

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

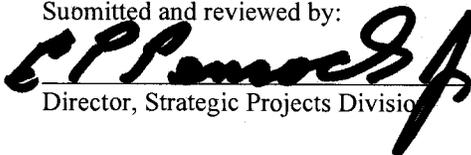
The Texas Transportation Commission (commission) finds it necessary to adopt amendments to §9.152, General Rules for Design-Build Contracts and §9.153, Solicitation of Proposals, relating to Design-Build Contracts, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted 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*.

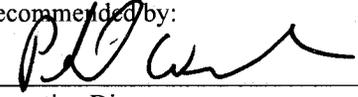
IT IS THEREFORE ORDERED by the commission that the amendments to §9.152 and §9.153 are adopted and are authorized for filing with the Office of the Secretary of State.

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:

  
Director, Strategic Projects Division

Recommended by:

  
Executive Director

**113148 JUN 28 12**

Minute  
Number

Date  
Passed

1 Adoption Preamble

2 The Texas Department of Transportation (department) adopts  
3 amendments to §§9.152 and 9.153, concerning Design-Build  
4 Contracts. The amendments to §§9.152 and 9.153 are adopted with  
5 changes to the proposed text as published in the May 11, 2012  
6 issue of the *Texas Register* (37 TexReg 3527).

7

8 EXPLANATION OF ADOPTED AMENDMENTS

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

16

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

23

24 These amendments provide for the department's periodic  
25 evaluation of a contractor's performance under a design-build

1 contract, and of the contractor's major team members,  
2 consultants, and subcontractors. The amendments also provide  
3 for the consideration of the results of those evaluations and  
4 other evaluations of past performance in the evaluation of  
5 qualifications statements submitted in response to a request for  
6 qualifications, and proposals submitted in response to a request  
7 for proposals. Past performance under other contracts  
8 determined by the department to be relevant to the project being  
9 delivered under the prospective agreement is an important  
10 indicator of a proposer's ability to perform the prospective  
11 agreement successfully.

12

13 Amendments to §9.152 provide that the department will evaluate  
14 the performance of a private entity that enters into a design-  
15 build contract, and will evaluate the performance of the private  
16 entity's major team members, consultants, and subcontractors.  
17 Evaluations will be conducted annually at twelve month intervals  
18 during the term of the design-build contract, upon termination  
19 of the design-build contract, and when the department determines  
20 that work is materially behind schedule or not being performed  
21 according to the requirements of the design-build contract.  
22 Optional evaluations may be conducted as provided in the design-  
23 build contract. Acts or omissions that are the subject of a  
24 good faith dispute will not be considered.

25

1 After a performance evaluation is conducted, and for at least 30  
2 days before the evaluation becomes final and is used by the  
3 department, the department will provide for review and comment a  
4 copy of the performance evaluation report to the entity being  
5 evaluated and, if that entity is a consultant or subcontractor,  
6 to the entity that entered into the design-build contract. The  
7 department will consider and take into account any submitted  
8 comments in finalizing the performance evaluation report.

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

21  
22 COMMENTS

23 Comments were received from the Texas Association of Business  
24 (TAB).

25

1 Comment:

2 TAB commented that they are encouraged by the department's  
3 recognition that objective performance review is an important  
4 part of the process of future evaluation of contracts and  
5 development agreements. They believe the private sector plays a  
6 critical role in future infrastructure development in Texas and  
7 that any new regulations must serve to further encourage private  
8 sector participation and fair and open competition toward  
9 innovative delivery of greatly needed transportation resources  
10 and traffic congestion relief. TAB commented that they trust  
11 that the department shares their belief in an objective review  
12 process that ensures fair competition and the highest and best  
13 use of taxpayer dollars. TAB stated that their comments are  
14 intended to make clear to the public that changes proposed to be  
15 made to the competitive procurement process will only enhance  
16 the effective and efficient use of their resources in advancing  
17 our transportation needs and support the mutual goal of a  
18 factual, objective, and transparent process that promotes  
19 participation by qualified contractors and developers. TAB  
20 strongly supports the clear and objective standards and criteria  
21 that must be a part of any improved evaluation process.

22

23 Response:

24 The department agrees that these rules must further encourage  
25 private sector participation and fair and open competition

1 toward the delivery of greatly needed transportation projects.  
2 Performance evaluations conducted by the department under these  
3 rules will be conducted in an objective and transparent manner,  
4 using objective criteria, and with consideration of any comments  
5 on the evaluation submitted by the entity being evaluated.

6

7 Comment:

8 TAB commented that the department should evaluate the relevant  
9 performance of the private entity that enters into a design  
10 build contract, and of the private entity's major team members,  
11 consultants, and subcontractors, all based on the objective  
12 criteria specified in §9.152(p).

13

14 Response:

15 The department agrees that evaluations should be limited to  
16 major team members, consultants, and subcontractors, and has  
17 made that change to §9.152. All performance of the private  
18 entity may be relevant to an evaluation. Performance  
19 evaluations conducted by the department under these rules will  
20 be conducted in an objective and transparent manner, using  
21 objective criteria. Section 9.152 has been amended to clarify  
22 that the evaluations will be conducted in accordance with the  
23 requirements of §9.152(p).

24

25 Comment:

1 TAB commented that evaluations that are not annual evaluations  
2 or conducted at the end of the contract should be limited to  
3 circumstances when the department determines that work is  
4 materially behind schedule or not being performed substantially  
5 according to the material requirements of the design-build  
6 contract.

7

8 Response:

9 The department agrees that evaluations should be conducted only  
10 when the work is materially behind schedule and has made that  
11 change. The department does not believe that performing work  
12 substantially in accordance with material requirements of the  
13 contract is sufficient to prevent the department from conducting  
14 an evaluation if deemed necessary, and has not made those  
15 changes.

16

17 Comment:

18 TAB commented that all evaluations conducted pursuant to  
19 §9.152(p) should be based on and limited to objective,  
20 verifiable criteria that are material indicators of performance  
21 substantially in accordance with the material terms of the  
22 design-build contract, and provides examples of such criteria.

23

24 Response:

25 The department agrees that performance evaluations should be

1 conducted in an objective and transparent manner, using  
2 objective criteria, but does not believe it is necessary to  
3 state that in §9.152.

4

5 Comment:

6 TAB commented that performance evaluations should not consider  
7 acts or omissions that are the subject of a good faith dispute.

8

9 Response:

10 The department agrees and has made that change.

11

12 Comment:

13 TAB commented that the department should provide an entity being  
14 evaluated a period of at least 30 days to review and comment on  
15 the performance evaluation before the evaluation becomes final  
16 and is used by the department. TAB commented that the  
17 department should reasonably consider and take into account any  
18 submitted comments before the department finalizes the  
19 performance evaluation report.

20

21 Response:

22 The department has amended §9.152 to provide a review and  
23 comment period of at least 30 days and to commit to consider and  
24 take into account any submitted comments.

25

1 Comment:

2 TAB commented that the relevant final results of performance  
3 evaluations should be provided to the entity being evaluated.

4

5 Response:

6 The department agrees that final evaluation reports should be  
7 provided to the entity that was evaluated and has made that  
8 change.

9

10 Comment:

11 TAB commented that only the relevant final results of  
12 performance evaluations conducted by the department under §9.152  
13 and §27.3 and other objective criteria should be considered by  
14 the department in the evaluation of qualifications submittals  
15 and proposals, and that the department should not consider the  
16 results of other performance evaluations determined by the  
17 department to be relevant to the project.

18

19 Response:

20 The department agrees that all performance evaluations  
21 considered should be determined by the department to be relevant  
22 to the project being procured, and has made that change. The  
23 department disagrees with the notion that other performance  
24 evaluations determined by the department to be relevant to the  
25 project should not be considered. Performance under contracts

1 other than design-build contracts and comprehensive development  
2 agreements is also important in predicting the quality of future  
3 work under the prospective design-build contract.

4

5 Comment:

6 TAB commented that the department's consideration of the  
7 relevant final results of performance evaluations in the  
8 evaluation of qualification submittals and proposals should be  
9 evenhanded, objective, and transparent and should take into  
10 account and give credit for not only good performance but also  
11 performance that materially deviates from the requirements of  
12 the design-build contract, all when measured against specified  
13 objective criteria.

14

15 Response:

16 The department agrees that performance evaluations should be  
17 conducted in an objective and transparent manner, using  
18 objective criteria, but does not believe it is necessary to  
19 state that in §9.152.

20

21 STATUTORY AUTHORITY

22 The amendments are adopted under Transportation Code, §201.101,  
23 which provides the Texas Transportation Commission with the  
24 authority to establish rules for the conduct of the work of the  
25 department.

- 1
- 2 CROSS REFERENCE TO STATUTE
- 3 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 major team members, consultants, and subcontractors, in  
10 accordance with the requirements of this subsection.

11 Evaluations will be conducted annually at twelve month intervals  
12 during the term of the design-build contract, upon termination  
13 of the design-build contract, and when the department determines  
14 that work is materially behind schedule or not being performed  
15 according to the requirements of the design-build contract.

16 Optional evaluations may be conducted as provided in the design-  
17 build contract. Acts or omissions that are the subject of a  
18 good faith dispute will not be considered. After a performance  
19 evaluation is conducted, and for at least 30 days before the  
20 evaluation becomes final and is used by the department, the  
21 department will provide for review and comment a copy of the  
22 performance evaluation report to the entity being evaluated and,  
23 if that entity is a consultant or subcontractor, to the entity

1 that entered into the design-build contract. The department  
2 will consider and take into account any submitted comments  
3 before the department finalizes the performance evaluation  
4 report. The results of performance evaluations will be provided  
5 to the entity that was evaluated and may be used in the  
6 evaluation of qualifications submittals and proposals submitted  
7 under §9.153 of this subchapter and §27.4 of this title  
8 (relating to Solicited Proposals) by proposers that include the  
9 major team members, consultants, and subcontractors evaluated.

10

11 §9.153. Solicitation of Proposals.

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

1 department otherwise believes might be interested and qualified  
2 to participate in the project that is the subject of the request  
3 for qualifications.

4 (b) Request for qualifications - content. At its sole  
5 option, the department may elect to furnish conceptual designs,  
6 fundamental details, technical studies and reports or detailed  
7 plans of the proposed project in the request for qualifications,  
8 and may request conceptual approaches to bringing the project to  
9 fruition. A request for qualifications must include:

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

12 (2) information regarding funding that may be available  
13 for the project;

14 (3) criteria that will be used to evaluate the  
15 qualifications submittals;

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

17 (5) the deadline by which qualifications submittals must  
18 be received by the department; and

19 (6) any other information the department considers  
20 relevant or necessary.

21 (c) Request for qualifications - evaluation. The  
22 department, after evaluating the qualification submittals  
23 received in response to a request for qualifications, will

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

1 list of qualified entities.

2 (d) Requests for proposals. If authorized by the  
3 commission, the department will issue a request for proposals  
4 from all private entities qualified for the short-list,  
5 consisting of the submission of detailed documentation regarding  
6 the project. A request for proposals must include:

7 (1) information on the overall project goals;

8 (2) publicly available cost estimates for the design-  
9 build portion of the project;

10 (3) materials specifications;

11 (4) special material requirements;

12 (5) a schematic design approximately 30 percent complete;

13 (6) known utilities;

14 (7) quality assurance and quality control requirements;

15 (8) the location of relevant structures;

16 (9) notice of any rules or goals adopted by the

17 department relating to awarding contracts to disadvantaged

18 business enterprises or small business enterprises;

19 (10) available geotechnical or other information related  
20 to the project;

21 (11) the status of any environmental review of the  
22 project;

23 (12) detailed instructions for preparing the technical

1 proposal, including a description of the form and level of  
2 completeness of drawings expected;

3 (13) the relative weighting of the technical and cost  
4 proposals and the formula by which the proposals will be  
5 evaluated and ranked, which must allocate at least 70 percent of  
6 weighting to the cost proposal;

7 (14) the criteria to be used in evaluating the technical  
8 proposals, and the relative weighting of those criteria;

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

10 (16) any other information the department considers  
11 relevant or necessary.

12 (e) Request for proposals - submittal requirements. The  
13 request for proposals must require the submission of a sealed  
14 technical proposal and a separate sealed cost proposal no later  
15 than the 180th day after the issuance of the request for  
16 proposals, and that provide information relating to:

17 (1) the feasibility of developing the project as  
18 proposed;

19 (2) the proposed solutions to anticipated problems;

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

21 (4) the engineering design proposed;

22 (5) the cost of delivering the project;

23 (6) the estimated number of days required to complete the

1 project; and

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

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

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

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

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

21 (g) Request for proposals - evaluation. The proposals will  
22 be evaluated by the department based on the results of  
23 performance evaluations conducted by the department under §9.152

1 of this subchapter and §27.3 of this title determined by the  
2 department to be relevant to the project, the results of other  
3 performance evaluations determined by the department to be  
4 relevant to the project, and other objective [~~these~~] evaluation  
5 criteria the department deems appropriate for the project,  
6 including those criteria deemed appropriate by the department to  
7 maximize the overall performance of the project and the  
8 resulting benefits to the state. Specific evaluation criteria  
9 and requests for pertinent information will be set forth in the  
10 request for proposals. The department shall first open,  
11 evaluate, and score each responsive technical proposal, and  
12 shall subsequently open, evaluate, and score the cost proposals  
13 from proposers that submitted a responsive technical proposal  
14 and assign points on the basis of the weighting specified in the  
15 request for proposals.

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

1 best value to the department.

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

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

- 1           (1) reject all proposals;
- 2           (2) modify the request for proposals and begin again the
- 3 submission of proposals; or
- 4           (3) proceed to the next most highly ranked proposal and
- 5 attempt to negotiate a design-build contract with that entity in
- 6 accordance with this paragraph.