

**REQUEST FOR PROPOSALS
TO DEVELOP, DESIGN, CONSTRUCT, FINANCE, OPERATE AND MAINTAIN
THE STATE HIGHWAY 288 TOLL LANES PROJECT IN HARRIS COUNTY
THROUGH A COMPREHENSIVE DEVELOPMENT AGREEMENT**

**VOLUME I
INSTRUCTIONS TO PROPOSERS**

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

**RFP ISSUED JANUARY 31, 2014
ADDENDUM #1 ISSUED FEBRUARY 10, 2014
ADDENDUM #2 ISSUED FEBRUARY 28, 2014
ADDENDUM #3 ISSUED APRIL 7, 2014
ADDENDUM #4 ISSUED JULY 8, 2014
ADDENDUM #5 ISSUED AUGUST 6, 2014
ADDENDUM #6 ISSUED OCTOBER 3, 2014**

**Texas Department of Transportation
7600 Chevy Chase Drive, Building 2, 4th Floor
Austin, Texas 78752**

KEY DATES

| EVENT | DATE |
|-----------------------------|------------------|
| Issue Request for Proposals | January 31, 2014 |
| Proposal Due Date | December 8, 2014 |
| Conditional Award | January 29, 2015 |

| | | |
|------------------|---|-----------|
| SECTION 1 | INTRODUCTION AND GENERAL PROVISIONS | 1 |
| 1.1 | Introduction..... | 1 |
| 1.2 | Project Goals..... | 1 |
| 1.3 | Project Description | 2 |
| 1.4 | Documents in the Request for Proposals | 4 |
| 1.5 | Construction and Interpretation of this ITP | 5 |
| 1.6 | Procurement Schedule and Financial Close Deadline | 6 |
| 1.7 | General Provisions Regarding Proposals..... | 8 |
| 1.8 | Federal Requirements and Funding | 9 |
| 1.9 | Toll Collection System | 10 |
| 1.10 | The Independent Engineer..... | 10 |
| SECTION 2 | PROCUREMENT PROCESS | 11 |
| 2.1 | Procurement Method..... | 11 |
| 2.2 | Receipt of the Request for Proposal Documents, Communications and Other Information | 11 |
| 2.3 | Questions and Response Process, Role of the Ombudsman and Addenda..... | 14 |
| 2.4 | Pre-Proposal Submittals..... | 16 |
| 2.5 | Pre-Proposal Meetings..... | 16 |
| 2.6 | Confidentiality/Public Information Act Disclosure Requests..... | 17 |
| 2.7 | TxDOT Studies and Investigations..... | 19 |
| 2.8 | Examination of RFP and Site Access | 19 |
| 2.9 | Errors | 20 |
| 2.10 | Improper Conduct..... | 20 |
| 2.11 | Changes in Proposer’s Organization..... | 20 |
| 2.12 | Changes to Companies or Entities Filling Key Project Roles | 21 |
| 2.13 | Changes in Key Personnel and Designation of New Key Personnel..... | 21 |
| 2.14 | Sales Tax..... | 22 |
| SECTION 3 | ALTERNATIVE TECHNICAL CONCEPTS, ALTERNATIVE FINANCIAL CONCEPT AND DRAFT TOLLING PLAN REVIEWS | 23 |
| 3.1 | Alternative Technical Concepts..... | 23 |
| 3.2 | Pre-Proposal Submission of ATCs | 23 |
| 3.3 | TxDOT Review of Pre-Proposal Submission of ATCs | 25 |
| 3.4 | Incorporation of ATCs in the CDA | 26 |
| 3.5 | Draft Tolling Plan | 26 |
| 3.6 | Alternative Financial Concepts..... | 27 |
| 3.7 | Confidentiality of ATCs, AFCs and Draft Tolling Plans..... | 30 |
| SECTION 4 | REQUIREMENTS FOR SUBMITTAL OF PROPOSALS AND ACCEPTANCE OF DELIVERY BY TXDOT | 31 |
| 4.1 | General Submittal Requirements | 31 |
| 4.2 | Requirement to Submit Compliant Proposal | 31 |
| 4.3 | Format..... | 32 |
| 4.4 | Additional Requirements for Proposal Delivery..... | 32 |
| 4.5 | Technical Proposal..... | 33 |
| 4.6 | Modifications, Withdrawals and Late Submittals..... | 34 |
| 4.7 | Forfeiture of Proposal Security; Relief From Obligation to Close by Specified Deadline | 34 |
| 4.8 | Acceptance of Delivery by TxDOT..... | 35 |

| | | |
|------------------|---|-----------|
| 4.9 | Costs Not Reimbursable | 36 |
| SECTION 5 | EVALUATION AND POST-SELECTION PROCESS | 37 |
| 5.1 | Organization of the TxDOT Evaluation Committees | 37 |
| 5.2 | Best Value Determination..... | 37 |
| 5.3 | Pass/Fail and Responsiveness Evaluation..... | 38 |
| 5.4 | Evaluation of Project Development Plan..... | 41 |
| 5.5 | Financial Proposal Evaluations..... | 43 |
| 5.6 | ESRC Evaluation of Technical and Financial Proposals | 45 |
| 5.7 | Requests for Clarification | 45 |
| 5.8 | Requests for Proposal Revisions..... | 45 |
| 5.9 | Identification of Apparent Best Value Proposal | 46 |
| 5.10 | Recommendation to Commission | 46 |
| 5.11 | Finalization of the CDA; Post-Selection Process | 47 |
| 5.12 | Post-Selection Deliverables | 49 |
| 5.13 | Negotiation of the Independent Engineer Agreement..... | 50 |
| 5.14 | TxDOT Post-Selection Deliverables and Notification to Legislative Budget Board..... | 50 |
| SECTION 6 | FINAL AWARD AND EXECUTION; POST-EXECUTION ACTIONS | 51 |
| 6.1 | Final Award, Execution and Delivery of CDA..... | 51 |
| 6.2 | Debriefings..... | 53 |
| 6.3 | Payment to Unsuccessful Proposers | 53 |
| SECTION 7 | PROTESTS | 55 |
| 7.1 | Applicability | 55 |
| 7.2 | Required Early Communication for Certain Protests | 55 |
| 7.3 | Deadlines for Protests | 55 |
| 7.4 | Content of Protest | 55 |
| 7.5 | Filing of Protest | 55 |
| 7.6 | Comments from other Proposers | 56 |
| 7.7 | Burden of Proof | 56 |
| 7.8 | Decision on Protest | 56 |
| 7.9 | Protestant's Payment of Costs | 56 |
| 7.10 | Rights and Obligations of Proposers..... | 56 |
| SECTION 8 | TXDOT RIGHTS AND DISCLAIMERS | 57 |
| 8.1 | TxDOT Rights | 57 |
| 8.2 | TxDOT Disclaimers..... | 58 |

EXHIBITS

| | |
|-------------|---|
| Exhibit A | Definitions and Acronyms |
| Exhibit B | Technical Proposal General Instructions |
| Exhibit C | Financial Proposal Instructions |
| Exhibit D | Required Forms |
| Form A | Proposal Letter |
| Form B-1 | Identification of Proposer and Equity Members |
| Form B-2 | Information About Proposer Organization |
| Form B-3 | Information About Major Participants, Major Professional Services Firms and Identified Subcontractors |
| Form B-4 | Key Contractors |
| Form C | Responsible Proposer Questionnaire |
| Form D | Personnel Work Assignment Form |
| Form E | Non-Collusion Affidavit |
| Form F | Buy America Certification |
| Form G | DBE Certification |
| Form H | Child Support Statement for State Grants, Loans and Contracts |
| Form I | Conflict of Interest Disclosure Statement |
| Form J | Price Proposal |
| Form J-2 | Price Proposal (Allocation of Revenue Payment for Federal Income Tax) |
| Form J-3 | Price Proposal (General Purpose Lane Capacity Improvement Payment) |
| Form K-1 | Proposal Bond |
| Form K-2 | Proposal Letter of Credit |
| Form K-3 | Closing Bond |
| Form K-4 | Closing Letter of Credit |
| Form L | Opinion of Counsel |
| Form M | Completion Deadlines |
| Form N | Detailed Costing Form |
| Form O | Termination for Convenience Amounts |
| Form P | Equal Opportunity Employment Certification |
| Form Q | Financial Summary |
| Form R | Revenue Payment Calculation |
| Form S | Guaranty |
| Form T | PABs Agreement |
| Exhibit E | Summary and Order of Proposal Contents |
| Exhibit F | Right of Entry Process |
| Exhibit G | Form of Payment for Work Product Agreement |
| Exhibit H-1 | Independent Engineer Services Agreement |
| Exhibit H-2 | List of Pre-Qualified Independent Engineers |
| Exhibit I | Minute Order |

**REQUEST FOR PROPOSALS
TEXAS DEPARTMENT OF TRANSPORTATION
STATE HIGHWAY 288 TOLL LANES PROJECT IN HARRIS COUNTY**

INSTRUCTIONS TO PROPOSERS

SECTION 1 INTRODUCTION AND GENERAL PROVISIONS

1.1 Introduction

This document comprises the Instructions to Proposers (“**ITP**”), Volume I of the Request for Proposals (“**RFP**”), as may be amended, issued by the Texas Department of Transportation (“**TxDOT**”), an agency of the State of Texas (the “**State**”), to seek competitive detailed proposals (individually, a “**Proposal**” and collectively, “**Proposals**”) for a public-private partnership for the State Highway (“**SH**”) 288 Toll Lanes Project in Harris County (the “**Project**”) to be evidenced by a Comprehensive Development Agreement (the “**CDA**”) as further described below. The CDA defines work to be performed by the entity or entities identified in the successful Proposal (the “**Developer**”) to develop, design, construct, finance, operate and maintain tolled lanes, general purpose lanes and associated facilities along an approximately 10.3-mile portion of SH 288 from U.S. Route (“**US**”) 59 to the Harris County line at Clear Creek in Harris County as more particularly described in the CDA. The form of the 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 (each a “**QS**”) delivered to TxDOT on or before August 2, 2013, in response to the Request for Qualifications for the Project issued on May 3, 2013, as amended (the “**RFQ**”).

Proposers must comply with this ITP during the procurement and in their responses to the RFP. Proposers also shall take the Project goals identified in Section 1.2 into consideration in drafting their Proposals.

The RFP permits a Proposer to identify an entity other than the Proposer to act as Developer for the CDA, thus allowing unsuccessful Proposers to avoid unnecessary costs associated with formation of such entity or entities. However, if any entity identified as a 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 discretion.

All forms identified in this ITP are found in Exhibit D unless otherwise noted. All times in this RFP are for local Central time in Austin, Texas.

1.2 Project Goals

TxDOT’s goals for the Project are as follows:

- (a) Securing quality design and construction in order to optimize the operational life cycle performance of the Project;
- (b) Expediting delivery of Project improvements;
- (c) Managing mobility within the Project area during construction;
- (d) Improving mobility within the Project area after the construction period;

- (e) Implementing safe construction, operation and maintenance;
- (f) Obtaining high quality operation and maintenance meeting or exceeding TxDOT requirements and expectations;
- (g) Facilitating participation by disadvantaged business enterprises (“**DBEs**”), women-owned business enterprises and minority business enterprises; and
- (h) Leveraging available local, regional and state/federal funds and toll revenue to maximize funding for the Project.

1.3 Project Description

1.3.1 General Project Description

TxDOT, in cooperation with local and regional stakeholders, has developed a project that consists of a 10.3-mile section of SH 288 from US 59 to the Harris County line at Clear Creek in Harris County.

The Project scope includes the following:

- (a) The design, construction, maintenance and operation of four tolled lanes within the median of SH 288 from US 59 to the Harris County line at Clear Creek;
- (b) The maintenance and operation of the general purpose lanes and associated facilities along the 10.3-mile section of SH 288;
- (c) The construction of a Direct Connector from SH 288 to Holcombe Boulevard near the Texas Medical Center (the “**TMC Direct Connector**”) within the scope of the Project;
- (d) At a future date as described in Section 1.3.4, the addition of one general purpose lane each direction from Interstate Highway (“**IH**”) 610 to Beltway (“**BW**”) 8; and
- (e) The design, construction, operation and maintenance of the BW 8 Direct Connectors, as described in the Technical Provisions.

1.3.2 Environmental Status

An Environmental Assessment was prepared for the Project area and submitted to the Federal Highway Administration (“**FHWA**”) for review, and TxDOT received approval from FHWA to move forward with public hearings. TxDOT held public hearings on March 5, 2013 at the DeBakey High School Cafeteria in Houston and on March 7, 2013 at the Berry Miller Jr. High School Cafeteria in Pearland. The Environmental Assessment was approved by FHWA, and a Finding of No Significant Impact (“**FONSI**”) was issued by FHWA on May 23, 2013.

The FONSI is available at http://ftp.dot.state.tx.us/pub/txdot-info/hou/sh288_us59/fonsi.pdf.

TxDOT held a public meeting for the TMC Direct Connector Environmental Assessment on January 24, 2013 and presented six alternative conceptual alignments. TxDOT held a public hearing for the TMC Direct Connector on June 27, 2013, and presented the Recommended Alternative. A Categorical Exclusion document was submitted to the FHWA and approved on March 31, 2014. These documents and additional information on the environmental status of the Project are included in the RID.

1.3.3 Scope of Developer's Obligations

The scope of Developer's obligations for the Project will include the development, design, construction, financing, maintenance and operation of the Project under the terms set forth in the CDA. The improvements to be completed by Developer will include design and installation of an open-road electronic toll collection system as necessary to allow for collection of tolls from users of the Project's tolled lanes.

Developer will be responsible for the design and construction (and all costs associated therewith in accordance with the CDA Documents) of utility and railroad improvements affected by the highway improvements. If additional right of way ("**ROW**") for utility adjustments or other purposes is necessary upon execution and delivery of the CDA, Developer will be responsible for the costs of acquiring any such ROW and will be responsible for providing right of way acquisition services in connection with the acquisition of any such additional parcels. TxDOT will assist Developer in the necessary acquisition of any additional ROW in accordance with applicable State law.

The limit of work for the CDA will be determined based on the scope of work set forth in Developer's Proposal.

Work under the CDA will proceed as authorized by notices to proceed ("**NTP**") issued by TxDOT under the CDA. An initial notice to proceed ("**NTP1**") will authorize Developer to perform certain Work related to the Project Management Plan and to engage in certain investigative and other activities. A second notice to proceed ("**NTP2**") will authorize Developer to proceed with the remaining development Work required during the initial construction for the Project described in Developer's Proposal (other than the expansion of the general purpose lanes, which will be authorized by a third notice to proceed as described in Section 1.3.4).

1.3.4 General Purpose Lane Expansion

After TxDOT issues a third notice to proceed ("**NTP3**"), Developer will also be responsible for the design, construction, maintenance and operation of one additional general purpose lane in each direction from IH 610 to BW 8. The CDA will permit TxDOT to issue NTP3 only upon reaching certain traffic volumes. TxDOT has estimated the current construction cost for such work, if undertaken in 2014, would be approximately \$113,100,000.

1.3.5 Availability of Public Funds

TxDOT intends to contribute approximately \$17,100,000 for construction of the TMC Direct Connector and associated acquisition of ROW. The public funds for the TMC Direct Connector will be contributed without regard to Proposer's offered Concession Payment or Public Funds Payments.

The Public Funds Payments (if applicable) will be paid to Developer in accordance with Section 4.6 of the CDA.

1.3.6 SH 288 Developments in Brazoria County

Concurrent with the development of the Project, the Brazoria County Toll Road Authority intends to design, construct, finance, operate and maintain improvements to SH 288 within Brazoria County (the "**Brazoria Project**"). Current plans for the Brazoria Project include the development of two northbound toll lanes and two southbound toll lanes located between existing northbound and southbound general purpose lanes and the addition of various access points to the Brazoria Project, which are currently

pending applicable environmental approvals. The new toll lanes to be constructed as part of the Brazoria Project will connect to the toll lanes to be constructed by the Developer near the Harris County and Brazoria County line.

TxDOT is currently negotiating a Project Development Agreement between TxDOT and Brazoria County which is anticipated to be executed after the Proposal Due Date. The Project Development Agreement is expected to require Developer to interface the Project with the Brazoria Project at a point 200 feet south of the south abutment of the Clear Creek Bridge on SH 288. This point will serve as the southern limit of the Project and the northern limit of the Brazoria Project. Although the Developer will be obligated to coordinate with Brazoria County, any deviation from the interface as specified in the CDA or Technical Provisions would be a TxDOT Change, unless such change is initiated by Developer. TxDOT and Brazoria County expect the two projects to open on or about the same time. This timing will be reflected in the Project Development Agreement and will be derived from the Developer's project schedule. If the Brazoria Project is delayed, the Project Development Agreement will permit the use of temporary ramps at the interface to connect the existing lanes in Brazoria County to the Developer's Toll Lanes in Harris County.

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, and
- (c) Volume III - Reference Information Documents.

Refer to Section 1.2 of the CDA for a list of the CDA Documents and their order of precedence for the CDA. Reference Information Documents (“**RID**”) publicly available as of the time of issuance of the RFP are posted to <http://www.txdot.gov/inside-txdot/projects/studies/houston/sh288-toll-lanes/project-documents.html>, which is hyperlinked to the Project Website. Additional RID may subsequently become available and will be distributed to Proposers via this hyperlink or, if confidential, via the RFP Website, as described further in Section 2.2 below.

The RID 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 RID are accurate, complete, pertinent or of any value to Proposers. The RID will not form a part of the CDA. 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 RID and, in addition, shall not be responsible for any conclusions drawn therefrom.

1.5 Construction and Interpretation of this ITP

1.5.1 Definitions and Acronyms

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

1.5.2 Number and Gender

In this ITP, terms defined in the singular have the corresponding plural meaning when used in the plural and vice versa, and words in one gender include all genders.

1.5.3 Headings

The division of this ITP into sections and other subdivisions is for convenience of reference only and shall not affect the construction or interpretation of this ITP. The headings in this ITP are not intended to be full or precise descriptions of the text to which they refer and shall not be considered part of this Agreement.

1.5.4 References to this ITP

The words “herein”, “hereby”, “hereof”, “hereto” and “hereunder” and words of similar import refer to this ITP as a whole and not to any particular portion of it. The words “Section”, “paragraph”, “sentence”, “clause” and “Exhibit” mean and refer to the specified article, section, paragraph, sentence, clause or exhibit of, or to, this ITP. A reference to a subsection or clause “above” or “below” refers to the denoted subsection or clause within the Section in which the reference appears.

1.5.5 References to Agreements and Other Documents

Unless specified otherwise, a reference to an agreement or other document is considered to be a reference to such agreement or other document (including any schedules or exhibits thereto) as it may be amended, modified or supplemented from time to time in accordance with its terms.

1.5.6 References to Any Person

A reference in this ITP to any Person at any time refers to such Person’s permitted successors and assigns.

1.5.7 Meaning of Including

In this ITP, the word “including” (or “include” or “includes”) means “including without limitation” and shall not be considered to set forth an exhaustive list.

1.5.8 Meaning of Discretion

In this ITP, the word “discretion” with respect to any Person means the sole and absolute discretion of such Person.

1.5.9 Notice, Approval, Etc., in Writing

Whenever the RFP Documents require or provide for any notice, approval, consent, acceptance, determination, decision, certificate, order, waiver, explanation, policy, information or the like, the same and any request therefor must be in writing (unless otherwise waived in writing by the other Party).

1.5.10 Meaning of Promptly

In this ITP, the word “promptly” means as soon as reasonably practicable in light of then-prevailing circumstances.

1.5.11 Trade Meanings

Unless otherwise defined herein, words or abbreviations that have well-known trade meanings are used herein in accordance with those meanings.

1.5.12 Laws

Unless specified otherwise, a reference to a Law is considered to be a reference to (a) such Law as it may be amended, modified or supplemented from time to time, (b) all regulations and rules pertaining to or promulgated pursuant to such Law, (c) the successor to the Law resulting from recodification or similar reorganizing of Laws and (d) all future Laws pertaining to the same or similar subject matter.

1.5.13 Currency

Unless specified otherwise, all statements of or references to dollar amounts or money in this Agreement are to the lawful currency of the United States of America.

1.6 Procurement Schedule and Financial Close Deadline

1.6.1 Procurement Schedule

The following represents the current schedule for the procurement.

| EVENT | DATE and TIME |
|--|--|
| Release of TIFIA term sheet | No later than 60 days before Proposal Due Date |
| Deadline for submittal of AFCs | October 3, 2014 |
| Last date for submittal of: (1) final questions regarding the RFP; (2) changes in organization; (3) Key Personnel; and (4) draft tolling plan | October 15, 2014 |
| Last date for TxDOT responses to AFCs | October 27, 2014 |
| Last date for TxDOT responses to: (1) final questions regarding the RFP (if necessary); (2) changes in organization; (3) Key Personnel; and (4) draft tolling plan | November 5, 2014 |
| Last date for submittal of name and information for Model Auditor, as described in <u>Section 5.11.2</u> | November 10, 2014 |
| Last date for submittal of Benchmark Rate(s) information | November 17, 2014 |
| Last date for TxDOT responses to: (1) Model Auditor information; and (2) Benchmark Rate(s) information source | November 24, 2014 |
| First day of market interest rate adjustment period | December 1, 2014 |

| EVENT | DATE and TIME |
|--|--|
| Proposal Due Date | December 8, 2014, 12:00 PM |
| Anticipated Conditional Award by Commission | January 29, 2015 |
| Final award and delivery of fully-executed CDA Documents | On or before July 6, 2015 |
| Financial Close | On or before 90 days after the execution and delivery of CDA Documents |

Where the RFP provides a deadline or due date for submission of documents, correspondence or other materials to TxDOT, the submission will only be considered timely if TxDOT receives the submission by the date and, if applicable, the time identified. All dates set forth above and elsewhere in the RFP are subject to change, in TxDOT's discretion, by notice to Proposers.

TxDOT expects that the TIFIA term sheet provided to Proposers 60 days prior to the Proposal Due Date will be unchanged through the Proposal Due Date. However, the term sheet remains subject to approval U.S. Department of Transportation Credit Council, which is expected at its October 2014 meeting. TxDOT will promptly notify Proposers of any changes to the term sheet that are received by TxDOT prior to the Proposal Due Date.

1.6.2 Conditional Award, Legal Sufficiency Review and Deadline for CDA Execution

TxDOT anticipates that the Texas Transportation Commission (the "**Commission**") will determine the best value Proposer and proceed with Conditional Award of the CDA to such Proposer at the meeting indicated in Section 1.6.1.

After Conditional Award, TxDOT, with the Preferred Proposer's cooperation and assistance, shall seek the determination by the Texas Attorney General that the CDA is legally sufficient (as required by Section 371.051 of the Texas Transportation Code). In connection with such review, the Preferred Proposer shall submit the examination fee required by Title 1, Texas Administrative Code, Ch. 58, Subchapter C, Rule 58.7, as set forth in Section 5.12.2(e).

Upon final award of the CDA, TxDOT shall deliver final forms of the CDA to the Preferred Proposer to be executed, as provided in Section 6.1.1. Subject to Section 4.6.2 with respect to the period of Proposal validity, the Preferred Proposer shall deliver to TxDOT executed copies of the CDA and the documents required under Section 6.1.3 (for TxDOT to counter-execute) by the deadline specified in Section 6.1.1.

1.6.3 Financial Close Deadline

If final award of the CDA is made (as described in Section 6.1.1), the successful Proposer shall be required to achieve Financial Close on or before 90 days after the execution and delivery of the CDA (subject to Section 3.4.2 of the CDA and any extensions of such deadline in accordance with the CDA).

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 development plan for the Work (“**Project Development Plan**”);
- (b) a Financial Proposal; and
- (c) properly completed Proposal forms.

The instructions and requirements for the Technical Proposal (including the Project Development Plan) 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 (Exhibit D) in the format specified, or submittal of a Proposal subject to any reservations, qualifications, conditions or assumptions, may result in TxDOT rejecting 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 Documents

Portions of the successful Proposal will become part of the CDA Documents, as applicable and to the extent 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 the Proposer. Subject to Exhibit C, Section 5.2, 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 the “**Rules**” (defined in Section 2.1) and 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 upon delivery to TxDOT and will not be returned to the submitting parties. Consequently, all such items may be subject to the Texas Government Code, Chapter 552 (the “**Act**”). Proposers should familiarize themselves with the provisions of the Act, requiring disclosure of public information and exceptions thereto. In no event shall the State, 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 the 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 FHWA. Proposers shall be notified by Addendum of any such modifications.

1.8.1 DBE Requirements

TxDOT has determined that Disadvantaged Business Enterprise (“**DBE**”) requirements apply to the design and construction of the Project under the CDA 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, the DBE Special Provisions and TxDOT’s DBE Program adopted pursuant to Title 49 CFR Part 26, are set forth and provided in the CDA. The DBE participation goal for the CDA is 12% of the professional services and construction portions of the Work performed under the CDA.

As set forth in Exhibit B, Section 3.2.9, each Proposer shall submit certifications 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 CDA, including Proposer’s exercise of good faith efforts. Requirements for the DBE Performance Plan are set forth in the DBE Special Provisions, Exhibit 13 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, TxDOT’s DBE Program and, for the CDA, the approved DBE Performance Plan.

1.8.2 Federal Funding, TIFIA and Private Activity Bonds

The Transportation Infrastructure Finance and Innovation Act (“**TIFIA**”) Program is a potential source of financing for the Project subject to federal requirements and availability. TxDOT submitted a Letter of Interest for the Project to the TIFIA Joint Program Office. TxDOT intends to negotiate a term sheet with the TIFIA Joint Program Office prior to the Proposal Due Date. The negotiated term sheet will contain the expected terms of financing for the Project. TxDOT will provide Proposers the opportunity to comment on a preliminary term sheet and will use best efforts to seek incorporation of reasonable terms requested by Proposers to the extent the TIFIA Joint Program Office considers such requests. Prior to selection as Preferred Proposer, Proposers may not contact FHWA. Proposers shall base their financial model on the negotiated term sheet provided by TxDOT. TxDOT has the right to participate in negotiations between the successful Proposer and TIFIA concerning the final term sheet.

TxDOT has received a provisional allocation for Private Activity Bonds (“**PABs**”) for the Project from the U.S. Department of Transportation (“**USDOT**”) in the amount of \$600,000,000. Each Proposer may, but is not obligated to, use the PABs allocation in its Financial Proposal. The Texas Private Activity Bond Surface Transportation Corporation will serve as the conduit issuer of the PABs (“**PABs Issuer**”). The Developer shall be responsible for all of the PABs Issuer’s costs associated with the issuance of the PABs, including attorneys’ fees associated with obtaining bond counsel opinions.

TxDOT will make the PABs allocation available to provide for a portion of the financing for the Project as set forth in the Developer's Financial Proposal. A Proposer wishing to use PABs shall be solely responsible for obtaining ratings, bond counsel opinions and credit enhancement, 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 and securities laws.

TxDOT's approach to the possible use of PABs has been developed as an accommodation to the Proposers in order to attempt to facilitate the use of PABs by Proposers. TxDOT makes no representation about, and no guarantee of the amount, if any, of PABs that can be issued for the Project or the use of proceeds of PABs to finance the Project as a matter of federal tax law. Proposers should seek advice from their own tax consultants. If a Proposer elects 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.

1.9 Toll Collection System

1.9.1 Toll System CDA

TxDOT has entered into a comprehensive development agreement (the "**Toll System CDA**") with a toll collection system provider ("**TCS Provider**"). Under the Toll System CDA, the TCS Provider 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 the TCS Provider under the Toll System CDA with respect to the Project and, accordingly, the Toll System CDA will not apply to this Project. Proposer may, in its discretion, negotiate with TxDOT's TCS Provider and/or any other toll systems subcontractor with respect to the toll collection systems for the Project.

1.9.2 Tolling Services Agreement

TxDOT will act as the Tolling Operations Contractor for customer service and related transaction processing and toll collection services for the Project (commencing as of the Service Commencement Date) and will provide such services as described in detail in the agreement set forth in Exhibit 11 to the CDA (the TxDOT Tolling Services Agreement).

1.10 The Independent Engineer

As specified in Section 17.1 of the CDA, 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 is set forth as Exhibit H-1, subject to further negotiations among the parties following Conditional Award and prior to execution of the CDA. TxDOT and Developer shall each be responsible for 50% of the costs of the Independent Engineer. Proposers are required to include their portion of the cost of the Independent Engineer in their Financial Proposal and no adjustment shall be made thereto for any changes in actual costs 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 in the current order of assignment. The pre-qualified firm listed first in Exhibit H-2 shall be assigned as the Independent Engineer for the Project. TxDOT will enter into a three-party agreement with the assigned firm only after TxDOT ascertains that no potential conflicts of interest exist or TxDOT

determines, in its discretion, that steps taken to mitigate potential conflicts are sufficient to allow the agreement to be awarded. If TxDOT determines there is a potential conflict of interest with the assigned Independent Engineer given Developer's organization, then the next pre-qualified firm on the list from Exhibit H-2 will be assigned as the Independent Engineer. TxDOT shall bear no responsibility or liability to Developer for the performance of the Independent Engineer.

SECTION 2 PROCUREMENT PROCESS

2.1 Procurement Method

The RFP is issued pursuant to Chapter 223 of the Code, Title 43, Texas Administrative Code, Ch. 27, Subchapter A (the "**Rules**") and other applicable provisions of Texas and federal Law.

If an award will be made, TxDOT will award the CDA to the responsible Proposer offering a Proposal that meets the high standards set by TxDOT and that is determined by TxDOT, through evaluation based upon the criteria set forth in the RFP in accordance with the Code and Rules, to provide the best value to TxDOT and to be in the best interest of the State.

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 unsolicited or nonconforming proposals.

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

The RFP and most portions of the RID will be available to Proposers and the public on the Project Website. However, portions of the RID containing confidential information will instead be posted only to the secure file transfer and sharing site for the Project (the "**RFP Website**"). The RFP Website is distinct from the Project Website viewable by the public. Access to the RFP Website will be granted only to shortlisted Proposers.

TxDOT has provided shortlisted Proposers with the address of the RFP Website. The RFP Website address and a username and password have been provided separately to each shortlisted Proposer. Each shortlisted Proposer will be required to treat the username and password as confidential information and to check the site regularly for Addenda to this RFP, confidential RID and for other procurement related information.

Other information related to the procurement may, at TxDOT's discretion, be made available to the public on the Project Website.

2.2.1 Authorized Representative

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

Texas Department of Transportation
7600 Chevy Chase Drive, Building 2, 4th Floor
Austin, Texas 78752
Attn: Mr. Eddie Sanchez, P.E.
E-mail: TxDOT-HOU-PPP-SH288@txdot.gov

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.

2.2.2 Identification of Proposer Designated Representative

Each Proposer's designated representative shall initially be the person identified in the QS as the single point of contact for the Proposer. If a Proposer changes its designated representative at any time, including subsequent to its submission of its Proposal, the Proposer shall provide TxDOT's Authorized Representative with the name and address of such new designated representative. A Proposer's failure to identify a designated representative in writing may result in the Proposer not receiving 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 (May 3, 2013) until September 26, 2013, the rules of contact provisions in the RFQ were applicable to this procurement. Starting on September 30, 2013, the date the industry review package was issued, and ending on the earliest of (i) the 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), social media, instant messages, texts 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's designated representative shall correspond with TxDOT regarding the RFP only through TxDOT's Authorized Representative (except communications with TxDOT's ombudsman as provided in Section 2.3.2 below). Except during one-on-one meetings, no telephone or oral requests will be considered.
- (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 Commission or with any TxDOT staff, advisors, contractors or consultants involved with the procurement or the Project, except for communications with TxDOT consultants who have completed their services for the Project and been released by TxDOT, communications expressly permitted by the RFP or except as approved in advance by the Authorized Representative in his/her discretion. The foregoing restriction shall not, however, preclude or restrict communications with regard to matters unrelated to the RFP or from 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 discretion of TxDOT.

- (d) Proposers shall not contact any of the Stakeholders regarding the Project, including employees, representatives, members and consultants of the Stakeholders, except as specifically approved in advance by TxDOT in writing or as set forth in this Section 2.2.3(d). Notwithstanding the foregoing, each Proposer may contact private landowners along the Project corridor for the purpose of performing due diligence and discussing aspects of the Proposal, including temporary construction easement, staging areas and borrow; provided, however, that Proposers shall not discuss other Proposers or their proposals, negotiate exclusive arrangements to the detriment of other Proposers or otherwise seek an unfair competitive advantage; and provided further that Proposers shall not attempt to obtain from such landowners rights of entry during the procurement except as set forth in Section 2.8.2. Proposers shall not communicate with the Texas Comptroller of Public Accounts.
- (e) Any communications determined by TxDOT, in its discretion, to be improper may result in disqualification.
- (f) Any official information regarding the Project will be disseminated from TxDOT's office on Department letterhead, on the RFP Website or on the Project Website. Any official correspondence 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.
- (h) 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, Alternative Technical Concepts (“ATCs”), Alternative Financial Concepts (“AFCs”), the Proposal, the CDA and all other matters pertaining to this Procurement 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, Role of the Ombudsman and Addenda

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 mistake, discrepancy, deficiency, ambiguity, error or omission contained therein, or of any provision that a Proposer fails to understand. Failure of a 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 expressly set forth in the CDA.

TxDOT will only consider comments or questions regarding the RFP, including requests for clarification and requests to correct errors, if submitted by a shortlisted Proposer to the e-mail address identified in

Section 2.2.1, provided, however, that any confidential communication regarding the procurement process shall be submitted to TxDOT's designated ombudsman by hard copy or electronic transmission in the format prescribed in Section 2.3.2 (*see Section 2.3.2* for a description of the instances in which communications may be submitted to the ombudsman).

Such comments or questions 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 and shall: (i) be listed in order of importance, indicating, where appropriate, whether the comment or question relates to a "go/no-go" issue that, if not resolved in an acceptable fashion, may preclude the Proposer from submitting a Proposal, or an issue having a material impact on the value of the transaction; (ii) identify the document (e.g., the CDA, Technical Provisions, etc.); (iii) identify the relevant section number, if applicable; and (iv) indicate whether the Proposer believes the question contains confidential or proprietary information relating to Proposer's Proposal, ATCs or AFCs. With respect to comments on the RFP Documents generally, suggested revisions to language in the appropriate RFP Documents are encouraged.

Except during one-on-one meetings, no telephone or oral requests will be considered. 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 TxDOT SH 288 Toll Lanes Project in Harris County. No requests for additional information or clarification submitted to any person other than TxDOT's Authorized Representative or, subject to compliance with Section 2.3.2, to TxDOT's designated ombudsman will be considered. Questions may be submitted only by a Proposer's designated representative and must include the requestor's name, address, telephone and facsimile numbers, e-mail address and the Proposer he or 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 Proposal, ATCs or AFCs. TxDOT reserves the right to disagree with a Proposer's assessment regarding confidentiality of information in the interest of maintaining a fair process or complying with applicable Law. Under such circumstances, TxDOT will inform the Proposer and may allow it to withdraw the question, rephrase the question, or have the question answered non-confidentially or, if TxDOT determines that it is appropriate to provide a general response TxDOT will modify the question to remove information that TxDOT determines is confidential. 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 date specified in Section 1.6.1. A consolidated, final set of questions and answers will be compiled and distributed prior to the Proposal Due Date.

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 discretion, that its interpretation or clarification requires a change in the RFP, TxDOT will prepare and issue an Addendum.

2.3.2 Ombudsman

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 2.3.2 on a confidential basis regarding the procurement process. Instead of submitting written communications to TxDOT's Authorized Representative as provided in Section 2.3.1, a Proposer may submit such confidential communications, comments or complaints regarding the procurement, to the ombudsman, where Proposer believes in good faith that confidentiality is essential. Please note that the deadline set

forth in Section 1.6.1 applies to comments and questions regarding the RFP that are submitted to the ombudsman. 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 TxDOT's Authorized Representative as identified in Section 2.2.1. If the ombudsman determines that the submitted material is not of a confidential nature or has been submitted past the applicable deadline set forth in Section 1.6.1, 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. TxDOT has designated the following individual who is not involved in the procurement to be the ombudsman for the procurement:

Ms. Rebecca Blewett, Esq.
Associate General Counsel
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701
E-mail Address: Becky.Blewett@txdot.gov

All other questions and requests for clarification should be submitted to the Authorized Representative in accordance with Section 2.3.1.

2.3.3 Addenda

TxDOT reserves the right, in its 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 pursuant to Section 5.8, 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 Project Website, and Proposers will be notified of the issuance of such Addenda. If any Addendum significantly impacts the RFP, as determined in TxDOT's discretion, TxDOT may change the Proposal Due Date. The announcement of such new date will be included in the Addendum. In addition, if the last date for Proposers to submit questions regarding the RFP has occurred or has changed, the Addendum will indicate the latest date for submittal of any permitted clarification requests concerning 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.

2.4 Pre-Proposal Submittals

Pre-Proposal Submittals are required as provided in Section 2.11 (regarding changes in a Proposer's organization), Section 2.13 (regarding changes in and new additions to Key Personnel), Section 3.5 (regarding the draft tolling plan), and Section 5.11.2 (regarding the Financial Model Auditor). In addition, any Proposer that wishes to submit an ATC pursuant to Section 3.2 or an AFC pursuant to Section 3.6 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. 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 herein, and on such other dates designated by TxDOT in writing to Proposers, to discuss issues and clarifications regarding the RFP and Proposer's ATCs and/or AFCs. 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 discretion, such disclosure would impair the confidentiality of an ATC or AFC, or would reveal a Proposer's confidential business strategies. FHWA may also participate in all one-on-one meetings.

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

- (a) The meetings are intended to provide Proposers with a better understanding of the RFP.
- (b) TxDOT will not discuss with any Proposer any Proposal, ATC or AFC other than Proposer's own.
- (c) Proposers shall not seek to obtain commitments from TxDOT in the meetings or otherwise seek to obtain an unfair competitive advantage over any other Proposer.
- (d) 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 of the foregoing provisions 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.

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 this ITP or any other part of the RFP unless it is incorporated in an Addendum issued pursuant to Section 2.3.3.

2.6 Confidentiality/Public Information Act Disclosure Requests

2.6.1 Disclosure Waiver

Each Proposer, by submitting a Proposal to TxDOT in response to the RFP, consents to the disclosures described in this ITP and all other disclosures required by law and expressly waives any right to contest, impede, prevent or delay such disclosure, or to initiate any proceeding that may have the effect of impeding, preventing or delaying such disclosure, under the Act, the Code, the Rules or any other law relating to the confidentiality or disclosure of information. Under no circumstances will TxDOT be responsible or liable to a Proposer or any other party as a result of disclosing any such materials. Each Proposer further agrees to assist TxDOT in complying with these disclosure requirements if it is the selected apparent best value Proposer.

2.6.2 Observers During Evaluation

Proposers are advised that observers from federal or other agencies, including representatives of local agencies and municipalities, may observe the Proposal evaluation process and will have the opportunity to review the Proposals after the Proposal Due Date. TxDOT has agreed to allow FHWA officials and their outside advisors to oversee the procurement process, which includes access to the Financial Proposals. Outside observers (other than FHWA officials) will be required to sign TxDOT's standard confidentiality agreement.

2.6.3 Public Disclosure of Proposal Documents

Proposers are advised that the information contained in Form I (Conflict of Interest Disclosure Statement) and the Executive Summary (described in Exhibit B, Section 3.1) of each Proposal may be publicly disclosed by TxDOT at any time and at TxDOT's discretion.

Proposers are advised that, upon recommendation to the Commission of the selection of an apparent best-value Proposer and in TxDOT's discretion, TxDOT may publicly release the selected apparent best-value Proposer's Form Q (Financial Summary Form), or any information contained therein. If TxDOT is unable to reach agreement on the CDA with the selected apparent best-value Proposer and TxDOT, in accordance with applicable law, chooses to enter into negotiations with the next highest ranking Proposer, then the Form Q submitted by such next highest ranking Proposer and any information contained therein, may be disclosed as described in the previous sentence for the selected apparent best-value Proposer.

After final award, or in the event that the procurement is cancelled by TxDOT, TxDOT shall have the right to disclose publicly any and all portions of all the Proposals, except the non-public financial statements of privately held entities. However, the non-public financial statements of privately held entities shall be subject to disclosure as described in Section 2.6.4.

2.6.4 Disclosure Process for Requests Under the Act

If a request is made under the Act for disclosure of the Proposals or information contained therein, other than information that may otherwise be disclosed pursuant to Proposer's express consent given in

accordance with Section 2.6.1, TxDOT will submit a request for an opinion from the Office of the Attorney General prior to disclosing any such documents. Proposer shall then have the opportunity to assert its basis for non-disclosure of such documents 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 in accordance with the Act and each Proposer consents to the release of all such information to the Attorney General for purposes of the Attorney General making a determination in response to a disclosure request under 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 labeled materials, whether the disclosure is deemed required by Law or by an order of court 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. 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 the 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 any non-public financial statement of privately held entities and other confidential proprietary information submitted by a Proposer, such Proposer shall be responsible for prosecuting or defending any action concerning the materials at its sole expense and risk; provided, however, that TxDOT reserves the right, in its 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 the Proposer whose Proposal is the subject thereof.

2.7 TxDOT Studies and Investigations

TxDOT has provided site investigation and traffic and revenue study information in the RID. To the extent TxDOT undertakes any additional investigative activities or studies, the information obtained by TxDOT from such activities or studies may be made available to Proposers in the RID. All information provided by TxDOT will be subject to the same limitations applicable to similar information furnished in the RID. Specifically, TxDOT makes no representation or warranty as to the accuracy, completeness or suitability of the additional information.

2.8 Examination of RFP and Site Access

2.8.1 Examination of RFP

Each Proposer shall be solely responsible for examining, with appropriate care and diligence, the RFP, including RID and any Addenda and material posted on the Project Website and the RFP Website and for informing itself with respect to any and all conditions that may in any way affect the amount or nature of its Proposal, or the performance of each Developer's obligations under the CDA with TxDOT. Each Proposer also is responsible for monitoring the Project Website and RFP Website 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, and 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 Site Access

An expedited process for obtaining rights of entry to access portions of the Project is attached hereto as Exhibit F. Subject to this Section 2.8.2 and pursuant to the terms of Exhibit F 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 the Proposer deems necessary; provided, however, that the Proposer shall not (a) interrupt or impede traffic flow; (b) stop traffic at cross-streets or intersections or otherwise to solicit information; and/or (c) 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, subject to the conditions specified in Exhibit F, for purposes of inspecting in-place assets and determining Site conditions through investigations. This work may include surveys and site investigations, such as geotechnical, Hazardous Materials and Utilities investigations. Proposer shall submit a preliminary testing plan for approval to the Authorized Representative before beginning any geotechnical investigations within the Project ROW or on the existing roadway. This plan shall indicate the proposed extent of removal or disturbance of any in place sub-grade or in place roadway material. The plan will describe surface location and depth of testing as well as specific test description to be performed. Proposer shall also submit the proposed method to refill and replace any removed roadway material to ensure the safe function of the in-place pavement. Finally, Proposer shall submit for approval the proposed traffic control supplier and traffic control plan needed to complete any and all testing.

After Conditional Award has been made, the selected Proposer will be allowed access to the Project ROW TxDOT owns, in accordance with the process described in this Section 2.8.2, to conduct surveys and site investigations, including geotechnical, Hazardous Materials and Utilities investigations and to engage in the other activities referenced in the Technical Provisions that are allowed prior to NTP2.

2.9 Errors

If any mistake, discrepancy, deficiency, ambiguity, error or omission 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 E).

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 Rules) 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 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, AFCs and Proposals), TxDOT will make every reasonable effort to treat Proposers equitably.

2.11 Changes in Proposer's Organization

Proposers are advised that, 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 team members identified in its QS, including, additions, deletions, reorganizations, changes in equity ownership or role changes in or of any of the foregoing, Proposer shall submit to TxDOT a written request for approval of the change as soon as possible but in no event later than the date and time 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 team members 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 discretion. Except as provided herein and in the CDA, a Proposer may not make any changes in the team members identified in its QS after the deadline set forth in Section 1.6.1. Between the applicable last date set forth in Section 1.6.1 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 Changes to Companies or Entities Filling Key Project Roles

Each Proposer must identify any company that will (a) fill a key project role, including project management, lead design firm, quality control management and quality assurance management; or (b)

serve as a key task leader for geotechnical, hydraulics and hydrology, structural, environmental, utility and right-of-way issues. Furthermore, the Proposer may not make changes to the companies so identified unless the original company or entity: (i) is no longer in business, is unable to fulfill its legal, financial or business obligations, or can no longer meet the terms of the teaming agreement with the Proposer; (ii) voluntarily removes itself from the team; (iii) fails to provide a sufficient number of qualified personnel to fulfill the duties identified during the proposal stage; or (iv) fails to negotiate in good faith in a timely manner in accordance with provisions established in the teaming agreement proposed for the Project. If Proposer makes team changes in violation of these requirements, any cost savings resulting from the change shall accrue to the State and not to Proposer. Proposer shall identify all such contractors on Form B-4. Note that all teaming agreements and subcontracts must be executed and provided to TxDOT before the execution of the CDA.

2.13 Changes in Key Personnel and Designation of New Key Personnel

Proposers are advised that TxDOT discourages changes in Key Personnel from the individuals listed in the QS. Any proposed changes in Key Personnel from those identified in the QS are subject to TxDOT approval as specified in this Section 2.13.

Each Proposer shall submit a package that includes a list of any proposed changes in Key Personnel from those identified in the QS and any new Key Personnel who were not required to be submitted with the QS falling within any of the categories identified in ITP Exhibit B, Section 3.2.5.2, along with a copy of a resume for each such person (which must contain the individual's qualifications and relevant work experience) and contact information for three references for each individual.

In addition, if any individual to be included in the Proposal is also proposed as a Key Personnel or for another position on any other TxDOT procurement, Proposer shall include in the package either: (1) a statement certifying that said individual will be available to assume its designated role on the TxDOT SH 288 Toll Lanes Project in Harris County if Proposer is the successful Proposer or (2) the resume of a qualified alternate.

Each such package shall include an original and five copies of the information specified above. The package shall be submitted to TxDOT by the date and time for submittal of changes in Key Personnel specified in Section 1.6.1 for review and approval by TxDOT, in its discretion. The package shall be delivered to the address set forth in Section 2.2.1.

TxDOT is under no obligation to approve requested changes in Key Personnel or designations of new Key Personnel and may disapprove such requests at its discretion. If TxDOT, in its discretion, disapproves a proposed Key Personnel or (if applicable) its proposed alternate, Proposer shall submit the information required above for its proposed substitute for review and approval by TxDOT in accordance with the foregoing process at least ten Business Days prior to the Proposal Due Date.

The Proposal may not include any Key Personnel previously disapproved by TxDOT in writing for such Key Personnel position.

A Proposer may not make any changes in its Key Personnel after receipt of TxDOT approval as specified in this Section 2.13, except as provided in the CDA Documents.

2.14 Sales Tax

Proposers should assume that the Project is exempt from sales tax for certain Expendable Materials as more particularly described in Section 35.2 of the CDA. The selected Proposer and its contractors and

subcontractors 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 Texas Comptroller’s website.

SECTION 3 ALTERNATIVE TECHNICAL CONCEPTS, ALTERNATIVE FINANCIAL CONCEPT AND DRAFT TOLLING PLAN REVIEWS

3.1 Alternative Technical Concepts

“Alternative Technical Concepts” or “ATCs” are concepts that conflict with the requirements for design, construction, operation and maintenance of the Project, or otherwise require a modification of the Technical Provisions but that may nevertheless be proposed in accordance with the terms and conditions set forth in this ITP. Sections 3.1 through 3.5 set forth a process for pre-Proposal review of ATCs. 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 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 discretion. A concept is not eligible for consideration as an ATC if, in TxDOT’s discretion, it is premised upon or would require (a) a mere reduction in Project scope, performance or reliability; (b) the addition of a separate TxDOT project to the CDA (such as expansion of the scope of the Project to include additional roadways); (c) an increase in the amount of time required for Substantial Completion of the Work under the CDA; or (d) changes in financial terms. 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 a concept would be considered an ATC by TxDOT, TxDOT recommends that the Proposer submit such concept for review as an ATC.

3.2 Pre-Proposal Submission of ATCs

If a Proposer wishes to include ATCs as part of its Proposal, Proposer may submit ATCs for review to the Authorized Representative set forth in Section 2.2.1, until the applicable last date and time identified in Section 1.6.1. Such submission shall be in writing, with a cover sheet identifying Proposer and stating “TxDOT SH 288 Toll Lanes Project in Harris County – 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 Submittal Requirements

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 routine or capital 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 that 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 and quantitative discussion 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 ROW will be required to implement the ATC (Proposers are advised that they shall (i) be solely responsible for the acquisition of any such ROW, 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 ROW; 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 on which 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; and
- (r) an analysis of how the ATC is equal or better in quality and performance than the requirements of the RFP.

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 consent, in its discretion, to do so. If implementation of an ATC will require approval by a third party (e.g., a governmental authority), Proposer shall have full responsibility for, and bear the full risk of, obtaining any such approvals after award of the CDA and submitting required or relevant 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 entitled to a Change Order for additional compensation or time under the CDA.

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 required and 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 discretion, of certain identified conditions that must be met or clarifications or modifications that must be made;
- (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; or
- (e) the submittal does not qualify as an ATC and may not be included in Proposer's Proposal.

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 RFP requirements.

TxDOT will make a preliminary determination on whether to accept and approve an ATC for submission. TxDOT will then provide each Proposer with an opportunity to request a one-hour ATC presentation meeting to discuss the ATCs that were preliminarily given conditional approval or were rejected. If a Proposer chooses to request a meeting, the Proposer shall provide TxDOT with an agenda regarding the ATCs they wish to discuss. Thereafter, TxDOT will provide a final determination regarding the ATCs included on Proposer's meeting agenda and discussed during the meeting. Preliminary decisions for the ATCs not included on the Proposer agenda, or shown on the Proposer agenda but not discussed by the Proposer in the ATC presentation meeting, will be deemed final. Proposers will be responsible for ensuring that the ATCs submitted with the Proposal comply 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 Conditional 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 Conditional 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 execution of the CDA, ATCs from unsuccessful Proposers may, in TxDOT's 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 execution of the CDA, ATCs from unsuccessful Proposers may, in TxDOT's 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 10 to the CDA and Exhibit

B, Section 4.3.2.2. Proposers must submit their draft tolling plan by the applicable last date and time set forth in Section 1.6.1.

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 RFP, including the CDA, or whether the submittal is non-responsive. Where the draft tolling plan is found to be 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 Alternative Financial Concepts

This Section 3.6 sets forth a process for pre-Proposal review of Alternative Financial Concepts (“**AFCs**”). This process is intended to allow Proposers to incorporate innovation and creativity into the Proposals, in turn allowing TxDOT to consider Proposer AFCs in making the selection decision, to avoid delays and potential conflicts in the commercial terms associated with deferring of reviews of AFCs to the post-award period and to obtain the best value for the public.

AFCs are changes to the terms of the CDA Documents, subject to the exclusions set forth in Section 3.6.1, that allow (a) financing structures (“**Financial AFCs**”) or (b) structures for the Developer and/or Project management and operations (“**Structure AFCs**”) that would otherwise be prohibited or impracticable due to the terms of the as-issued CDA Documents.

TxDOT has discretion to allow or reject any AFC submitted. Proposers are advised that TxDOT will allow an AFC only if TxDOT determines that the terms and conditions of the CDA Documents, as modified by the AFC, allow TxDOT substantially the same or better value for money, rights and remedies as the unmodified terms and conditions.

3.6.1 Exclusions to AFCs

A concept is not an AFC if, in TxDOT's discretion, it reduces TxDOT's value for money or TxDOT's contractual rights or remedies, including any concepts that include the following:

- (a) An increase in the Term;
- (b) A change to the tolling provisions, including tolling systems, rates, toll lane pricing and speed requirements, user classifications, exempt vehicles and post-termination tolling provisions;
- (c) An increase in TxDOT liability for Project Debt;
- (d) Reduction in compensation to TxDOT, including the Revenue Payments, Refinancing Gain payments, Tolling Method Gain payments and positive changes pursuant to Section 3.6.3(a) of the CDA;
- (e) Increase in the amount of public funds (other than as set forth in Boxes 2 and 3 of Form J-1) or an adverse change in the draw requirements from the terms set forth in Article 4 of the CDA;
- (f) Increase in compensation to the Developer in the event of termination, including provisions relating to Compensation Amounts and Termination Compensation;

- (g) A change in the conditions to, or procedures for certifying, Substantial Completion, Service Commencement and Final Acceptance;
- (h) A change regarding allocation of responsibilities between TxDOT and Developer for performance of design, permitting, ROW acquisition, Utility Adjustments, construction, operations, maintenance, Renewal Work, Upgrades, Technology Enhancements, Safety Compliance or Handback Requirements;
- (i) A change to the provisions addressing Compensation Events and Relief Events, or any other modifications that would allocate additional risk to TxDOT or reduce risks assumed by Developer;
- (j) A change to the provisions on the role or scope of the Independent Engineer;
- (k) A change to the provisions relating to Unplanned Revenue Impacting Facilities;
- (l) A change to the provisions regarding Developer default, notice, cure periods, remedies and dispute resolution, except to the extent such change would result in more favorable terms to TxDOT;
- (m) A change to the Lender rights and protections provided in the CDA Documents, except insofar as an AFC not directed at such provisions incidentally would require amendment of such provisions in order for the AFC to work;
- (n) A change to the provisions relating to Noncompliance Points and related remedies, except to the extent such change would result in more favorable terms to TxDOT;
- (o) A change to the termination provisions, except to the extent such change would result in neutral or more favorable terms to TxDOT;
- (p) A change to the provisions regarding lender direct agreements, except insofar as an AFC not directed at lender direct agreements would require entry into or amendment of a direct lender agreement in order for the AFC to work; or
- (q) A change resulting in requirements for insurance, performance security, Proposal Security or Closing Security, as applicable, or indemnities that would be less favorable to TxDOT.

3.6.2 Pre-Proposal Submission of AFCs

If a Proposer wishes to include AFCs as part of its Proposal, the Proposer shall first submit the AFC for initial review by TxDOT. Proposers may submit AFCs for initial review to the Authorized Representative set forth in [Section 2.2.1](#), until the last date and time identified in [Section 1.6.1](#). Such submission shall be in writing, with a cover sheet identifying Proposer and stating “TxDOT SH 288 Toll Lanes Project in Harris County – Confidential AFCs for Initial Review.” If Proposer does not identify its submittal as described in the preceding sentence, the submission will not be treated as an AFC by TxDOT. Proposer shall submit five copies of each AFC initial review submission to TxDOT. An AFC initial review submission shall be a concise description of the AFC that is no more than two pages single-spaced, not including the cover sheet described above.

After reviewing each AFC initial review submission, TxDOT shall notify the Proposer if the Proposer is invited to submit a Pre-Proposal AFC submission with respect to the particular AFC. Proposers invited to submit a Pre-Proposal AFC submission may submit a Pre-Proposal AFC to the Authorized Representative set forth in Section 2.2.1, until the last date and time identified in Section 1.6.1. Such submissions shall be in writing, with a cover sheet identifying Proposer and stating “TxDOT SH 288 Toll Lanes Project in Harris County – Confidential Pre-Proposal AFCs.” Proposer shall clearly identify the submittal as a request for review of a Pre-Proposal AFC under this ITP. If Proposer does not identify its submittal as described in the preceding sentence, the submission will not be treated as an AFC by TxDOT. Only Pre-Proposal AFCs invited by TxDOT after the review of an AFC initial review submission will be considered by TxDOT for inclusion in the Proposal.

Pre-Proposal AFC submissions shall include five copies of the following:

- (a) a sequential AFC number identifying Proposer and the AFC number (multi-part or multi-option AFCs shall be submitted as separate individual AFCs with unique sequential numbers);
- (b) a detailed narrative description of the AFC, including a designation of the AFC as either a Financial AFC or a Structure AFC;
- (c) an explanation of the value of the AFC to TxDOT;
- (d) an explanation and detailed description of each proposed change to the as-issued CDA Documents, including a detailed mark-up of each provision in the as-issued CDA Documents that will be changed as a result of the AFC;
- (e) the analysis justifying use of the AFC, which may include an explanation of how the proposed changes to the CDA Documents will provide TxDOT substantially the same (or better) rights and remedies as the unmodified terms and conditions; and
- (f) an estimate of any savings that would accrue to TxDOT should the AFC be approved and implemented.

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

3.6.3 Modifications to the RFP

If TxDOT determines, as the result of review of a proposed AFC 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 AFC. Furthermore, TxDOT may modify the RFP Documents to incorporate modifications proposed by an AFC, provided that TxDOT (a) will not advise the other Proposers that the modification is associated with an AFC, and (b) will not make any modification if TxDOT determines that such modification would compromise a Proposer’s intellectual property.

3.6.4 TxDOT Review of Pre-Proposal Submission of AFCs

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

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

- (a) the AFC, as submitted, is acceptable for inclusion in the Proposal;
- (b) the submittal is not acceptable for inclusion in the Proposal;
- (c) the AFC is not acceptable in its present form, but will be acceptable upon satisfaction, in TxDOT's discretion, of certain identified conditions which must be met or clarifications or modifications that must be made; or
- (d) the concept in the submittal is permitted under the RFP Documents.

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

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

3.6.5 Incorporation of AFCs in the CDA

Following Conditional Award of the CDA, the AFCs that were pre-approved by TxDOT and incorporated in the Proposal by the successful Proposer shall be included in the CDA Documents in the form pre-approved by TxDOT. If TxDOT responded to any AFC by stating that it would be acceptable if certain conditions, clarifications or modifications were met, those identified conditions, clarifications or modifications 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 AFCs.

Following Conditional Award of the CDA, AFCs from unsuccessful Proposers may, in TxDOT's discretion, be presented to the selected Developer as a TxDOT Change Order in accordance with the CDA.

3.7 Confidentiality of ATCs, AFCs and Draft Tolling Plans

Subject to the provisions of the Act and the Rules, ATCs, AFCs, draft tolling plans and all communications regarding ATCs, AFCs and draft tolling plans will remain confidential until a decision is made to select a Proposer or cancel the procurement, 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 2.6.3 of this ITP. The foregoing shall not preclude TxDOT from modifying the documents as necessary to comply with applicable Law or to account for information obtained by TxDOT outside of the ATC and AFC processes. By submitting a Proposal, Proposer agrees, if it is not selected, to disclosure of its work product to the successful Proposer.

SECTION 4 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. The Proposal shall be submitted in recyclable, low-cost, sealed containers, in the format and manner set forth in Sections 4.3 and 4.4 no later than the Proposal Due Date and time specified in Section 1.6.1, except for the Cost and Pricing Data, which may be delivered after the Proposal Due Date pursuant to Section 4.5.3.

4.1.1 Signatures Required

The Proposal Letter (Form A) shall be signed in blue ink by all Equity Members and shall be accompanied by evidence of signatory authorization as specified in Form A.

4.1.2 Copies

Where copies of the Proposal are required, Proposer shall mark the document or cover with the word "Copy".

4.1.3 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 date and 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 or AFCs (including conditionally pre-approved ATCs or AFCs 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. Any Proposal that contains a material alteration, as determined by TxDOT in its discretion, to this ITP Forms, 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, in its discretion. Such disqualification will not result in the forfeiture of Proposer's Proposal Security.

Each Proposal must be submitted in the official format that 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: (i) is submitted in paper form or on disk other than that specified by TxDOT, (ii) is not properly signed, (iii) is missing any parts, or (iv) otherwise does not meet the Proposal submittal requirements;
- (b) If the Proposal contains irregularities that make the Proposal incomplete, indefinite or ambiguous as to its meaning, including illegible text, omissions, erasures, alterations, 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 the Proposal: (i) limits or modifies the Proposal Security, (ii) does not provide the Proposal Security (see Exhibit B, Section 3.3) or (iii) does not provide requested information deemed material by TxDOT; 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. 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 8½ by 11-inch format is required for typed submissions and an 11 by 17-inch format is required for drawings, except the Proposer's schematic shall be provided in the format set forth in Exhibit B, Section 4.2.2. Any support letters provided from parties outside the United States may be submitted in ISO A4 format and design drawings may be submitted on roll plots not to exceed 34 inches in width (and such design drawings shall be submitted on DVD in PDF format and in Bentley Microstation format). Preliminary schedule submissions shall include both a hard copy and the electronic files necessary to view and manipulate the schedule in Primavera.

Submittals must be bound with all pages in a binder and the Technical Proposal must be sequentially numbered. Printed lines may be single-spaced with the type font size being no smaller than 12-point, other than in tables and figures which may be prepared using 10-point font size type. 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 completed Proposal shall be submitted and delivered in sealed containers no later than the Proposal Due Date and time specified in Section 1.6.1. The Proposal is to be delivered to TxDOT at the following address:

Texas Department of Transportation
7600 Chevy Chase Drive, Building 2, 4th Floor
Austin, Texas 78752

Attn: Mr. Eddie Sanchez, P.E.
E-mail: TxDOT-HOU-PPP-SH288@txdot.gov

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

4.5 Technical Proposal

4.5.1 General

All of the binders comprising the original Technical Proposal, together with an electronic copy on one or more DVDs or USB drives, shall be packaged in a single container, clearly addressed to TxDOT as provided herein and labeled “[Proposer Name]: Original Technical Proposal for the TxDOT SH 288 Toll Lanes Project in Harris County.” In addition, Proposer shall provide 10 copies of the Technical Proposal, excluding: (a) the Proposal Security (which must be submitted according to the requirements set forth below) and (b) any roll plots, for which Proposer shall provide four copies. The containers that include the required hard copies of the Technical Proposal shall be labeled “Copies of Technical Proposal for the TxDOT SH 288 Toll Lanes Project in Harris County.”

The electronic copies shall be in PDF format on DVDs or USB drives; provided, however, that (a) Proposal forms may be submitted in either PDF 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.

4.5.2 Proposal Security

One original and three 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 SH 288 Toll Lanes Project in Harris County.”

4.5.3 Financial Proposal

One original and six copies of the Financial Proposal shall be delivered to TxDOT, together with one electronic copy of the Financing Plan in either PDF or Word format (*see Exhibit C*). The documents shall be included in a sealed container labeled “[Proposer Name]: Financial Proposal for the TxDOT SH 288 Toll Lanes Project in Harris County.” One original, one copy and six electronic copies in the format set forth in Exhibit C, Section 6.2.1 of the Financial Model, Form J-1, Form J-2, Form J-3, Form O, Form R and any financial statements shall also be delivered to TxDOT. The Cost and Pricing Data shall be delivered not later than seven days after the Proposal Due Date.

4.6 Modifications, Withdrawals and Late Submittals

4.6.1 Modifications to a Proposal

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's designated representative. Such written request shall be delivered to TxDOT's Authorized Representative specified 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. Except as expressly set forth herein, 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 or Closing Security, as applicable. Proposals shall be valid for a period of 210 days after the Proposal Due Date. No Proposer shall withdraw its Proposal within the 210-day period, unless notified by TxDOT that (i) no CDA for the Project will be awarded by TxDOT pursuant to the RFP; (ii) TxDOT has awarded the CDA to another Proposer and has received the executed CDA and other required documents; (iii) TxDOT does not intend to award the CDA to Proposer; or (iv) such Proposer is not the apparent best value or next highest ranking Proposer.

If the next best Proposer is notified during the 210-day period that it is selected for negotiations, such Proposer shall enter into good faith negotiations with TxDOT and shall use its best efforts to extend the validity of its Proposal for the period until 270 days after the Proposal Due Date.

Any Proposer may elect 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; Relief From Obligation to Close by Specified Deadline; Forfeiture of Closing Security

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 or Closing Security, as applicable, as set forth in this Section 4.7 if the following circumstances occur: (a) Proposer fails to attend and actively participate in reasonably scheduled negotiation meetings with TxDOT, or (b) Proposer 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, that are inconsistent with the Independent Engineer scope of work or which would compromise the independence of the Independent Engineer.

Each Proposer, by submittal of its Proposal, shall be deemed to have agreed to the following:

4.7.1 Failure to Meet Commitments

Subject to Section 4.6.2, the Proposal Security is subject to forfeiture if (a) Proposer is selected as the apparent best value Proposer and fails to deliver Closing Security as required under Exhibit B, Section 3.3, or (b) Proposer withdraws, repudiates or otherwise indicates in writing that it will not meet any commitments made in its Proposal except as specifically permitted hereunder.

4.7.2 Failure to Execute and Deliver Documents

Subject to Section 4.6.2, the selected Proposer's Proposal Security or Closing Security, as applicable, is subject to forfeiture if it fails to deliver to TxDOT executed copies of the CDA and the documents required under Section 6.1 by the deadline set forth in Section 1.6.2, unless such failure is directly attributable to:

- (a) TxDOT's failure to provide timely responses 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, provided Proposer has engaged in good faith negotiations with TxDOT and the Independent Engineer as set forth in Section 5.13;
- (c) 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 5.13;
- (d) TxDOT's failure to timely deliver any of the TxDOT Post-Selection Deliverables described in Section 5.14;
- (e) 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; or
- (f) The refusal by the Texas Attorney General to determine that the CDA is legally sufficient (as required by Section 371.051 of the Texas Transportation Code) after having received all requested information from the apparent best value Proposer, unless such refusal is due to an action or inaction of the Preferred Proposer, an action or inaction initiated by or on behalf of the Preferred Proposer, or information or an element of the CDA provided by the Preferred Proposer.

4.7.3 Failure to Achieve Financial Close

The selected Proposer's Closing Security is subject to forfeiture if it fails to achieve Financial Close by the deadline set forth in Section 1.6.3, unless such failure is directly attributable to an event set forth in Section 3.4.2 of the CDA.

4.8 Acceptance of Delivery by TxDOT

TxDOT will provide a receipt for Proposals that are timely delivered to TxDOT as specified herein.

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, costs associated with Post-Selection Deliverables and costs relating to the finance process, shall be borne by Proposer, except for any costs paid by TxDOT in accordance with Section 6.3.

SECTION 5 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 pass/fail and responsiveness criteria, followed by a subsequent responsiveness and qualitative evaluation of the Project Development Plan, an initial review of each Financial Proposal for pass/fail and responsiveness criteria, a subsequent responsiveness and quantitative evaluation of each Financial Proposal, a ranking determination and a best value determination. The process may, at TxDOT's discretion, 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 5.12.3. The evaluation and selection process is subject to modification by TxDOT, in its discretion.

The evaluation process will involve the following steps:

- (a) TxDOT evaluation committees will:
 - i. evaluate the Proposals and determine which Proposer has offered the apparent best value Proposal, with specific analysis of overall value of money to TxDOT, based on the specific evaluation criteria set forth herein; and
 - ii. provide a recommendation to TxDOT senior management regarding the apparent best value.
- (b) TxDOT senior management will review and consider the recommendations from the TxDOT evaluation committees 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.

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 subcommittees consisting of TxDOT personnel.

The ESRC and the various subcommittees will be comprised of representatives from TxDOT. 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 of local agencies and municipalities, 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 determination of apparent best value will be computed using the following formula:

$$\begin{aligned} \text{Total Proposal Score} &= \text{Financial Score (max. 80 points)} \\ &+ \text{Technical Score (max. 20 points)} \end{aligned}$$

5.2.1 Technical Score

The Technical Score (maximum of 20 points) will be calculated based on the Evaluation Score for the Project Development Plan as described in Section 5.4.2.

5.2.2 Financial Score

The Financial Score (maximum 80 points) will be computed as the sum of the Price Score (maximum 76 points), as described in Section 5.5.1, and the Termination for Convenience Fee Score (maximum 4 points), as described in Section 5.5.2.

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 for the Proposal's conformance to the RFP instructions regarding organization, format and responsiveness to the requirements of the RFP and based on the pass/fail criteria set forth below.

5.3.1 Technical Proposals

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

- (a) The business form of Proposer, the proposed Developer and any entities that will have joint and several liability (i.e., any joint venture members or partners) under the CDA or that will provide a guaranty (including any joint venture agreement, partnership agreement, operating agreement, articles of incorporation, bylaws, association agreements or equivalent documents) is consistent with the requirements of the Project and CDA Documents.
- (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 complete, properly executed proposal bond(s) that comply with the requirements of Exhibit B, Section 3.3.1 or letter(s) of credit that comply with the requirements of Exhibit B, Section 3.3.2. Proposer shall be permitted to submit multiple proposal bonds or multiple letters of credit otherwise meeting the requirements set forth in Exhibit B, Section 3.3, but Proposer may not submit a combination of proposal bonds and letters of credit.
- (e) The Proposal Commitment Date for Service Commencement of the Project set forth on Form M is no later than the milestone date specified in Exhibit 8 of the CDA included in the RFP. Proposer's Preliminary Project Baseline Schedule shows achievement of Service Commencement no later than Proposer's commitment date for Service Commencement as shown on Form M.

- (f) The Technical Proposal as outlined in Exhibit B, including the Project Development Plan outlined in Exhibit B, meets all applicable RFP requirements.

5.3.2 Financial Proposals

Financial Proposals for the CDA will be evaluated based on the following pass/fail and responsiveness criteria:

- (a) Proposer's financial condition and capabilities shall not have materially adversely changed from its financial condition and capabilities as evidenced by the financial and other 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. profitability;
 - ii. ability to manage existing debt;
 - iii. ability to invest equity; and
 - iv. other commitments and contingencies.

If TxDOT determines that a Proposer has insufficient financial capacity to fulfill its obligations under the CDA, it may offer Proposer the opportunity to meet the financial requirement through one or more guarantors acceptable to TxDOT. If required, Proposer shall provide such guaranty in the form attached hereto as Form S.

- (b) Proposer's Financing Plan demonstrates the following:
 - i. that it identifies sufficient financing for the CDA, including all design and construction, operation, maintenance and rehabilitation funding;
 - ii. that it is adequate, feasible and capable of being executed if Proposer is awarded the CDA; and
 - iii. that it is sufficiently developed and, subject to Exhibit C, Section 5.2, 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 Project throughout the term in accordance with the requirements of the CDA; and

- E. achievement of Financial Close for the Project by the deadline identified in Section 1.6.3.
- (c) In evaluating the adequacy of Proposer's Financing Plan under Section (c)(ii) above, the following factors will be considered:
- i. the robustness of the results under Proposer's traffic scenario or specified range of traffic scenarios;
 - ii. reasonableness of revenues and costs;
 - iii. subject to Exhibit C, Section 5.2, the terms and conditions of the financing (including debt, quasi equity and equity), including compliance with the conditions set forth in Article 3 of the CDA, and the conditions attached to financing, if any, appear reasonable;
 - iv. guarantees and other security required to realize financing;
 - v. the level of commitment of Equity Members in Proposer;
 - vi. subject to Exhibit C, Section 5.2, assurance from senior lenders that they are prepared to accept the terms of any proposed TIFIA financing substantially as set forth in any applicable indicative term sheet, or provision of an alternative approach assuring that Financial Close will be achieved by the deadline identified in Section 1.6.3.
- (d) Proposer has provided the required lenders' support letters or indicative letters of support evidencing the proposed lenders' willingness to provide funding under the CDA pursuant to Exhibit C, Section 5.2.
- (e) Proposer has provided assurance that private equity will be in place for the CDA, including the required letters from Proposer's Equity Member evidencing their commitment to provide equity funding pursuant to Exhibit C, Section 5.3.
- (f) the Proposal is in compliance with the Toll Regulation attached to the CDA as Exhibit 10.

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. 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 that are unrelated to the substantive content of the Proposals.

5.4 Evaluation of Project Development Plan

After completion of the pass/fail and initial responsiveness review, the Project Development Plan will be evaluated based on the factors set forth below to determine whether it improves upon 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 (30 points);
- (b) Design-Build Management and Technical Solutions (40 points); and
- (c) Operations and Maintenance Management and Technical Solutions (30 points).

Subfactors and their relative weightings are listed in [Section 5.4.1.1](#) through [5.4.1.3](#). Consecutive factors or subfactors are set forth in descending order of importance, provided however, except as otherwise noted, consecutive factors or subfactors 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; a well-defined approach to Project schedule methodology and schedule and cost information in detail sufficient for assessing Project schedule/cost balance; and a well-defined approach to environmental management and public involvement.

The General Project Management evaluation subfactors include:

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

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

Objectives: A Design-Build management organization with clear lines of responsibility that presents a well-defined and executable approach for design, construction, ROW acquisition and utility adjustment, and that incorporates 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 technical solutions;
- (c) Design-Build quality management; and
- (d) ROW acquisition and utility adjustment management and approach.

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

Objectives: An operations and maintenance management organization with clear lines of responsibility that presents a well-defined and executable approach for operations and maintenance and that provides 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 approach;
- (b) Operations and maintenance technical solutions; and
- (c) Operations and maintenance quality management.

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 for Project Development Plan

The Development Plan Evaluation Subcommittee (“**DPES**”) will review the Project Development Plan with reference to the evaluation factors specified in Section 5.4.1 above, in accordance with the guidelines provided in this Section 5.4.2 and will assign a qualitatively rating for each of the evaluation subfactors in accordance with Table 5.1.

Table 5.1

| 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 Proposer’s team 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’s team 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’s team 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 the Proposer may fail to satisfy the requirements of the Concession 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’s team may fail to satisfy the requirements of the CDA Documents. Weaknesses are correctable or acceptable per minimum standards. |

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

During the evaluation, each subfactor as described in Section 5.4.1 above will be assigned a consensus rating by TxDOT, which will be converted to points. The points for each subfactor will be added to determine the Proposal’s score for each of the corresponding evaluation factors. The score of each of the corresponding evaluation factors will then be added to arrive at the total evaluation score for the Project Development Plan, with 100 maximum possible points.

5.5 Financial Proposal Evaluations

The Financial Proposal Evaluation Subcommittee (“**FPES**”) will evaluate the Financial Proposal to determine (i) the Concession Payment, if any (Form J-1, Box 1), (ii) the Public Funds Payments, if any (Form J-1, Boxes 2 and 3), (iii) the General Purpose Lane Capacity Improvement Payments (Form J-3), and (iv) the Termination for Convenience Amounts (Form O). The Financial Score will be determined based on the Price Score and Termination for Convenience Fee Score. No consideration will be given to any other revenue payments in the evaluation of a financial offer.

5.5.1 Price Score

5.5.1.1 Price Forms

First, each Proposer shall offer (a) a Concession Payment payable by Proposer to TxDOT greater than or equal to \$0, as set forth in Form J-1, Box 1 (including both the nominal amount and net present value thereof), (b) a schedule of Public Funds Payments required, as set forth in Form J-1, Box 2 and (c) the net present value of such Public Funds Payments, as set forth in Form J-1, Box 3. If a Proposer intends to offer a Concession Payment, the Proposer should put “none” for the Public Funds Payments in Form J-1, Box 2; conversely, if a Proposer intends to request public funds, the Proposer should put “\$0” for the Concession Payment in Form J-1, Box 1. TxDOT will not offset the Concession Payment by the public funds made available for the TMC Direct Connector. For the purposes of the remainder of this Section 5.5.1, a Proposer’s “Net Price” refers to either (a) the net present value of the Concession Payment offered by the Proposer in Form J-1, Box 1(b) or (b) the net present value of the Public Funds Payments requested by the Proposer in Form J-1, Box 3 (reflected as a negative number, as indicated in Form J-1, Box 3).

Second, each Proposer shall provide the allocation of Revenue Payment between the right to toll Toll Lanes and rent for the Project Right of Way as set forth in Form J-2, Box 1.

Third, each Proposer shall offer (a) an amount equal to the Proposer’s estimated lump-sum, fixed-price amount for the GPLCI Design-Build Contract as set forth in Form J-3, Table A (which amount shall be subject to adjustment pursuant to Section 25.1.7(c) of the CDA) and (b) a schedule of annual payments that if paid to Developer would cause the Project IRR to equal the Project IRR set forth in the Base Case Financial Model as set forth in Form J-3, Table B (which schedule shall be subject to adjustment pursuant to Section 25.1.7(d) of the CDA). For the price of the GPLCI Design-Build Contract (Table A), each Proposer should determine a current cost of the GPLCI Design-Build Contract as if the work were undertaken in 2015 and then, in Table A, indicate the future value of that cost, at a 4% discount rate, as of 2035. In Table B, each Proposer shall specify the amount to be paid by TxDOT annually from Service Commencement of the General Purpose Lane Capacity Improvements, which should be assumed to be January 1, 2035 for this purpose, through the end of the term of the CDA, assuming no early termination. The annual amounts should be calculated as the difference between (i) Toll Revenues less operating, lifecycle and maintenance costs with the General Purpose Lane Capacity Improvements and (ii) Toll Revenues less operating, lifecycle and maintenance costs without the General Purpose Lane Capacity Improvements.

5.5.1.2 Price Score

Each Proposer’s Price Score shall be determined as follows:

$$\text{Price Score} = \text{the greater of (a) 0 or (b) } 76 * \left(\frac{P_1}{P_{Best}} \right)$$

Where:

P_1 = (a) such Proposer’s Net Price *plus* (b) the Anchor Price

P_{Best} = (a) the highest Net Price offered by the Proposers *plus* (b) the Anchor Price

Anchor Price = (a) the absolute value of the highest Net Price offered by the Proposers *plus* (b) \$100,000,000

5.5.2 Termination for Convenience Fee Score

As required by Texas Transportation Code sec. 371.101 (as amended by S.B. 1730 (2013)), each Proposer shall offer a schedule of Termination for Convenience Amounts as set forth in Form O. If Proposer's Project Segment Plan contemplates multiple Project Segments, the Service Commencement Date on Form O shall refer to the first Service Commencement Date. TxDOT shall award the full Termination for Convenience Fee Score (4 points) to the Proposer or Proposers that offer the lowest Termination for Convenience Amount. Each remaining Proposer's Termination for Convenience Fee Score shall be calculated as follows:

$$\text{Termination for Convenience Fee Score} = \text{the greater of (a) 0 or (b) } 4 * \left(1 - \left(\frac{P_1 - P_{Best}}{P_{Best}} \right) \right)$$

Where:

P_1 = the net present value of such Proposer's Termination for Convenience Amount

P_{Best} = the net present value of the lowest Termination for Convenience Amount offered by the Proposers

5.6 ESRC Evaluation of Technical and Financial Proposals

Before reviewing the 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 that the DPES reconsider the DPES's recommendations, or may develop the ESRC's own recommendations.

After determining each Proposal's Technical Score, the ESRC will review the Financial Proposal and FPES evaluation results and determine each Proposal's Financial Score. The ESRC may accept the evaluation results provided by the FPES, may request the FPES to re-perform the evaluation, or may perform the evaluation itself.

Finally, the ESRC will determine the Total Proposal Score for each Proposal based on the formula set forth in Section 5.2 and determine the rankings and the apparent best value.

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 any aspect of its Proposal. Any requests for clarification shall be in writing to Proposer's designated representative. 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 Requests for Proposal Revisions

TxDOT may, at any time after receipt of Proposals and prior to final award, determine that it is appropriate to request changes to the Proposals ("**Proposal Revisions**"). The request for Proposal

Revisions may include revisions to the RFP, including reductions in or additions to the Project scope. Before requesting any such Proposal Revisions, TxDOT will engage in separate discussions (either in writing or in person through one-on-one meetings) with each Proposer and in accordance with the procedures for proposal revisions described in 23 CFR 636.501 *et seq.* 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 Revision. Each Proposer may determine in its discretion whether to deliver the requested Proposal Revisions. Failure of a Proposer to deliver the requested Proposal Revisions shall not, in and of itself, result in the forfeiture of such Proposer’s Proposal Security; *provided* that such Proposer’s original Proposal, together with the Proposal Security included therewith, shall remain valid and in effect notwithstanding its election not to deliver the requested Proposal Revisions.

Upon receipt of Proposal Revisions, the ESRC, with assistance from the appropriate subcommittees, 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, assigned rankings to the Proposals based on the Total Proposal Scores (whether based on the original Proposals or Proposal Revisions) and determined the apparent best value Proposal, the ESRC will present its recommended rankings to a PPP Steering Committee comprised of the Chief Planning and Projects Officer, TxDOT’s Chief Financial Officer and the Houston District Engineer.

5.10 Recommendation to Commission

The PPP Steering Committee will review the Proposals and the recommendations and supporting information provided by the ESRC and may: (i) accept the recommendation, (ii) reject the recommendation and cancel the procurement or (iii) request that the ESRC reconsider the ESRC’s recommendation. If the PPP Steering Committee accepts the ESRC’s recommendation, the PPP Steering Committee will provide the recommendation to the TxDOT Executive Director regarding which Proposal provides the apparent best value.

Upon receipt of recommendations from the PPP Steering Committee, the TxDOT Executive Director will review the recommendations and may accept the recommendation, reject the recommendation and cancel the procurement, or request that the PPP Steering Committee reconsider the recommendation. If the Executive Director accepts the PPP Steering Committee’s recommendation, the Executive Director will make a recommendation to the Commission regarding the rankings of Proposers and designation of the best value Proposal. The Commission will evaluate the recommendations and will determine whether to proceed with Conditional Award of the CDA to the apparent best value Proposer or take any other action. The Commission’s decision of Conditional Award of the CDA to the apparent best value Proposer, as well as the rankings, 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 limited negotiations with the apparent best value Proposer to clarify any remaining issues regarding scope, schedule, financing or any other information provided by that Proposer. In addition, limited negotiations may be conducted as necessary to incorporate the ideas and concepts of unsuccessful Proposers' work product; however, any decision to commence or continue negotiations regarding the terms of the CDA is at TxDOT's discretion. By submitting its Proposal, each Proposer commits to enter into the form of CDA included in the RFP, without negotiation or variation, to fill in blanks and include information from the Proposal that the form of the CDA indicates is required. In addition, pursuant to Texas Transportation Code Section 223.203 and this Section 5.11.1, at the request of the apparent best value Proposer, such Proposer can reasonably expect that TxDOT will enter into good faith negotiations with such Proposer to make changes to the CDA (including applicable Exhibits) to clarify and support the intended U.S. federal income tax treatment of such Proposer; provided that such negotiations will be limited to terms that would not (1) adversely impact TxDOT's rights and commercial position under the CDA or (2) otherwise have a material adverse effect on TxDOT, the region or the State.

If a CDA satisfactory to TxDOT cannot be negotiated with the apparent 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) requiring the best value Proposer to enter into the CDA in the form included in the RFP, without variation except to fill in blanks and include information from the Proposal that the form of the CDA indicates is required, (b) rejecting all Proposals, (c) issues of a request for Proposal Revisions to Proposers, but only if the ATCs of one or more Proposers have not been revealed to the successful Proposer, or (d) proceeding to the next most highly ranked Proposal to finalize or attempt to negotiate the CDA with that Proposer in accordance with this Section 5.11. If option (d) is selected, the Proposer that submitted the next most highly ranked Proposal will be considered the apparent best value Proposer.

5.11.2 Financial Model Audit

Proposer shall cause an independent audit of Proposer's Financial Model (the "**Financial Model Audit**") to be conducted by a firm engaged by Proposer and approved by TxDOT (the "**Model Auditor**"). Such independent audit shall be at 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. Proposer shall cause the Financial Model Audit report(s) and opinion(s) to be delivered to TxDOT with its Financial Proposal in accordance with Exhibit C, Section 6.9.

As part of the Financial Model Audit, Proposers 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 U.S. 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 Proposer's lenders.

Prior to engaging the Model Auditor, 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 cover claims by TxDOT arising from any errors or omissions by the Model Auditor in

connection with the Model Audit). The engagement terms with the Model Auditor may limit the Model Auditor's liability to TxDOT for the audit opinion's failure to identify any error(s) in the Financial Model to an amount of no less than four times the fees of the Model Auditor as contained in its contract at the date of Proposal submittal or as subsequently amended, whichever is higher. The Model Auditor chosen by Proposer must be unaffiliated with Proposer and otherwise be free of any conflict of interest. Proposer shall submit all requested information concerning the proposed Model Auditor to TxDOT for TxDOT's approval by the applicable last date specified in Section 1.6.1. TxDOT will provide a decision on the requested Model Auditor pre-approval not later than the last date specified in Section 1.6.1.

Neither party will be entitled to any adjustment to the revenue payment provisions based on the results of the Financial Model Audit.

Pursuant to Section 4.3 of the CDA, Developer is required to provide an update to the Financial Model Audit within two Business Days after the Effective Date and within two Business Days after the date of Financial Close.

5.11.3 Office of Attorney General Determination

As a condition precedent to final award of the CDA, the Office of the Attorney General shall provide a determination that the proposed CDA is legally sufficient.

5.11.4 Changes in Certain Financing Terms

TxDOT will provide Developer certain interest rate and credit spread protection as set forth in Section 3.6.1 of the CDA. The interest rate adjustment will be based on the movement, if any, in the benchmark rates underlying the financing contained in Developer's Financing Plan and Financial Model (the "**Benchmark Rates**"). Benchmark Rates must be independently verifiable by TxDOT using Bloomberg U.S.-based screens. The Benchmark Rates' information source must be submitted to TxDOT for approval by the date set forth in Section 1.6.1 and must be approved by TxDOT not later than 10:00 a.m. on the date set forth in Section 1.6.1. Benchmark Rates will be recorded by TxDOT, or its designee, at 10:00 a.m. on the first date of the market interest rate adjustment period and at 10:00 a.m. on the last date of the market interest rate adjustment period. The reading will be taken on the Bloomberg U.S.-based screen. Readings will be sent to Developer immediately, and Developer 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 adjustment described in Section 3.6.1. In the event of a dispute, TxDOT may elect to reexamine the reading provided there is sufficient evidence to support the claim. Each facility assumed in the Financial Proposal and Financial Model must correspond to a single Benchmark Rate

On the day following the first date of the market interest rate adjustment period, TxDOT will provide minimum credit spreads for PABs and taxable bonds for an assumed credit rating of BBB- or Baa3. Proposers may not propose credit spreads less than the minimum spreads provided. TxDOT will provide credit spread protection as described in Section 3.6.1(a)(ii) of the CDA.

5.11.5 TIFIA Negotiations

If the Preferred Proposer included TIFIA financing in its Project Plan of Finance, the Preferred Proposer shall submit, within 14 days after Conditional Award, (a) the credit assessment materials required at that point in time for the TIFIA financing to the TIFIA Joint Program Office and (b) a financing schedule that demonstrates that Financial Close can be reasonably expected to be achieved by the deadline for Financial Close (as provided in Section 1.6.3). TxDOT has the right to participate in negotiations between the

Preferred Proposer and the TIFIA Joint Program Office concerning the final term sheet. The Preferred Proposer shall notify TxDOT of any meetings with the TIFIA Joint Program Office and shall include TxDOT on all communications with the TIFIA Joint Program Office, including email correspondence, conference calls and meetings.

5.12 Post-Selection Deliverables

5.12.1 Project Management Plan

During the period between Conditional Award and final award of the CDA, the Preferred 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 guarantee 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 five Business Days after notification of Conditional Award:

- (a) Evidence of authority to transact business in the State 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 from the Texas Secretary of State indicating that such member is in existence, along with a Certificate of Good Standing from the state of organization of the member; (ii) search results from the Texas Comptroller's website (<https://ourcpa.cpa.state.tx.us/coa/Index.html>) indicating that such member is "Active", or (iii) other evidence acceptable to TxDOT.
- (b) If not previously submitted, a copy of the final organizational documents for the Developer and, if a Developer is a limited liability company, partnership or joint venture, for each member or partner of the Developer. The final form of the organizational documents may not differ materially from the draft organizational documents included with the Proposal. If Developer is a joint venture, attach a letter from each joint venture member stating that the joint venture agrees to be held jointly and severally liable for any and all of the duties and obligations of Developer under the Proposal and under any contract arising therefrom.
- (c) Closing security in the amount of \$30,000,000, in accordance with Exhibit B, Section 3.3 ("**Closing Security**"). Upon delivery of the Closing Security, TxDOT shall return the Proposal Security (in the amount of \$10,000,000) provided by such successful Proposer. For the avoidance of doubt, upon delivery of the Closing Security, such Closing Security shall secure the successful Proposer's obligations from and after delivery thereof and through Financial Close, as set out in Exhibit B, Section 3.3.
- (d) If security for Developer's obligations under the CDA is required by TxDOT pursuant to Section 5.3.2, the form of the proposed guarantees (Form S).
- (e) A check in the amount of \$100,000 payable to the order of The Office of the Attorney General for the purposes of the legal sufficiency review of the CDA.

During the negotiation period, as a condition to final award, Proposer shall deliver drafts of the deliverables identified in Section 6.1.3, for pre-approval by TxDOT.

5.12.3 TxDOT Comments On Post-Selection Deliverables

TxDOT shall provide comments on any Post-Selection Deliverables required to be delivered to TxDOT hereunder (including documents required to be approved under Section 5.12.2), within ten Business Days of the date of TxDOT's receipt of such deliverable. TxDOT shall have five Business Days to review and respond to subsequent submittals of the deliverable.

5.13 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 execution and delivery of the CDA. 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.

If inability of the selected Proposer to execute and deliver the CDA by the applicable deadline 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 executing and delivering the CDA by the applicable deadline 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 that will be payable to eligible Proposers in accordance with Section 6.3.

5.14 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 and an opinion from Mayer Brown LLP. Drafts of such opinions will be delivered on or before 30 days prior to the scheduled date of final award, and the final opinions will be delivered on the date of final award. Updated opinions will be provided on the date of Financial Close.
- (b) The fully executed CDA, Lease, Memorandum of Lease, Tolling Services Agreement, Security Instruments and PABs Agreement, conformed for execution (subject to the interest rate adjustment referenced in Section 5.11.4), to be delivered no later than seven days before the scheduled date of final award.

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 apparent best value Proposal, or, if applicable, the next 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.

SECTION 6 FINAL AWARD AND EXECUTION; POST-EXECUTION ACTIONS

6.1 Final Award, Execution and Delivery of CDA

6.1.1 CDA Execution and Final Award

Upon and subject to successful completion of any negotiations (if held), concurrence in award by the FHWA, and receipt by TxDOT of all of the documents required by this ITP to be provided by the Preferred Proposer prior to execution of the CDA, TxDOT shall deliver execution copies of the CDA to the Preferred Proposer for execution by the Preferred Proposer. TxDOT shall deliver four sets to be retained by TxDOT and as many sets as requested by the Preferred Proposer to be retained by the Preferred Proposer.

Within five Business Days after receipt of such execution copies, the Preferred Proposer shall execute and return all execution copies of the CDA, together with the required documents described in Section 6.1.3, to TxDOT for counter-execution by TxDOT. If Developer is a joint venture or a partnership, the CDA must be executed on behalf of Developer by all joint venture members or general partners, as applicable.

Within 15 Business Days after receipt of the executed CDA sets (and all other required documents) from the Preferred Proposer, TxDOT shall counter-execute the CDA, retain four sets of the executed CDA for itself, and deliver the other executed CDA sets to Developer. Final award shall be deemed to have occurred upon delivery of the fully executed sets to Developer.

Subject to satisfaction of all conditions precedent to the foregoing, the CDA shall be fully executed and become effective not later than the expiration of the validity of the Preferred Proposer's Proposal.

6.1.2 Documents to Be Delivered By Proposer With Executed CDA

Proposer shall deliver the documents listed below to TxDOT concurrently with the executed 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 thereunder 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 Developer is a limited liability company, such evidence shall be in the form of (i) a resolution of the governing body of the limited liability company, certified by an appropriate officer of the company, or (ii) a managing member(s) resolution, certified by an appropriate officer of the managing member(s), or (iii) if there is no managing member, a resolution from each member certified by an appropriate officer of such member. If Developer 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 and/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), in substantially the form attached hereto as Form L (with such changes as agreed to by TxDOT in its 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 each Developer and its Major Participants hold all licenses required for performance of the Work;
- (e) Executed Lease (in a form approved by TxDOT for (i) consistency with the CDA, (ii) inclusion of a provision naming TxDOT as a third party beneficiary, and (iii) inclusion of provisions prohibiting the release of escrowed documents to any party without TxDOT's approval);
- (f) 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;
- (g) TxDOT approved DBE Performance Plan in accordance with the requirements of Section 1.7.1;
- (h) Commitments for payment and performance security as follows: 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 Payment and Performance Bonds, each in the amount of 100% of the cost of Construction Work and in form acceptable to TxDOT, as described in Section 26.2 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, execution and delivery of the Design Build Contract and issuance of NTP2; 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 following the date of the letter. The Surety letter must commit to issuance of a bond on behalf of Proposer's Design Build Contractor, naming TxDOT as a dual obligee;
- (i) If security for Proposer's obligations under the CDA is required by TxDOT pursuant to Section 5.3.2, guarantees from Guarantor(s) in the form previously approved by TxDOT;
- (j) Executed PABs Agreement;
- (k) Executed Tolling Services Agreement;

- (l) Other ancillary documents, if any, not inconsistent with the CDA Documents or this ITP, customarily and reasonably provided in connection with the execution of Texas comprehensive development agreements and non-financial closing of such transactions (which TxDOT shall identify at least 10 Business Days prior to the date by which the Developer is required to deliver the documents listed in this Section 6.1.3 to TxDOT) and (ii) other documents determined to be necessary as a result of pre-award negotiations (which TxDOT and Proposer shall mutually identify as part of the pre-award negotiations).

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 the award of the CDA.

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 the award of the CDA.

6.3 Payment to Unsuccessful Proposers

6.3.1 Payment for Work Product

Each Proposer that submits a responsive, but unsuccessful, Proposal and that has timely executed and delivered to TxDOT a Payment for Work Product Agreement in the form attached hereto as Exhibit G, 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 I. 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.

6.3.2 Amount of Payment; Invoice

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 \$950,000.

In order to be eligible to receive payment, each Proposer must execute and deliver a Payment for Work Product Agreement (Exhibit G). An executed copy of the Payment for Work Product Agreement must be submitted with such Proposer's proposal on or prior to the Proposal Due Date.

Proposers that have timely executed and delivered a Payment for Work Product Agreement must submit an invoice in a form acceptable to TxDOT no earlier than 45 days after notice of final award (including execution of the CDA) is posted on the RFP Website, 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 selected apparent best value Proposer and TxDOT), as applicable.

Payments will be made within 30 days of receipt of Proposer's invoice in a form acceptable to TxDOT, provided that if the CDA has been awarded and Financial Close has not occurred prior to such date, TxDOT shall have no obligation to make payment until two Business Days following Financial Close.

6.3.3 Right to Use Work Product

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

Each Proposer acknowledges that TxDOT will have the right to inform the successful Proposer regarding the contents of the other Proposals after Conditional 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 otherwise 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 is 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; provided, however, that an unsuccessful Proposer may reject the payment and retain the work product if the procurement is canceled. Failure to deliver the invoice within the time period specified herein shall be deemed a rejection.

6.3.4 Payment to Proposer Selected for Award

For the purposes of this Section 6.3, a Proposer that withdraws its Proposal as a result of any of the circumstances set forth in Section 4.7.2 shall be deemed to have submitted an unsuccessful Proposal for purposes hereof; *provided* that (a) the delay for which TxDOT is responsible continues beyond the proposal validity period (as determined pursuant to Section 4.6.2); and (b) there was no concurrent Proposer delay. In no event shall any Proposer that is selected for award but fails to satisfy the award conditions set forth in Section 6.1 or that fails to timely execute and deliver the Payment for Work Product Agreement (Exhibit G) be entitled to receive a payment for work product under this Section 6.3.

SECTION 7 PROTESTS

7.1 Applicability

This Section 7 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 the 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 10 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 above, with a copy to the Office of General Counsel, Texas Department of Transportation, 125 E. 11th St., Austin, Texas 78701, as soon as the basis for protest is known to the Proposer. A Proposer filing a protest shall concurrently submit a copy of the protest to the other Proposers whose addresses may be obtained from the RFP Website.

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 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 discretion, make appropriate revisions to the RFP by issuing Addenda.

7.9 Protestant's Payment of Costs

If a protest is denied, the 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, 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 7, 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

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 discretion, to:

- (a) Develop the Project and any facility in any manner that it, in its discretion, deems necessary;
- (b) Reject any or all of the Proposals;
- (c) Modify any dates set or projected in the RFP and extend any deadlines;
- (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 discretion;
- (g) Suspend, discontinue or terminate negotiations of the CDA at any time, elect not to commence negotiations of the CDA 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 least 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;
- (r) Request or obtain additional information about any Proposal from any source;
- (s) Disqualify any Proposer that violates the terms of the RFP;
- (t) Issue Addenda, including after the Proposal Due Date, and including changes to conform the RFP to applicable legal requirements and address any changes to the scope of the Project arising from the environmental analysis process; and
- (u) 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 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, have 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.