

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

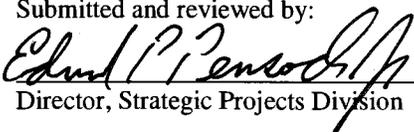
The Texas Transportation Commission (commission) finds it necessary to propose amendments to §9.152, General Rules for Design-Build Contracts and §9.153, Solicitation of Proposals, relating to Design-Build Contracts, to be codified under Title 43, Texas Administrative Code, Part 1.

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*.

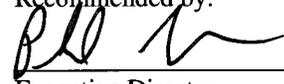
IT IS THEREFORE ORDERED by the commission that the amendments to §9.152 and §9.153 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

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:


Director, Strategic Projects Division

Recommended by:


Executive Director

113083 APR 26 12

Minute Number Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §§9.152 and 9.153, concerning Design-Build
4 Contracts.

5

6 EXPLANATION OF PROPOSED AMENDMENTS

7 The department's own experience, and that of other agencies,
8 establishes that evaluating contractor performance periodically
9 during the term of a contract and discussing the results with
10 contractors is a powerful motivator for contractors to maintain
11 high quality performance or improve inadequate performance, and
12 is one of the most important tools available for ensuring good
13 contractor performance.

14

15 Past performance information is an important tool for use in
16 future evaluations of qualifications and proposals, and in the
17 award of design-build contracts. The use of past performance as
18 an evaluation factor in the contract award process is
19 instrumental in making "best value" selections. It enables the
20 department to better predict the quality of future work.

21

22 These amendments provide for the department's periodic
23 evaluation of a contractor's performance under a design-build
24 contract, and of the contractor's team members, consultants, and
25 subcontractors. The amendments also provide for the

1 consideration of the results of those evaluations and other
2 evaluations of past performance in the evaluation of
3 qualifications statements submitted in response to a request for
4 qualifications, and proposals submitted in response to a request
5 for proposals. Past performance under other contracts is an
6 important indicator of a proposer's ability to perform the
7 prospective agreement successfully.

8
9 Amendments to §9.152 provide that the department will evaluate
10 the performance of a private entity that enters into a design-
11 build contract, and will evaluate the performance of the private
12 entity's team members, consultants, and subcontractors.

13 Evaluations will be conducted annually at twelve month intervals
14 during the term of the design-build contract, upon termination
15 of the design-build contract, and when the department determines
16 that work is behind schedule or not being performed according to
17 the requirements of the design-build contract. Optional
18 evaluations may be conducted as provided in the design-build
19 contract.

20
21 After a performance evaluation is conducted, the department will
22 provide for review and comment a copy of the performance
23 evaluation report to the entity being evaluated and, if that
24 entity is a consultant or subcontractor, to the entity that
25 entered into the design-build contract. The department will

1 consider any submitted comments in finalizing the performance
2 evaluation report.

3

4 Amendments to §9.153 provide that the department will consider
5 the results of performance evaluations conducted by the
6 department under §9.152 and 43 TAC §27.3 (concerning
7 Comprehensive Development Agreements), the results of other
8 performance evaluations determined by the department to be
9 relevant to the project, and other criteria that the department
10 considers appropriate in the evaluation of qualifications
11 statements submitted in response to a request for
12 qualifications, and in the evaluation of proposals for a design-
13 build contract.

14

15 FISCAL NOTE

16 James Bass, Chief Financial Officer, has determined that for
17 each of the first five years in which the amendments as proposed
18 are in effect, there will be fiscal implications for state
19 government as a result of enforcing or administering the
20 amendments. The fiscal implications cannot be quantified with
21 certainty as it will depend on the number of design-build
22 contracts entered into by the department and the number of
23 performance evaluations conducted by the department. There will
24 be no fiscal implications for local governments as a result of
25 enforcing or administering the amendments.

1

2 Ed Pensock, Director, Strategic Projects Division, has certified
3 that there will be no significant impact on local economies or
4 overall employment as a result of enforcing or administering the
5 amendments.

6

7 PUBLIC BENEFIT AND COST

8 Mr. Pensock has also determined that for each year of the first
9 five years in which the sections are in effect, the public
10 benefit anticipated as a result of enforcing or administering
11 the amendments will be to improve the process for awarding
12 design-build contracts and to improve the performance of
13 contractors and team members, consultants, and subcontractors of
14 contractors. There are no anticipated economic costs for
15 persons required to comply with the sections as proposed. There
16 will be no adverse economic effect on small businesses.

17

18 SUBMITTAL OF COMMENTS

19 Written comments on the proposed amendments to §§9.152 and 9.153
20 may be submitted to Ed Pensock, Director, Strategic Projects
21 Division, Texas Department of Transportation, 125 East 11th
22 Street, Austin, Texas 78701-2483. The deadline for receipt of
23 comments is 5:00 p.m. on June 11, 2012. In accordance with
24 Transportation Code, §201.810(a)(5), a person who submits
25 comments must disclose, in writing with the comments, whether

1 the person does business with the department, may benefit
2 monetarily from the proposed amendments, or is an employee of
3 the department.

4

5 STATUTORY AUTHORITY

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

10

11 CROSS REFERENCE TO STATUTE

12 Transportation Code, Chapter 223, Subchapter F.

1 SUBCHAPTER I. DESIGN-BUILD CONTRACTS

2 §9.152. General Rules for Design-Build Contracts.

3 (a) Applicability. The rules in this subchapter address the
4 manner by which the department intends to evaluate submissions
5 received from private entities in response to requests for
6 qualifications and requests for proposals issued by the
7 department.

8 (b) Reservation of rights. The department reserves all
9 rights available to it by law in administering this subchapter,
10 including without limitation the right in its sole discretion
11 to:

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

14 (2) reject any and all qualifications submittals or
15 proposals at any time;

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

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

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

23 (6) negotiate with a proposer to include aspects of

1 unsuccessful proposals for that project in the design-build
2 contract;

3 (7) request or obtain additional information about any
4 proposal from any source;

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

7 (9) waive deficiencies in a qualifications submittal or
8 proposal, accept and review a non-conforming qualifications
9 submittal or proposal, or permit clarifications or supplements
10 to a qualifications submittal or proposal; or

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

13 (c) Costs incurred by proposers. Except as provided in
14 §9.153(f) of this subchapter (relating to Solicitation of
15 Proposals), under no circumstances will the state, the
16 department, or any of their agents, representatives,
17 consultants, directors, officers, or employees be liable for, or
18 otherwise obligated to reimburse, the costs incurred by
19 proposers, whether or not selected for negotiations, in
20 developing proposals or in negotiating agreements.

21 (d) Department information. Any and all information the
22 department makes available to proposers shall be as a
23 convenience to the proposer and without representation or

1 warranty of any kind except as may be expressly specified in the
2 request for qualifications or request for proposals. Proposers
3 may not rely upon any oral responses to inquiries.

4 (e) Procedure for communications. If a proposer has a
5 question or request for clarification regarding this subchapter
6 or any request for qualifications or request for proposals
7 issued by the department, the proposer shall submit the question
8 or request for clarification in writing to the person
9 responsible for receiving those submissions, as designated in
10 the request for qualifications or request for proposals, and the
11 department will provide the responses in writing. The proposer
12 shall also comply with any other provisions in the request for
13 qualifications or request for proposals regulating
14 communications.

15 (f) Compliance with rules. In submitting any proposal, the
16 proposer shall be deemed to have unconditionally and irrevocably
17 consented and agreed to the foregoing provisions and all other
18 provisions of this subchapter.

19 (g) Proposer information submitted to department. All
20 qualifications submittals or proposals submitted to the
21 department become the property of the department and may be
22 subject to the Public Information Act, Government Code, Chapter
23 552. Proposers should familiarize themselves with the provisions

1 of the Public Information Act. In no event shall the state, the
2 department, or any of their agents, representatives,
3 consultants, directors, officers, or employees be liable to a
4 proposer for the disclosure of all or a portion of a proposal
5 submitted under this subchapter. Except as otherwise expressly
6 specified in the request for qualifications or request for
7 proposals, if the department receives a request for public
8 disclosure of all or any portion of a qualifications submittal
9 or proposal, the department will notify the applicable proposer
10 of the request and inform that proposer that it has an
11 opportunity to assert, in writing, a claimed exception under the
12 Public Information Act or other applicable law within the time
13 period specified in the department's notice and allowed under
14 the Public Information Act. If a proposer has special concerns
15 about information it desires to make available to the
16 department, but which it believes constitutes a trade secret,
17 proprietary information or other information excepted from
18 disclosure, the proposer should specifically and conspicuously
19 designate that information as such in its qualifications
20 submittal or proposal. The proposer's designation shall not be
21 dispositive of the trade secret, proprietary, or exempted nature
22 of the information so designated.

23 (h) Sufficiency of proposal. All proposals, whether

1 solicited or unsolicited, should be as thorough and detailed as
2 possible so that the department may properly evaluate the
3 potential feasibility of the proposed project as well as the
4 capabilities of the proposer and its team members to provide the
5 proposed services and complete the proposed project.

6 (i) Project studies. Studies that the department deems
7 necessary as to route designation, civil engineering,
8 environmental compliance, and any other matters will be
9 assigned, conducted, and paid for as negotiated between the
10 department and the successful proposer and set forth in the
11 design-build contract.

12 (j) Proposer's additional responsibilities. The department,
13 in its sole discretion, may authorize the successful proposer to
14 seek licensing, permitting, approvals, and participation
15 required from other governmental entities and private parties,
16 subject to such oversight and review by the department as
17 specified in the design-build contract.

18 (k) Proposer's work on environmental review of eligible
19 project. The department may solicit proposals in which the
20 proposer is responsible for providing assistance in the
21 environmental review and clearance of an eligible project,
22 including the provision of technical assistance and technical
23 studies to the department or its environmental consultant

1 relating to the environmental review and clearance of the
2 proposed project. The environmental review and the documentation
3 of that review shall at all times be conducted as directed by
4 the department and subject to the oversight of the department,
5 and shall comply with all requirements of state and federal law,
6 applicable federal regulations, and the National Environmental
7 Policy Act (42 U.S.C. §4321 et seq.), if applicable, including
8 but not limited to the study of alternatives to the proposed
9 project and any proposed alignments, procedural requirements,
10 and the completion of any and all environmental documents
11 required to be completed by the department and any federal
12 agency acting as a lead agency. The department:

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

15 (2) shall specify the level of design and other
16 information to be provided by the private entity or its
17 consultants or subcontractors; and

18 (3) shall independently review any studies and
19 conclusions reached by the private entity or its consultants or
20 subcontractors before their inclusion in an environmental
21 document.

22 (1) Effect of environmental requirements on design-build
23 contract. Completion of the environmental review, including

1 obtaining approvals required under the National Environmental
2 Policy Act, is required before the private entity may be
3 authorized to conduct and complete the final design and start
4 construction of a project. Additionally, all applicable state
5 and federal environmental permits and approvals must be obtained
6 before the private entity may start construction of the portion
7 of a project requiring the permit or approval. Unless and until
8 that occurs, the department is not bound to any further
9 development of the project. The department, and any federal
10 agency acting as a lead agency, may select an alternative other
11 than the one in the proposed project, including the "no-build"
12 alternative. A design-build contract shall provide that the
13 agreement will be modified as necessary to address requirements
14 in the final environmental documents, and shall provide that the
15 agreement may be terminated if the "no-build" alternative is
16 selected or if another alternative is selected that is
17 incompatible with the requirements of the agreement.

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

22 (n) Additional matters. Any matter not specifically
23 addressed in this subchapter that pertains to the construction,

1 expansion, extension, related capital maintenance,
2 rehabilitation, alteration, or repair of a highway project
3 pursuant to this subchapter, shall be deemed to be within the
4 primary purview of the commission, and all decisions pertaining
5 thereto, whether or not addressed in this subchapter, shall be
6 as determined by the commission, subject to the provisions of
7 applicable law.

8 (o) Performance and payment security. The department shall
9 require a private entity entering into a design-build contract
10 to provide a performance and payment bond or an alternative form
11 of security, or a combination of bonds and other forms of
12 security, in an amount equal to the cost of constructing the
13 project, unless the department determines that it is
14 impracticable for a private entity to provide security in that
15 amount, in which case the department will set the amount of
16 security. The security will be in the amount that, in the
17 department's sole determination, is sufficient to ensure the
18 proper performance of the agreement, and to protect the
19 department and payment bond beneficiaries supplying labor or
20 materials to the private entity or a subcontractor of the
21 private entity. Bonds and alternate forms of security shall be
22 in the form and contain the provisions required in the request
23 for proposals or the design-build contract, with such changes or

1 modifications as the department determines to be in the best
2 interest of the state. In addition to, or in lieu of,
3 performance and payment bonds, the department may require:

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

6 (2) United States bonds or notes, accompanied by a duly
7 executed power of attorney and agreement authorizing the
8 collection or sale of the bonds or notes in the event of the
9 default of the private entity or a subcontractor of the private
10 entity, or such other act or event that, under the terms of the
11 design-build contract, would allow the department to draw upon
12 or access that security;

13 (3) an irrevocable letter of credit issued or confirmed
14 by a financial institution to the benefit of the department,
15 meeting the credit rating and other requirements prescribed by
16 the department, and providing coverage for a period of at least
17 one year following final acceptance of the project or, if there
18 is a warranty period, at least one year following completion of
19 the warranty period;

20 (4) an irrevocable letter signed by a guarantor meeting
21 the net worth or other financial requirements prescribed in the
22 request for proposals or design-build contract, and which
23 guarantees, to the extent required under the request for

1 proposals or design-build contract, the full and prompt payment
2 and performance when due of the private entity's obligations
3 under the design-build contract; or

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

6 (p) Performance evaluations. The department will evaluate
7 the performance of a private entity that enters into a design-
8 build contract, and will evaluate the performance of the private
9 entity's team members, consultants, and subcontractors.
10 Evaluations will be conducted annually at twelve month intervals
11 during the term of the design-build contract, upon termination
12 of the design-build contract, and when the department determines
13 that work is behind schedule or not being performed according to
14 the requirements of the design-build contract. Optional
15 evaluations may be conducted as provided in the design-build
16 contract. After a performance evaluation is conducted, the
17 department will provide for review and comment a copy of the
18 performance evaluation report to the entity being evaluated and,
19 if that entity is a consultant or subcontractor, to the entity
20 that entered into the design-build contract. The department
21 will consider any submitted comments in finalizing the
22 performance evaluation report. The results of performance
23 evaluations may be used in the evaluation of qualifications

1 submittals and proposals submitted under §9.153 of this
2 subchapter and §27.4 of this title (relating to Solicited
3 Proposals) by proposers that include the team members,
4 consultants, and subcontractors evaluated.

5

6 §9.153. Solicitation of Proposals.

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

22 (b) Request for qualifications - content. At its sole
23 option, the department may elect to furnish conceptual designs,

1 fundamental details, technical studies and reports or detailed
2 plans of the proposed project in the request for qualifications,
3 and may request conceptual approaches to bringing the project to
4 fruition. A request for qualifications must include:

5 (1) information regarding the proposed project's
6 location, scope, and limits;

7 (2) information regarding funding that may be available
8 for the project;

9 (3) criteria that will be used to evaluate the
10 qualifications submittals;

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

12 (5) the deadline by which qualifications submittals must
13 be received by the department; and

14 (6) any other information the department considers
15 relevant or necessary.

16 (c) Request for qualifications - evaluation. The
17 department, after evaluating the qualification submittals
18 received in response to a request for qualifications, will
19 identify and approve a "short-list" that is composed of those
20 entities that are considered most qualified to submit detailed
21 proposals for a proposed project. In evaluating the
22 qualification submittals, the department will consider the
23 results of performance evaluations conducted by the department

1 under §9.152 of this subchapter (relating to General Rules for
2 Design-Build Contracts) and §27.3 of this title (relating to
3 General Rules for Private Involvement), the results of other
4 performance evaluations determined by the department to be
5 relevant to the project, and other criteria [~~such qualities~~]
6 that the department considers relevant to the project, including
7 a proposer's qualifications, experience, technical competence,
8 and ability to develop the project, and that may include the
9 private entity's financial condition, management stability,
10 staffing, and organizational structure. The department may
11 interview entities responding to a request for qualifications.
12 The department shall short-list at least two private entities to
13 submit proposals, but may not short-list more private entities
14 than the number of private entities designated in the request
15 for qualifications if a maximum number is designated. The
16 department shall advise each entity providing a qualifications
17 submittal whether it is on the short-list of qualified entities.

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

23 (1) information on the overall project goals;

- 1 (2) publicly available cost estimates for the design-
2 build portion of the project;
- 3 (3) materials specifications;
- 4 (4) special material requirements;
- 5 (5) a schematic design approximately 30 percent complete;
- 6 (6) known utilities;
- 7 (7) quality assurance and quality control 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 related
13 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 technical

1 proposals, and the relative weighting of those criteria;

2 (15) the proposed form of design-build contract; and

3 (16) any other information the department considers
4 relevant or necessary.

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

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

12 (2) the proposed solutions to anticipated problems;

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

14 (4) the engineering design proposed;

15 (5) the cost of delivering the project;

16 (6) the estimated number of days required to complete the
17 project; and

18 (7) any other information requested by the department.

19 (f) Requests for proposals - payment for work product. The
20 request for proposals shall stipulate an amount of money, as
21 authorized under Transportation Code, §223.249, that the
22 department will pay to an unsuccessful proposer that submits a
23 proposal that is responsive to the requirements of the request

1 for proposals. The commission shall approve the amount of the
2 payment to be stipulated in the request for proposals, which
3 must be a minimum of twenty-five hundredths of one percent of
4 the contract amount. The request for proposals shall provide
5 for the payment of a partial amount in the event the procurement
6 is terminated. In determining the amount of the payment, the
7 commission shall consider:

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

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

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

14 (g) Request for proposals - evaluation. The proposals will
15 be evaluated by the department based on the results of
16 performance evaluations conducted by the department under §9.152
17 of this subchapter and §27.3 of this title, the results of other
18 performance evaluations determined by the department to be
19 relevant to the project, and other [~~those~~] evaluation criteria
20 the department deems appropriate for the project, including
21 those criteria deemed appropriate by the department to maximize
22 the overall performance of the project and the resulting
23 benefits to the state. Specific evaluation criteria and

1 requests for pertinent information will be set forth in the
2 request for proposals. The department shall first open,
3 evaluate, and score each responsive technical proposal, and
4 shall subsequently open, evaluate, and score the cost proposals
5 from proposers that submitted a responsive technical proposal
6 and assign points on the basis of the weighting specified in the
7 request for proposals.

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

17 (i) Selection of entity. The department shall submit a
18 recommendation to the commission regarding approval of the
19 proposal determined to provide the apparent best value to the
20 department. The commission may approve or disapprove the
21 recommendation, and if approved, will award the design-build
22 contract to the apparent best value proposer. Award may be
23 subject to the successful completion of negotiations, any

1 necessary federal action, execution by the executive director of
2 the design-build contract, and satisfaction of such other
3 conditions that are identified in the request for proposals or
4 by the commission. The proposers will be notified in writing of
5 the department's rankings. The department shall also make the
6 rankings available to the public.

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

16 (1) reject all proposals;

17 (2) modify the request for proposals and begin again the
18 submission of proposals; or

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