

~~progress; or~~]

[~~(C) changes in scope of services are necessary.~~]

(2) The supplemental agreement will be executed:

(A) prior to the expiration date of the [~~original~~] contract;

(B) prior to exceeding the contract amount; and

(C) prior to performance of unauthorized work.

(d) [~~(e)~~] Indefinite deliverable contract work authorization. If the department and the provider are unable to execute a satisfactory work authorization containing a fair and reasonable price, the department project manager shall end negotiations with that provider. Only after negotiations have been ended will the department contact another provider with an indefinite deliverable contract to initiate negotiations for the work.

(e) [~~(f)~~] Contract close out.

(1) Final audit. The department's Audit Office may perform an audit.

(2) Time. A contract is ready for close out when:

(A) services have been provided;

(B) products, including data and deliverables, have been received and accepted;

(C) approval has been received from the U.S. Department

of Transportation, when federally funded;

(D) payments have been made;

(E) audit findings have been resolved;

(F) the contract expires unless extended by supplemental agreement; [~~and~~]

(G) the final DBE/HUB report has been submitted; and

(H) the final provider performance evaluation is completed and finalized.

(f) [~~(g)~~] Provider performance evaluations.

(1) The department will document demonstrated competence and qualifications by evaluating the prime provider and project manager's performance.

(A) The evaluation shall be conducted annually at twelve month intervals during ongoing contract activity, upon completion of a contract, or when the managing office determines that the work is behind schedule or not being performed according to the contract.

(B) Optional evaluations may be conducted upon completion of a contract phase.

(2) The department may evaluate project constructability not less than every 12 months during project construction and upon completion of the construction contract.

(3) The department will give a copy of the performance

evaluation to the prime provider for review and comment. If the prime provider responds with comments on its evaluation, the department will include the comments in the CCIS database identified in §9.41 of this subchapter [~~title~~] (relating to Precertification).

(4) Performance evaluation scores will be entered into the CCIS database and may be used in determining the qualifications of the prime provider or subprovider in accordance with §9.35 or §9.36 of this subchapter (relating to Short List Proposals and Evaluation and Short List Interviews and Evaluation, respectively) [~~(relating to Short List Meeting, Proposals, and Evaluation) or §9.36 (relating to Short List Interviews and Evaluation) of this subchapter~~].

§9.39. Selection Types, [~~and~~] Contract Types, and Projected Contracts.

(a) Selection types. The department will perform three types of contract selections.

(1) Individual contract selection. One contract will result from the contract notice.

(2) Multiple contract selection. More than one contract of similar work types will result from the contract notice. The notice will indicate the number and type of contracts to result

from the advertisement, and specify a range of scores for prime providers that will be considered qualified to perform the work.

(A) If more prime providers fall within the specified range than the anticipated number of contracts, prime providers will be selected in order of ranking in the evaluation process.

(B) If the anticipated number of contracts is greater than the number of prime providers that fall within the specified range, then each prime provider will be selected for one contract. Each of the remaining contracts will be [~~randomly~~] awarded to the prime providers that [~~who~~] fall within the specific range until all providers have two contracts or all contracts have been awarded. If there is still an excess of contracts, then the process repeats.

(3) Emergency contract selection. To utilize the emergency selection procedure, the executive director of the department or the director's designee must certify in writing that there is good cause to believe that an emergency situation exists, including safety hazards or a substantial disruption of the orderly flow of traffic and commerce for the department.

(A) Eligibility. To be eligible to work on an emergency contract, a prime provider's [~~firm's~~] project manager must be precertified pursuant to §9.41 of this subchapter [~~title~~] (relating to Precertification) or must complete a

precertification application form prescribed by the department.

(B) Notification.

(i) After an emergency is certified, the managing officer will review the department's file of eligible firms. If there are [~~is~~] a sufficient number of firms, the managing officer will notify at least three of those firms.

(ii) Consistent with and contingent upon the nature of the emergency, the managing officer may contact prospective firms by telephone, letter, facsimile [~~telefacsimile~~], or other appropriate form of communication.

(iii) The managing officer will inform each firm of the nature of the emergency and furnish specifications for the remedy, including time constraints, and any additional information needed for the firm to prepare a project team.

(C) Selection. The department will select the provider [~~firm~~] based on demonstrated competence and qualifications. The department will negotiate [~~at~~] a fair and reasonable price with the top-ranked provider. If agreement cannot be reached, the department will negotiate with the subsequent firms, in order of selection, until an agreement is reached. If no eligible firm is able to provide the required type of service, the managing officer may take any measure necessary to identify and locate an available firm that [~~who~~] is able to provide the required

service. If selected, the prospective contractor thus identified must complete the precertification application prior to execution of the contract.

(b) Contract types. The department will offer two types of contracts.

(1) Indefinite deliverable contract. This contract may be for an individual project or for multiple projects. The typical type of work will be described in the notice. The total of the contract work authorizations shall not exceed $5,000,000 in a division, region, metropolitan district, or border district of the department, unless approved by the Texas Transportation Commission prior to NOI publication. The total of the contract work authorizations shall not exceed $2,000,000 in a district of the department other than a metropolitan or border district. The contract period [,] in which initial work authorizations may be issued [,] may not be longer than two years from the date of contract execution, unless approved by the Texas Transportation Commission prior to NOI publication. Supplemental agreements may be issued to extend the contract period beyond the two years, but only as necessary to complete work on an initial work authorization.

(2) Specific deliverable contract. This contract may be for an individual project or for multiple projects. The notice

will describe the specific deliverables to be procured under the contract. There is no dollar limit on the size of the contract, and there is no time restriction on the contract period.

(c) Projected contracts. The department will publish quarterly a statewide list of projected contracts for consulting engineering, architectural, and surveying services and will provide upon request, or make available on the department's web site, a copy of each list to community, business, and professional organizations for dissemination to their membership.

§9.41. Precertification.

(a) Contract Eligibility. To be eligible for selection [~~to perform work~~] in the categories approved according to §9.43 of this subchapter [~~title~~] (relating to Precertification Requirements), a [~~prime~~] provider [~~and a subprovider~~] must be precertified under [~~in accordance with~~] this section unless the department has waived the precertification requirements for a contract that is less than $250,000.[~~:~~]

[~~(1) the anticipated work in an individual work category is less than 5.0% of the contract; or~~]

[~~(2) the department has waived the precertification requirements for a contract that is less than $250,000.~~]

(b) Application.

(1) Registered architects, registered professional engineers, registered or licensed professional surveyors, and other technical staff who desire to be precertified by the department to perform work on architectural, engineering, or surveying contracts[,] shall submit a completed precertification application to the Design Division for review and determination of precertification status.

(2) An application form prescribed by the department [,] may be obtained by contacting the Texas Department of Transportation, Design Division, 125 East 11th Street, Austin, Texas 78701-2483, or through the department's web site.

(3) The application form will request information concerning the experience of the individual.

(4) The precertification web site will include:

(A) a copy of the application form;

(B) instructions concerning submittal of information for precertification, including format and length restrictions for data to be submitted; and

(C) the requirements for precertification in each category.

(5) The submittal date for review deadlines as described in subsection (f) of this section shall be the date the

precertification application is received by the Design Division.

(6) The precertification of a provider by the department does not guarantee that work will be awarded to that provider.

(c) Deadline. When precertification is required as described in subsection (a) of this section, prime providers and subproviders must be precertified in the individual work [~~technical~~] categories by the deadline for receipt of the letter of interest to be eligible for selection. The department will not delay the consultant selection process or contract execution for a prime provider or subprovider that has not been precertified.

(d) Data management. The department will maintain the CCIS containing qualification information submitted in the precertification application by the firm for an employee.

(e) Firm and employee status.

(1) A firm may be precertified in a work category if the firm has a current employee precertified in the category.

(2) A firm employee may be precertified in a work category if the department determines the employee possesses the skills and experience to meet the requirements. An employee is not precertified based on the firm's experience.

(3) A precertification will transfer with the employee if the employee leaves the firm.

(4) The department may review a firm's information to evaluate whether the support, equipment, and other resources necessary to do the work are provided to the employee.

(5) A firm with one employee who is precertified in multiple work categories is precertified in those categories. When required, prime providers and subproviders must be precertified in the categories of work they will be performing; however, a provider or subprovider is not required to be precertified in every category of work involved in the contract, unless it will be performing in a lead capacity on all categories of work.

(f) Review process.

(1) An individual, and therefore the firm, will be precertified within 60 days of receipt of complete and accurate information for the submittal or notified in writing within the same time period that they did not meet the requirements for precertification or that additional submittals will be required for review.

(2) If the submittal is incomplete, a firm will be requested to submit additional information for review. The firm shall submit such information within 30 days of receipt of the department's request for such information. If the information is not provided within 30 days after receipt of the request, the

application for precertification will be processed with the information available. The department will make a determination on precertification status within 60 days of receipt of the additional information.

(3) The department will consider the following factors in reviewing the precertification applications:

(A) current license or registration;

(B) personal experience and training; [~~and~~]

(C) work category requirements as maintained on the department's web site; and [~~.~~]

(D) any record of unprofessional conduct.

(g) Updates. A firm must report any change in the information included in the original application no later than 45 days after the change occurs.

(h) Annual renewal. To maintain eligibility under subsection (a) of this section, no later than March 31 of each year, the provider must renew the precertification of the provider and the provider's employees. The provider shall submit its annual renewal through CCIS.

(i) Inactive status. Any provider that has not renewed by the annual renewal deadline is inactive. When precertification is required as described in subsection (a) of this section, a provider in an inactive status on the deadline for receipt of

the letter of interest is not eligible for selection. To become active and eligible the provider must renew under subsection (h) of this section.

(j) [~~(h)~~] Appeal. A firm may appeal denial of precertification by submitting additional information within 30 days of receipt of written notification of denial to the Design Division. This information shall justify why the applicant meets the requirements for precertification. The department will review the information and make a determination regarding precertification. A firm may file a written complaint regarding precertification denial with the executive director or his or her designee.

§9.42. Administrative Qualification.

(a) Exception. Administrative qualification is not necessary for non-engineering firms and provider services included in Group 6 - bridge inspection, Group 12 - materials inspection and testing, Group 14 - geotechnical services, Group 15 - surveying and mapping, or [~~and/or~~] Group 16 - architecture as listed on the department's web site for precertification. Provider [~~Providers~~] compensation for these services is typically based on units of service rates. The Audit Office and the Design Division may agree to grant exceptions for other

provider services on a case by case basis. In determining whether to grant an exception, the Audit Office and the Design Division may consider the nature of the services to be provided, the method of payment to be used, the reasonableness and feasibility of requiring an audited indirect cost rate, and any other relevant factors. Any request for an exception must be received by the Audit Office prior to the due date of the letter of interest.

(b) Time to provide information. Each prime provider and subprovider must submit the [~~Prime providers and subproviders may provide~~] information described in this section no later than the LOI due date. [~~prior to selection. If the information is not furnished before selection, it must be provided after selection and before contract execution.~~] The administrative qualification submittal is a separate submittal from the precertification submittal, and is submitted to the Texas Department of Transportation, Audit Office, 125 E. 11th Street, Austin, Texas 78701-2483. Administrative qualification submittals will not be received by the Design Division. [~~Submission prior to selection is encouraged to facilitate timely contract execution requirements.~~]

(c) Evaluation factors. The department will consider the following factors in determining administrative qualifications

of prime providers or subproviders.

(1) Adequate accounting system. The prime provider or subproviders must demonstrate the existence of an adequate accounting system that meets the department's audit requirements, as evidenced by certification by an independent certified public accountant or governmental agency. The system must be adequate to support all billings made to the department and other clients.

(2) Indirect cost rate audit. The prime provider or subprovider must submit an indirect cost rate audit for the time period specified in subparagraph (C) of this paragraph performed by an independent certified public accountant, an agency of the federal government, another state transportation agency, or a local transit agency except as provided in subparagraph [~~subparagraphs~~] (D) [~~and (E)~~] of this paragraph. If the audit is performed by an independent certified public accountant, the provider or subprovider must assure that the department will be given access to the audit work papers.

(A) The audit report shall include statements that the audit was performed in accordance with generally accepted government auditing standards and the indirect cost rate was developed in accordance with the Federal Acquisition Regulations, 48 CFR Part 31.

(i) AASHTO Uniform Audit and Accounting Guide is acceptable guidance for the audit of the indirect cost rate.

(ii) Department requirements that differ from the AASHTO guide are contained in the Indirect Cost Rate Guidance available through the department's website.

(B) The department may perform indirect cost rate audits of any prime provider or subprovider under contract to, or desiring to do business with, the department. These audits will be conducted consistent with the criteria outlined in this subsection.

(C) The end of the fiscal period of the audit report must be within twenty four [~~eighteen~~] months of the date the notice was posted [~~provider selection~~].

(D) The department may contract with a prime provider or allow utilization of a subprovider lacking an approved indirect cost rate audit if[~~:~~] the prime provider or subprovider has been in operation, as currently organized, for less than one fiscal year or the estimated value of its portion of the contract is not more than $500,000.

[~~(i) the value of the contract is less than $250,000;~~]

[~~(ii) the prime provider or subprovider can adequately document and support all proposed costs; and~~]

[~~(iii) all other qualification requirements of this subsection are met.~~]

[~~(E) Prime providers or subproviders who have been in operation with an accounting system acceptable to the department, for less than one fiscal year since organization or comprehensive reorganization shall prepare a projected indirect cost rate for the first fiscal year of operation. The indirect cost rate will be supported by estimated expenditures and be in accordance with the Indirect Cost Rate guidance referred to in subparagraph A of this paragraph. The department's Audit Office will review the estimate and establish a provisional indirect cost rate for use in contract negotiations.~~]

(3) Salary rates. The department will consider current salary rates, range of rates, or average rates by job classification.

(4) Direct costs. The department will consider [~~other direct~~] costs such as copies, Computer Aided Design and Drafting (CADD), or other direct costs.

(d) Provision of administrative qualification information. The department's Audit Office will provide administrative qualification information to the managing office when notified [~~requested~~] by the Design Division [~~a managing office~~] upon selection approval of a provider for the contract, for use in

negotiations as identified in §9.37 of this subchapter [~~title~~] (relating to Selection).

(e) Prohibited actions. Administrative qualification information obtained through this section will not be made available to the CST by the department's Audit Office prior to contract selection.

§9.43. Precertification Requirements.

(a) Requirements.

(1) Eligible employees. A firm may be precertified in the precertification [~~technical~~] work categories maintained on the department's web site by providing the listed requirements. A firm may only submit an application for an individual who is employed by that firm at the time of submittal for precertification.

(2) Experience. The experience used to meet requirements may be either prior to or after licensure unless otherwise stated in a specific category. For the purpose of experience for precertification, the employee may be licensed to practice in any state for which that experience is recognized by the:

(A) Texas Board of Professional Engineers for engineers;

(B) Texas Board of Architectural Examiners for

architects; or

(C) Texas Board of Professional Land Surveying for land surveyors.

(b) Work categories. The approved precertification work category definitions and requirements will be maintained on the department's web site. The Texas Transportation Commission, by minute order, may add, revise, or delete a work category.