

**REQUEST FOR PROPOSALS
TO DEVELOP, DESIGN, CONSTRUCT, FINANCE, OPERATE AND MAINTAIN
THE
IH 635 MANAGED LANES PROJECT
THROUGH A COMPREHENSIVE DEVELOPMENT AGREEMENT**

**VOLUME I
INSTRUCTIONS TO PROPOSERS**

**A PROJECT OF THE
TEXAS DEPARTMENT OF TRANSPORTATION**

ISSUED SEPTEMBER 17, 2007

**Texas Department of Transportation
125 East 11th Street – Fifth Floor
Austin, Texas 78701**

CERTAIN KEY DATES

<u>EVENT</u>	<u>DATE</u>
Issue Final Request for Proposals	September 17, 2007
Proposal Due Date	March 17, 2008
CDA conditionally awarded (anticipated)	May 29, 2008
CDA executed and delivered (anticipated)	July 29, 2008

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Form E	Personnel Work Assignment Form
Form F	Non-Collusion Affidavit
Form G	Buy America Certification
Form H	DBE Certification
Form I	Child Support Statement for State Grants, Loans and Contracts
Form J	Conflict of Interest Disclosure Statement
Form K	Financial Request / Offer Form
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INSTRUCTIONS TO PROPOSERS

(Request for Proposals: IH 635 Managed Lanes Project)

SECTION 1.0 INTRODUCTION AND GENERAL PROVISIONS

1.1 Introduction

This Request for Proposals (“RFP”) is issued by the Texas Department of Transportation (“TxDOT”), an agency of the State of Texas, to seek competitive detailed proposals (individually, a “Proposal” and collectively, “Proposals”) for a public-private partnership to be evidenced by a Comprehensive Development Agreement (“CDA”). The CDA shall provide that the entity identified in the successful Proposal (the “Developer”) shall develop, design, construct, finance, operate and maintain the IH 635 Managed Lanes Project (the “Project”). The form of CDA is included in Volume II of the RFP.

TxDOT is issuing the RFP to those Proposers shortlisted based on TxDOT’s evaluation of Qualification Submittals (“QSs”) delivered to TxDOT on September 22, 2005 in response to the Request for Qualifications for the Project issued on May 23, 2005 (as amended, the “RFQ”).

Proposers must comply with these Instructions to Proposers (“ITP”) during the procurement and in their responses to the RFP. Proposers shall also take the Project goals identified in Section 1.2 below into consideration in drafting their Proposals.

The RFP permits a Proposer to identify an entity other than Proposer to act as Developer, thus allowing unsuccessful Proposers to avoid unnecessary costs associated with formation of such entity. However, if the entity identified as Developer in the successful Proposal is not formed as contemplated herein, or fails to comply with the requirements set forth herein, the entity(ies) that signed the Proposal shall have the obligation either to enter into the CDA itself or to provide a substitute Developer acceptable to TxDOT in its sole discretion.

All forms named in this ITP are found in Exhibit D unless otherwise noted. All times in this ITP are CST or CDT, as applicable.

1.2 Project Goals

TxDOT’s goals for the Project are as follows:

(a) Maintaining mobility through the Project area during construction and renewal activities through the term of the concession while minimizing impacts to business, communities and adjacent property owners through communication, cooperation and coordination with Stakeholders;

- (b) Improving mobility within the Project area after the construction period;
- (c) Implementing safe construction, operation and maintenance;
- (d) Obtaining cost-effective financing and leveraging available state funds and toll revenue to maximize funding for this and other regional projects eligible for federal transportation funding;
- (e) Securing quality design and construction to optimize the operational life cycle performance of the Project and accommodate Related Transportation Facilities with minimal impact;
- (f) Expediting delivery of Project improvements;
- (g) Obtaining high quality operation and maintenance meeting or exceeding TxDOT technical requirements, including interoperability requirements, applying the same standards to the Managed and General Purpose Lanes, and allowing handback to TxDOT upon termination of the CDA, in accordance with TxDOT requirements; and
- (h) Facilitating participation by DBEs, women-owned business enterprises and minority business enterprises, consistent with the CDA Documents and applicable Laws and regulations.

1.3 General Project Description and Scope of Developer's Obligations

1.3.1 General Project Description

The Project consists of reconstruction of the IH 635 general purpose lanes, new construction of managed lanes, reconstruction of existing frontage roads and construction of new frontage roads. Along IH 35E, the Project consists of elevated direct connector ramps between IH 35E and IH 635. Other facilities to the extent necessary will be constructed for connectivity, mobility and safety. Tolling operation will be provided for the managed lanes for the approximately 17 mile Project along the IH 635 and IH 35E corridors in Dallas County. In addition, operations and maintenance work is required for the IH 635 and IH 35E. Municipalities located adjacent to the corridor include the Cities of Dallas and Farmers Branch.

The Project is divided into the following Sections:

- a. IH 635 Section (IH 635 from east of IH 35E to east of Merit Drive): This section of IH 635 currently includes eight general purpose lanes and two interim HOV lanes from IH 35E to Merit Drive (8.9 miles eastbound and 8.0 miles westbound). The Developer will fully reconstruct the IH 635 Section, which will result in an 8-lane general-purpose freeway, a 6-lane managed lane facility and a continuous 2 to 3-lane frontage road system with access ramps. In addition, the following cross streets/facilities will be reconstructed: Denton Drive, Josey Lane, Webb Chapel Road, Joe Ratcliff Walkway, Marsh Lane, Rosser Road, Valley View Lane, Midway Road, Welch Road, main lanes of the Dallas North Tollway (DNT) and portions of the

DNT interchange impacted by the Project, Montfort Drive, Preston Road, Hillcrest Road and Park Central Boulevard.

b. IH 635/IH 35E Interchange (IH 635 from east of Luna Road to east of IH 35E and IH 35E from Crown Road to south of Valwood Parkway): This interchange currently consists of eight, 1 to 3-lane direct connectors between IH 635 and IH 35E. The Developer will construct four additional 2 to 3-lane direct connectors within the the IH 635/IH 35E Interchange (the existing direct connectors will be left in place). The direct connectors to be constructed include: northbound IH 35E to eastbound IH 635, westbound IH 635 to southbound IH 35E, westbound IH 635 to northbound IH 35E, and southbound IH 35E to eastbound IH 635. The westbound-southbound and northbound-eastbound direct connectors will connect with the elevated direct connector Managed Lanes to be built on the IH 35E Section. The IH 635/IH 35E Interchange also includes other reconstruction or new construction as required on IH 635 from east of Luna Road to east of IH 35E and on IH 35E from Crown Road to south of Valwood Parkway.

c. IH 35E Section (IH 35E from the Loop 12 / IH 35E Split to Crown Road): This section of the Project will include the construction of two 3-lane elevated direct connector Managed Lanes along IH 35E that will interface with the IH 635/IH 35E Interchange direct connectors. The existing IH 35E facility will not be reconstructed. Four 1 to 2-lane direct connectors will be constructed within the existing interchange at the south end of the Project at Loop 12. Additionally, minor improvements to ramp connections to/from IH 35E and limited frontage road construction near Walnut Hill Lane will be required.

d. IH 635/US 75 Interchange (IH 635 from Merit Drive to Greenville Avenue): The existing IH 635/US 75 interchange will remain functionally in place. The private sector developer will construct the elements necessary to provide tolling operation for the Managed Lanes within the existing interchange. The construction will include Managed Lane entrance/exit ramp improvements on IH 635 near Greenville Avenue and along the TI Boulevard Managed Lanes access ramps.

TxDOT has received a Finding of No Significant Impact (FONSI) for all Sections within the Project limits. The approved FONSI are listed below.

- a) "Finding of No Significant Impact, Loop 12: From Spur 408 to I.H. 35E and I.H. 35E from Spur 482 to I.H. 635," December 11, 2002
- b) "Finding of No Significant Impact, U.S. 75/I.H. 635 Interchange," October 22 1993; supplemental Categorical Exclusion for additional High Occupancy Vehicle Facilities, April 1997; and Re-evaluation, January 31 2001
- c) "Finding of No Significant Impact, I.H. 635 (LBJ Freeway – West Section): From Luna Road to U.S. 75," April 29, 2004.

TxDOT is currently re-evaluating the FONSI for these Sections, with an anticipated approval date of December 2007.

1.3.2 Scope of Developer's Obligations

Developer's obligations under the CDA will generally include all efforts required to develop, design, construct, finance, operate and maintain the Project in accordance with the requirements of the CDA Documents.

1.4 Documents in the Request for Proposals

The RFP consists of the following volumes, and any other documents that may be issued by Addendum, as such documents may be amended and supplemented:

- (a) Volume I – this ITP (including exhibits and forms);
- (b) Volume II – the CDA Documents (Books 1 – 3); and
- (c) Volume III – the Reference Information Documents.

Refer to Section 1.2 of the CDA for a list of the CDA Documents and their order of precedence, and to Volume III for the Reference Information Documents.

The Reference Information Documents are included in the RFP for the purpose of providing information to Proposers that is in TxDOT's possession. TxDOT has not determined whether the Reference Information Documents are accurate, complete or pertinent, or of any value to Proposers. The Reference Information Documents will not form a part of the contract between TxDOT and Developer. Except as may be provided otherwise in the CDA, TxDOT makes no representation, warranty or guarantee as to, and shall not be responsible for, the accuracy, completeness, or pertinence of the Reference Information Documents, and, in addition, shall not be responsible for any conclusions drawn therefrom.

1.5 Definitions and Acronyms

Refer to Exhibit A hereto for the meaning of various capitalized terms and acronyms used but not defined herein, and refer to Exhibit 1 to the CDA for the meaning of capitalized terms and acronyms used but not defined herein or in said Exhibit A.

1.6 Procurement Schedule; Financial Close Deadline

1.6.1 Procurement Schedule

The following represents the current schedule for the procurement.

<u>EVENT</u>	<u>DATE and TIME</u>
Issue Final Request for Proposals	September 17, 2007
One-on-one meetings with Proposers to discuss business terms	September 26, 2007
Last date for Proposer submittal of initial	October 19, 2007

<u>EVENT</u>	<u>DATE and TIME</u>
questions regarding the RFP	
One-on-one meetings with Proposers and FSLSC	Week of October 22, 2007
One-on-one meetings with Proposers to discuss TPs, ATCs, tolling and CDA	October 31, November 1 – 2, 2007
One-on-one meetings with Proposers to discuss business terms	November 14 - 15, 2007
Last date for Proposer submittal of questions regarding the RFP, as described in <u>Section 2.3.1</u>	12:00 p.m. January 7, 2008
Last date for submittal of ATCs, as described in <u>Section 3.2</u>	12:00 p.m. January 9, 2008
One-on-one meetings with Proposers to discuss Proposal submittal requirements	February 6 – 7, 2007
Last date for TxDOT responses to questions regarding the RFP (if necessary), as described in <u>Section 2.3.1</u>	February 13, 2008
Last date for TxDOT responses to ATCs, as described in <u>Section 3.2</u>	February 13, 2008
Last date for submittal of name and information for Model Auditor, as described in <u>Section 5.11.3</u> (Optional)	12:00 p.m. February 15, 2008
Last date for submittal of draft tolling plan, as described in <u>Section 3.5</u>	12:00 p.m. February 22, 2008
Last date for submittal of Benchmark Rate(s) and proposed information source, as described in <u>Section 5.11.4</u>	12:00 p.m. February 25, 2008
Last date for submittal of changes in organization and submittal of Key Personnel, as described in <u>Section 2.11</u> and <u>Exhibit B, Section 3.2.5.1</u>	12:00 p.m. February 29, 2008
Last date for TxDOT responses to draft tolling plan, organizational changes and changes to Key Personnel, as described in <u>Section 3.5, Section 2.11, and Exhibit B, Section 3.2.5.1</u>	March 3, 2008
Last date for submittal of name and information for Escrow Agent, as described in <u>Section 4.4.4</u>	12:00 p.m. March 3, 2008
Last date for TxDOT to independently verify and approve Benchmark Rate(s), as	March 3, 2008

<u>EVENT</u>	<u>DATE and TIME</u>
described in <u>Section 5.11.4</u>	
Last date for TxDOT response to proposer Model Auditor, as described in <u>Section 5.11.3</u> (if applicable)	March 10, 2008
Proposal Due Date	12:00 p.m. March 17, 2008
Conditional award by Commission (anticipated)	May 29, 2008
TxDOT provides Legislative Budget Board and State Auditor with a copy of CDA, Proposal and financial forecast (at least 30 days prior to execution of CDA)	June 27, 2008
CDA executed and delivered (anticipated)	July 29, 2008
Deposit of Concession Payment (if applicable)	Two business days after CDA executed and delivered

All dates set forth above and elsewhere in the RFP are subject to change, in TxDOT's sole discretion, by Addendum. All times listed above and elsewhere in the RFP are for local, Central time in Austin, Texas for the applicable date.

1.6.2 Financial Close Deadline

If selected for negotiations and award of the CDA, Proposer shall be required to, on or before 61 days after the announcement by the Texas Transportation Commission ("Commission") of the best value Proposer and conditional award of the CDA to such Proposer, (a) deliver to TxDOT executed copies of the CDA and the documents required under Section 6.1.2 and (b) achieve financial close.

1.7 General Provisions Regarding Proposals

1.7.1 Proposal Contents

As used in this procurement, the term "Proposal" means a Proposer's complete response to the RFP, including (a) a Technical Proposal, including a Project Development Plan and properly completed Proposal forms, and (b) a Financial Proposal, including certain portions of a Financing Plan and properly completed Proposal forms (to be delivered directly to TxDOT) and certain portions of a Financing Plan and a Financial Model and supporting documentation (to be delivered into escrow). Requirements for the Technical Proposal and the Financial Proposal are set forth in Exhibits B and C, respectively, and a checklist showing the required contents of the entire Proposal is found in Exhibit E. The Proposal shall be organized in the order listed in Exhibit E, and shall be clearly indexed. Each Proposal component shall be clearly titled and identified and shall be submitted without reservations, qualifications, conditions or assumptions. Any failure to provide all the information and all completed

forms in the format specified, or submittal of a Proposal subject to any reservations, qualifications, conditions or assumptions, may result in TxDOT's rejection of the Proposal or giving it a lower rating. All blank spaces in the Proposal forms must be filled in as appropriate. No substantive change shall be made in the Proposal forms.

1.7.2 Inclusion of Proposal in CDA

Portions of the successful Proposal will become part of the CDA Documents, as specified in the CDA. All other information is for evaluation purposes only and will not become part of the CDA Documents.

1.7.3 Commitments in the Proposal

The verbiage used in each Proposal will be interpreted and evaluated based on the level of commitment provided by Proposer. Tentative commitments will be given no consideration. For example, phrases such as "we may" or "we are considering" will be given no consideration in the evaluation process since they do not indicate a firm commitment.

1.7.4 Ownership of Proposal and Applicability of Public Information Act

Subject to the exceptions specified herein and in Section 223.203 of the Texas Transportation Code (the "Code"), all written and electronic correspondence, exhibits, photographs, reports, printed material, tapes, disks, designs, and other graphic and visual aids submitted to TxDOT during this procurement process, whether included in the Proposal or otherwise submitted, become the property of the State of Texas upon delivery to TxDOT, and will not be returned to the submitting parties.

Proposers should familiarize themselves with the provisions of the Public Information Act, Texas Government Code, Chapter 552 (the "Act") requiring disclosure of public information, and exceptions thereto (including the exceptions set forth in Section 223.204 of the Code). In no event shall the State of Texas, TxDOT, or any of their agents, representatives, consultants, directors, officers or employees be liable to a Proposer or Proposer team member for the disclosure of any materials or information submitted in response to the RFP. See also Section 2.6.

1.8 Federal Requirements and Funding

In order to preserve the ability of the parties to use federal funding for the Project, the procurement process and CDA must comply with applicable federal Laws and regulations. TxDOT reserves the right to modify the RFP to address any concerns, conditions or requirements of the Federal Highway Administration ("FHWA"). Proposers shall be notified by Addendum of any such modifications.

1.8.1 DBE Requirements

TxDOT has determined that Disadvantaged Business Enterprises ("DBEs") requirements apply to design and construction of the Project, and has adopted a DBE

Program to provide DBEs opportunities to participate in the business activities of TxDOT as service providers, vendors, contractors, subcontractors, advisors, and consultants. TxDOT has adopted the definition of DBEs set forth in 49 CFR § 26.5. Proposer's DBE compliance obligations shall be governed by all applicable federal DBE regulations, including Title 49 CFR Part 26, as well as applicable requirements set forth in the CDA Documents and TxDOT's DBE Program document.

TxDOT's DBE requirements applicable to the CDA are set forth in Section 10.9 of the CDA and the DBE Special Provisions attached as Exhibit 12 to the CDA and TxDOT's DBE Program adopted pursuant to Title 49 CFR Part 26. The DBE participation goal for the Project is 12.12% for the professional services and construction portions of the Work performed under the CDA. As set forth in Section 3.2.9 of Exhibit B, each Proposer shall submit a certification concerning DBE requirements with its Proposal. Failure to provide the required DBE certification shall be considered a breach of the Proposal requirements and shall render a Proposal non-responsive.

Following conditional award of the CDA, the selected Proposer will be required to submit a detailed DBE Performance Plan describing the methods to be employed for achieving TxDOT's DBE participation goals for the Project, including Proposer's exercise of good faith efforts. Requirements for the DBE Performance Plan are set forth in the DBE Special Provisions, Exhibit 15 to the CDA. The DBE Performance Plan will be subject to review, comment and approval by TxDOT prior to and as a condition of final award and execution of the CDA.

The selected Proposer will also be required to provide DBE commitments in the form required by TxDOT as DBE subcontractors are identified, in accordance with the DBE Special Provisions, the approved DBE Performance Plan, and TxDOT's DBE program.

1.8.2 Federal Funding, TIFIA and Private Activity Bonds

Federal grant funds are available for the Work. Based on the level of interest expressed by Proposers, TxDOT will apply for credit assistance under the Transportation Infrastructure Finance and Innovation Act ("TIFIA") program as well as an allocation from the United States Department of Transportation ("USDOT") of a portion of the \$15 billion of private activity bonds ("PABs") for the Project as described below.

1.8.2.1 PABs Allocation

TxDOT will request from the USDOT the reservation of an allocation for the issuance of a principal amount of PABs based on a pro forma plan of finance to be developed by TxDOT based on its estimates of Project costs and available revenues. TxDOT, a related nonprofit entity or another qualified entity will serve as the issuer of the PABs ("PABs Issuer"). TxDOT will make this allocation available to the PABs Issuer to be used in connection with the issuance of the PABs to provide a portion of the financing for the Project. Proposers seeking to use PABs shall be solely responsible for obtaining ratings, bond counsel opinions, credit enhancement and an underwriting commitment or placement of the PABs, as well as satisfying any conditions placed on the use of the

allocation by USDOT or complying with any other requirements of State and federal tax laws.

The foregoing approach has been developed by TxDOT as an accommodation to Proposers and in order to attempt to facilitate the use of PABs to Proposers. TxDOT makes no representation as to nor guarantees the amount, if any, of private activity bonds that can be issued for the Project or the use of proceeds to finance the Project as a matter of federal tax law. Proposers should seek the advice of their own tax consultants. Should a Proposer elect to include PABs in its Financial Proposal, it does so at its own risk and cost, and TxDOT shall have no liability with respect thereto.

1.8.2.2 TIFIA Credit Assistance

Pursuant to an Early Development Agreement with FHWA, TxDOT will apply for a conditional commitment for a subordinated loan under the TIFIA program based on a pro forma plan of finance to be developed by TxDOT based on its estimates of Project costs and available revenues in an approximate amount of \$139 million to provide financing for the Project. TxDOT anticipates receiving the conditional commitment prior to the Proposal Due Date. A draft of the conditional commitment, indicative term sheet and the form of the credit agreement will be made available to Proposers. TxDOT will assign or otherwise convey to Developer the conditional commitment in order to make the TIFIA credit assistance available to Developer to provide a portion of the financing of the Project. Except as expressly set forth in the draft of the conditional commitment with regard to TxDOT's responsibilities with respect to the TIFIA credit assistance, Developer has the sole responsibility for satisfying any conditions to obtain the funds made available under the conditional commitment. A TIFIA Joint Program Office Representative will be available at one of the currently scheduled one-on-one meetings to respond to questions about the terms and conditions for TIFIA credit assistance.

1.9 Toll Collection System

1.9.1 Raytheon Toll System CDA

TxDOT has entered into a comprehensive development agreement (the "Toll System CDA") with Raytheon Company ("Raytheon"). Under the Toll System CDA, Raytheon has responsibility to design, construct, install, and maintain open-road toll collection systems on projects designated by TxDOT pursuant to the terms thereof.

TxDOT has chosen not to negotiate a "Project Segment Supplement" with Raytheon under the Toll System CDA with respect to this Project and, accordingly, the Toll System CDA will not apply to this Project. Proposer may, in its discretion, negotiate with Raytheon and/or any other toll systems subcontractor with respect to providing tolling systems for the Project.

1.9.2 NTTA Tolling Services Agreement

Pursuant to Senate Bill 792, 80th Leg., R.S. (2007), §9.05 (to be codified in the Code), NTTA will act as the exclusive O&M Contractor for certain mandatory toll collection and

enforcement services for the Project for the entire term of revenue service (commencing as of Service Commencement). NTTA will provide customer service, back office and clearinghouse services, which will be described in detail in an agreement with NTTA for the NTTA tolling services (the “NTTA Tolling Services Agreement”). The form of NTTA Tolling Services Agreement will be provided to Proposers after the RFP is issued. Delivery to TxDOT of executed copies of NTTA Tolling Services Agreement is a condition to final award and execution of the CDA.

1.10 The Independent Engineer

As specified in CDA Section 9.3.1, certain quality assurance services for the Project will be provided by an Independent Engineer under a joint contract among TxDOT, Developer and the Independent Engineer. A draft form of this contract and a general scope of work for the Independent Engineer are set forth as Exhibits H-1 and H-2, subject to further negotiations among the parties following conditional award and prior to execution of the CDA. TxDOT and Developer shall equally share the costs of the Independent Engineer. Proposers are required to include their share of the cost of the Independent Engineer in their Financial Proposal and no adjustment shall be made for any changes thereto arising during finalization of the scope of work and form of contract.

The Independent Engineer shall be a firm that has been pre-qualified by TxDOT for the performance of independent engineer services. Exhibit H-2 lists firms that have been pre-qualified as of the issuance date of the RFP. Proposers may select any firm that is on the TxDOT pre-qualified list and shall identify such firm in its Proposal, in accordance with Exhibit B, Section 4.1.1(e).

TxDOT will enter into a three-party agreement with the selected firm only after TxDOT ascertains that no potential conflicts of interest exist or TxDOT determines, in its sole discretion, that steps taken to mitigate potential conflicts are sufficient to allow the agreement to be awarded. TxDOT is not recommending any particular firm as the Independent Engineer for a Proposer team or the Project, and TxDOT shall bear no responsibility or liability for the selection by a Proposer of any firm or its performance as Independent Engineer.

SECTION 2.0 PROCUREMENT PROCESS

2.1 Procurement Method

The RFP is issued pursuant to Chapter 223 of the Code, Senate Bill 792, 80th Leg., R.S. (2007), Title 43, Texas Administrative Code, Ch. 27, Subchapter A (the “Rules”) and other applicable provisions of Texas and federal Law.

TxDOT will award the CDA (if at all) to the responsible Proposer offering a Proposal meeting the high standards set by TxDOT and which is determined by TxDOT, through evaluation based upon the criteria set forth in the Code, the Rules and the RFP, to provide the best value to TxDOT and to be in the best interest of the State of Texas.

TxDOT will accept Proposals for the Project only from those Proposers TxDOT has shortlisted for the procurement based on their responses to the RFQ.

TxDOT will not review or consider alternative proposals.

2.2 Receipt of the Request for Proposal Documents, Communications and Other Information

The RFP will be issued to shortlisted Proposers in electronic format on the secure file transfer site for the Project (the “FTP site”).

2.2.1 Authorized Representative and Ombudsman

TxDOT has designated the following individual to be its authorized representative for the procurement (the “Authorized Representative”):

John Hudspeth, P.E.
Texas Department of Transportation
4777 E. Highway 80
Mesquite, Texas 75150-6643
Phone: (214) 320-4490
Fax: (214) 320-6117
E-mail: jhudsp1@dot.state.tx.us

Proposers shall provide a copy of correspondence to:

Diana Vargas
Texas Department of Transportation
125 East 11th Street, Fifth Floor
Austin, Texas 78701
PH: (512) 936-0974
Fax: (512) 936-0970
Email: dvargas@dot.state.tx.us

From time to time during the procurement process or during the term of the CDA, TxDOT may designate another Authorized Representative or representatives to carry out some or all of TxDOT's obligations pertaining to the Project.

TxDOT has designated the following individual who is not involved in the procurement to be the ombudsman for the procurement:

Claire McGuinness, Esq.
Associate General Counsel
Texas Department of Transportation
125 East 11th Street, Fifth Floor
Austin, Texas 78701
E-mail Address: cmcguin@dot.state.tx.us

The ombudsman's role and the methods for communicating with the ombudsman are described in Section 2.3.3.

2.2.2 Identification of Proposer Representative

If a Proposer changes its designated representative to receive documents, communications or notices in connection with the procurement subsequent to its submission of the QS, Proposer shall provide TxDOT's Authorized Representative with the name and address of such new designated representative. Failure to identify a designated representative in writing may result in Proposer failing to receive important communications from TxDOT. TxDOT is not responsible for any such failure.

2.2.3 Rules of Contact

From the date of issuance of the RFQ until December 21, 2006, the rules of contact provisions in the RFQ were applicable to this procurement. Starting on December 21, 2006, the date the Industry Review Package was issued, and ending on the earliest of (i) execution and delivery of the CDA, (ii) rejection of all Proposals by TxDOT or (iii) cancellation of the RFP, the following rules of contact shall apply. These rules are designed to promote a fair and unbiased procurement process. Contact includes face-to-face, telephone, facsimile, electronic-mail (e-mail), or formal written communication.

The specific rules of contact are as follows:

(a) No Proposer nor any of its team members may communicate with another Proposer or its team members with regard to the RFP or either team's Proposal, except that (i) subcontractors that are shared between two or more Proposer teams may communicate with their respective team members so long as those Proposers establish a protocol to ensure that the subcontractor will not act as a conduit of information between the teams and (ii) this prohibition does not apply to public discussions regarding the RFP at any TxDOT sponsored informational meetings.

(b) Each Proposer shall designate one representative responsible for contacts with TxDOT, and shall correspond with TxDOT regarding the RFP only through TxDOT's Authorized Representative and Proposer's designated representative.

(c) No Proposer or representative thereof shall have any ex parte communications regarding the RFP or the procurement described herein with any member of the Texas Transportation Commission or with any TxDOT staff, advisors, contractors or consultants involved with the procurement, except for communications expressly permitted by the RFP or except as approved in advance by the Authorized Representative or the Director of the Texas Turnpike Authority Division, in his/her sole discretion. The foregoing restriction shall not, however, preclude or restrict communications with regard to matters unrelated to the RFP or participation in public meetings of the Commission or any public or Proposer workshop related to the RFP. Any Proposer engaging in such prohibited communications may be disqualified at the sole discretion of TxDOT.

(d) Except to the extent that NTTA participates in workshops or one-on-one meetings as set forth in Section 2.5.2 or as otherwise approved in writing by TxDOT, Proposers shall not communicate with NTTA regarding the Project. There will be no one-on-one meetings with NTTA between the Proposal Due Date and conditional award. The selected Proposer will have the opportunity to request one-on-one meetings with TxDOT and NTTA to discuss the provision of optional services by NTTA, however, discussions regarding changes to the mandatory services are prohibited. Proposers shall not contact any of the other Stakeholders regarding the Project, except as specifically approved in advance by TxDOT in writing. Any Proposer engaging in such prohibited communications may be disqualified at the sole discretion of TxDOT.

(e) Any communications determined by TxDOT, in its sole discretion, to be improper may result in disqualification.

(f) Any official information regarding the Project will be in writing, on TxDOT letterhead, and signed by TxDOT's Authorized Representative or designee.

(g) TxDOT will not be responsible for any oral exchange or any other information or exchange that occurs outside the official process specified herein.

Proposer shall note that no correspondence or information from TxDOT or anyone representing TxDOT regarding the RFP or the Proposal process in general shall have any effect unless it is in compliance with Section 2.2.3(f).

2.2.4 Language Requirement

All correspondence regarding the RFP, ATCs, Proposal, and CDA are to be in the English language. If any original documents required for the Proposal are in any other language, Proposer shall provide a certified English translation, which shall take precedence in the event of conflict with the original language.

2.3 Questions and Response Process, Addenda, Role of the Ombudsman and Pre-Proposal Submittals

2.3.1 Questions and Responses Regarding the RFP

Proposers shall be responsible for reviewing the RFP and any Addenda issued by TxDOT prior to the Proposal Due Date, and for requesting written clarification or interpretation of any perceived discrepancy, deficiency, ambiguity, error or omission contained therein, or of any provision which Proposer fails to understand. Failure of Proposer to so examine and inform itself shall be at its sole risk, and no relief for error or omission will be provided by TxDOT. Proposers shall submit, and TxDOT will respond to, requests for written clarification in accordance with this Section 2.3.1. To the extent responses are provided, they will not be considered part of the CDA nor will they be relevant in interpreting the CDA except as they may clarify provisions otherwise considered ambiguous.

TxDOT will only consider questions regarding the RFP, including requests for clarification and requests to correct errors, if submitted by a shortlisted Proposer to the Authorized Representative or TxDOT's designated ombudsman, by hard copy, facsimile, or other electronic transmission in the prescribed format.

Such request may be submitted at any time prior to the applicable last date specified in Section 1.6.1 or such later date as may be specified in any Addendum. Requests for clarification or interpretation must specifically reference the relevant RFP volume, section and page number, unless such request is of general application (in which case the request for clarification shall so note).

No telephone or oral requests will be considered, and e-mail requests must be followed up by a facsimile or other hard copy delivery. Proposers are responsible for ensuring that any written communications clearly indicate on the first page or in the subject line, as applicable, that the material relates to the Project. No requests for additional information or clarification to any person other than TxDOT's Authorized Representative or, subject to compliance with this Section 2.3.1, TxDOT's ombudsman, will be considered. Questions may be submitted only by Proposer's designated representative, and must include the requestor's name, address, telephone and facsimile numbers, and Proposer he/she represents.

The questions and TxDOT's responses will be in writing and will be delivered to all Proposers, except that TxDOT intends to respond individually to those questions identified by a Proposer or deemed by TxDOT as containing confidential or proprietary information relating to a Proposer's ATCs. TxDOT reserves the right to disagree with Proposer's assessment regarding confidentiality of information, in the interest of maintaining a fair process or complying with applicable Law, in which case TxDOT may allow Proposer to withdraw the question. TxDOT may rephrase questions as it deems appropriate and may consolidate similar questions. TxDOT contemplates issuing multiple sets of responses at different times during the procurement process. Except for responses to questions relating to Addenda, the last set of responses will be issued no

later than the applicable last date specified in Section 1.6.1. A consolidated, final set of questions and answers will be compiled and distributed prior to final award.

TxDOT may convene pre-Proposal meetings with Proposers as it deems necessary (see Section 2.5), and Proposers must make themselves available to TxDOT for such pre-Proposal meetings and to discuss any matters they submit to TxDOT under this Section 2.3.1. If TxDOT determines, in its sole discretion, that its interpretation or clarification requires a change in the RFP, TxDOT will prepare and issue an Addendum.

2.3.2 Addenda

TxDOT reserves the right, in its sole discretion, to revise, modify or change the RFP and/or procurement process at any time before the Proposal Due Date (or, if Proposal Revisions are requested, prior to the due date for Proposal Revisions). Any such revisions will be implemented through issuance of Addenda to the RFP. Addenda will be posted on the FTP site, and Proposers will be notified of the issuance of such Addenda. If any Addendum significantly impacts the RFP, as determined in TxDOT's sole discretion, TxDOT may change the Proposal Due Date. The announcement of such new date will be included in the Addendum.

Proposer shall acknowledge in its Proposal Letter (see Form A) receipt of all Addenda and question and answer responses. Failure to acknowledge such receipt may cause the Proposal to be deemed non-responsive and be rejected. TxDOT reserves the right to hold group meetings with Proposers and/or one-on-one meetings with each Proposer to discuss any Addenda or response to requests for clarifications. TxDOT does not anticipate issuing any Addenda later than five business days prior to the Proposal Due Date. However, if the need arises, TxDOT reserves the right to issue Addenda after such date. If TxDOT finds it necessary to issue an Addendum after such date, then any relevant processes or response times necessitated by the Addendum will be set forth in a cover letter to that specific Addendum.

2.3.3 Ombudsman

As set forth in Section 2.2.1, TxDOT has designated an employee who is not involved in this procurement to act as an ombudsman for the purpose of receiving written communications submitted in accordance with this Section 2.3.3 on a confidential basis. Instead of submitting written communications to the Authorized Representative as provided in Section 2.3.1, a Proposer may submit such confidential communications, and any confidential comments or complaints regarding the procurement, to the ombudsman, where Proposer believes in good faith that confidentiality is essential. A Proposer must submit such confidential communications in a separate document that does not include any information identifying Proposer. After receiving such confidential communications, the ombudsman shall forward only the separate document containing the confidential communication to the Authorized Representative as identified in Section 2.2.1. If the ombudsman determines that the submitted material is not of a confidential nature, the ombudsman shall return the submission to Proposer and instruct Proposer

to submit the communication directly to TxDOT's Authorized Representative in accordance with Section 2.3.1.

2.4 Pre-Proposal Submittals

Pre-Proposal Submittals are required as provided in Section 2.11 (regarding changes in a Proposer's organization); Section 5.11.3 (regarding the Financial Model Auditor (optional)); Section 5.11.4 (regarding Benchmark Rate(s)); Section 4.4.4 (regarding Proposer's selected Escrow Agent); Section 3.5 (regarding draft tolling plan); and Exhibit B, Section 3.2.5.1 (regarding Key Personnel). In addition, any Proposer that wishes to submit an ATC pursuant to Section 3.2 must make a Pre-Proposal Submittal as described therein.

2.5 Pre-Proposal Meetings

2.5.1 Informational Meetings

TxDOT may hold joint informational meetings with all Proposers at any time prior to the Proposal Due Date. Informational meetings may be held either in person or by telephonic or electronic means. If held telephonically or electronically, the meeting will permit interactive communication between all Proposers and TxDOT. Written notice of any informational meetings will be sent to all Proposers. If the meeting is conducted by telephonic or electronic means, the notice will inform Proposers of the manner of the meeting.

If any informational meeting is held, each Proposer shall attend with appropriate members of its proposed key management personnel, and if required by TxDOT, senior representatives of proposed team members identified by TxDOT.

2.5.2 One-on-One Meetings

TxDOT intends to conduct one-on-one meetings with each Proposer on the dates set forth in Section 1.6.1, and on such other dates designated by TxDOT in writing to Proposers, to discuss issues and clarifications regarding the RFP and Proposer's ATCs. TxDOT reserves the right to disclose to all Proposers any issues raised during the one-on-one meetings, except to the extent that TxDOT determines, in its sole discretion, such disclosure would impair the confidentiality of an ATC or would reveal a Proposer's confidential business strategies. Participation at such meetings by Proposers shall be mandatory. TxDOT may permit NTTA to participate in one-on-one meetings for the purposes of describing the terms of NTTA Tolling Services Agreement.

The one-on-one meetings are subject to the following rules:

- The meetings are intended to provide Proposers with a better understanding of the RFP.
- TxDOT will not discuss with any Proposer any Proposal or ATC other than its own.

- Proposers shall not seek to obtain commitments from TxDOT or NTTA in the meetings or otherwise seek to obtain an unfair competitive advantage over any other Proposer.
- No aspect of these meetings is intended to provide any Proposer with access to information that is not similarly available to other Proposers, and no part of the evaluation of Proposals will be based on the conduct or discussions that occur during these meetings.

Persons attending the one-on-one meetings will be required to sign an acknowledgment and waiver that addresses the foregoing rules and to identify all participants from Proposer whether attending in person or by phone.

2.5.3 Questions and Responses During One-on-One Meetings

During one-on-one meetings, Proposers may ask questions and TxDOT may provide responses. However, any responses provided by TxDOT during one-on-one meetings may not be relied upon unless questions were submitted in writing and TxDOT provided written responses in accordance with Section 2.3.1. The questions and TxDOT's responses will be provided in writing to all Proposers, except to the extent such questions are deemed by TxDOT to contain confidential or proprietary information relating to a particular Proposer's Proposal or ATCs.

2.5.4 Statements at Meetings

Nothing stated at any pre-proposal meeting or included in a written record or summary of a meeting will modify the ITP or any other part of the RFP unless it is incorporated in an Addendum issued pursuant to Section 2.3.2.

2.6 Confidentiality/Public Information Act Disclosure Requests

Proposers are advised that observers from federal or other agencies, including representatives appointed by the Regional Transportation Council (RTC) may observe the Proposal evaluation process and will have the opportunity to review the Proposals after the Proposal Due Date. Prior to the submission of final Proposals, Proposers will also have the opportunity to meet separately with representatives of the TIFIA Joint Program Office and their outside advisors. The confidentiality of any information presented to the TIFIA Joint Program representatives is governed by 49 CFR Part 7; furthermore, FHWA has agreed to take reasonable steps to prevent this information from becoming a public record. Outside advisors to FHWA will be required to sign TxDOT's standard confidentiality agreement. By submitting a Proposal to TxDOT in response to the RFP, Proposer consents to such disclosure and expressly waives any right to contest such disclosure under Section 223.204(a) of the Code or the Public Information Act.

After conditional award of the CDA, TxDOT shall have the right to disclose any and all portions of all Proposals, except that financial statements of Equity Participants described in Exhibit C, Section 2.0 will not be subject to disclosure unless they are

independently a matter of public information, and Escrowed Materials shall be subject to disclosure only as described below. Each Proposer, by submitting a Proposal to TxDOT in response to the RFP, consents to such disclosure and expressly waives any right to contest such disclosure under Section 223.204(a) of the Code or the Public Information Act.

If a request is made under the Act for disclosure of the Proposals, including Escrowed Materials, TxDOT will submit a request for an opinion from the Office of the Attorney General prior to disclosing any such documents in accordance with the Act. Proposer shall then have the opportunity to assert its basis for non-disclosure and claimed exception under the Act or other applicable Law to the Office of the Attorney General within the time period specified in the notice issued by TxDOT and allowed under the Act. However, it is the responsibility of Proposer to monitor such proceedings and make timely filings. TxDOT may, but is not obligated to, make filings of its own concerning possible disclosure; however, TxDOT is under no obligation to support the positions of Proposer. By submitting a Proposal to TxDOT in response to the RFP, Proposer consents to, and expressly waives any right to contest, the provision by TxDOT to the Office of the Attorney General of all, or representative samples of, the Proposal, including Escrowed Materials, in accordance with the Act. Under no circumstances will TxDOT be responsible or liable to a Proposer or any other party as a result of disclosing any such materials, whether the disclosure is deemed required by Law or by an order of court or the Office of the Attorney General or occurs through inadvertence, mistake or negligence on the part of TxDOT or its officers, employees, contractors or consultants.

All Proposers should obtain and thoroughly familiarize themselves with the Act, Code and any Rules applicable to the issue of confidentiality and public information. All Proposals received in response to the RFP shall conform to and contain the detailed information required by the Code and the Rules. TxDOT will not advise a Proposer as to the nature or content of documents entitled to protection from disclosure under the Code, the Act or other Texas Laws, as to the interpretation of such Laws, or as to definition of trade secret. Proposer shall be solely responsible for all determinations made by it under applicable Laws. Each Proposer is advised to contact its own legal counsel concerning the effect of applicable Laws to that Proposer's own circumstances.

In the event of any proceeding or litigation concerning the disclosure of any Proposal or portion thereof, including Escrowed Materials, submitted by Proposer, Proposer shall be responsible for otherwise prosecuting or defending any action concerning the materials at its sole expense and risk; provided, however, that TxDOT reserves the right, in its sole discretion, to intervene or participate in the litigation in such manner as it deems necessary or desirable. All costs and fees (including attorneys' fees and costs) incurred by TxDOT in connection with any litigation, proceeding or request for disclosure shall be reimbursed and paid by Proposer whose Proposal is the subject thereof.

2.7 TxDOT Studies and Investigations

TxDOT has completed its Site investigations and traffic and revenue studies and does not anticipate undertaking any further investigative activities during the procurement

process. To the extent TxDOT undertakes any additional investigative activities, the information obtained by TxDOT from such activities may be made available to Proposers.

2.8 Examination of RFP and Access to Site

2.8.1 Examination of RFP

Each Proposer shall be solely responsible for examining, with appropriate care and diligence, the RFP, including Reference Information Documents and any Addenda, and material posted on the FTP site, and for informing itself with respect to any and all conditions which may in any way affect the amount or nature of its Proposal, or the performance of its obligations following award if Proposer enters into the CDA with TxDOT. Each Proposer also is responsible for monitoring the FTP site for information concerning the RFP and the procurement. The Proposal Letter (Form A) includes an acknowledgment that Proposer has received and reviewed all materials posted thereon. Failure of Proposer to so examine and inform itself shall be at its sole risk, and TxDOT will provide no relief for any error or omission.

Each Proposer is responsible for conducting such investigations as it deems appropriate in connection with its Proposal, regarding the condition of existing facilities and Site conditions, including Hazardous Materials, permanent and temporary Utility appurtenances, area population, traffic patterns and driver preferences, keeping in mind the provisions of the CDA regarding assumption of liability by Proposer. Proposer's receipt of TxDOT-furnished information does not relieve Proposer of such responsibility.

The submission of a Proposal shall be considered prima facie evidence that Proposer has made the above-described examination and is satisfied as to the conditions to be encountered in performing the Work and as to the requirements of the CDA Documents.

2.8.2 Existing Construction Work Site Information and Access

After issuance of the RFP and through the Proposal Due Date, Proposers will be provided with project updates concerning the status of existing IH 635 construction. These updates will be considered additions to the Reference Information Documents described in Section 1.4. In addition, Proposers may access the Site for investigations with TxDOT's prior written consent through the process outlined in Section 2.8.3.

2.8.3 Other Access

An expedited process for obtaining rights of entry to access portions of the Project is attached hereto as Exhibit I. Pursuant to the terms set forth in Exhibit I and subject to Proposer obtaining any required administrative or governmental approvals, each Proposer will be permitted to conduct data mining studies and investigations for purposes of obtaining additional traffic and revenue information that Proposer deems necessary; provided, however, that Proposer shall not (i) interrupt or impede traffic flow; (ii) stop traffic at cross-streets or intersections or otherwise to solicit information; and/or (iii) request any vehicle/owner data or information from TxDOT prohibited by Law.

Proposers will be allowed access, through the Proposal Due Date, to those portions of the Project under TxDOT ownership that are not currently under construction, subject to the conditions specified in Exhibit I, for purposes of inspecting in-place assets and determining Site conditions through non-destructive investigations. This work may include surveys and site investigations, such as geotechnical, Hazardous Materials and Utilities investigations.

After conditional award has been made, the selected Proposer will be allowed access to the Project Right of Way that TxDOT owns, in accordance with the process described in this Section 2.8.3, in order to conduct surveys and site investigations, including geotechnical, Hazardous Materials and Utilities investigations, and to engage in the other activities that are allowed prior to NTP2.

2.9 Errors

If any mistake, error, or ambiguity is identified by Proposer at any time during the procurement process in any of the documents supplied by TxDOT, Proposer shall have a duty to notify TxDOT of the recommended correction in writing in accordance with Section 2.3.1.

2.10 Improper Conduct

2.10.1 Non-Collusion

Neither Proposer nor any of its team members shall undertake any of the prohibited activities identified in the Non-Collusion Affidavit (Form F).

2.10.2 Organizational Conflicts of Interest

The rules at 43 Texas Administrative Code § 27.8 regarding organizational conflicts of interest apply to all CDA projects, including this Project. Proposers are advised that the rules may preclude certain firms and their subsidiaries and affiliates from participating on a Proposer team.

By submitting its Proposal, each Proposer agrees that, if an organizational conflict of interest (as defined in the draft policy) is thereafter discovered, Proposer must make an immediate and full written disclosure to TxDOT that includes a description of the action that Proposer has taken or proposes to take to avoid or mitigate such conflicts. If an organizational conflict of interest is determined to exist, TxDOT may, at its sole discretion, cancel the procurement, disqualify Proposer with a conflict or take other action as necessary to mitigate the conflict. If Proposer was aware of an organizational conflict of interest prior to the award of the CDA and did not disclose the conflict to TxDOT, TxDOT may pursue remedies under the CDA including termination of the CDA for default.

2.10.3 Equitable Treatment of Proposers

During the procurement process (including the process for evaluation of ATCs and Proposals), TxDOT will not engage in conduct that treats any Proposer inequitably.

2.11 Changes in Proposer's Organization

In order for a Proposer to remain qualified to submit a Proposal after it has been placed on the shortlist, unless otherwise approved in writing by TxDOT, Proposer's organization as identified in the QS must remain intact for the duration of the procurement process. If a Proposer wishes to make changes in the Major Participants identified in its QS, including, without limitation, additions, deletions, reorganizations and/or role changes in or of any of the foregoing, Proposer shall submit to TxDOT a written request for approval of the change from TxDOT as soon as possible, but in no event later than the applicable last date set forth in Section 1.6.1. Any such request shall be addressed to TxDOT at the address set forth in Section 2.2.1, accompanied by the information specified for such entities or individuals in the RFQ. If a request is made to allow deletion or role change of any Major Participant identified in its QS, Proposer shall submit such information as may be required by TxDOT to demonstrate that the changed team meets the RFQ and RFP criteria (pass/fail and technical). Proposer shall submit an original and five copies of each request package. TxDOT is under no obligation to approve such requests and may approve or disapprove in writing a portion of the request or the entire request at its sole discretion. Except as provided herein and in the CDA, a Proposer may not make any changes in the Major Participants identified in its QS after the applicable last date set forth in Section 1.6.1. Between the applicable deadline set forth in Section 1.6.1 for submission of changes in Proposer's organization and execution of the CDA, TxDOT will consider requests by Proposers to make changes in Proposers' organization based only on unusual circumstances beyond Proposer's control.

2.12 Sales Tax

Proposers should assume that the Project is exempt from sales tax for certain Expendable Materials as more particularly described in the CDA. The selected Proposer will be required to submit a "Texas Sales and Use Tax Exemption Certification" to a seller for exempt items. The referenced form is available online to the public through the Comptroller's website.

SECTION 3.0 ALTERNATIVE TECHNICAL CONCEPT AND DRAFT TOLLING PLAN REVIEWS

3.1 Alternative Technical Concepts

Sections 3.1 through 3.4 set forth a process for pre-Proposal review of ATCs conflicting with the requirements for design, construction, operation and maintenance of the facilities, or otherwise requiring a modification of the Technical Provisions. This process is intended to allow Proposers to incorporate innovation and creativity into the Proposals, in turn allowing TxDOT to consider Proposer ATCs in making the selection decision, to avoid delays and potential conflicts in the design associated with deferring of reviews of ATCs to the post-award period, and, ultimately, to obtain the best value for the public.

ATCs eligible for consideration hereunder shall be limited to those deviations from the requirements of the as-issued CDA Documents that result in performance and quality of the end product that is equal to or better than the performance and quality of the end product absent the deviation, as determined by TxDOT in its sole discretion. A concept is not an ATC if, in TxDOT's sole judgment, it merely results in reduced quantities, performance or reliability. A concept is not eligible for consideration as an ATC if it is premised upon or would require (a) the addition of a separate TxDOT project to the CDA (such as expansion of the scope of the Project to include additional roadways), (b) a change in the aesthetic or landscaping provisions set forth in Book 2, or (c) an increase in the amount of time required for Service Commencement. ATCs that, if implemented, would require further environmental evaluation of the Project, may be allowed, provided that Developer will bear the schedule and cost risk associated with such additional environmental evaluation. If Developer is not able to obtain the approvals necessary to implement the ATC, Developer will be obligated to develop the Project in accordance with existing approvals without additional cost or extension of time.

Any ATC that has been pre-approved may be included in the Proposal, subject to the conditions set forth herein.

If a Proposer is unsure whether a concept is consistent with the requirements of the RFP or if that concept would be considered an ATC by TxDOT, TxDOT recommends that Proposer submit such concept for review as an ATC.

3.2 Pre-Proposal Submission of ATCs

Proposer may submit ATCs for review to TxDOT at the address specified in Section 2.2.1, until the applicable last date and time identified in Section 1.6.1. All ATCs shall be submitted in writing, with a cover sheet identifying Proposer and stating "IH 635 Managed Lanes Project – Confidential ATCs." Proposer shall clearly identify the submittal as a request for review of an ATC under this ITP. If Proposer does not clearly designate its submittal as an ATC, the submission will not be treated as an ATC

by TxDOT. ATC submittals shall include five copies of a narrative description of the ATC and technical information, including drawings, as described below.

3.2.1 Pre-Proposal ATC submissions shall include:

(a) a sequential ATC number identifying Proposer and the ATC number (multi-part or multi-option ATCs shall be submitted as separate individual ATCs with unique sequential numbers);

(b) a description and conceptual drawings of the configuration of the ATC or other appropriate descriptive information, including a traffic operational analysis, if appropriate;

(c) the locations where, and an explanation of how, the ATC will be used on the Project;

(d) any changes in operations requirements associated with the ATC, including ease of operations;

(e) any changes in maintenance requirements associated with the ATC, including ease of maintenance;

(f) any changes in Handback Requirements associated with the ATC;

(g) any changes in the anticipated life of the item(s) comprising the ATC;

(h) any reduction in the time period necessary to design and construct the Project resulting from implementing the ATC, including, as appropriate, a description of method and commitments;

(i) references to requirements of the RFP which are inconsistent with the proposed ATC, an explanation of the nature of the deviations from said requirements, and a request for approval of such deviations;

(j) the analysis justifying use of the ATC and why the deviation, if any, from the requirements of the RFP should be allowed;

(k) a preliminary analysis of potential impacts on vehicular traffic (both during and after construction), environmental permitting, community impact, safety, and life-cycle Project and infrastructure costs, including impacts on the cost of repair, maintenance and operation;

(l) a preliminary analysis of potential impacts on Project revenue;

(m) if and what additional right of way will be required to implement the ATC (and Proposers are advised that they shall (i) be solely responsible for the acquisition of any such right of way, including the cost thereof and obtaining any necessary Environmental Approvals; (ii) not be entitled to any Change Order for time or money as

a result of Site conditions (i.e., Hazardous Materials, differing site conditions, geotechnical issues, Utilities, etc.) on such additional right of way; and (iii) not be entitled to any Change Order for time or money as a result of any delay, inability or cost associated with the acquisition of such right of way);

(n) a description of other projects where the ATC has been used, the degree of success or failure of such usage and names and contact information including phone numbers and e-mail addresses for project owner representatives that can confirm such statements;

(o) a description of added risks to TxDOT or third parties associated with implementing the ATC;

(p) an estimate of any additional TxDOT, Developer and third party costs associated with implementation of the ATC;

(q) an estimate of any savings that would accrue to TxDOT should the ATC be approved and implemented;

(r) a description of how the ATC is equal or better in quality and performance than the requirements of the RFP; and

(s) a preliminary analysis of potential impacts on the Public Funds Request or Concession Payment, as applicable.

3.2.2 Proposer shall not make any public announcement or disclosure to third parties concerning any ATC until after pre-approval (including conditional pre-approval) has been obtained. Following pre-approval (including conditional pre-approval), if a Proposer wishes to make any such announcement or disclosure, it must first notify TxDOT in writing of its intent to take such action, including details as to date and participants, and obtain TxDOT's prior written consent, in its sole discretion, to do so.

3.2.3 If implementation of an ATC will require approval by a third party (e.g., a governmental authority), Proposer will have full responsibility for, and bear the full risk of, obtaining any such approvals after award of the CDA and submission of data; provided, however, that TxDOT shall retain its role as liaison with any governmental authorities as more particularly described in the CDA and Technical Provisions. If any required third-party approval is not subsequently granted with the result that Proposer must comply with the requirements of the original RFP, Proposer will not be eligible for a Change Order that results in compensation to Proposer or extends the CDA schedules.

3.2.4 If TxDOT determines, based on a proposed ATC or otherwise, that the RFP contains an error, ambiguity or mistake, TxDOT reserves the right to modify the RFP to correct the error, ambiguity or mistake, regardless of any impact on a proposed ATC.

3.3 TxDOT Review of Pre-Proposal Submission of ATCs

TxDOT may request additional information regarding proposed ATCs at any time and will, in each case, return responses to each Proposer regarding its ATC on or before the applicable last date set forth in Section 1.6.1, provided that TxDOT has received all requested information regarding such ATC.

TxDOT's responses will be limited to one of the following statements:

- (a) the ATC is acceptable for inclusion in the Proposal;
- (b) the ATC is not acceptable for inclusion in the Proposal;
- (c) the ATC is not acceptable in its present form, but may be acceptable upon the satisfaction, in TxDOT's sole discretion, of certain identified conditions which must be met or clarifications or modifications that must be made; or
- (d) the submittal does not qualify as an ATC but may be included in Proposer's Proposal because it appears to be within the requirements of the RFP.

TxDOT will make a preliminary determination on whether to accept and approve an ATC for submission. However, Proposer will be responsible for ensuring that the final submittal complies with the requirements of the RFP.

Approval of an ATC will constitute a change in the specific requirements of the CDA Documents associated with the approved ATC for that specific Proposer. Each Proposer, by submittal of its Proposal, acknowledges that the opportunity to submit ATCs was offered to all Proposers, and waives any right to object to TxDOT's determinations regarding acceptability of ATCs.

TxDOT's rejection of a pre-Proposal submission of an ATC will not entitle Proposer to an extension of the Proposal Due Date or the date that the ATCs are due; provided, however, that the foregoing shall not limit TxDOT's absolute and sole right to modify the Proposal Due Date or any other date in connection with this procurement.

TxDOT anticipates that its comments provided to a Proposer will be sufficient to enable Proposer to make any necessary changes to its ATCs. However, if a Proposer wishes additional clarifications regarding necessary changes, Proposer may provide a written request for clarifications under Section 2.3.1.

3.4 Incorporation of ATCs in the CDA

Following award of the CDA, the ATCs that were pre-approved by TxDOT and incorporated in the Proposal by the successful Proposer shall be included in the CDA Documents. If TxDOT responded to any ATC by stating that it would be acceptable if certain conditions were met, those conditions will become part of the CDA Documents. The CDA Documents will be conformed after award, but prior to execution of the CDA, to reflect the ATCs, including any TxDOT conditions thereto. Notwithstanding anything

to the contrary herein, if Developer does not comply with one or more TxDOT conditions of pre-approval for an ATC or Developer fails to obtain a required third party approval for an ATC, Developer will be required to comply with the original requirements of the RFP without additional cost or extension of time as set forth in the CDA.

Prior to award of the CDA, ATCs from unsuccessful Proposers may, in TxDOT's sole discretion, be presented to the selected Developer for possible incorporation in the CDA during negotiation of the final terms of the CDA pursuant to Section 5.11.1. In addition, following award of the CDA, ATCs from unsuccessful Proposers may, in TxDOT's sole discretion, be presented to the selected Developer as a TxDOT Change Order in accordance with the CDA.

3.5 Draft Tolling Plan

Proposers shall submit a draft tolling plan for TxDOT's review of general responsiveness to the requirements of the RFP pertaining to tolling regulations set forth in Exhibit 4 to the CDA. Proposers must submit their plan by the applicable last date and time set forth in Section 1.6.1. Submittals shall consist of the limits of toll segments, general location of toll gantries, methodology for tolling (i.e., fixed or dynamic), declaration zone locations, and the location of enforcement zones.

TxDOT intends to respond in writing to submittals by the applicable last date set forth in Section 1.6.1. TxDOT's response will indicate whether the draft tolling plan, as presented, is generally responsive to the requirements of the CDA and the RFP or whether the submittal is non-responsive. Where the draft tolling plan is found non-responsive, TxDOT will attempt to identify the general areas of the submittal that are non-responsive, and at TxDOT's discretion, TxDOT may request that the plan be resubmitted if it is deemed non-compliant by TxDOT.

3.6 Confidentiality

Subject to the provisions of the Act and Section 223.204 of the Code, ATCs, draft tolling plans and all communications regarding ATCs and draft tolling plans will remain confidential until a decision is made to select a Proposer, at which time all confidentiality rights, if any, shall be of no further force and effect except as otherwise allowed under the Act, applicable Law, and Section 2.6. By submitting a Proposal, Proposer agrees, if it is not selected, to disclosure of its work product to the successful Proposer.

SECTION 4.0 REQUIREMENTS FOR SUBMITTAL OF PROPOSALS AND ACCEPTANCE OF DELIVERY BY TXDOT

4.1 General Submittal Requirements

Each Proposal shall include a Technical Proposal and a Financial Proposal meeting the requirements set forth in Exhibits B and C.

4.1.1 Proposal Due Date

The completed Proposal shall be delivered in sealed containers no later than the Proposal Due Date.

4.1.2 Signatures Required

The Proposal Letter (Form A) shall be signed in blue ink by all parties making up Proposer, and shall be accompanied by evidence of signatory authorization as specified in Form A.

4.1.3 Certified Copies

Where certified copies of the Proposal are required, Proposer shall mark the document or cover with the words "Certified True Copy" and have the mark oversigned by Proposer's designated representative.

4.1.4 Consequences of Failure to Follow Requirements

Failure to use sealed containers or to properly identify the Proposal may result in an inadvertent early opening of the Proposal and may result in disqualification of the Proposal. Proposer shall be entirely responsible for any consequences, including disqualification of the Proposal, which result from any inadvertent opening if TxDOT determines that Proposer did not follow the foregoing instructions. It is Proposer's sole responsibility to see that its Proposal is received as required. Proposals received after the time due will be rejected without consideration or evaluation.

4.2 Requirement to Submit Compliant Proposal

The Proposal may not include any qualifications, conditions, exceptions to or deviations from the requirements of the RFP, except as contained in pre-approved ATCs (including conditionally pre-approved ATCs that have been revised to satisfy any conditions to approval). If the Proposal does not fully comply with the instructions and rules contained in this ITP, including the exhibits, it may be disqualified.

Each Proposal must be submitted in the official format which is specified by TxDOT in the RFP. Proposer shall sign the original copy of the Proposal submitted to TxDOT. Multiple or alternate proposals may not be submitted.

Proposals may be considered non-compliant and may be rejected for any of the following reasons:

(a) If the Proposal is submitted in paper form or on disk other than that specified by TxDOT; if it is not properly signed; if any part of the Proposal is missing from the Proposal package, and/or if it otherwise does not meet the Proposal submittal requirements;

(b) If TxDOT determines that the Proposal contains irregularities that make the Proposal incomplete, indefinite, or ambiguous as to its meaning, including illegible text, omissions, erasures, alterations, or items not called for in the RFP, or unauthorized additions;

(c) If multiple or alternate Proposals are submitted or if the Proposal includes any conditions or provisions reserving the right to accept or reject an award or to enter into a CDA following award;

(d) If Proposer attempts to limit or modify the Proposal Security, if the Proposal Security (see Exhibit B, Section 3.3) is not provided, and/or if requested information deemed material by TxDOT is not provided; and

(e) Any other reason TxDOT determines the Proposal to be non-compliant.

4.3 Format

The Proposal shall contain concise written material and drawings enabling a clear understanding and evaluation of the capabilities of Proposer and the characteristics and benefits of the Proposal. Legibility, clarity, and completeness of the Technical Proposal and Financial Proposal are essential. The Technical Proposal shall not exceed the page limitation set forth in Exhibit B, Section 2.0. No page limit applies to appendices and exhibits, however, TxDOT does not commit to review any information in appendices and exhibits other than those required to be provided, and the Proposal evaluation process will focus on the body of the Proposal and any required appendices and exhibits.

An 8 ½ by 11-inch format is required for typed submissions and an 11 by 17-inch format is required for drawings, except that design drawings may be submitted on scroll mats not to exceed 34 inches in width (and such design drawings shall be submitted on CD or DVD in Adobe (.pdf) format and in Bentley Microstation format).

Submittals must be bound with all pages in a binder sequentially numbered. Printed lines may be single-spaced with the type font size being no smaller than 12-point. The use of 11 by 17-inch foldouts for tables, graphics and maps is acceptable in the main body of the Proposal. Each 11 by 17–inch foldout will be considered one page.

4.4 Additional Requirements for Proposal Delivery

The Proposal is to be delivered to TxDOT at the following address, except for the Escrowed Materials, which shall be delivered to the Escrow Agent as specified in Section 4.4.4:

Phillip E. Russell, P.E.
Texas Department of Transportation
Texas Turnpike Authority
125 East 11th Street
Austin, Texas 78701-2483

Each binder of the Proposal shall be labeled to indicate its contents. The original Technical and Financial Proposals shall be clearly identified as “original”; copies of the Proposals shall be sequentially numbered, labeled and bound.

4.4.1 Technical Proposal

All of the binders comprising the original Technical Proposal, together with an electronic copy on one or more CDs and the envelopes described in Section 4.4.2, shall be packaged in a single container, clearly addressed to TxDOT as provided herein, and labeled “[Proposer Name]: Original Technical Proposal for the TxDOT IH 635 Managed Lanes Project.” Proposer shall provide 20 certified copies of the Technical Proposal (except for the Proposal Security and Escrow Agreement). The containers that include the required hard copies of the Technical Proposal shall be labeled “Copies of Technical Proposal for the TxDOT IH 635 Managed Lanes Project.”

The electronic copy shall be in Adobe (.pdf) format on CD(s); provided, however, that (a) Proposal forms may be submitted in either Adobe or Word format, and (b) corporate, partnership, joint venture and limited liability company documents (e.g., articles of incorporation, bylaws, partnership agreements, joint venture agreements and limited liability company operating agreements) may be submitted in hard copy and need not be submitted electronically.

4.4.2 Proposal Security and Escrow Agreement

One original and three certified copies of the Proposal Security shall be provided with the Technical Proposal, and shall be in a separate envelope labeled “[Proposer Name]: Proposal Security for the TxDOT IH 635 Managed Lanes Project.” A copy of the Escrow Agreement shall be provided with the Technical Proposal, in a separate envelope labeled “[Proposer Name]: Escrow Agreement for the TxDOT IH 635 Managed Lanes Project.”

4.4.3 Financial Proposal

One original and six certified copies of the Financial Proposal shall be delivered to TxDOT, together with one electronic copy of the Financing Plan in either Adobe or Word

format. The documents shall be included in a sealed container labeled “[Proposer Name]: Financial Proposal for the TxDOT IH 635 Managed Lanes Project.”

4.4.4 Escrowed Materials

The Cost and Pricing Data (also referred to herein as the “Escrowed Materials”) shall be delivered into escrow in one or more sealed containers labeled: “[Proposer Name]: Escrowed Financial Proposal for the TxDOT IH 635 Managed Lanes Project—Cost and Pricing Data,” containing one set of the Cost and Pricing Data (see Exhibit C, Section 5.7). The Cost and Pricing Data shall be delivered into escrow not later than seven days after the Proposal Due Date.

Proposer shall provide TxDOT with the name, address and contact information of Proposer’s selected Escrow Agent by the applicable last date set forth in Section 1.6.1. Proposer shall deliver to the Escrow Agent chosen by Proposer the Escrowed Materials, along with three completed original Escrow Agreements executed by Proposer in substantially the form attached as Form M. The documents shall be delivered to the Escrow Agent at the address identified in the Escrow Agreement, which shall be located within a 10 mile radius of 125 East 11th Street, Austin, Texas. The Escrow Agent chosen by Proposer must be unaffiliated with Proposer and otherwise must be free of any conflict of interest. A copy of the executed Escrow Agreement shall be included in the Technical Proposal as specified in Section 4.4.2.

4.5 Currency

All required pricing, revenue and cost information shall be provided in US\$ currency only.

4.6 Modifications, Withdrawals and Late Submittals

4.6.1 Modifications to a Proposal

A Proposer may modify its Proposal in writing prior to the specified time on the Proposal Due Date. The modification shall conform in all respects to the requirements for submission of a Proposal. Modifications shall be clearly delineated as such on the face of the document to prevent confusion with the original Proposal and shall specifically state that the modification supersedes the previous Proposal and all previous modifications, if any. If multiple modifications are submitted, they shall be sequentially numbered so TxDOT can accurately identify the final Proposal. The modification must contain complete Proposal sections, complete pages or complete forms as described in Exhibits B and C. Line item changes will not be accepted. No facsimile or other electronically transmitted modifications will be permitted.

4.6.2 Withdrawal and Validity of Proposals

Proposer may withdraw its Proposal at any time prior to the time due on the Proposal Due Date by means of a written request signed by Proposer or its properly authorized representative. Such written request shall be delivered to the address in Section 2.2.1.

A withdrawal of a Proposal will not prejudice the right of a Proposer to file a new Proposal provided that it is received before the time due on the Proposal Due Date. No Proposal may be withdrawn on or after the time due on the Proposal Due Date and any attempt to do so will result in a draw by TxDOT upon the Proposal Security. Proposals shall initially be valid for a period of 180 days after the Proposal Due Date. The next best value Proposer shall not withdraw its Proposal, which Proposal shall remain valid for an additional 90 days beyond the 180-day period if notified by TxDOT that it is selected for negotiations of the CDA within such 180-day period. Any Proposer may elect, in its sole discretion, to extend the validity of its Proposal beyond the time periods set forth above.

4.6.3 Late Proposals

TxDOT will not consider any late Proposals. Proposals and/or modification or withdrawal requests received after the time for submittal of Proposals will be returned to Proposer without consideration or evaluation.

4.7 Forfeiture of Proposal Security

By submitting its Proposal, each Proposer understands and agrees that it shall forfeit its Proposal Security if it is selected as the apparent best value Proposer and Proposer fails to increase the Proposal Security as required under Exhibit B, Section 3.3, or Proposer withdraws, repudiates or otherwise indicates in writing that it will not meet any commitments made in its Proposal, or the next best value Proposer is selected for negotiations within 180 days from the Proposal Due Date and the next best value Proposer fails to extend the Proposal Security as required under Exhibit B, Section 3.3.1 (if Proposer provided a proposal bond as its initial Proposal Security). Each Proposer further agrees that it shall forfeit its Proposal Security if it is selected but fails to achieve commercial and financial close by the deadline set forth in Section 1.6.2 and deposit the Concession Payment (if applicable) by the applicable deadline in accordance with Section 6.1.3, unless such failure is directly attributable to:

(a) TxDOT's failure to respond to Post-Selection Deliverables in accordance with Section 5.12.3;

(b) Proposer's failure to reach agreement with TxDOT and the Independent Engineer on the terms of the Independent Engineer Agreement, except in the event Proposer has failed to engage in good faith negotiations with TxDOT and the Independent Engineer as set forth in Section 5.14

(c) litigation challenging a NEPA Approval that is filed before lapse of the applicable statute of limitations and remains pending on the applicable deadlines for commercial and financial close and payment of the Concession Payment (if applicable) in accordance with Section 5.13;

(d) the State's credit rating drops below A+ from Standard & Poor's and A2 from Moody's;

(e) the refusal of the PABs Issuer to issue bonds in the amount that Proposer's underwriters are prepared to underwrite, provided that such refusal is not due to any fault of Proposer, including Proposer's failure to satisfy all requirements that it is obligated to satisfy under that certain agreement to be entered into by TxDOT, Proposer and the PABs Issuer relating to the responsibilities of the parties with respect to the issuance of the PABs in the form provided to Proposers prior to the Proposal Due Date;

(f) the refusal of the PABs Issuer's counsel to allow closing of the PABs where the bond counsel is ready to give an unqualified opinion regarding the validity of the issuance of the PABs and the tax exempt status of interest paid on the PABs, unless the basis for such refusal is that it would be unreasonable for bond counsel to deliver the opinion;

(g) the unreasonable refusal by the Texas Attorney General to issue a legal opinion after having received all requested information from the selected Proposer;

(h) if TIFIA credit assistance is part of the initial financing under Proposer's Financial Proposal, the failure of the TIFIA JPO to close financing after Proposer has satisfied all requirements and conditions of the conditional term sheet and draft credit agreement provided to Proposers prior to the Proposal Due Date;

(i) TxDOT's or the Independent Engineer's failure to attend and participate in reasonably scheduled negotiation meetings concerning the Independent Engineer Agreement in accordance with Section 5.14;

(j) TxDOT's failure to timely deliver any of the TxDOT Post-Selection Deliverables described in Section 5.15; or

(k) TxDOT's election not to enter into the CDA in the form included with the RFP, following (A) TxDOT's election to commence negotiations regarding the CDA, (B) Proposer's engaging in good faith negotiations as set forth in Section 5.11.1, and (C) failure of the parties to agree upon changes to the terms of the CDA.

For purposes of this Section 4.7, Proposer's obligation to achieve commercial close shall be satisfied when Proposer has executed and delivered to TxDOT the CDA and all documents required hereby, including the documents described in Sections 6.1.1 and 6.1.2.

Any Proposal that contains a material alteration, as determined by TxDOT, in its sole discretion, to the ITP forms or the ITP exhibits, including any material alteration to the form of Proposal Security (Form L), will be considered non-responsive and non-compliant. Alterations that have been approved in writing in advance by TxDOT will not be considered material. If a Proposal is deemed non-responsive or non-compliant, TxDOT may disqualify the Proposal from further consideration. Such disqualification will not result in the forfeiture of Proposer's Proposal Security.

Each Proposer, by submittal of its Proposal, shall be deemed to have agreed to the foregoing.

4.8 Acceptance of Delivery by TxDOT

TxDOT will provide a receipt for Proposals that are timely delivered to TxDOT as specified herein. Proposer will be responsible for obtaining a delivery receipt from the Escrow Agent and obtaining the Escrow Agent's signature on the Escrow Agreements.

A TxDOT representative will visit the Escrow Agent's office on or shortly after the Proposal Due Date to examine the Escrowed Materials and obtain a fully executed copy of the Escrow Agreement.

4.9 Costs Not Reimbursable

The cost of preparing the Proposal and any costs incurred at any time before final award and execution of the CDA, including costs incurred for any interviews, payment owing to Proposer's Escrow Agent, costs associated with Post-Selection Deliverables and costs relating to the finance process, shall be borne by Proposer, except for any costs paid in accordance with Section 6.3.

SECTION 5.0 EVALUATION AND POST-SELECTION PROCESS

TxDOT's goal is to create a fair and uniform basis for the evaluation of the Proposals in compliance with all applicable legal requirements governing this procurement.

The Proposal evaluation process will include an initial review of each Proposal for responsiveness and pass-fail criteria, followed by a subsequent responsiveness and qualitative evaluation of the Project Development Plan, subsequent responsiveness evaluation of the Financial Proposal and a net present value determination of the Public Funds Request (if applicable) and a best value determination. The process may include a request for Proposal Revisions, and may include a negotiations phase with the selected Proposer(s). The steps in the process and evaluation criteria are set forth in Sections 5.3 through 5.11. The evaluation and selection process is subject to modification by TxDOT, in its sole discretion.

The evaluation process will involve the following steps:

1. TxDOT evaluation committees will:
 - (a) evaluate the Proposals and determine which Proposer has offered the apparent best value Proposal, including the consideration of the overall total value of money to TxDOT and the specific evaluation criteria set forth herein; and
 - (b) provide a recommendation to TxDOT senior management regarding the apparent best value.
2. TxDOT senior management will review and consider the recommendations from the TxDOT evaluation committee, and will provide a recommendation for conditional award to the Commission. The Commission will issue notice of conditional award after considering the recommendations received.

The details of the evaluation and selection process are set forth more fully in this Section 5.0.

5.1 Organization of the TxDOT Evaluation Committees

Evaluation of Proposals will be conducted by TxDOT's Evaluation and Selection Recommendation Committee ("ESRC") with assistance from four separate subcommittees – a Technical Proposal pass/fail and responsiveness subcommittee, a Financial Proposal pass/fail and responsiveness subcommittee, a Development Plan Evaluation Subcommittee ("DPES"), and a Financial Proposal Evaluation Subcommittee ("FPES").

The ESRC and the various subcommittees will be comprised of representatives from TxDOT and will be chaired by individuals designated by the Texas Turnpike Authority Division Director. In addition to TxDOT voting members, the ESRC and subcommittees may also be assisted by advisors, including TxDOT representatives and outside

consultants who will offer advice on the technical, financial and legal aspects of each Proposal. The primary responsibility of these advisors will be to assist the ESRC and subcommittees in making the educated and informed assessment of the individual strengths and weaknesses of the Proposals. In addition, observers from federal or other agencies, including representatives appointed by the RTC, with specific interests and responsibilities associated with the Project may be invited to observe aspects of the evaluation process. All evaluators and outside consultants and observers will be required to sign confidentiality statements and will be subject to TxDOT conflict of interest control requirements.

5.2 Best Value Determination

The best value determination will be based on an 80-20 point scale. The Price Score will represent up to 80 points of the total score and the Technical Score will represent up to 20 points of the total score. The determination of apparent best value shall be based on the highest Total Proposal Score computed based on the following formula:

$$\text{Total Proposal Score} = \text{Price Score (max. 80 points)} + \text{Technical Score (max. 20 points)}$$

The Price Score will be based on the net present value of each Proposer's request for public funds or on the offer of payment, determined pursuant to Section 5.5 and Form K, based on the following formula:

$$\text{Price Score} = ((\text{FR/O} - \$1 \text{ billion}) * 80) / (\text{BR/O} - \$1 \text{ billion})$$

where: "FR/O" is the net present value of Proposer's Public Funds Request (Form K, Box 2) or the Concession Payment offer (Form K, Box 3), as applicable. A Concession Payment offer will be written as a negative number.

"BR/O" is the highest Concession Payment offer, or if no Concession Payment offers are received, the lowest net present value Public Funds Request. A Concession Payment offer will be written as a negative number.

The Technical Score will be calculated based on the ESRC evaluation score for the Project Development Plan (maximum of 100 points) as described in Section 5.4.2. The Technical Score will be calculated using the following formula:

$$\text{Technical Score} = \text{ESRC evaluation score} * 0.20$$

5.3 Pass/Fail and Responsiveness Evaluation

Upon receipt, the Technical Proposals and the Financial Proposals will be made available for review by the relevant pass/fail and responsiveness subcommittees. They will be reviewed (a) for the Proposal's conformance to the RFP instructions regarding organization and format and responsiveness to the requirements set forth in the RFP

and (b) based on the pass/fail criteria set forth below. The Technical Proposals and Financial Proposals will be further reviewed for responsiveness by the DPES and FPES as described in Sections 5.4 and 5.5. All reviews of the Escrowed Materials will take place at the Escrow Agent's offices.

5.3.1 Technical Proposals

Technical Proposals will be evaluated based on the following pass/fail criteria:

(a) The business form of Proposer, the proposed Developer, and any entities that will have joint and several liability under the CDA or that will provide a performance guaranty (including any joint venture agreement, partnership agreement, operating agreement, articles of incorporation bylaws or equivalent documents) is consistent with Project and CDA Document requirements.

(b) Proposer has provided a DBE certification in accordance with the requirements of Exhibit B, Section 3.2.9.

(c) Proposer information, certifications, signed statements and documents as listed in Exhibit B, Section 3.2 are included in the Proposal and do not identify any material adverse information.

(d) Proposer has delivered Proposal Security in the form of a complete, properly executed proposal bond that complies with the requirements of Exhibit B, Section 3.3.1 or letter of credit that complies with the requirements of Exhibit B, Section 3.3.2.

(e) The Proposal provides for Service Commencement within five years of NTP2.

(f) The Technical Proposal submitted by Proposer meets all applicable RFP requirements.

5.3.2 Financial Proposals

Financial Proposals will be evaluated based on the following pass/fail criteria:

(a) The Public Funds Request, if applicable, does not exceed the Maximum Available Funds.

(b) Proposer's financial condition and capabilities shall not have materially adversely changed from its financial condition and capabilities as evidenced by the financial data submitted in the QS, such that Proposer continues to have the financial capacity to complete, operate, and maintain a project of the nature and scope of the Project. Factors that will be considered in evaluating Proposer's financial capacity include the following:

- i. Proposer's current financial strength;

- ii. the credit quality of Proposer and Major Participants that are equity owners of Proposers; and
- iii. any current or pending claims, litigation or equivalent.

If TxDOT determines that a Proposer is undercapitalized, it will offer Proposer the opportunity to meet the financial requirement through one or more Guarantors acceptable to TxDOT.

(c) Proposer's Financing Plan demonstrates the following:

- i. that it identifies sufficient financing for the Project, including all design and construction, operation, maintenance and rehabilitation funding;
- ii. that it is sufficiently robust, feasible and is capable of being executed expediently if Proposer is awarded the CDA; and
- iii. that it is sufficiently developed and has attracted sufficient support and commitment from Lenders and investors, to satisfy TxDOT that there is no material risk on financial grounds of any performance failure, including failure to perform any of the following:
 - A. Execution and delivery of the CDA;
 - B. Making payments owing to TxDOT;
 - C. Completion of design and construction of the Project by the Service Commencement Deadline set forth in the CDA and in accordance with CDA requirements;
 - D. Operation and maintenance of the facility throughout the Lease Term in accordance with the requirements of the CDA and Lease; and
 - E. Achievement of financial close by the applicable deadline identified in Section 1.6.2.
- iv. contains key milestones that are consistent with the Project Development Plan in Section 5.4.

Factors that will be considered in evaluating the robustness of Proposer's Financial Proposal include the following:

- i. the robustness of the results under the specified range of traffic scenarios including Proposer and/or TxDOT's traffic assumptions;
- ii. reasonableness of revenues and costs;

- iii the terms and conditions of the financing (including debt, quasi equity and equity), including compliance with the conditions set forth in Section 4 of the CDA, and the degree of conditionality attached;
- iv. guarantees and other security required to realize financing;
- v. the level of commitment of the Principal Participants;
- vi. the level of commitment demonstrated by potential lenders to the proposed financing in advance of requiring submissions with credit committee approval;
- vii. assurance from senior lenders that they are prepared to accept the terms of any proposed TIFIA financing substantially as set forth in the indicative term sheet, or provision of an alternative approach assuring that financial close will be achieved.

(d) Proposer has provided the required lenders' support letters evidencing the proposed lenders' willingness to provide funding pursuant to Section 3.3 of Exhibit C.

(e) Proposer has provided assurance that private equity will be in place, including the required letters from Proposer's equity owners evidencing their commitment to provide equity funding pursuant to Section 3.4 of Exhibit C.

(f) The Proposal is in compliance with the Toll Regulation attached to the CDA as Exhibit 4.

Any Proposer that fails to achieve a passing score on any of the pass/fail portions of the evaluation may not be eligible for recommendation for award.

5.3.3 TxDOT Right to Exclude Proposals from Consideration or to Waive Mistakes

Those Proposals not responsive to the RFP, or that do not pass the pass/fail criteria, may be excluded from further consideration, and Proposer will be so advised. TxDOT may also exclude from consideration any Proposer whose Proposal contains a material misrepresentation. TxDOT reserves the right to waive minor informalities, irregularities and apparent clerical mistakes which are unrelated to the substantive content of the Proposals.

5.4 Evaluation of Project Development Plan by DPES

After completion of the pass/fail and initial responsiveness review, the Project Development Plan will be evaluated by the DPES based on the factors set forth below to determine whether it includes any improvements over the CDA requirements and brings additional benefits and/or value to TxDOT and the public.

5.4.1 Project Development Plan Evaluation Factors

The evaluation factors for the Project Development Plan are as follows:

- (a) General Project Management;
- (b) Design-Build Management and Technical Solutions; and
- (c) Operations and Maintenance Management and Technical Solutions.

The Project Development Plan Evaluation Factors identified in clauses (a) through (c) above are listed in descending order of importance. Subfactors and their relative weightings are listed in Section 5.4.1.1 through 5.4.1.3. Consecutive factors or subfactors with descending order of importance may be of equal value to each other.

The evaluation factors will be evaluated and rated using the rating guidelines specified in Section 5.4.2, with special attention given to the objectives presented in Sections 5.4.1.1 through 5.4.1.3, which describe the expectations of TxDOT with regard to the Work to be performed and the related information to be submitted in the Project Development Plan. Along with the goals identified in Section 1.2, these objectives will guide TxDOT's assessment of the evaluation factors and subfactors.

5.4.1.1 General Project Management

Objectives: An organization that is designed with clear lines of responsibility, appropriate personnel and well defined roles that respond to the Project obligations. Furthermore, a well defined approach to Project schedule methodology, and schedule and cost information in detail sufficient for assessing Project schedule/cost balance.

The General Project Management evaluation subfactors include:

- (a) Management structure and personnel;
- (b) Environmental management;
- (c) Schedule, cost control and risk management;
- (d) Safety;
- (e) Organizational systems;
- (f) Public information and communications management; and
- (g) Mentoring and job training.

Subfactors (a) through (d) are each weighted more than subfactors (e) through (g).

See Exhibit B for additional detail regarding the specific information concerning this factor to be submitted as part of the Project Development Plan.

5.4.1.2 Design-Build Management and Technical Solutions

Objective: A Design-Build management organization with clear lines of responsibility, and which presents a well-defined and executable approach for design and construction, and incorporating technical solutions with innovative features that achieve the obligations of the Project.

The Design-Build Management and Technical Solutions evaluation subfactors include:

- (a) Design-Build management approach;
- (b) Design-Build quality management; and
- (c) Design-Build technical solutions.

Subfactors (a) and (b) are each weighted more than subfactor (c).

See Exhibit B for additional detail regarding the specific information concerning this factor to be submitted as part of the Project Development Plan.

5.4.1.3 Operations and Maintenance Management and Technical Solutions

Objective: An operations and maintenance management organization with clear lines of responsibility, and which presents a well-defined and executable approach for operations and maintenance, providing a well operated and maintained facility responding to the needs of the Project, the adjacent communities and the traveling public.

The Operations and Maintenance Management and Technical Solutions evaluation subfactors are as follows:

- (a) Operations and maintenance management;
- (b) Operations and maintenance quality management; and
- (c) Operations and maintenance technical solutions.

Subfactors (a) and (b) are each weighted more than subfactor (c).

See Exhibit B for details regarding the specific information concerning this factor to be submitted as part of the Project Development Plan.

5.4.2 Evaluation Guidelines

The DPES will review the Project Development Plan with reference to the evaluation factors specified in Section 5.4.1, in accordance with the guidelines provided in this Section 5.4.2. The major categories of the Project Development Plan will be qualitatively evaluated and assigned a rating as follows:

ADJECTIVE RATING	DESCRIPTION
Excellent	The Proposal greatly exceeds the stated requirements/objectives, offering material benefits and/or added value, and providing assurance that a consistently outstanding level of quality will be achieved. There is very little or no risk that this Proposer would fail to satisfy the requirements of the CDA Documents. Weaknesses, if any, are very minor and can be readily corrected. Significant unique and/or innovative characteristics are present.
Very Good	The Proposal significantly exceeds the stated requirements/objectives, offering advantages, benefits and/or added value, and providing assurance that a level of quality will be achieved that is materially better than acceptable. There is little risk that Proposer would fail to satisfy the requirements of the CDA Documents. Weaknesses, if any, are very minor and can be readily corrected. Some unique and/or innovative characteristics are present.
Good	The Proposal materially exceeds the stated requirements/objectives and provides assurance that the level of quality will meet or exceed minimum requirements. There may be a slight probability of risk that Proposer may fail to satisfy the requirements of the CDA Documents. Weaknesses, if any, are minor and can be readily corrected. Little or minimal unique and/or innovative characteristics are present.
Fair	The Proposal marginally exceeds stated requirements/objectives and provides satisfactory assurance that the level of quality will meet or marginally exceed minimum requirements. There may be questions about the likelihood of success and there is risk that Proposer may fail to satisfy the requirements of the CDA Documents. Weaknesses are correctable or acceptable per minimum standards.
Meets Minimum	The Proposal meets stated requirements/objectives and provides satisfactory assurance that the minimum level of quality will be achieved. There may be questions about the likelihood of success and there is some risk that Proposer may fail to satisfy the requirements of the CDA Documents. Weaknesses are correctable or acceptable per minimum standards

In assigning ratings TxDOT may assign “+” or “-” (such as, “Excellent -”, “Good +”, and “Fair +”) to the ratings to better differentiate within a rating in order to more clearly differentiate between the technical evaluation factors and the overall Project Development Plans. However, TxDOT will not assign ratings of “Meets Minimum –” or “Excellent +.”

The term “weakness,” as used herein, means any flaw in the Proposal that increases the risk of unsuccessful contract performance.

During the evaluation, each subfactor as described above, will be assigned a consensus rating by the DPES, which will be converted to points. The points for each subfactor will be summed to determine the Proposal's score for each of the corresponding evaluation factors. The score of each of the evaluation factors will then be summed to arrive at the overall ESRC score for the Project Development Plan, with 100 maximum possible points.

5.5 Financial Proposal Evaluations

The FPES will evaluate the Financial Proposal to determine the net present value of the financial request from TxDOT or the financial offer to TxDOT, as applicable, as well as for responsiveness. The net present value of a financial request will equal the net present value of the Public Funds Request (Form K, Box 2). If there is any inconsistency between Proposer's determination of net present value and TxDOT's determination, TxDOT's determination will control. A financial offer to TxDOT will equal the Concession Payment (Form K, Box 3). The Proposal's Price Score will be determined in accordance with the formula set forth in Section 5.2. No consideration will be given to revenue sharing other than the Concession Payment (if applicable) in the evaluation of a financial offer. All reviews of the Escrowed Materials will take place at the Escrow Agent's offices.

5.6 ESRC Evaluation of Technical and Financial Proposals and Schedule

Before reviewing the Financial Proposal and FPES evaluation results, the ESRC will review the Project Development Plans and the ratings and points recommendations provided by the DPES with respect to each Project Development Plan. The ESRC may accept the recommendations provided by the DPES, may request the DPES to reconsider its recommendations, or may develop its own recommendations. The ESRC will determine each Proposal's Technical Score based on the formula set forth in Section 5.2.

Next, the ESRC will review the Financial Proposal and FPES evaluation results and determine each Proposal's Price Score. The ESRC will verify that the FPES has calculated the Price Score correctly for each Proposal. If the ESRC determines that a Price Score has not been correctly calculated, then the ESRC may revise the recommended Price Score based on the calculation set forth in the RFP or may request that the FPES reconsider its recommendation.

Finally, the ESRC will determine the Total Proposal Score for each Proposal by adding the Proposal's Technical Score and Price Score.

5.7 Requests for Clarification

TxDOT may at any time issue one or more requests for clarification to the individual Proposers, requesting additional information or clarification from a Proposer, or may request a Proposer to verify or certify certain aspects of its Proposal. Proposers shall respond to any such requests within two business days (or such other time as is specified by TxDOT) from receipt of the request. The scope, length and topics to be

addressed in clarifications shall be prescribed by, and subject to the discretion of, TxDOT.

Upon receipt of requested clarifications and additional information as described above, if any, the Proposals may be re-evaluated to factor in the clarifications and additional information.

5.8 Request for Proposal Revisions

TxDOT may, at any time after receipt of Proposals and prior to final award and execution of the CDA, determine that it is appropriate to request changes to the Proposals (“Proposal Revisions”). If Proposal Revisions are requested, TxDOT will follow the procedures for revised proposals described in 23 CFR Part 636. TxDOT may request Proposal Revisions with or without discussions as described therein. The request for Proposal Revisions will identify any revisions to the RFP and will specify terms and conditions applicable to the Proposal Revisions, including identifying a time and date for delivery. In the event that Proposal Revisions are requested, the term “Proposal,” as used in the RFP, shall mean the original Proposal, as modified by the Proposal Revisions. Notwithstanding anything herein to the contrary, for the purpose of this Section 5.8, if and only if TxDOT does not receive at least one responsive Proposal, a Proposal will not be ineligible to participate in a request for Proposal Revisions solely because the Proposal includes a Public Funds Request that exceeds the Maximum Available Funds.

Upon receipt of Proposal Revisions, the ESRC, with assistance from the Technical or Financial pass/fail and responsiveness subcommittees, DPES, or FPES, as appropriate, will re-evaluate the Proposals as revised, and will revise ratings and value estimates as appropriate following the process described above.

5.9 Identification of Apparent Best Value Proposal

Once the ESRC has determined a Total Proposal Score for each Proposal and assigned rankings to the Proposals based on the Total Proposal Scores (whether based on the original Proposals or Proposal Revisions), the ESRC will present its recommended rankings to a Steering Committee comprised of the Texas Turnpike Authority Director, the Director of TxDOT’s Finance Division and the Dallas District Engineer.

5.10 Recommendation to Commission

The Steering Committee will review the Proposals and the recommendations and supporting information provided by the ESRC, and may accept the recommendation, reject the recommendation and cancel the procurement or request the ESRC to reconsider the recommendation. If the Steering Committee accepts the ESRC’s recommendation, the Steering Committee will provide the recommendation to the TxDOT Executive Director or his designee regarding which Proposal provides the best overall value.

Upon receipt of recommendations from the Steering Committee, the TxDOT Executive Director or his designee will review the recommendations and may accept the recommendation, reject the recommendation and cancel the procurement, or request the Steering Committee to reconsider the recommendation. If the Executive Director accepts the Steering Committee's recommendation, the Executive Director, or his designee, will make a recommendation to the Commission regarding the rankings of Proposers and designation of the best value. The Commission will evaluate the recommendations and will determine whether to proceed with a conditional award of a CDA to the apparent best value Proposer or take any other action. Final award of the CDA would be subject to (a) successful completion of negotiations (if held), (b) concurrence in award by FHWA, (c) receipt by TxDOT of all of the documents and payment required to be provided prior to execution of the CDA under Section 6.1, (d) execution of the CDA by the Executive Director of TxDOT or his designee and (e) any other conditions required by the Commission. The Commission's decision of conditional award of the CDA to the apparent best value Proposer will be made in a public hearing and will be considered a public announcement of intent to award the CDA by the Commission.

The Commission's decision regarding award of the CDA shall be final.

5.11 Finalization of the CDA; Post-Selection Process

5.11.1 Negotiation of CDA

If authorized by the Commission, TxDOT will proceed with the apparent best value Proposer to finalize the CDA. TxDOT may agree to negotiate various aspects of the CDA with the apparent best value Proposer, including Form P (Detailed Costing Form) and incorporation of unsuccessful Proposers' work product; however, any decision to commence negotiations regarding the terms of the CDA is at TxDOT's sole discretion. By submitting its Proposal, each Proposer commits to enter into the form of CDA included in the RFP, without negotiation or variation, except to fill in blanks and include information that the form of CDA indicates is required from the Proposal.

As a condition precedent to final award of the CDA, the Office of the Attorney General must determine that the proposed form of CDA is legally sufficient.

If a CDA satisfactory to TxDOT cannot be negotiated with the best value Proposer, TxDOT will formally end negotiations with that Proposer and take action consistent with the direction provided by the Commission. Such action may include (a) rejection of all Proposals, (b) issuance of a request for Proposal Revisions to Proposers; or (c) proceeding to the next most highly ranked Proposal to finalize or attempt to negotiate a CDA with that Proposer in accordance with this Section 5.11.

In the event TxDOT elects to commence negotiations with a Proposer, such Proposer will be deemed to have failed to engage in good faith negotiations with TxDOT and shall forfeit its Proposal Security as set forth in Section 4.7 if Proposer fails to attend and actively participate in reasonably scheduled negotiation meetings with TxDOT or insists

upon terms or conditions for any documents to be negotiated or provided by Developer hereunder, that are inconsistent with the CDA Documents and, with respect to the Independent Engineer Agreement, are inconsistent with the Independent Engineer scope of work set forth in Exhibit 2 to Exhibit H-1 or which would compromise the independence of the Independent Engineer.

5.11.2 Cash Flow Analysis

As a condition precedent to award of the CDA, TxDOT must be assured and satisfy itself that the Public Funds Request (if applicable) is consistent with the anticipated preliminary Project Baseline Schedule and costs as set forth on Form P. As a further condition precedent to award of the CDA, Developer shall have provided such information as TxDOT reasonably requests to verify and determine the reasonableness of such schedule and costs.

5.11.3 Financial Model Audit

As a condition precedent to final award of the CDA, Developer shall cause an independent audit of the selected Proposer's Financial Model to be conducted by a firm engaged by the selected Proposer and approved by TxDOT (the "Model Auditor"), at the selected Proposer's sole cost and expense. Copies of the audit report(s) and opinion(s) shall be co-addressed to TxDOT and TxDOT shall be expressly identified therein as an entity entitled to rely upon such audit. Developer shall cause the audit report(s) and opinion(s) to be delivered to TxDOT no later than seven days before the date of close of finance.

Prior to engaging the Model Auditor, the selected Proposer will provide TxDOT with information about the proposed Model Auditor (including qualifications and relevant experience), the proposed terms of engagement (including the proposed form of the model audit opinion) and the level of professional liability coverage (which must include TxDOT as an additional insured). The Model Auditor chosen by Proposer must be unaffiliated with Proposer and otherwise be free of any conflict of interest. At Proposer's option, it may seek to obtain advance approval by TxDOT of a proposed Model Auditor by submitting all requested information concerning the proposed Model Auditor not less than 30 days prior to the Proposal Due Date. TxDOT would provide a decision on any requested pre-approval not later than one week prior to the Proposal Due Date.

The selected Proposer shall bear the risk of the financial model audit (or any other review of the costs or revenue) resulting in a Public Funds Request from TxDOT higher or a Concession Payment lower than that set out in its Proposal, and may not pass any additional costs or reduction in the Concession Payment on to TxDOT or request additional public funds. To the extent that the financial model audit (or any other review of costs or revenue) results in a Public Funds Request from TxDOT that is lower or a Concession Payment that is higher than those set out in the Proposal, TxDOT will also bear the risk and may not lower the Public Funds Request from TxDOT or increase the Concession Payment set out in the Proposal

Neither party will be entitled to any adjustment to the Public Funds Request or Concession Payment, as appropriate, or the revenue sharing provisions, based on the results of the model audit.

The selected Proposer shall also provide TxDOT with an opinion from the Model Auditor stating that the Financial Model is suitable for use in connection with the Compensation Event procedures set out in the CDA. The Model Auditor is not required to provide an opinion on whether the financial statements for future periods are in compliance with GAAP. This opinion, on which TxDOT shall be a co-addressee and expressly entitled to rely, may also result from the independent review of the Financial Model required by the selected Proposer's lenders. The opinion is to be provided at the selected Proposer's cost. Within two business days after the Effective Date, the selected Proposer shall deliver to TxDOT at Proposer's cost an update of the audit and opinion obtained from the independent model auditor that provided to TxDOT an opinion on suitability of the Base Case Financial Model. The updated audit and opinion shall be co-addressed to TxDOT, and TxDOT shall be expressly identified therein as an entity entitled to rely thereon. The updated audit and opinion shall take into account the finalized financing terms.

5.11.4 Market Interest Rate Adjustment

TxDOT will bear the risk and have the benefit of changes in market interest rates (either positive or negative) for the period beginning at 10:00 a.m. on March 10, 2008 and ending on the date of financial close.

The interest rate adjustment will be based on the movement, if any, in the benchmark bond(s) or SWAP rates underlying the financing contained in Developer's Financing Plan and Financial Model (the "Benchmark Rate(s)"). The Benchmark Rate(s) must be independently verifiable by TxDOT using Bloomberg U.S. based screens. The Benchmark Rate(s)' relative weightings and information source must be submitted to TxDOT for approval by February 25, 2008 and must be approved by TxDOT not later than 10:00 a.m. on March 3, 2008.

Benchmark Rate(s) will be recorded by TxDOT, or its designee, at 10:00 a.m. on the first and last day of the market interest rate protection period. The reading will be taken on the Bloomberg U.S. based screen at 10:00 a.m. Readings will be sent to the selected Proposer immediately and Proposer will have up to one hour to dispute each reading. If no objection is made within the hour, the reading as taken by TxDOT from the Bloomberg U.S. based screen shall be used for the purpose of determining the market interest rate adjustment. In the event of a dispute, TxDOT may elect to reexamine the 10:00 a.m. reading provided there is sufficient evidence to support the claim.

On the date of financial close the selected Proposer and TxDOT shall both adjust the Financial Model to reflect the change in the Benchmark Rate(s) and agree to the exact impact of such an adjustment, highlighting specifically the positive or negative change of the Public Funds Request from TxDOT or Concession Payment to TxDOT.

5.12 Post-Selection Deliverables

5.12.1 Project Management Plan

During the period between conditional award and final award of the CDA, the selected Proposer may, but is not required to, submit all or portions of the Project Management Plan for review, comment and possible pre-approval. TxDOT encourages such early submittal(s), and will attempt to provide comments to any such submittals generally in accordance with the process and timelines set forth in the CDA, but cannot guaranty that it will in fact undertake such review or provide comments or approval.

5.12.2 Documents To Be Submitted Following Conditional Award

As a condition precedent to final award of the CDA, the successful Proposer shall deliver the following to TxDOT within 10 days after notification of conditional award:

(a) Evidence of authority to transact business in the State of Texas for all members of Proposer's team that will transact business in the State, dated no earlier than 30 days prior to the Proposal Due Date. Depending on the form of organization, such evidence may be in the form of (i) a Certificate of Authority to transact business in Texas along with a Certificate of Good Standing from the state of organization of the member; (ii) a Certificate of Good Standing from the Texas Comptroller; or (iii) other evidence acceptable to TxDOT.

(b) If not previously submitted, a copy of the final organizational documents for Developer and, if Developer is a limited liability company, partnership or joint venture, for each member or partner of Developer. The final form of the organizational documents may not differ materially from the draft organizational documents included with the Proposal.

(c) Increased Proposal Security in the amount of \$75 million, in accordance with Exhibit B, Section 3.3.

(d) If security for Proposer's obligations under the CDA is required by TxDOT pursuant to Exhibit C, Section 2.0, the form of the proposed guarantees, which shall be in form and substance acceptable to TxDOT, in its sole discretion.

During the negotiation period, as a condition to final award, Proposer shall deliver drafts of the deliverables identified in Section 6.1.1, for pre-approval by TxDOT.

5.12.3 TxDOT Comments On Post-Selection Deliverables

TxDOT shall provide comments on any Post-Selection Deliverable required to be delivered to TxDOT for review and approval hereunder within 10 days of the date of TxDOT's receipt of such deliverable. TxDOT shall have three Business Days to review and respond to subsequent submittals of the deliverable.

5.13 NEPA Impacts to Post-Selection Process

In the event Proposer is unable to close financing by the deadline set forth in Section 1.6.2 as a result of pending litigation challenging a NEPA Approval filed before lapse of the applicable statute of limitations, Developer will be excused from reaching financial close by the deadline and shall not forfeit its Proposal Security. In such event, TxDOT may elect to terminate the procurement and/or Developer may elect to withdraw its Proposal. Neither TxDOT nor any of Proposers shall be entitled to any compensation whatsoever on account of such termination prior to financial close other than the payment for work product which will be payable to eligible Proposers in accordance with Section 6.3.

5.14 Negotiation of the Independent Engineer Agreement

Promptly following conditional award, TxDOT and the selected Proposer shall agree on a schedule to negotiate and finalize the Independent Engineer Agreement consistent with the scheduled deadline for commercial and financial close. Both the selected Proposer and TxDOT shall thereafter adhere to the terms of such schedule and shall attend and actively participate in reasonably scheduled negotiation meetings (“the Independent Engineer negotiations”). If the selected Proposer fails to negotiate in good faith (including any action of the type that would be deemed a failure to engage in good faith negotiations under the standards set forth in Section 5.11.1), it will forfeit its Proposal Security as set forth in Section 4.7.

If inability of the selected Proposer to reach commercial and financial close by the applicable deadlines is directly attributable to TxDOT’s or the Independent Engineer’s failure to negotiate in good faith (including any action of the type that would be deemed a failure to engage in good faith negotiations under the standards set forth in Section 5.11.1), Proposer shall be excused from reaching commercial and financial close and paying the Upfront Concession Payment by the applicable deadlines and shall not forfeit its Proposal Security. In such event, TxDOT may elect to terminate the procurement and/or the selected Proposer may elect to withdraw its Proposal. Neither TxDOT nor any of Proposers shall be entitled to any compensation whatsoever on account of such termination prior to financial close other than the payment for work product which will be payable to eligible Proposers in accordance with Section 6.3.

5.15 TxDOT Post-Selection Deliverables and Notification to Legislative Budget Board

TxDOT will provide the following documents to the selected Proposer within the specified timeframes, provided all conditions precedent to final award have been satisfied:

- (a) An opinion from the Office of General Counsel concerning (i) knowledge of any pending or threatened litigation challenging the CDA Documents; (ii) the due authorization, execution and delivery of the CDA by TxDOT; and (iii) knowledge regarding any consents required to be obtained for the performance of TxDOT’s

obligations under the CDA and regarding any conflicts with any other agreements to which TxDOT is a party. A draft will be delivered on or before 30 days prior to the scheduled date of financial close, and the final opinion will be delivered on the date of financial close.

(b) The fully executed CDA conformed for execution, to be delivered no later than seven days before the scheduled date for financial close.

At least 30 days prior to final award, TxDOT is required to provide the Legislative Budget Board and the State Auditor with the following, as compliance with Sections 371.052 and 371.151 of the Code: (i) a copy of the CDA; (ii) a copy of the selected best value Proposal; (iii) a financial forecast prepared by TxDOT for the Project; and (iv) a copy of TxDOT's traffic and revenue report for the Project. TxDOT is also required, pursuant to Sections 371.052 and 371.151 of the Code, to publish certain financial information of the selected best value Proposer. By submitting a Proposal, Proposer hereby consents to these disclosures and all other disclosures required under Law, and further agrees to assist TxDOT in complying with these requirements if it is the selected Proposer.

SECTION 6.0 CONTRACT AWARD AND EXECUTION; POST AWARD ACTIONS

6.1 Final Award, Execution and Delivery of CDA

Upon the successful completion of negotiations, finalization of the CDA, and satisfaction of all conditions to final award specified in this ITP other than this Section 6.1, TxDOT will deliver four sets of execution copies of the CDA to the selected Proposer along with a number of sets of execution copies as reasonably requested by Proposer. The selected Proposer shall obtain all required signatures and deliver all of the execution sets to TxDOT within seven Business Days of receipt, together with the required documents described in Section 6.1.2. If Developer is a joint venture or a partnership, the CDA must be executed by all joint venture members or general partners, as applicable. Within 15 Business Days of TxDOT's receipt of all such documents, TxDOT will execute the agreements, retain four sets and deliver the other executed sets to Proposer. Final award shall be deemed to have occurred upon delivery of the fully executed sets to Proposer.

6.1.1 Documents To Be Delivered By Proposer With Executed CDA

Proposer shall deliver the documents listed below to TxDOT concurrently with the executed sets of the CDA, as a condition to execution of the CDA by TxDOT. On or before the date that TxDOT delivers the execution sets of the CDA to Proposer, TxDOT shall notify Proposer regarding the number of originals and copies required to be delivered.

(a) Evidence of approval of the final form of the CDA and of due authorization, execution, delivery and performance of the CDA by Developer and (if Developer is a joint venture) by its joint venture members. Such evidence shall be in form and substance satisfactory to TxDOT. If Developer is a corporation, such evidence shall be in the form of a resolution of its governing body certified by an appropriate officer of the corporation. If Developer is a partnership, such evidence shall be in the form of a resolution signed by the general partners and appropriate evidence of authorization for each of the general partners, in each case, certified by an appropriate officer of the general partner. If Proposer is a limited liability company, such evidence shall be in the form of (1) a resolution of the governing body of the limited liability company, certified by an appropriate officer of the company, or (2) a managing member(s) resolution, certified by an appropriate officer of the managing member(s), or (3) if there is no managing member, a resolution from each member certified by an appropriate officer of such member. If Proposer is a joint venture, such evidence shall be in the form of a resolution of each joint venture member, certified by an appropriate officer of such joint venture member.

(b) A written opinion from counsel for Developer, which counsel shall be approved by TxDOT (which may be in-house or outside counsel, provided that the organization/authorization/execution opinion shall be provided by an attorney licensed in the State of the formation/organization of the entity for which the opinion is rendered

(i.e., Developer, joint venture member, etc.) and the qualification to do business in Texas and the enforceability opinion shall be provided by an attorney licensed in the State of Texas), in substantially the form attached hereto as Form N (with such changes as agreed to by TxDOT in its sole discretion); provided, however, that the organization/authorization/execution opinion for an entity formed or organized under the laws of the State of Delaware may be issued by an in-house or outside counsel not licensed in Delaware.

(c) Evidence of insurance required to be provided by Developer under the CDA.

(d) Evidence that Developer and Major Participants hold all licenses required for performance of the Work.

(e) Executed Lease and Lease Escrow Agreement (in a form approved by TxDOT for (i) consistency with the CDA, (ii) inclusion of a provision naming TxDOT as a 3rd party beneficiary, and (iii) inclusion of provisions prohibiting the release of escrowed documents to any party without TxDOT's approval);

(f) Executed copies of the Intellectual Property Escrow Agreement(s) in substantially the form attached hereto as Form Q (with such changes as agreed to by TxDOT in its sole discretion);

(g) Executed Project Trust Agreement (in the form of Exhibit K) and the Project Trust and Security Instruments;

(h) Copies of executed Initial Funding Agreements and Initial Security Documents;

(i) Copy of executed NTTA Tolling Services Agreement (to be provided));

(j) Copy of Independent Engineer Agreement (substantially in the form of Exhibit H-1 with such changes as agreed to by Proposer, TxDOT and the Independent Engineer) executed by Proposer and the Independent Engineer;

(k) TxDOT approved DBE Performance Plan in accordance with the requirements of Section 1.8.1;

(l) A letter from a licensed Surety, rated in the top two categories by two nationally recognized rating agencies or at least A minus (A-) or better and Class VIII or better by A.M. Best and Company, signed by an authorized representative as evidenced by a current certified power of attorney, committing to provide a performance bond and a payment bond, each in the amount of \$250 million, and in the form acceptable to TxDOT as described in Section 16.2 of the CDA. If multiple Surety letters are provided, the Proposal shall identify which Surety will be the lead Surety. The commitment letter may include no conditions, qualifications or reservations for underwriting or otherwise, other than a statement that the commitment is subject to award and execution of the CDA, issuance of NTP2 and execution and delivery of the Design-Build Contract within

10 days following award and execution of the CDA; provided, however, that the Surety may reserve in its letter the right to reasonably approve any material adverse changes made to the CDA, the Technical Provisions or the Design-Build Contract prior to the date the bonds are issued, but excluding any changes or information reflected in the Proposal, such as ATCs and Proposer commitments. The Surety letter must commit to issuance of a bond on behalf of Proposer's Design-Build Contractor, naming TxDOT as a dual obligee;

(m) Certification Regarding NTTA Communications in the form of Form R, except that the reference to the "Proposal Due Date" in such form shall be revised to refer to the "date of financial close";

(n) A Lender's Direct Agreement (in the form of Exhibit L);

(o) Any other requirements identified by TxDOT as a condition to award or execution or determined during pre-award negotiations; and

(p) If applicable, the proposed form of escrow agreement and information regarding the proposed escrow service pursuant to Section 6.1.4 of Exhibit C.

6.1.2 Deposit of the Concession Payment

The successful Proposer shall deposit the Concession Payment (if applicable) into the appropriate trust account in accordance with the Project Trust Agreement within two Business Days following the delivery of all documents required hereby, including the items set forth in Sections 6.1.1 and 6.1.2 and execution and delivery of the CDA by the parties. Failure to make the required payment by such deadline (if applicable) will result in a draw by TxDOT upon the Proposal Security.

6.1.3 Execution of the CDA Prior to Financial Close

At any time after conditional award, TxDOT has the unilateral option, in its sole discretion and with reasonable notice, to require commercial close, including execution of the CDA, prior to financial close. If TxDOT exercises this option, the CDA will be revised to (a) amend the financial close deadline, if necessary; (b) provide that the CDA may be terminated by either party without penalty if financial close is delayed beyond the financial close deadline due to pending NEPA litigation filed prior to expiration of the applicable statute of limitations, and (c) include any other amendments necessary to effect the foregoing. Upon receipt of notice by TxDOT that it is exercising its option, the selected Proposer shall work diligently to provide the documents set forth in Sections 6.1.1 and 6.1.2 to the extent not already provided, and TxDOT and Developer shall work diligently to achieve commercial close as expeditiously as possible. Any ancillary agreements, including the Independent Engineer Agreement and Tolling Services Agreement, shall include provisions automatically terminating the agreement in the event the CDA is terminated for failure to reach financial close by the deadline. The Proposal Security will remain in effect pursuant to Exhibit B, Section 3.3.1 and shall be forfeited if Developer fails to reach financial close by the applicable deadline unless excused pursuant to Section 4.7.

6.2 Debriefings

All Proposers submitting Proposals will be notified in writing of the results of the evaluation process. Proposers not selected for award may request a debriefing. Debriefings shall be provided at the earliest feasible time after execution of the CDA. The debriefing shall be conducted by a procurement official familiar with the rationale for the selection decision and CDA award.

Debriefings shall:

(a) Be limited to discussion of the unsuccessful Proposer's Proposal and may not include specific discussion of a competing Proposal;

(b) Be factual and consistent with the evaluation of the unsuccessful Proposer's Proposal; and

(c) Provide information on areas in which the unsuccessful Proposer's Technical Proposal had weaknesses or deficiencies.

Debriefing may not include discussion or dissemination of the thoughts, notes, or rankings of individual members of the ESRC, but may include a summary of the rationale for the selection decision and CDA award.

6.3 Payment to Unsuccessful Proposers

Each Proposer that submits a responsive, but unsuccessful, Proposal shall be entitled to receive payment from TxDOT for work product that is not returned to Proposer, on the terms and conditions described herein and in the Minute Order issued by the Commission, a copy of which is attached hereto as Exhibit J. No Proposer shall be entitled to reimbursement for any of its costs in connection with the RFP except as specified in this Section 6.3.

The amount of the payment may not exceed the value of the work product provided in the Proposal that can, as determined by TxDOT, be used by TxDOT in the performance of its functions, up to the maximum stipulated amount per Proposer. The maximum stipulated payment for work product per Proposer for this procurement is \$1,000,000. In order to request payment, each Proposer must submit an invoice to TxDOT. The invoice may be submitted no earlier than 45 days after notice of final award, including execution of the CDA and receipt of the Concession Payment (if applicable), is posted on the FTP site, or, if final award is not made, not earlier than 30 days after cancellation of the procurement or expiration of the time period for award stated in the RFP (as such time period may be extended by mutual agreement of the apparent best value Proposer and TxDOT), as applicable. All Proposers eligible to receive a payment for work product shall be required to submit an invoice to TxDOT in a form acceptable to TxDOT in order to receive such payment. Payments will be made within 30 days of receipt of an invoice therefor, provided that if a CDA has been awarded and close of finance has not occurred prior to such date, TxDOT shall have no obligation to make payment until two business days following close of finance.

In accordance with Section 223.203(m) of the Code, each Proposer agrees that TxDOT shall be entitled to use all work product that is not returned to Proposer (including ATCs, concepts, ideas, technology, techniques, methods, processes, drawings, reports, plans and specifications) contained in its Proposal or generated by or on behalf of Proposer for the purpose of developing its Proposal, in consideration for TxDOT's agreement to make payment as provided herein, without any further compensation or consideration to Proposer.

Each Proposer acknowledges that TxDOT will have the right to inform the successful Proposer regarding the contents of the other Proposals after award of the CDA, and that the CDA may incorporate the above-described work product or concepts based thereon. Upon Proposer's receipt of payment hereunder, this right shall extend to allow TxDOT to use such work product in the performance of its functions. As provided in Section 223.203(m) of the Code, the use of any of the work product by TxDOT at the sole risk and discretion of TxDOT, and shall in no way be deemed to confer liability on the unsuccessful Proposer. Each Proposer acknowledges and agrees that it does not have the right to refuse the payment hereunder and keep the contents of its Proposal from being used by TxDOT, as described herein.

In no event shall any Proposer that is selected for award but fails to satisfy the award conditions set forth in Section 6.1 be entitled to receive a payment for work product under this Section 6.3.

6.4 Disposition of Escrowed Materials Following Conclusion of Procurement Process

Concurrently with delivery of the executed CDA, Developer will execute and deliver the Intellectual Property Escrow Agreement(s) (Form Q, with such changes as agreed to by TxDOT in its sole discretion) to the Escrow Agent, allowing the Escrowed Materials to be transferred to the Intellectual Property Escrow and to be available for review by the parties as described in the CDA.

In accordance with the procedures set forth in the Escrow Agreement (Form M), each unsuccessful Proposer shall have the right to retrieve its Escrowed Materials after the CDA has been executed and delivered and the Concession Payment made, if applicable, after TxDOT rejects all of the Proposals or after TxDOT terminates this procurement.

SECTION 7.0 PROTESTS

7.1 Applicability

This Section 7.0 and Section 27.6 of Title 43 of the Texas Administrative Code set forth the exclusive protest remedies available with respect to the RFP and prescribe exclusive procedures for protests regarding:

- (a) allegations that the terms of the RFP are wholly ambiguous, contrary to legal requirements applicable to the procurement, or exceed TxDOT's authority;
- (b) a determination as to whether a Proposal is responsive to the requirements of the Request for Proposals, as applicable; and
- (c) award of a CDA.

7.2 Required Early Communication for Certain Protests

Protests concerning the issues described in Section 7.1(a) may be filed only after Proposer has informally discussed the nature and basis of the protest with TxDOT, following the procedures for those discussions prescribed in the RFP.

7.3 Deadlines for Protests

7.3.1 Protests concerning the issues described in Section 7.1(a) must be filed as soon as the basis for the protest is known, but no later than 20 days prior to the Proposal Due Date, unless the protest relates to an Addendum to the RFP, in which case the protest must be filed no later than five business days after the Addendum is issued (but in any event, prior to the Proposal Due Date).

7.3.2 Protests concerning the issues described in Section 7.1(b) must be filed no later than five business days after receipt of the notification of non-responsiveness.

7.3.3 Protests concerning the issues described in Section 7.1(c) must be filed no later than ten business days after the earliest of the notification of intent to award, and the public announcement of the apparent best value Proposer.

7.4 Content of Protest

Protests shall completely and succinctly state the grounds for protest, its legal authority, and its factual basis, and shall include all factual and legal documentation in sufficient detail to establish the merits of the protest. Statements shall be sworn and submitted under penalty of perjury.

7.5 Filing of Protest

Protests shall be filed by hand delivery on or before the applicable deadline to the address specified in Section 2.2.1, with a copy to the Office of General Counsel, Texas

Department of Transportation, 125 E. 11th Street, Suite 702, Austin, TX 78701-2483, as soon as the basis for protest is known to Proposer. Proposer filing the protest shall concurrently submit a copy of the protest to the other Proposers whose addresses may be obtained from the FTP site.

7.6 Comments from other Proposers

Other Proposers may file statements in support of or in opposition to the protest within seven days of the filing of the protest. TxDOT shall promptly forward copies of all such statements to the protestant. Any statements shall be sworn and submitted under penalty of perjury.

7.7 Burden of Proof

The protestant shall have the burden of proving its protest. TxDOT may, in its sole discretion, discuss the protest with the protestant and other Proposers. No hearing will be held on the protest. The protest shall be decided on the basis of written submissions.

7.8 Decision on Protest

The Assistant Executive Director for Engineering Operations or his designee shall issue a written decision regarding the protest within 30 days after the filing of the detailed statement of protest. If necessary to address the issues raised in a protest, TxDOT may, in its sole discretion, make appropriate revisions to the RFP by issuing Addenda.

7.9 Protestants Payment of Costs

If a protest is denied, Proposer filing the protest shall be liable for TxDOT's costs reasonably incurred to defend against or resolve the protest, including legal and consultant fees and costs, and any unavoidable damages sustained by TxDOT as a consequence of the protest.

7.10 Rights and Obligations of Proposers

Each Proposer, by submitting its Proposal, expressly recognizes the limitation on its rights to protest provided in this Section 7.0, and expressly waives all other rights and remedies and agrees that the decision on the protest is final and conclusive. If a Proposer disregards, disputes, or does not follow the exclusive protest remedies provided in this Section, it shall indemnify and hold TxDOT and its officers, employees, agents, and consultants harmless from and against all liabilities, fees and costs, including legal and consultant fees and costs, and damages incurred or suffered as a result of such Proposer's actions. Each Proposer, by submitting a Proposal, shall be deemed to have irrevocably and unconditionally agreed to this indemnity obligation.

SECTION 8.0 TXDOT RIGHTS AND DISCLAIMERS

8.1 TxDOT Rights

TxDOT may investigate the qualifications and Proposal of any Proposer under consideration, may require confirmation of information furnished by a Proposer and may require additional evidence of qualifications to perform Developer's obligations under the CDA. TxDOT reserves the right, in its sole discretion, to:

- (a) Develop the Project in any manner that it, in its sole discretion, deems necessary;
- (b) Reject any or all of the Proposals;
- (c) Modify any dates set or projected in the RFP;
- (d) Cancel, modify or withdraw the RFP in whole or in part;
- (e) Terminate this procurement and commence a new procurement for part or all of the Project;
- (f) Terminate evaluations of Proposals received at any time, in its sole discretion, including, for instance, in the case that TxDOT determines, , that none of the Proposals provide a favorable value of money to TxDOT;
- (g) Suspend and terminate CDA negotiations at any time, elect not to commence CDA negotiations with any responding Proposer and engage in negotiations with other than the highest ranked Proposer;
- (h) Modify the procurement process (with appropriate notice to Proposers);
- (i) Waive or permit corrections to data submitted with any response to the RFP until such time as TxDOT declares in writing that a particular stage or phase of its review of the responses to the RFP has been completed and closed;
- (j) Permit submittal of addenda and supplements to data previously provided in a Proposal pursuant to a request for clarification issued by TxDOT until such time as TxDOT declares that a particular stage or phase of its review of the responses to the RFP has been completed and closed;
- (k) Appoint evaluation committees to review Proposals, make recommendations and seek the assistance of outside technical experts and consultants in Proposal evaluation;
- (l) Disclose information contained in a Proposal to the public as described herein;
- (m) Approve or disapprove changes in the Key Personnel identified in the QS;

- (n) Approve or disapprove changes in Proposer's organization;
- (o) Accept a Proposal other than that which requests the lowest public funds from or offers the highest total payment to TxDOT;
- (p) Waive deficiencies, informalities and irregularities in Proposals; accept and review a non-conforming Proposal or seek clarifications or modifications to a Proposal;
- (q) Not issue a notice to proceed after execution of the CDA; and
- (r) Exercise any other right reserved or afforded to TxDOT under the RFP and applicable Law.

8.2 TxDOT Disclaimers

The RFP does not commit TxDOT to enter into a contract. Except as expressly set forth in Section 6.3, TxDOT and the State of Texas assume no obligations, responsibilities, or liabilities, fiscal or otherwise, to reimburse all or part of the costs incurred or alleged to have been incurred by parties considering a response to and/or responding to the RFP. All of such costs shall be borne solely by each Proposer and Proposer team.

In no event shall TxDOT be bound by, or liable for, any obligations with respect to the Project until such time (if at all) as the CDA, in form and substance satisfactory to TxDOT, has been authorized and executed by TxDOT and, then, only to the extent set forth therein. In submitting a Proposal in response to the RFP, Proposer is specifically acknowledging these disclaimers.