

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

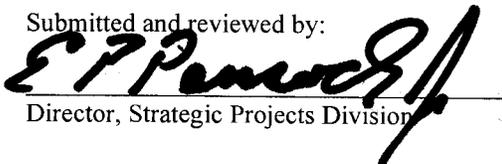
The Texas Transportation Commission (commission) finds it necessary to adopt amendments to §27.3, General Rules for Private Involvement and §27.4, Solicited Proposals, relating to Comprehensive Development Agreements, to be codified under Title 43, Texas Administrative Code, Part 1.

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*.

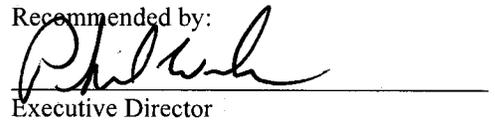
IT IS THEREFORE ORDERED by the commission that the amendments to §27.3 and §27.4 are adopted and are authorized for filing with the Office of the Secretary of State.

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

113149 JUN 28 12

Minute
Number

Date
Passed

1 Adoption Preamble

2 The Texas Department of Transportation (department) adopts
3 amendments to §27.3, General Rules for Private Involvement, and
4 §27.4, Solicited Proposals, both concerning Comprehensive
5 Development Agreements. The amendments to §§27.3 and 27.4 are
6 adopted with changes to the proposed text as published in the
7 May 11, 2012 issue of the *Texas Register* (37 TexReg 3559).

8
9 EXPLANATION OF ADOPTED AMENDMENTS

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

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

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

14

15 Amendments to §27.3 provide that the department will evaluate
16 the performance of a private entity that enters into a
17 comprehensive development agreement, and will evaluate the
18 performance of the private entity's major team members,
19 consultants, and subcontractors. Evaluations will be conducted
20 annually at twelve month intervals during the term of the
21 comprehensive development agreement, upon termination of the
22 comprehensive development agreement, and when the department
23 determines that work is materially behind schedule or not being
24 performed according to the requirements of the comprehensive
25 development agreement. Optional evaluations may be conducted as

1 provided in the comprehensive development agreement. Acts or
2 omissions that are the subject of a good faith dispute will not
3 be considered.

4

5 After a performance evaluation is conducted, and for at least 30
6 days before the evaluation becomes final and is used by the
7 department, the department will provide for review and comment a
8 copy of the performance evaluation report to the entity being
9 evaluated and, if that entity is a consultant or subcontractor,
10 to the entity that entered into the comprehensive development
11 agreement. The department will consider and take into account
12 any submitted comments in finalizing the performance evaluation
13 report.

14

15 Amendments to §27.4 provide that the department will consider
16 the results of performance evaluations conducted by the
17 department under §27.3 and 43 TAC §9.152 (concerning Design-
18 Build Contracts) determined by the department to be relevant to
19 the project, the results of other performance evaluations
20 determined by the department to be relevant to the project, and
21 other objective criteria that the department considers
22 appropriate in the evaluation of qualifications statements
23 submitted in response to a request for qualifications, and in
24 the evaluation of proposals for a comprehensive development
25 agreement.

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COMMENTS

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

Comment:

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

1 that must be a part of any improved evaluation process.

2

3 Response:

4 The department agrees that these rules must further encourage

5 private sector participation and fair and open competition

6 toward the delivery of greatly needed transportation projects.

7 Performance evaluations conducted by the department under these

8 rules will be conducted in an objective and transparent manner,

9 using objective criteria, and with consideration of any comments

10 on the evaluation submitted by the entity being evaluated.

11

12 Comment:

13 TAB commented that the department should evaluate the relevant

14 performance of the private entity that enters into a

15 comprehensive development agreement, and of the private entity's

16 major team members, consultants, and subcontractors, all based

17 on the objective criteria specified in §27.3(q).

18

19 Response:

20 The department agrees that evaluations should be limited to

21 major team members, consultants, and subcontractors, and has

22 made that change to §27.3. All performance of the private

23 entity may be relevant to an evaluation. Performance

24 evaluations conducted by the department under these rules will

25 be conducted in an objective and transparent manner, using

1 objective criteria. Section 27.3 has been amended to clarify
2 that the evaluations will be conducted in accordance with the
3 requirements of §27.3(q).

4

5 Comment:

6 TAB commented that evaluations that are not annual evaluations
7 or conducted at the end of the agreement should be limited to
8 circumstances when the department determines that work is
9 materially behind schedule or not being performed substantially
10 according to the material requirements of the comprehensive
11 development agreement.

12

13 Response:

14 The department agrees that evaluations should be conducted only
15 when the work is materially behind schedule and has made that
16 change. The department does not believe that performing work
17 substantially in accordance with material requirements of the
18 agreement is sufficient to prevent the department from
19 conducting an evaluation if deemed necessary, and has not made
20 those changes.

21

22 Comment:

23 TAB commented that all evaluations conducted pursuant to
24 §27.3(q) should be based upon and limited to objective,
25 verifiable criteria that are material indicators of performance

1 substantially in accordance with the material terms of the
2 comprehensive development agreement, and provides examples of
3 such criteria.

4

5 Response:

6 The department agrees that performance evaluations should be
7 conducted in an objective and transparent manner, using
8 objective criteria, but does not believe it is necessary to
9 state that in §27.3.

10

11 Comment:

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

14

15 Response:

16 The department agrees and has made that change.

17

18 Comment:

19 TAB commented that the department should provide an entity being
20 evaluated a period of at least 30 days to review and comment on
21 the performance evaluation before the evaluation becomes final
22 and is used by the department. TAB commented that the
23 department should reasonably consider and take into account any
24 submitted comments before the department finalizes the
25 performance evaluation report.

1

2 Response:

3 The department has amended §27.3 to provide a review and comment
4 period of at least 30 days and to commit to consider and take
5 into account any submitted comments.

6

7 Comment:

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

10

11 Response:

12 The department agrees that final evaluation reports should be
13 provided to the entity that was evaluated and has made that
14 change.

15

16 Comment:

17 TAB commented that only the relevant final results of
18 performance evaluations conducted by the department under §27.3
19 and §9.152 and other objective criteria should be considered by
20 the department in the evaluation of qualifications submittals
21 and proposals, and that the department should not consider the
22 results of other performance evaluations determined by the
23 department to be relevant to the project.

24

25 Response:

1 The department agrees that all performance evaluations
2 considered should be determined by the department to be relevant
3 to the project being procured, and has made that change. The
4 department disagrees with the notion that other performance
5 evaluations determined by the department to be relevant to the
6 project should not be considered. Performance under contracts
7 other than comprehensive development agreements and design-build
8 contracts is also important in predicting the quality of future
9 work under the prospective comprehensive development agreement.

10

11 Comment:

12 TAB commented that the department's consideration of the
13 relevant final results of performance evaluations in the
14 evaluation of qualification submittals and proposals should be
15 evenhanded, objective, and transparent and should take into
16 account and give credit for not only good performance but also
17 performance that materially deviates from the requirements of
18 the comprehensive development agreement, all when measured
19 against specified objective criteria.

20

21 Response:

22 The department agrees that performance evaluations should be
23 conducted in an objective and transparent manner, using
24 objective criteria, but does not believe it is necessary to
25 state that in §27.3.

1

2 STATUTORY AUTHORITY

3 The amendments are adopted under Transportation Code, §201.101,
4 which provides the Texas Transportation Commission (commission)
5 with the authority to establish rules for the conduct of the
6 work of the department, and more specifically, Transportation
7 Code, §223.209, which requires the commission to adopt rules,
8 procedures, and guidelines governing selection of a developer
9 for a comprehensive development agreement and negotiations to
10 promote fairness, obtain private participants in projects, and
11 promote confidence among those participants.

12

13 CROSS REFERENCE TO STATUTE

14 Transportation Code, §223.209.

1 SUBCHAPTER A. COMPREHENSIVE DEVELOPMENT AGREEMENTS

2 §27.3. General Rules for Private Involvement.

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

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

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

15 (2) reject any and all qualifications submittals or
16 proposals, whether solicited or unsolicited, at any time;

17 (3) terminate evaluation of any and all qualifications
18 submittals or proposals, whether solicited or unsolicited, at
19 any time;

20 (4) issue a request for qualifications relating to a
21 project described in an unsolicited proposal after the rejection
22 or termination of the evaluation of the proposal and any
23 competing proposals;

1 (5) suspend, discontinue, or terminate comprehensive
2 development agreement negotiations with any proposer at any time
3 prior to the actual authorized execution of such agreement by
4 all parties;

5 (6) negotiate with a proposer without being bound by any
6 provision in its proposal, whether solicited or unsolicited;

7 (7) negotiate with a proposer to include aspects of
8 unsuccessful proposals for that project in the comprehensive
9 development agreement;

10 (8) request or obtain additional information about any
11 proposal from any source;

12 (9) modify, issue addenda to, or cancel any request for
13 qualifications or request for proposals;

14 (10) waive deficiencies in a qualifications submittal or
15 proposal, accept and review a non-conforming qualifications
16 submittal or proposal, or permit clarifications or supplements
17 to a qualifications submittal or proposal;

18 (11) revise, supplement, or make substitutions for all or
19 any part of these rules; or

20 (12) retain or return all or any portion of the fees
21 required to be paid by proposers under this subchapter, as
22 provided in subsection (h) of this section.

23 (c) Costs incurred by proposers. Except as provided in

1 §27.4(f) of this subchapter (relating to Solicited Proposals),
2 under no circumstances will the state, the department, or any of
3 their agents, representatives, consultants, directors, officers,
4 or employees be liable for, or otherwise obligated to, reimburse
5 the costs incurred by proposers, whether or not selected for
6 negotiations, in developing solicited or unsolicited proposals
7 or in negotiating agreements.

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

14 (e) Procedure for communications. If a proposer has a
15 question or request for clarification regarding these rules or
16 any request for qualifications or request for proposals issued
17 by the department, the proposer shall submit the question or
18 request for clarification in writing to the person responsible
19 for receiving those submissions, as designated in the request
20 for qualifications or request for proposals, and the department
21 will provide the responses in writing. The proposer shall also
22 comply with any other provisions in the request for
23 qualifications or request for proposals regulating

1 communications.

2 (f) Compliance with rules. In submitting any proposal, the
3 proposer shall be deemed to have unconditionally and irrevocably
4 consented and agreed to the foregoing provisions and all other
5 provisions of this subchapter.

6 (g) Proposer information submitted to department. All
7 qualifications submittals or proposals submitted to the
8 department become the property of the department and may be,
9 except as provided by Transportation Code, §223.204, subject to
10 the Public Information Act, Government Code, Chapter 552.
11 Proposers should familiarize themselves with the provisions of
12 Transportation Code, §223.204 and the Public Information Act.
13 In no event shall the state, the department, or any of their
14 agents, representatives, consultants, directors, officers, or
15 employees be liable to a proposer for the disclosure of all or a
16 portion of a proposal submitted under this subchapter. If the
17 department receives a request for public disclosure of all or
18 any portion of a proposal, the department will notify the
19 applicable proposer of the request and inform such proposer that
20 it has an opportunity to assert, in writing, a claimed exception
21 under the Public Information Act or other applicable law within
22 the time period specified in the department's notice and allowed
23 under the Public Information Act. If a proposer has special

1 concerns about information it desires to make available to the
2 department, but which it believes constitutes a trade secret,
3 proprietary information or other information excepted from
4 disclosure, the proposer should specifically and conspicuously
5 designate that information as such in its proposal. The
6 proposer's designation shall not be dispositive of the trade
7 secret, proprietary, or exempted nature of the information so
8 designated.

9 (h) Proposal review fee. A nonnegotiable proposal review
10 fee shall be required for any unsolicited proposal submitted
11 under this subchapter and applied by the department to offset
12 the cost of processing and reviewing the proposal. An
13 unsolicited proposal for a project in the department's unified
14 transportation program must be accompanied by a proposal review
15 fee of \$5,000. An unsolicited proposal for a project that is
16 not in the department's unified transportation program must be
17 accompanied by a proposal review fee of \$10,000. The executive
18 director may approve a proposal review fee for a particular
19 project in a lower amount. In approving a lower fee, the
20 executive director shall consider the complexity of the project.
21 Failure to submit the required proposal review fee shall bar the
22 department's consideration of the applicable proposal. All fees
23 shall be submitted in the form of a cashier's check made payable

1 to the department. A proposal review fee that is submitted with
2 a proposal for a project that is not an eligible project, or
3 that the department is not otherwise legally authorized to
4 accept shall be returned to the proposer. All other proposal
5 review fees are nonrefundable.

6 (i) Sufficiency of proposal. All proposals, whether
7 solicited or unsolicited, should be as thorough and detailed as
8 possible so that the department may properly evaluate the
9 potential feasibility of the proposed project as well as the
10 capabilities of the proposer and its team members to provide the
11 proposed services and complete the proposed project.

12 (j) Project studies. Studies that the department deems
13 necessary as to route designation, civil engineering, traffic
14 and revenue, environmental compliance, and any other matters
15 will be assigned, conducted, and paid for as negotiated between
16 the department and the successful proposer and set forth in the
17 comprehensive development agreement or in any separate contract
18 for consultant services. Unless otherwise provided in the
19 request for proposals, the department will favor proposals in
20 which the costs for studies will be advanced by the private
21 entity, particularly if the advance is at the private entity's
22 risk. The department may elect to pay, in whole or in part, the
23 costs for such studies in its sole discretion. The department

1 may require that the financial plan for each proposal provide
2 for reimbursement of all related expenses incurred by the
3 department, as well as any department study funds utilized in
4 connection with the project.

5 (k) Proposer's additional responsibilities. The
6 department, in its sole discretion, may authorize the successful
7 proposer to seek licensing, permitting, approvals, and
8 participation required from other governmental entities and
9 private parties, subject to such oversight and review by the
10 department as specified in the comprehensive development
11 agreement or in any separate contract for consultant services.

12 (l) Proposer's work on environmental review of eligible
13 project. The department may solicit proposals or accept
14 unsolicited proposals in which the proposer is responsible for
15 providing assistance in the environmental review and clearance
16 of an eligible project, including the preparation of
17 environmental impact assessments and analyses and the provision
18 of technical assistance and technical studies to the department
19 or its environmental consultant relating to the environmental
20 review and clearance of the proposed project. The environmental
21 review and the documentation of that review shall at all times
22 be conducted as directed by the department and subject to the
23 oversight of the department, and shall comply with all

1 requirements of state and federal law, applicable federal
2 regulations, and the National Environmental Policy Act (42
3 U.S.C. §4321 et seq.), if applicable, including but not limited
4 to the study of alternatives to the proposed project and any
5 proposed alignments, procedural requirements, and the completion
6 of any and all environmental documents required to be completed
7 by the department and any federal agency acting as a lead
8 agency. The department:

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

11 (2) shall specify the level of design, alternatives to be
12 reviewed, impacts to consider, and other information to be
13 provided by the private entity or its consultants or
14 subcontractors; and

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

19 (m) Effect of environmental requirements on comprehensive
20 development agreement. Completion of the environmental review
21 is required before the private entity may be authorized to
22 conduct and complete the final design and start construction of
23 a project. Additionally, all applicable state and federal

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

14 (n) Public meetings and hearings. All public meetings or
15 hearings required to be held pursuant to applicable law or
16 regulation will be directed and overseen by the department, with
17 participation by such other parties as it deems appropriate.

18 (o) Additional matters. Any matter not specifically
19 addressed in this subchapter which pertains to the acquisition,
20 design, development, financing, construction, reconstruction,
21 extension, expansion, maintenance, or operation of an eligible
22 project pursuant to this subchapter, shall be deemed to be
23 within the primary purview of the commission, and all decisions

1 pertaining thereto, whether or not addressed in this subchapter,
2 shall be as determined by the commission, subject to the
3 provisions of applicable law.

4 (p) Performance and payment security. The department shall
5 require a private entity entering into a comprehensive
6 development agreement to provide a performance and payment bond
7 or an alternative form of security in an amount that, in the
8 department's sole determination, is sufficient to ensure the
9 proper performance of the agreement, and to protect the
10 department and payment bond beneficiaries supplying labor or
11 materials to the private entity or a subcontractor of the
12 private entity. Bonds and alternate forms of security shall be
13 in the form and contain the provisions required in the request
14 for proposals or the comprehensive development agreement, with
15 such changes or modifications as the department determines to be
16 in the best interest of the state. In addition to, or in lieu
17 of, performance and payment bonds, the department may require:

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

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

1 entity, or such other act or event that, under the terms of the
2 comprehensive development agreement, would allow the department
3 to draw upon or access such security;

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

10 (4) an irrevocable letter signed by a guarantor meeting
11 the net worth or other financial requirements prescribed in the
12 request for proposals or comprehensive development agreement,
13 and which guarantees, to the extent required under the request
14 for proposals or comprehensive development agreement, the full
15 and prompt payment and performance when due of the private
16 entity's obligations under the comprehensive development
17 agreement and other documents and agreements executed by the
18 private entity in connection with the comprehensive development
19 agreement; or

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

22 (q) Performance evaluations. The department will evaluate
23 the performance of a private entity that enters into a

1 comprehensive development agreement, and will evaluate the
2 performance of the private entity's major team members,
3 consultants, and subcontractors, in accordance with the
4 requirements of this subsection. Evaluations will be conducted
5 annually at twelve month intervals during the term of the
6 comprehensive development agreement, upon termination of the
7 comprehensive development agreement, and when the department
8 determines that work is materially behind schedule or not being
9 performed according to the requirements of the comprehensive
10 development agreement. Optional evaluations may be conducted as
11 provided in the comprehensive development agreement. Acts or
12 omissions that are the subject of a good faith dispute will not
13 be considered. After a performance evaluation is conducted, and
14 for at least 30 days before the evaluation becomes final and is
15 used by the department, the department will provide for review
16 and comment a copy of the performance evaluation report to the
17 entity being evaluated and, if that entity is a consultant or
18 subcontractor, to the entity that entered into the comprehensive
19 development agreement. The department will consider and take
20 into account any submitted comments in finalizing the
21 performance evaluation report. The results of performance
22 evaluations will be provided to the entity that was evaluated
23 and may be used in the evaluation of qualifications submittals

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

5

6 §27.4. Solicited Proposals.

7 (a) Applicability. If the department develops a concept for
8 private participation in an eligible project, it will solicit
9 participation in accordance with the requirements of this
10 section.

11 (b) Request for qualifications - notice. If authorized by
12 the commission to issue a request for qualifications for an
13 eligible project, the department will set forth the basic
14 criteria for professional experience, technical competence, and
15 capability to complete a proposed project, and such other
16 information as the department considers relevant or necessary in
17 the request for qualifications and will publish it at a minimum
18 in the Texas Register and in one or more newspapers of general
19 circulation in this state. The department may also elect to
20 furnish the request for qualifications to businesses in the
21 private sector that the department otherwise believes might be
22 interested and qualified to participate in the project which is
23 the subject of the request for qualifications.

1 (c) Request for qualifications - content. At its sole
2 option, the department may elect to furnish conceptual designs,
3 fundamental details, technical studies and reports or detailed
4 plans of the proposed project in the request for qualifications.
5 The request for qualifications may request one or more
6 conceptual approaches to bring the project to fruition.

7 (d) Request for qualifications - evaluation. The
8 department, after evaluating the qualification submittals
9 received in response to a request for qualifications, will
10 identify and approve a "short-list" that is composed of those
11 entities that are considered most qualified to submit detailed
12 proposals for a proposed project. In evaluating the
13 qualification submittals, the department will consider the
14 results of performance evaluations conducted by the department
15 under §27.3 of this subchapter (relating to General Rules for
16 Private Involvement) and §9.152 of this title (relating to
17 General Rules for Design-Build Contracts) determined by the
18 department to be relevant to the project, the results of other
19 performance evaluations determined by the department to be
20 relevant to the project, and other objective evaluation criteria
21 ~~[such qualities]~~ that the department considers relevant to the
22 project, which may include the private entity's financial
23 condition, management stability, technical capability,

1 experience, staffing, and organizational structure. The request
2 for qualifications will include the criteria used to evaluate
3 the qualification submittals and the relative weight given to
4 the criteria. The department shall advise each entity providing
5 a qualification submittal whether it is on the short-list of
6 qualified entities.

7 (e) Requests for proposals. If authorized by the
8 commission, the department will issue a request for proposals
9 from all private entities qualified for the short-list,
10 consisting of the submission of detailed documentation regarding
11 the project. The request for proposals may require the
12 submission of additional information relating to:

13 (1) the proposer's qualifications and demonstrated
14 technical competence;

15 (2) the feasibility of developing the project as
16 proposed;

17 (3) detailed engineering or architectural designs;

18 (4) the proposer's ability to meet schedules;

19 (5) a detailed financial plan, including costing
20 methodology, cost proposals, and project financing approach; or

21 (6) any other information the department considers
22 relevant or necessary.

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

1 request for proposals may stipulate an amount of money, as
2 authorized under Transportation Code, §223.203(m), that the
3 department will pay to an unsuccessful proposer that submits a
4 detailed proposal that is responsive to the requirements of the
5 request for proposals. The commission shall approve the amount
6 of the payment to be stipulated in the request for proposals.

7 In determining whether to approve a payment, the commission
8 shall consider:

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

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

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

15 (g) Joint proposal by private entity and environmental
16 consultant. If the department solicits proposals in which an
17 entity affiliated with the proposing private entity will act as
18 the department's environmental consultant for an eligible
19 project, the request for proposals may require the submission of
20 a consolidated joint proposal from the private entity and the
21 environmental consultant or subcontractor that results in a
22 comprehensive development agreement and separate contract for
23 environmental services.

1 (h) Detailed proposal evaluation criteria. The proposals
2 will be evaluated by the department based on the results of
3 performance evaluations conducted by the department under §27.3
4 of this subchapter and §9.152 of this title determined by the
5 department to be relevant to the project, the results of other
6 performance evaluations determined by the department to be
7 relevant to the project, and other objective [~~these~~] evaluation
8 criteria the department deems appropriate for the project, which
9 may include the reasonableness of any financial plan submitted
10 by a proposer, the reasonableness of the project schedule,
11 reasonableness of assumptions (including those related to
12 ownership, legal liability, law enforcement, and operation and
13 maintenance of the project), forecasts, financial exposure and
14 benefit to the department, compatibility with other planned or
15 existing transportation facilities, likelihood of obtaining
16 necessary approvals and other support, cost and pricing, toll
17 rates and projected usage, scheduling, environmental impact,
18 manpower availability, use of technology, governmental liaison,
19 and project coordination, with attention to efficiency, quality
20 of finished product and such other criteria, including
21 conformity with department policies, guidelines and standards,
22 as may be deemed appropriate by the department to maximize the
23 overall performance of the project and the resulting benefits to

1 the state. Specific evaluation criteria and requests for
2 pertinent information will be set forth in the request for
3 proposals.

4 (i) Apparent best value proposal. Based on the evaluation
5 and the evaluation criteria described under subsection (h) of
6 this section and set forth in the request for proposals, the
7 department will rank all proposals that are complete, responsive
8 to the request for proposals, and in conformance with the
9 requirements of this subchapter, and may select the private
10 entity whose proposal offers the apparent best value to the
11 department. If the request for proposals provides for a
12 consolidated joint proposal to be submitted for a separate
13 environmental consultant contract as well as the comprehensive
14 development agreement, the request for proposals shall specify
15 how the two parts of the proposal will be evaluated in making
16 the overall best value determination.

17 (j) 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 comprehensive
22 development agreement to the apparent best value proposer.
23 Award may be subject to the successful completion of

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

7 (k) Negotiations with selected entity. If authorized by
8 the commission, the department will attempt to negotiate a
9 comprehensive development agreement with the apparent best value
10 proposer to design, develop, construct, finance, reconstruct,
11 extend, expand, maintain, or operate the project and (if
12 included in the request for proposals) an environmental
13 consultant contract. If a comprehensive development agreement
14 satisfactory to the department cannot be negotiated with that
15 proposer, or if, in the course of negotiations, it appears that
16 the proposal will not provide the department with the overall
17 best value, the department will formally end negotiations with
18 that proposer and, in its sole discretion, either:

19 (1) reject all proposals;

20 (2) modify the request for proposals and begin again the
21 submission of proposals; or

22 (3) proceed to the next most highly ranked proposal and
23 attempt to negotiate a comprehensive development agreement with

1 that entity in accordance with this paragraph.

2 (1) Negotiations with environmental consultant. If an
3 environmental consultant contract satisfactory to the department
4 cannot be negotiated with the selected consultant, the
5 department may elect to terminate negotiations and proceed with
6 the negotiation of the comprehensive development agreement only.