

# Negotiated Contracts Policy Manual



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## **Manual Notice: 2024-1**

**From:** Kenneth Stewart, Director of Contract Services

**Manual:** *Negotiated Contracts Policy Manual*

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### **Purpose**

The purpose is to revise Chapter 1.

### **Changes**

Chapter 1, *Standards for Contracts* – Changes include:

- Section 2: Adding language to “Disclosure of Interested Parties” to implement HB1817, passed during 88th Legislature's regular session.
- Section 4: Updating language in “TxDOT-Required Training” and “Best Value- and Qualifications-Based Procurement Training” to clarify how often employees who are subject to professional and scientific services training requirements should take mandatory training and who is responsible for tracking training compliance.
- Section 4: Adding language to “Statewide Training” and “Other Required Training” to identify who is responsible for tracking training compliance.

### **Contact**

For more information about this manual, please contact Contract Services at 512-416-4620.

### **Archives**

Past manual notices are available in a [PDF archive](#).

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# Chapter 1: Standards for Contracts

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## Section 1: Overview

### Purpose

The Negotiated Contracts Policy Manual presents statutory authority and policies to guide Texas Department of Transportation (TxDOT) personnel in the selection, administration, and monitoring of entities that will perform work under negotiated contracts using uniform standards prior to and following contract execution. Policy specific to agreement types (i.e. Advance Funding Agreements, Scientific Services) can be found in the chapters addressing those agreement types.

### Statutory Authority

Appropriate law, federal regulation, state regulation, and TxDOT policy govern all TxDOT contracts. For example:

- **State and Federal Statutes** are written laws or acts enacted by the Texas Legislature or the U.S. Congress,
- **Code of Federal Regulations** (CFR) is a record of federal regulations that TxDOT must reference and follow if federal dollars are used to fund an outsourced project in any capacity,
- **Texas Government Code** (Tex. Gov't Code) is a record of laws passed by the Texas Legislature governing all state agencies,
- **Texas Transportation Code** (Tex. Transp. Code) is a record of laws passed by the Texas Legislature specific to transportation, and
- **Texas Administrative Code** (TAC) is a record of rules that state agencies have adopted for implementing certain statutes set forth in the Government Code and Transportation Code. Rules have the force of law.

### Negotiated Contract Defined

When used in this manual, the term negotiated contracts refers to those contracts for which TxDOT has the responsibility to negotiate price, scope, schedule, terms, or other components of the agreement. Negotiated contracts may be:

- a contract with a public or private entity to obtain a service that requires TxDOT to perform a selection process in which one or more items may need to be evaluated, scored, or negotiated prior to the award and execution of a contract,
- an advance funding agreement (AFA) that requires TxDOT to determine which entities will perform required tasks and which entities will contribute resources (for example, land, funds or labor) to complete a transportation project.

This manual does not include policy for a particular type of contract if a programmatic policy manual exists for that type of contract, such as Right of Way (ROW) contracts, for example.

Negotiated contracts do not include any contracts which are not negotiated, including those which follow a competitive bid process or those for which traditional negotiations are not permitted by rule or statute. Some of the contracts that are not negotiated, for definition within this manual, include:

- Construction contracts
- Maintenance contracts
- State Use Contracts

### **Contract Document Ownership and Responsibilities**

The roles of the Office of Primary Responsibility and Office of Record are defined below unless stated otherwise within this or other TxDOT policy.

#### **Office of Primary Responsibility**

The Office of Primary Responsibility (OPR) is the District or Division (D/D) responsible for the management activities for contract documents. The OPR is also responsible for making decisions on behalf of the Department with regard to the use, classification, and protection of specific information contained within each contract document.

#### **The OPR for a contract is responsible for:**

- Complying with all reporting requirements;
- Processing contract amendments and any other changes to the contract within TxDOT policy requirements for that type of contract;
- Maintaining the Selection File and Documentation File in accordance with TxDOT policy and state requirements;
- Entering and updating contract document-related data in the designated System of Record for contract data, or otherwise ensuring the data is up to date;
- Providing the Office of Record with the official record version of all signed contract and work authorization documents; and
- Notifying the Contract Services Division if the Enterprise Contract Types List requires updates or additions.

**Office of Record**

The Office of Record (OoR) is the D/D that is responsible for retaining the Department's official version (record) of a signed contract, including any documents that amend the contract, authorize work, or change work that is authorized.

**The Office of Record for a contract is responsible for:**

- Ensuring the signed contract and any documents that amend the contract, authorize work, or change work that is authorized, are stored in accordance with Department policy;
- Posting a copy of the contract to the Department's internet website in accordance with state law;
- Retaining and destroying the File of Record in accordance with state records retention laws; and
- Validating the data in the system of record for the contract document matches the data on the contract and receives a unique contract ID.

The OoR is the OPR by default unless stated otherwise within another TxDOT policy specific to a contract type or program.

The [Enterprise Contract Type List](#) identifies the Office of Primary Responsibility and Office of Record for each of the Department's contract types, in accordance with these rules.

## Section 2: Contracting Requirements

### Requirements of a Contract

Contract terms and conditions may vary depending on the type of service procured. However, every contract, regardless of the service it procures, must adhere to the following contractual requirements:

*Offer and Acceptance:* One party must offer to enter into a legal agreement, and the other party must accept the terms of the offer,

*Consideration:* Any promises made by parties must be supported by legally sufficient and bargained for consideration (promise of payment), which is the cause, motive, benefit or price that induces parties to enter the contract,

*Contractual Capacity:* Both parties entering into the contract must have the legal capacity to do so. They must be recognized by law to possess characteristics qualifying them as competent parties,

*Legality:* The contract must be made to accomplish some goal that is legal and not against public policy,

*Consent:* Apparent consent of both parties must be genuine, and

*Form:* The contract must be in writing.

### Commission Approval

New transportation projects that will initiate contracting activities require approval from the Texas Transportation Commission, TxDOT's five-member governing board appointed by the Governor. A Commission Meeting Minute Order must be obtained for proposed transportation projects that require the Commission's approval.

### Iran, Sudan, or Designated Terrorist Organizations

TxDOT may not enter into a contract with a company that is identified on the Texas Comptroller of Public Accounts' list of companies that do business with Iran, Sudan, or designated foreign terrorist organizations.

Tex. Gov't Code ch. 2252.152

### Prohibition on Contracts with Companies Boycotting Israel

TxDOT may not enter into a contract with a company for goods or services unless the contract contains a certification that:

- The company does not boycott Israel and will not boycott Israel during the term of the contract; or
- The verification required by Section 2271.002 of the Texas Government Code does not apply to the contract.

This certification applies only to contracts between TxDOT and a company with 10 or more full-time employees, where the contract value is at least \$100,000 and is paid wholly or partly from public funds.

This certification is not required if the contract is with a sole-source provider.

Tex. Gov't Code ch. 2271

### **Discrimination Against Firearm or Ammunition Industries**

TxDOT may not enter into a contract with a company for the purchase of goods or services unless the contract contains a certification that the company:

- Does not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association; and
- Will not discriminate during the term of the contract against a firearm entity or firearm trade association.

This certification applies only to contracts between TxDOT and a company with at least 10 full-time employees, where the contract value is at least \$100,000 and is paid wholly or partly from public funds.

The certification is not required if the contract is with a sole-source provider or if the solicitation did not result in at least one bid from a company that is able to provide this written certification.

Tex. Gov't Code ch. 2274

### **Energy Company Boycott**

TxDOT may not enter into a contract with a company for the purchase of goods or services unless the contract contains a certification that:

- The company does not, and will not for the duration of the contract, boycott energy companies; or
- The verification required by Section 2274.002 of the Texas Government Code does not apply to the contract.

This certification applies only to contracts between TxDOT and a company with at least 10 full-time employees, where the contract value is at least \$100,000 and is paid wholly or partly from public funds.

The certification is not required if the contract is with a sole-source provider or if the solicitation did not result in at least one bid from a company that is able to provide this written certification.

Tex. Gov't Code ch. 2274

### **Non-disclosure Form**

All TxDOT personnel participating on a competitive selection and award team for a TxDOT contract must sign a non-disclosure form, regardless of the method of procurement for the contract.

### **Best Value Analysis**

Best value procurement incorporates factors other than price into the selection process to improve performance or achieve other specific project goals. Best value contracts do not include engineering, architecture, or surveying contracts. Considerations for best value procurement can include items such as risks in procurement, a firm's past experience and performance, current project workload, a subcontractor evaluation plan, and life cycle costs.

For each purchase of goods or services or contract awarded using the best value standard, the Contract Services Director or Procurement Director must approve each purchase or contract, ensure that the best value standard used is documented, and acknowledge in writing that TxDOT complied with the *Negotiated Contracts Procedure Manual* and the Texas Comptroller of Public Account's *Procurement and Contract Management Guide*.

### **Contracts for Professional Services of Physicians, Optometrists, and Registered Nurses**

TxDOT may select and award a contract for the purchase of professional services of physicians, optometrists, or registered nurses on the basis of:

- the provider's agreement to payment of a set fee, as a range or lump-sum amount; and
- the provider's affirmation and the governmental entity's verification that the provider has the necessary occupational licenses and experience.

Procurements that utilize this selection method are not subject to competitive advertising and proposal evaluation requirements. Tex. Gov't Code § 2254.008.

### **Risk Analysis**

Under state laws effective September 1, 2015, all state agencies are required to “develop and comply with a purchasing accountability and risk analysis procedure.” Acts 2015, 84th Leg., R.S., S.B. 20, § 18 (codified at Tex. Gov't Code § 2261.256(a)).

As part of the procurement process, the Office of Primary Responsibility (OPR) must perform a risk analysis for each contract to be procured having an expected maximum amount payable exceeding \$25,000. A formal risk analysis is not required for contracts that are inherently low risk,

such as those having an expected maximum amount payable of \$25,000 or less or low bid construction and maintenance contracts.

At a minimum, the risk analysis must assess the risk of fraud, waste, or abuse in the contractor selection process, contract provisions, and payment methods, and any contract procurement identified as high risk must receive enhanced contract monitoring. In addition, the OPR must notify Contract Services of the high-risk contract, either in conjunction with Contract Services' review of the contract, or through an email to Contract Services' risk analysis email box, [CSD\\_RiskReports@txdot.gov](mailto:CSD_RiskReports@txdot.gov).

The OPR must update the risk analysis throughout the life of the contract whenever factors outlined in the Risk Assessment change or new risks are identified. The timing of updates may be periodic or based on specific events (e.g., selecting a contractor, preparing a work authorization, assigning a work authorization, amending the contract, completing a milestone, receiving a deliverable, or starting a new phase of a project). The OPR must immediately notify Contract Services if an updated risk analysis raises a contract's risk level to high risk. Contract Services will notify TxDOT administration, as appropriate, of any issue or risk that is identified.

The OPR should use the risk analysis to manage the risks associated with the contract, which places TxDOT in a position to best avoid or minimize threats and to benefit from opportunities. Risk management includes identifying, prioritizing, and controlling risks; planning and implementing risk responses; and developing and updating project plans in response to changes in risks and their impacts. To control risks, the OPR should implement risk response plans, track previously identified risks, and continuously look for new risks.

Risk management necessarily involves the judgment of experts with relevant experience in the type of work being performed. The OPR must use the risk form developed by Contract Services to evaluate the risk for each contract and underlying work authorization, with input from experts where appropriate. This risk form will provide an initial risk rating of high, medium, or low. This risk rating may be increased by the project manager, OPR leadership, or the OPR's Chief. The original risk analysis, along with each subsequent version, must be maintained in the File of Record.

## **Comptroller's Procurement and Contract Management Guide**

TxDOT shall comply with the Texas Comptroller of Public Accounts' (Comptroller) *Procurement and Contract Management Guide* (CMG) to the extent TxDOT enters into best value contracts for goods and services. TxDOT's contracts relating to highway construction or highway engineering, as well as contracts subject to Texas Transportation Code Section 201.112, are exempt from the Contract Advisory Team review and will be handled in accordance with the Texas Transportation Code, and consistent with the CMG whenever possible.

## **DBE/HUB Requirements**

Federal and state governments have established the Disadvantaged Business Enterprise (DBE) and the Historically Underutilized Business (HUB) programs to create a more level playing field on



which minority-owned and women-owned businesses can compete fairly for federal and state-funded contracts.

The HUB program is a state program for state-funded projects. The Comptroller of Public Accounts certifies providers as HUBs. Contracts over \$100,000 with subcontracting opportunities require a HUB Subcontracting Plan.

The DBE program is a federal program for contracts that expend federal funds. Under this program, TxDOT must make a good faith effort to meet or exceed the assigned DBE contract goal. TxDOT certifies providers interested in becoming DBEs. Individual federal contracts have DBE assigned goals. Only providers certified as DBEs will satisfy DBE goals.

State HUB requirements are described in Tex. Gov't Code ch. 2161; Federal DBE requirements are described in 49 CFR Part 26.

The performing entity (the prime provider) is required to document that efforts have been made to secure sub-providers that are certified as either a DBE if federal dollars are used to fund the project or a HUB if the project is funded entirely by state dollars.

## **Negotiated Purchases of Services**

For policy regarding negotiated purchases of non-professional services, refer to the Procurement Division's *Purchasing Manual*.

## **Required Insurance**

Professional and scientific services providers are required to **maintain** three insurance policies during the life of the contract:

- worker's compensation,
- commercial general liability, and
- automobile liability.

This requirement does not apply to alternative delivery agreements, such as design-build and comprehensive development agreements, which have specific insurance obligations set forth within each contract.

A completed Form 1560-CS Certificate of Insurance is the only approved proof of insurance. The provider must have a current Form 1560-CS Certificate of Insurance on file with Contract Services before the contract is executed. Subcontractors are not required to maintain separate insurance.

A new certificate must be submitted each time a provider's insurance policies are changed or renewed during the contract period. The insurance policies must remain current during the entire period.

Contract Services monitors certificates of insurance and will notify the managing district or division of any lapses in coverage. The managing district or division is responsible for ensuring

that providers cease work during a lapse in coverage or proof of coverage until Contract Services receives a current Form 1560-CS Certificate of Insurance.

Providers of non-professional or non-scientific services, such as those contracted through a purchase order, use Form 1950 Certificate of Insurance for Services. Low-bid construction or maintenance contractors use Form 1560-RFC Certificate of Insurance, and routine facilities contractors use Form 1560-RFC Certificate of Insurance - Routine Facilities Contract. Form 1950, 1560, and 1560-RFC are managed and maintained by the Office of Record for the relevant contract.

### **Modification of Contract Forms**

Any modification to a contract form that is created and maintained by Contract Services requires the approval of Contract Services. Changes of this nature warrant legal counsel because they may alter the way the contract performs legally.

### **Contracts Valued at \$1 Million or More**

Contract Services must review all negotiated contracts valued at one million dollars or more, all amendments to those agreements, and all contracts and amendments (without regard to dollar value) involving toll equity agreements, pass through tolls, state infrastructure bank loans, and comprehensive development agreements.

### **Disclosure of Interested Parties**

In accordance with Tex. Gov't Code §2252.908, TxDOT may not enter into certain contracts with a business entity unless the business entity submits a Disclosure of Interested Parties to TxDOT at the time the business entity submits the signed contract to TxDOT. The law applies only to a contract that either (1) requires an action or vote by the governing body of the entity or agency before the contract may be signed or (2) has a value of at least \$1 million. The disclosure requirement applies to a contract entered into on or after January 1, 2016.

If the business entity fails to provide the required disclosure, TxDOT may only void the contract if TxDOT submits written notice of the business entity's failure to provide the required disclosure to the business entity and the business entity fails to submit the required disclosure to TxDOT on or before the 10th business day after the day that the business entity receives the written notice of failure.

## Signature Authority

Contract Services maintains on its internal website lists of persons authorized to sign various contractual documents on behalf of TxDOT. All D/Ds have a duty to update these lists and send them to Contract Services as often as changes occur in their signature authority delegations.

## Contract Execution

Executing the contract requires TxDOT's signature authority and the performing entity's designated representative to sign the contract in the signature block. The signatures signify mutual acceptance of the agreement and must be followed by a typed or printed name, title, and date of signature. A contract is fully executed when all parties to the contract have signed and dated the signature block. TxDOT contracts contain a provision that states that, the performing entity cannot begin work or incur costs until notified in writing by TxDOT, or until it accepts and signs a work authorization issued by TxDOT. Should a contract contain different language, the performing entity must follow the procedure set out in that contract.

## \$5 Million Certification

For each contract for the purchase of goods or services that has a value exceeding \$5 million, the Contract Services Director or Procurement Director must issue a written certification verifying that the solicitation and purchasing methods and contract selection process utilized in the procurement of the contract complies with state law and agency policy. This certification must be kept with the contract file. Tex. Gov't Code §2261.255

In the event there are potential issues that may arise in the solicitation, purchasing, or contractor selection process, the certification must identify such issues and must be submitted to the Texas Transportation Commission.

## LBB Reporting Under Senate Bill 1

In accordance with the General Appropriations Act (GAA), TxDOT must report to the Legislative Budget Board (LBB) as follows:

- Contracts greater than \$1 million that are procured using a non-competitive/sole source procurement must be reported within 15 days of award.
- Contracts greater than \$10 million must be reported within 15 days of award.
- Contracts greater than \$1 million that are procured using an emergency process must be reported within five days of award.
- All other contracts for goods or services valued over \$50,000 must be reported within 30 days of execution.

These reporting requirements apply to new contracts, grants, purchase orders, interagency contracts, interlocal contracts, federal contracts, and amendments.

For each contract valued over \$10 million, as well as each contract valued over \$1 million that is procured using an emergency process issued without competition, TxDOT must include a certification letter signed by the executive director of the agency or a designee.

Additionally, in response to the LBB's request, TxDOT must review a list of all amendments that increased a contract's overall value by 10% or more and respond according to the LBB's instructions.

### **Contracts Posting to TxDOT Internet**

TxDOT must post to its internet website each contract with a private vendor that TxDOT enters into for the purchase of goods or services. The Office of Record for the contract documents is responsible for ensuring the contract is posted. TxDOT must keep the contract posted until it expires or is terminated. This posting requirement does not apply to contracts for which there is no cost.

Each posting must include:

- if not competitively bid, authority under which the contract is entered into without competitive bidding, or
- if competitively bid, the request for proposal.

The Office of Record must redact from the contract to be posted:

- information that is confidential under law, including information that relates to computer network security,
- information excepted from public disclosure by the attorney general, and
- social security numbers.

Tex. Gov't Code §2261.253, see also Tex. Gov't Code §552.139(d).

### **Amendments**

During the course of managing a contract, the contract may need to be amended. For example:

- extending time to the contract,
- adding to or deleting from the contract's scope of work, which may require increasing or decreasing the contract's maximum amount payable,
- changing the contract's method of payment,
- amending the contract to use work authorizations, or
- adding or removing sub-providers that the performing entity has selected to work on the project.

An amendment must be executed before the contract expires and must be executed before the additional services are provided.

If it is amending a contract of a type that requires a competitive procurement, the amendment must be in support of the original service and cannot add a totally new project or type of service.

### **Reasons for Contract Termination**

- *Termination for Cause* happens as a result of a performing entity's non-performance or non-compliance with the contract;
- *Termination for Convenience* is a convenience termination when a party, for a reason of its own, terminates the contract unilaterally. TxDOT contracts allow only for TxDOT to terminate for convenience; or
- *Termination for Department Reasons* is done without the agreement of the provider.

When both parties agree, a contract amendment is used to terminate an agreement.

### **Contract Services as the Office of Record**

Contract Services is the office of record for:

- Architectural, Engineering, Survey, and Commercial Lab contracts,
- Private Consultant contracts,
- Other Professional Services contracts,
- Interagency contracts,
- Interlocal contracts,
- Advance Funding Agreements, and
- all supplemental agreements, amendments, work authorizations and supplemental work authorizations for the above contracts.

### **Revolving Door**

State law contains “revolving door” provisions which may prohibit some TxDOT employees from accepting employment with private entities with which TxDOT has entered into contracts. Prior to accepting employment with a private vendor, TxDOT employees have a duty to verify that they are not barred by a revolving door provision and other reasons including, but not limited to as a result of their involvement in the contractor selection process, contract negotiations, or as having worked on a contract.

## Section 3: Contract Monitoring

### Nepotism Policy

Tex. Gov't Code §2262.004 requires personnel of a state agency to disclose information regarding certain relationships with, and direct or indirect pecuniary interests in, any party to a major contract with the state agency prior to the award of a major contract.

TxDOT has implemented its own Nepotism Policy in order to better monitor its contracts for the potential of nepotism. TxDOT personnel involved in making a decision or recommendation regarding the solicitation, evaluation, award, or terms of a contract that amounts to \$1 million or more, as well as a work authorization of \$100,000 or more under such contracts, must complete and sign the State Agency Uniform Nepotism Disclosure Form before the contract or work authorization is executed.

This requirement applies to all scientific services, commercial lab, engineering, architecture, survey and other professional services that fall into certain categories based on dollar amount. Supplemental agreements and supplemental work authorizations do not require the Disclosure Form. The Executive Director must approve the execution of either the contract or work authorization if a positive response is received.

### Contractor Responsibility

Companies and individuals that contract with TxDOT have a responsibility to report nepotism. When signing contracts with TxDOT, each contractor certifies that it has no knowledge that any of its employees have relatives employed by TxDOT. It also certifies that none of the employees of its subcontractors are related to TxDOT employees. Relatives include any:

- great grandparent, grandparent, parent, aunt or uncle, sibling, niece or nephew, spouse, child, grandchild, or great grandchild, or
- grandparent, parent, sibling, child, or grandchild of the person's spouse.

### Conflict of Interest

A conflict of interest can be defined as a situation in which an employee's private interest (usually financial or economic in nature) conflicts or raises a reasonable question of conflict with the employee's public duties and responsibilities.

All parties should avoid situations where financial, social, or political relationships impair one's ability to make independent, fair, and impartial judgments.

TxDOT employees, as well as performing entities, have an obligation to disclose situations that may create or give the perception of creating a conflict of interest.

## **Travel**

Any out-of-state travel by a contractor on a TxDOT project requires D/D approval. Any out-of-country travel requires approval by the Deputy Executive Director.

A contractor may not pay travel expenses for a TxDOT employee unless TxDOT is managing a multistate pooled fund project. In this circumstance, travel paid by the contractor for purposes of information exchange is authorized.

## **Contract Filing Requirements**

Each contract for professional services or scientific services must have three official files: the File of Record, the Selection File, and the Documentation File. These files must be maintained electronically in TxDOT's authorized electronic content management system.

While it is acceptable for contract managers or project managers to maintain personal filing systems that contain convenience copies of official documents and other unofficial documents, these personal files must be maintained on a district-or division-shared drive, not in the electronic content management system. The electronic content management system is used to maintain the official contract files and records following contract award.

Each of the three official files must take into account all applicable laws and rules, such as records retention rules and public posting requirements.

## **File of Record**

The Office of Record is responsible for the File of Record, which is created following execution of the contract. It contains the originals of all legal documents, such as the contract and any associated work authorizations and supplemental agreements, along with documentation of internal approvals and any other documents required by law prior to signature, and the solicitation. The File of Record is subject to review and audit.

## **Selection File**

The OPR is responsible for creating and maintaining the Selection File, which is used to retain selection information, such as vendor responses and evaluation information. It does not contain the solicitation, which is maintained in the File of Record. This information assists in proving that the selection of the performing entity was based upon its qualifications and reasonableness of fee.

Being able to retrieve this information in a timely manner is critical since it is considered public information and may be requested by any member of the public, including an entity that contests not being awarded a contract with TxDOT.

**Documentation File**

The OPR is responsible for creating and maintaining the Documentation File, which is used to document contract and project management activities and outcomes. The Documentation File includes documentation of the contract manager's monitoring efforts, evidence of the project's progress, and correspondence with the performing entity throughout the contract period. Any event or circumstance that may affect the work effort, be it external events (e.g., turnover, funding, unavailability of materials, and other circumstances beyond TxDOT's control) or ineffectiveness (e.g., occurrences such as an entity's miscommunication, interpretation, errors, and non-compliance with contractual requirements that TxDOT can take action against) must be thoroughly documented. This file contains thorough documentation of potential problems that may arise during the contract period and instructions for corrective action from the managing office. This information will be critical if the contract is terminated or if a dispute with the performing entity cannot be resolved and a lawsuit is filed against TxDOT.

**Record Retention and Open Records Requests**

TxDOT must keep contract files for seven (7) years following closeout. Advance Funding Agreements, however, must be maintained indefinitely since these agreements may specify which parties are responsible for maintaining the roadway and/or certain facilities. Like most government information, these files are considered public information and are subject to open record requests. Refer to 43 TAC ch. 3, subch. B, to obtain TxDOT's rules regarding public information.

**Payment of Work**

TxDOT's negotiated contracts do not permit TxDOT to pay the performing entity for:

- tasks performed that are outside the contract period,
- tasks performed that are not authorized in the contract's scope of work, nor
- tasks completed that do not meet the specifications set forth in the contract's scope of work.

**Payment of Work – Apparent Authority**

While a vendor may not be paid for work performed outside the terms of a valid contract, there are instances where a vendor completes work based on apparent authority, rather than actual authority. This occurs when a contract requires the use of a work authorization (WA) or notice to proceed to authorize work, and although a vendor's work is generally allowed by the contract, it is not explicitly permitted by a WA or notice to proceed.

TxDOT may pay for the work performed without requiring the vendor to submit a contract claim only in the following instances:

- A vendor performed work after the termination date of a valid WA, but both parties mistakenly understood that the WA had been extended, provided the WA could have legally been extended under the contract with supplemental work authorization.



- The parties failed to include a specific task in the WA scope that was permitted by the contract scope, but both parties mistakenly understood that the task was included in the WA.

In either of these scenarios, TxDOT may consider the vendor's invoice as "undisputed" and make a payment according to the [Undisputed Invoice Process](#) on the Contract Services Crossroads page. Although TxDOT is authorized by this policy to make payment in these limited scenarios, TxDOT may decline to use this process and direct the vendor to file a contract claim. For work performed outside the terms of a valid work authorization that do not meet the above-stated requirements, TxDOT staff must reject the invoice as disallowed, and the vendor must utilize the contract claim process to seek payment.

NOTE: TxDOT employees who authorize work outside the terms of a valid work authorization or notice to proceed are in violation of TxDOT policy, including signature authority, and are subject to disciplinary action and may be personally liable for work they mistakenly authorize.

## **Errors and Omissions**

If the performing entity has received payment for work that does not comply with contract specifications, it is still accountable for correcting the work. The errors and omissions clause requires the performing entity to correct, at its expense, any work it performs that does not meet specifications during and after the contract period.

Regardless of the actions the performing entity takes, the work must continue unless the entity's performance is of such poor quality that TxDOT has no other recourse but to terminate the contract.

## Section 4: Mandatory Training Requirements

### Background

In order to better manage its professional services contracting programs, TxDOT has established mandatory training requirements for employees who are involved with the development or management of professional services contracts and work authorizations subject to Tex. Gov't Code ch. 2254 and scientific services contracts and work authorizations subject to Tex. Transp. Code ch. 223, as well as the signatories to those contracts and work authorizations.

For purposes of this mandatory training, **contract and work authorization development** includes at least one of the following:

- Assessment of need,
- Development and review of specification,
- Development and review of scopes of work,
- Identification and selection of procurement methods,
- Identification and preparation of evaluation criteria,
- Preparation of and advertising solicitation documents,
- Tabulation of respondent bids,
- Evaluation of respondent proposals, statements of qualifications, or interviews,
- Negotiations, and
- Preparation and completion of contract and work authorization documents.

For the purposes of this mandatory training, **contract and work authorization management** includes at least one of the following:

- Assessment of risk,
- Verification of contractor performance,
- Monitoring compliance with deliverable and reporting requirements,
- Enforcement of contract terms,
- Monitoring and reporting of vendor performance, and
- Ensuring the contract performance and practice are consistent with applicable rules and laws.

**Applicability**

The professional and scientific services training requirements apply to certain employees involved with professional or scientific services contracts with maximum amounts payable of \$1 million or more, including work authorizations for those contracts (collectively referred to as “applicable contracts or work authorizations”). Below is a non-exhaustive list of TxDOT employees to whom these training requirements apply:

- All employees who make decisions or recommendations with regard to procurement, negotiation, or management of applicable contracts or work authorizations,
- Contract development team members for applicable contracts,
- Employees with signature authority for an applicable contract or work authorizations,
- Project Managers for applicable contracts or work authorizations,
- Contract Administrators/Managers for all applicable contract or work authorizations,
- Selection team members for applicable contracts,
- Negotiators for applicable contracts or work authorizations, and
- Employees who approve deliverables for applicable contracts or work authorizations.

**TxDOT-Required Training**

Employees subject to TxDOT’s professional and scientific services training requirements must participate in a series of courses addressing the following topics.

- Contract Fundamentals,
- Contract Law,
- Contract Types,
- Standard Terms and Conditions,
- Signature Authority,
- Solicitation Process,
- Scopes of Work,
- Fee Schedules,
- Negotiations,
- Risk Analysis,
- Contract Management,
- Contract Ethics

### **Best Value- and Qualifications-Based Procurement Training**

The Contract Services Division manages the training requirements for employees involved with best value-based contracts, including scientific services, right of way acquisition, and real estate appraisal contracts. A list of the mandatory training courses for these employees is located on the Contract Services Crossroads Page under the [Training Section](#).

The Professional Engineering Procurement Services (PEPS) Division manages the training requirements for employees involved with qualifications-based contracts, including engineering, architecture, and survey contracts. A list of the mandatory training courses for each employee is based on the role that the employee is performing.

Employees subject to TxDOT's professional and scientific services training requirements must complete the required training as soon as possible when assigned their role, and at least every five years thereafter. Each District and Division is responsible for tracking their employees' compliance with these training requirements.

### **Statewide Training**

In accordance with Tex. Gov't Code §656.051 and 34 TAC §20.133, employees must be certified as a Certified Texas Contract Developer (CTCD) to engage in contract development functions for professional or scientific services contracts. CTCD training and certification is managed by the Texas Comptroller of Public Accounts (CPA). The specific course requirements and exam information can be found on the CPA's website. Each District and Division is responsible for tracking their employees' compliance with these training requirements.

### **Other Required Training**

If an employee is a contract manager for a contract that is not subject to TxDOT's contract claims process (i.e. purchase orders), then the employee is required to be a Certified Texas Contract Manager (CTCM). In accordance with Tex Gov't Code §§656.051 and 656.052 and 34 TAC §20.133, the employee must take the required classes and pass an examination offered by the CPA's Statewide Procurement Division to become a CTCM. Each District and Division is responsible for tracking their employees' compliance with these training requirements.

## Chapter 2: Advance Funding Agreements

### Contents:

[Section 1: Overview](#)

[Section 2: Types of AFAs](#)

[Section 3: Contract Standards](#)

## Section 1: Overview

### Description of an AFA

An Advance Funding Agreement (AFA) is a negotiated contract between TxDOT and a local government, another state agency or another state where both parties agree to a funding arrangement to contribute funds, labor, raw materials, or land, in order to develop or maintain a highway project required by 43 TAC §15.55.

A local government may be a:

- city,
- county,
- river authority,
- independent school district,
- municipal utility district,
- other local governmental agency,
- private or public utility company,
- railroad, or
- other political subdivision of this state, or special district that has the authority to finance a highway improvement project.

### Comparison to a Typical Procurement Contract

In a **typical** procurement contract, TxDOT pays another party for a single, well-defined procurement such as land, a good, or service. For example, if a project needs plans, specifications, and estimates (PS&E), TxDOT will enter into a procurement contract with an engineering firm to do the work.

In an AFA, TxDOT and a local government will conduct separate "typical" procurements for each of the tasks assigned to them by the AFA. Each item of work must be identified and the party responsible for accomplishing that work must be clearly stated in the agreement.

### Authority

TxDOT may construct and maintain a comprehensive system of state highways and public roads. Tex. Transp. Code §201.103.

TxDOT may use federal funds for public road construction. Tex. Transp. Code §§ 222.031, 222.034.

A local government may finance and TxDOT may accept funding for the construction of public roads. Tex. Transp. Code §§ 222.051, 222.052, 222.053.

TxDOT is authorized to regulate the placement of public utilities along state highways. Tex. Transp. Code ch. 203, subch. E.

TxDOT is authorized to administer the Transportation Alternatives Program to provide funding for a variety of alternative transportation projects. 43 TAC ch. 11, subch. F.

TxDOT is authorized to administer the Transportation Alternatives Set-Aside Program to provide funding for a variety of alternative transportation projects. 43 TAC ch. 11, subch. G.

## Section 2: Types of AFAs

### MAFA and LPAFA

Contract Services uses a streamlined format for AFAs with local governments. The format consists of two components:

- A Master Advance Funding Agreement (MAFA), and
- A Local Transportation Project Advance Funding Agreement (LPAFA).

The MAFA contains the **general terms and conditions** and cites the federal and state laws that govern these agreements between the State of Texas, through TxDOT and the local governments. The local government adopts a MAFA and agrees that its general terms and conditions will be followed on all the local projects undertaken by TxDOT and the local government, unless a specific exception is made in a project agreement (LPAFA). Signing a MAFA helps the two parties avoid negotiating and reviewing standard contract terms and conditions each time they wish to enter into an agreement. The MAFA **does not** specify either the cost or the scope of work for individual projects. The MAFA **does not** have a set termination date and is in effect until terminated by TxDOT or the local government.

Once a MAFA has been adopted, a LPAFA is used to define the scope of work and funding for a **specific project**. The LPAFA contract period usually ends upon completion of the project unless the LPAFA is terminated in accordance with the terms of the contract. The LPAFA specifies the division of responsibilities for performing work, such as:

- right of way acquisition,
- preparation of PS&E, and
- construction of a roadway.

The LPAFA also specifies which party will provide what resources, such as which party will provide the land or the cash necessary for a project. The party responsible for performing work may or may not be the party responsible for paying for the work. The LPAFA **does not** include general terms and conditions of the contract, as TxDOT and the local government agreed to these provisions in the MAFA. If there are exceptions to the MAFA that pertain to a specific project, then the LPAFA provides for these exceptions. It expands or adds to what is not covered in the MAFA.

### Advance Funding Agreement (Long Form)

An AFA (long form) template must be used when the local government elects not to enter into a MAFA. It can also be used even if the MAFA is in place. Each AFA contains the scope of work, who is responsible for the funding, who is responsible for doing the work, the general terms and conditions, the local government's resolution, the project map, and it also cites the federal and state laws that govern the agreement with the local government.



**Voluntary AFA**

The AFA for a Voluntary Project is a standard template to be used when cash or other resources are voluntarily contributed by a local government or state agency to an on-system project. The local government funds 100% of the costs for a distinct project or a discrete element of a larger project. The agreement does not contain required federal provisions because the contributed resources are not a part of a federal program agreement. Projects or discrete elements of a project that are funded by federal or state programs requiring a financial match are not eligible for a Voluntary AFA.

**Non-Construction AFA**

The AFA for non-construction projects is a standard template for local projects that do not involve construction. A typical non-construction AFA terminates upon completion of the project or termination by either party. A non-construction AFA requires a termination date of no more than three years.

**Templates**

Templates for all AFAs, LPAFAs and the MAFA can be found on Contract Services' intranet site.

## **Section 3: Contract Standards**

### **Commission Approval**

A highway improvement project must be authorized in a Commission Minute Order. This is usually an individual minute order or can be a series of MOs depending on the funding. However, when a project is included in the Unified Transportation Program (UTP), the MO approving the UTP is the only MO needed.

### **Executive Director Approval**

Some projects require Executive Director approval, but not specific Commission approval. Title 43 TAC §15.56 (d) states that the executive director is authorized to approve requests to finance an approved highway improvement project. An “approved highway improvement project” is defined as a highway improvement project on the state highway system identified in the statewide transportation plan (STP) or a regional transportation plan. The district's Transportation Improvement Plan (TIP) is considered to be the regional plan. If the project is in the STP or the district's TIP, a separate MO is not required.

### **Special Approvals**

Some types of circumstances and funding structures with the local government involve special approval from TxDOT's Administration or the appropriate District Engineer. The requirements can be found in Title 43 TAC §15.52.

### **TxDOTCONNECT is the System of Record**

TxDOTCONNECT is the system of record for all Advance Funding Agreements. Therefore, AFAs must be entered into TxDOTCONNECT and an AFA ID must be generated. There must be adequate funding allocated in TxDOTCONNECT to meet or exceed the budgeted amount of the AFA.

### **Federal Funds and Direct State Costs**

When federal funds are being used, it is TxDOT policy to provide an estimate of the direct state costs in the budget when reviewing construction, preliminary engineering, environmental, right of way, and utility work.

### **State Funds and Off-system Projects**

It is TxDOT policy, with limited exceptions, that no state funds will be expended on off-system projects.

**Projects in Economically Disadvantaged Counties**

An economically disadvantaged county is one that has below average per capita taxable property value and income and above average unemployment. In evaluating a proposal for a highway improvement project with a local government that consists of all or a portion of an economically disadvantaged county, the Executive Director shall, for those projects in which the Commission is authorized by law to provide state cost participation, adjust the minimum local matching funds requirement after evaluating a local government's effort and ability to meet the requirement. Title 43 TAC §15.55.

**Outstanding Balance**

When Contract Services receives a partially executed agreement, Contract Services will check the Financial Management Division's website to see if the local government has any outstanding balance and how long the balance has been outstanding. If an outstanding balance exists with the local government, Contract Services will review the district's attempts to collect the balance, the amount outstanding, and the impact of the project on mobility, and will obtain the Deputy Executive Director's approval before fully executing the contract.

**Executed Agreement**

A written agreement must be executed before TxDOT can expend money or resources on a project.

**Older Agreements Without Current Federal Requirements**

When it is discovered that an agreement does not comply with current federal requirements, Contract Services will obtain a commitment from the OPR that the agreement will be amended or terminated and that work will not be performed under the present agreement. If the district does not provide the requested assurance, Contract Services will notify Administration.

**Withdrawal from the Project**

A local government that withdraws from a project after an AFA is executed may still have funding responsibilities. The local government is responsible for payment of direct and indirect project costs incurred by TxDOT for the items of work in which it is participating.

**Document Retention**

Contract Services is the Office of Record for all AFAs and amendments. The Office of Primary Responsibility maintains a file for all other documentation relating to the contract. This file is subject to audit and will be used in resolving contractual issues. If the AFA includes right of way or maintenance provisions, the file must be maintained indefinitely.

## Chapter 3: Interagency Cooperation Contract

### Contents:

[Section 1: Overview](#)

[Section 2: Contract Standards](#)

[Section 3: Limits on Interagency Contracts](#)

## **Section 1: Overview**

Interagency cooperation contracts (IAC) are used when a state agency needs necessary and authorized services or resources from another state agency. IACs must conform to Tex. Gov't Code ch. 771.

When TxDOT is the Performing Agency, it is committing its resources (employees, time, equipment, supplies, etc.) to assist another agency.

When TxDOT is the Receiving Agency, it is compensating another agency for providing goods or services.

## Section 2: Contract Standards

### Authority

An agency may not enter into an agreement or contract that requires or permits the agency to exceed its duties and responsibilities or the limitations of its appropriated funds. Tex. Gov't Code § 771.010.

An agency may agree or contract with another agency for the provision of necessary and authorized services or resources. An agency may not provide services or resources to another agency that are required by Article XVI, Section 21, of the Texas Constitution to be provided under a contract awarded to the lowest responsible bidder. Tex. Gov't Code § 771.003.

### Contract Documents

Although a Letter of Agreement is authorized by statute, it is TxDOT policy to use the IAC template available on the Contract Services intranet site.

### Signed Contract in Place

A written agreement or contract must be fully executed **before** a state agency may provide or receive a service or resource.

### Memorandum of Understanding

A Memorandum of Understanding is a term that is often used, but has no established legal meaning. Therefore, for all transactions that are intended to be legally binding, the IAC template must be used.

### Subcontracts

Any subcontracting approval will be included in the IAC. All subcontracting must comply with TxDOT policy as well as state and federal requirements.

### Administration Approval

Administration approval is required in advance on all IACs in which TxDOT is expending funds regardless of the maximum amount payable.

## **Funding**

A state agency that receives services or resources shall reimburse another state agency providing the services or resources the actual cost of providing the services or resources or the nearest practicable estimate of that cost.

A state agency that receives services or resources may advance federal funds to an agency providing the services or resources if the agency receiving the services or resources determines that the advance would facilitate the implementation of a federally funded program.

A state agency that receives services or resources may advance funds to the agency providing the services or resources if an advance is necessary to enable the providing agency to provide the services or resources. If an advance is made, the agencies shall ensure after the services or resources are provided that the providing agency has received only sufficient funds to reimburse its total costs. An advance of funds is a reimbursement for the purposes of Tex. Gov't Code § 771.008.

See generally Tex. Gov't Code § 771.007

## **Records**

Contract Services is the Office of Record for all IACs and amendments, including those under \$50,000. The Office of Primary Responsibility maintains a file for all other documentation relating to the contract. The file of record is maintained the entire life of the contract and for the ensuing seven years or longer if audit issues or litigation occurs. This file is subject to audit and will be used in resolving contractual issues.

## **Reports**

Within 30 days of the end of each fiscal year, the department is required to make annual reports available on its website containing information for all IACs that exceed \$10 million in value or those that may reasonably be expected to exceed \$10 million. Information in the report must identify each state agency that is a party to an IAC, whether TxDOT is receiving money or disbursing money under the contract, the amount spent by the disbursing agency for the contract and the method of finance; and the agency programs for which the agencies entered the contract and the appropriation line items from which funds were spent by the agencies to perform the contract.

The Office of Primary Responsibility for IACs that exceed \$10 million or may be reasonably expected to exceed \$10 million must identify the method of finance, agency programs, and the appropriation line item when submitting those IACs for reporting to Contract Services.

See Article IX, §17.12 of the 2022-2023 General Appropriations Act.

## Section 3: Limits on Interagency Contracts

### Information Resources (IR)

A state agency may not enter into an **interagency transaction** for the receipt of **information resources** technologies unless the agency complies with Tex. Gov't Code ch. 2054.

All procurements for information resource technology must be included in TxDOT's Biennial Operation Plan because no IR can be purchased unless the purchase has been approved by Texas Department of Information Resources.

### Construction for Other Agencies

TxDOT may not construct a highway, road, building, or other structure for another agency. Tex. Gov't Code § 771.003.

#### Exceptions:

- TxDOT can enter into agreements with a state college, university or public junior college authorizing TxDOT to assume responsibility for maintenance, improvement, relocation or extension of existing on-campus streets, parking lots and access ways. Tex. Gov't Code § 771.003.
- TxDOT can enter into agreements with the Texas Juvenile Justice Department for the construction, maintenance, or repair of roads in an institution, hospital, or school. Tex. Transp. Code § 201.603.
- TxDOT can enter into agreements with the Texas Parks and Wildlife Department (TPWD) to construct, repair, and maintain roads in and adjacent to certain TPWD facilities if the total does not exceed a certain amount and the funding is from Fund 6. Texas Parks and Wildlife Code § 13.013.
- TxDOT can enter into agreements with the Texas Historical Commission (THC) to construct, repair, and maintain roads in and adjacent to certain THC facilities if the total does not exceed a certain amount and the funding is from Fund 6. Tex. Gov't Code § 442.102.
- TxDOT can enter into agreements with the Texas Department of Public Safety to address infrastructure needs that affect law enforcement. Tex. Gov't Code § 411.0098.

### Other Contracting Avenues

There are times when TxDOT contracts with other state agencies through a contract other than an IAC:

- the Contract for State Use Program template must be used for set-aside work under the **State Use Program**, which gives state agencies the authority to purchase goods and services from Texans with disabilities. The template may be found on Contract Services intranet site.



- the standard research agreement must be used for all research projects. The template may be obtained from the Research and Technology Implementation Division.

**Inmate Labor**

Tex. Transp. Code §223.044 allows TxDOT to contract with the Texas Department of Criminal Justice for the use of **inmate labor** for state highway system improvement projects. The contract must conform to Tex. Gov't Code ch. 771.

## Chapter 4: Interlocal Agreements

### Contents:

[Section 1: Overview](#)

[Section 2: Contract Standards](#)

## Section 1: Overview

### Statutory Authority

Texas Transportation Code §201.209 authorizes TxDOT to enter into Interlocal contracts with one or more local governments in accordance with Texas Government Code Chapter 791. Interlocal agreements are for TxDOT to either provide or acquire goods or services.

43 Texas Administrative Code §9.9 establishes procedures for contracting with one or more local government agencies to perform governmental functions and services through an Interlocal contract.

### Interlocal Agreements Compared to Advance Funding Agreements

Advance Funding Agreements are agreements where a local government is providing either resources or money to a project. Typically, these Advance Funding Agreements are road-related contracts and the projects are authorized under statutes that either allow or require local governments to contribute toward road-related expenditures.

Interlocal agreements are also agreements with a local government. However, TxDOT uses the term “Interlocal” to indicate agreements that are not Advance Funding Agreements. Instead, Interlocal agreements are used when contracting to acquire **non-roadway governmental functions and services**.

Interlocal agreements require a detailed Scope of Work and Advance Funding Agreements do not.

Interlocal agreements do not allow for construction. Construction projects must be handled through Advance Funding Agreements.

## **Section 2: Contract Standards**

### **Authority to Perform Services**

The local government and TxDOT may only contract with each other to perform functions and services that state law authorizes them to perform. If either party does not have the authority to perform an act, TxDOT cannot enter into an Interlocal contract to pay a local government to perform the act for TxDOT. The same is true for the local government. For example, TxDOT does not have its own statutory authority to build and operate a library, so TxDOT cannot enter an Interlocal agreement for a local government to provide a library for TxDOT, even though that service is a governmental function.

### **Approval**

An Interlocal contract must be authorized by the governing body of the local government when required by law. The local government must provide some proof that the governing body approved entering into an agreement. This proof is usually in the form of an Ordinance or Resolution, and it must be incorporated into the Interlocal Agreement by reference and be attached.

The exception is an Interlocal contract with a municipally owned electric utility, in which the governing body may establish procedures for entering into an Interlocal contract that does not exceed \$100,000 without requiring the approval of the governing body. Tex. Gov't Code §791.011(d)(1).

### **Administration**

An Interlocal contract may be amended to reflect significantly changed conditions or mutually agreed changes in scope of work. If the local government withdraws from the project after the contract is executed, the local government is responsible for all costs incurred by TxDOT under the contract.

## Chapter 5: Use of Private Consultants

### Contents:

[Section 1: Overview](#)

[Section 2: Contract Standards](#)

## Section 1: Overview

### Private Consultants

Private consultants study and advise state agencies through a contract that does not involve the traditional relationship of employer and employee. Tex. Gov't Code §2254.021.

The distinction between statutorily defined professional services and private consultant services does not imply that private consultants do not render services of a professional nature. The distinction is in the legal definition and not in the quality of service.

Examples of private consultant work are studies of:

- a TxDOT function,
- how TxDOT should implement legislation, and
- how TxDOT can save money.

### Professional Services

A professional service is defined by Texas Government Code §2254.002(2)(A) as a service provided by a licensed professional in one of the following fields provided in connection with the professional employment or practice of a person who is licensed to provide the following services:

- accounting,
- architecture,
- landscape architecture,
- land surveying,
- medicine,
- optometry,
- professional engineering,
- real estate appraising,
- professional nursing, or
- forensic science.

### Exemptions

According to Texas Government Code §2254.024, a private consultant contract does not apply to the professional services listed above. In addition, private consultant contracts do not apply to:

- private legal counsel,

- investment counselors,
- actuaries,
- medical and dental services.

**Specific Authority**

The statutory authority for TxDOT to enter into a contract with a private consultant is contained in the Texas Government Code, ch. 2254, subch. B; Title 34 Texas Admin. Code §5.54.

## Section 2: Contract Standards

### Federal Funds

If the work is federally funded, the federal funding agency must approve the use of a private consultant before the selection. The administering division is responsible for obtaining written approval. 23 CFR §172.5.

If the work is federally funded, the federal funding agency must also concur in writing in a sole source procurement regardless of the amount. 23 CFR §172.7(a)(3); Federal Acquisition Regulation (FAR) 6.303 and 6.304.

### Automated Systems

Projects involving Automated (computer) Information Systems must be coordinated through the Information Management Division.

### Notices of Intent

The notices of intent for contracts exceeding \$15,000 must be submitted to the Legislative Budget Board (LBB) and the Governor's Office of Budget and Planning at the time the selection process starts. The Governor's Office of Budget and Planning will decide in a finding of fact that the services are necessary. Tex. Gov't Code §2254.028.

### Public Notice

Public notice of the Request For Proposal must be published in the *Electronic State Business Daily (ESBD)*. The notice must be published not later than the 30<sup>th</sup> day before the date of contract signature. Tex. Gov't Code §2254.029. If the consultant services contract is \$15,000 or less, it is not considered a major consulting services contract. Tex. Gov't Code §2254.021(2). As a result, it is not subject to publication requirements in the ESBD before or after entering into it. It should at least be published on TxDOT's webpage.

### Selection

In selecting a private consultant, TxDOT must base its choice on demonstrated competence, knowledge, qualifications, and the reasonableness of the proposed fee for the services. It is the intent of Texas Government Code, Chapter 2254 to ensure:

- the greatest and fairest competition in the selection of private consultants, and
- that all potential private consultants are afforded notice of the need for and opportunity to provide consulting services.



When other considerations are equal, private consultants whose principal place of business is within the state or who will manage the consulting engagement wholly from one of its offices within the state are to be given preference. Tex. Gov't Code §2254.027

Cost is not to be the sole factor in the selection process, but it must be considered.

### **Sole Source**

Texas Government Code §2254.022 does not prohibit the letting of a sole-source contract for consulting services if no proposal is received from a competent, knowledgeable, and qualified private consultant at a reasonable fee.

### **Contract Services**

Contract Services is responsible for managing the procurement process for all private consulting contracts.

### **Notice of Award**

If the contract exceeds \$50,000, a notice must be sent to the LBB no later than the 30th day after entering into the contract. Tex. Gov't Code §2254.0301.

### **Renewing, Amending, or Extending Contract**

Before renewing, amending, or extending a contract for major consulting services, the department must notify the Legislative Budget Board and the Office of the Texas Governor of the contract and publish information regarding the renewal, amendment, or extension in the Electronic State Business Daily.

See Tex. Gov't Code §2254.031.

### **Reports**

As part of the biennial budgetary hearing process conducted by the LBB and the Governor's Budget and Planning Office, TxDOT must supply reports on what action was taken in response to the recommendations of any private consultant during the previous biennium. Tex. Gov't Code §2254.037.

### **Texas State Library**

All documents, films, recordings, or reports produced by a private consultant must be filed with the Texas State Library. Tex. Gov't Code §2254.036.

## **Chapter 6: Engineering, Surveying, and Architectural Negotiated Contracts**

### **Contents:**

[Section 1: Overview](#)

[Section 2: Provider Selection](#)

[Section 3: Contract Standards](#)

## Section 1: Overview

### Purpose

This chapter provides standards and policy for the selection of providers of architectural, engineering, and surveying services and the negotiation and management of contracts that require a registered architect, professional engineer, or registered professional land surveyor.

### Authority

Texas Government Code, Chapter 2254, Subchapter A, identifies engineers, architects, and land surveyors as professional services providers and provides methods used to obtain their services.

43 TAC §9.30 et seq. establishes mandatory administrative rules for selecting and awarding contracts to engineers, architects, and surveyors in accordance with Tex. Transp Code §223.041; Tex. Gov't Code Chapter 2254, Subchapter A; 23 U.S.C. §112(b)(c); 40 U.S.C. §§ 1101-1104; and 23 CFR Part 172.

### Contract Types

TxDOT offers three types of contracts:

- an **indefinite deliverable (ID) contract** may be used for a single project or for multiple projects. The solicitation will describe the typical work types to be performed under the contract.
- a **specific deliverable (SD) contract** may be used for a single project or for multiple projects. The solicitation will specify the specific deliverables to be provided under the contract.
- a **multiphase contract** may be used for a single project or for multiple projects. The solicitation will describe the services to be provided under the contract and will divide the services into phases. The specific scope of work may be established and the associated costs negotiated and authorized by phase as the project progresses.
- 43 TAC §9.32

### Landscape Architects

For information on acquiring Landscape Architect services, refer to 43 TAC §9.80-9.89.

## Section 2: Provider Selection

### Precertification

Precertification establishes the minimum technical qualifications to perform work under a standard work category. 43 TAC §9.33.

### Selection Processes

TxDOT issues solicitations and selects providers under the following processes:

- the **Non-federal Process**, also known as the state process, may be used for any contract that is not subject to 43 TAC §9.35 (relating to the Federal Process). 43 TAC §9.34.
- the **Federal Selection Process** applies to an engineering or design related service contract related to a highway construction project and reimbursed with federal-aid highway program funding. 43 TAC §9.35.
- the **Emergency Contract Process** may be used when the executive director determines that an emergency situation, including a safety hazard, a substantial disruption of the orderly flow of traffic and commerce, or a risk of substantial financial loss to TxDOT exists and that an architectural, engineering, or surveying services contract is needed to address the situation. 43 TAC §9.38.
- the **Urgent and Critical Selection Process** may be used when the executive director certifies that an urgent and critical need exists that cannot otherwise be met, that there is sufficient objective reason to believe that a specific provider is the most qualified to perform the services, and that federal funds will not be involved in the contract. 43 TAC §9.39.

### Contract Under a Pilot Program

The Executive Director may approve an exception to the selection requirements for the procurement of architectural, engineering, or surveying services under a pilot program approved by the Commission for the purpose of improving the efficiency and fairness of TxDOT's qualifications-based procurement processes. 43 TAC §9.42.

## Section 3: Contract Standards

### Negotiations

Contracts must be negotiated in accordance with 43 TAC §9.40.

### Administrative Qualification

Administrative qualification is a process the Professional Engineering Procurement Services Division (PEPS) uses to verify that a provider has a Federal Acquisition Regulation (FAR) compliant overhead. Providers must submit information to TxDOT annually to maintain Administratively Qualified (AQ) status. For federal selection processes, firms that provide engineering or design related services must be AQ on or before the solicitation closing date to be eligible to perform those services.

### Issuing Work and Monitoring Time

#### Issuing Work Authorizations for Indefinite Deliverable Contracts:

The contract period in which initial work authorizations may be issued may not be longer than four years after the date of contract execution, unless the Texas Transportation Commission approves a longer period to issue work authorizations prior to the solicitation posting date. 43 TAC §9.32.

The execution date is the date of the last signature or initials necessary to make the contract legally binding. Usually, the execution date is the date that TxDOT signed the contract.

If a prime contract expires, each of its ongoing work authorizations also terminates.

**Specific Deliverable Contracts:** A specific deliverable contract may be extended to the extent necessary to complete all tasks specified in the project schedule.

### Required Insurance

The prime provider is required to **maintain** three policies during the life of the contract:

- workers' compensation,
- commercial general liability, and
- Texas business automobile.

The provider must have a certificate of insurance on file with Contract Services before the contract is executed. Subcontractors are not required to maintain separate insurance.

A new certificate must be submitted each time a provider's insurance policies are changed or renewed during the contract period.

The insurance policies must remain current during the entire contract period.

### Contract Administration

In accordance with 43 TAC §9.41:

- a prime provider shall perform at least 30 percent of the contract work with its own work force, unless otherwise approved by TxDOT,
- the prime provider project manager may not be replaced without the prior written consent of TxDOT,
- TxDOT may perform interim and final audits, and
- TxDOT will document the prime provider's performance.

### Supplemental Agreements

Supplemental agreements may be used to change the scope, schedule, or amounts payable under an indefinite or specific deliverable agreement.

The contract period of an indefinite deliverable contract may be extended with a supplemental agreement, but it may not be extended to exceed the five year maximum contract term on federally funded agreements. Extending time to complete an indefinite deliverable contract only allows for the completion of work authorizations that were issued within four years of the prime contract execution date and does not authorize issuance of new work authorizations past the four year period.

TxDOT may extend a specific deliverable contract until completion of construction to enable the managing office to keep a provider engaged to perform design revisions (not necessarily the fault of the provider) during the project's construction phase. This action:

- keeps a provider available that is already familiar with the project,
- averts TxDOT from performing the additional work in-house.

Additional work required because of a provider's error or omission must be performed by the provider without any cost to TxDOT, whether or not the contract has expired.

With indefinite deliverable contracts, the managing office may not supplement a work authorization with an unrelated task, even if the contract is still open because of an unperformed deliverable on one of the original work authorizations.

Increased labor rates are not sufficient justification for an increase in the maximum amount payable. For **Specific Deliverable** contracts, the maximum amount payable may be increased only if the scope of work is increased or the time schedule is extended.

The managing office can amend the contract's method of payment only under compelling circumstances.

## **Name Changes**

A name change occurs when a provider changes its name, but not its legal identity. An individual may change their name through marriage or a court order, for example. If a provider changes its name, it must submit documentation showing that the name change has been legally implemented. For most business entities, this will involve changing the name legally through the Secretary of State.

## **Assignments**

An assignment occurs when a new provider replaces the original provider. This may result from a sale of underlying assets of the original provider or from a change in the original provider's legal identity because of a change of business form, as from a corporation to a partnership. Only TxDOT, by written consent, may authorize assignment. Therefore, the Assignment form must have the signature of an authorized representative of the original provider, of an authorized representative of the new provider (who may in some cases be the same person), and of the authorized TxDOT representative.

## **Contract Services' Role**

Contract Services reviews documents, prior to execution, related to engineering, architecture, and survey under the following circumstances:

- All contracts more than \$1,000,000, unless:
  - Approved TxDOT contract and scope templates are used without modifications, or
  - Approved TxDOT contract and scope templates are used and all modifications are approved by Contract Services prior to execution.
- All work authorizations more than \$1,000,000; and;
- All supplemental agreements and supplemental work authorizations with a cumulative value of more than \$1,000,000.

Contract Services is the office of record for Engineering, Surveying, Commercial Laboratory, and Architectural Services contracts.

Contract Services is the point of contact concerning legal issues pertinent to procurement and management of services secured through all negotiated contracts.

## Chapter 7: Scientific Services

### Contents:

[Section 1: Overview](#)

[Section 2: Procurement](#)



## Section 1: Overview

### Statutory Authority

Texas Transportation Code ch. 223, subch. D, provides for the procurement of technical experts to perform scientific services for TxDOT. The Environmental Affairs Division (ENV) has implemented procedures for selecting scientific experts under 43 Texas Administrative Code (TAC) ch. 9, subch. F, which allows TxDOT to select technical experts through the use of competitive sealed proposals. This is a procurement process that requires TxDOT to select a technical expert based upon the reasonableness of fees and qualifications to perform the required work or services.

### Technical Expert Defined

Technical experts are qualified to perform scientific services for TxDOT that typically include environmental or cultural assessments, studies, analyses, and document preparation that aid TxDOT and its engineering consultants in the design and implementation of transportation projects.

A technical expert may be an:

- archaeologist,
- biologist,
- geologist,
- historian,
- architectural historian, or
- any other expert in a natural, social, historical, or environmental science.

43 TAC § 9.81

### Common Tasks of Technical Experts

Technical experts perform several duties that may include, but are not limited to, the following studies and assessments that are set forth in environmental documents that will guide the planning and development of a transportation project:

- producing documentation and documents for compliance with National Environmental Policy Act and other laws governing environmental and cultural impacts,
- public involvement,
- community impact assessment (Land Use Impacts, Farmland Impacts, Social Impacts, Relocation Impacts, Economic Impacts, Environmental, and Environmental Justice),

- environmental impacts (Air Quality Impacts, Noise Impacts, Water Quality Impacts),
- Corp of Engineers permits (and related studies) under Rivers and Harbors Act §9, and Clean Water Act §§ 401, 404,
- US Coast Guard permits (and related activities) under Rivers and Harbors Act §9,
- biology,
- floodplain impacts,
- hazardous materials impacts (insofar as they don't involve a Professional Engineer (PE) seal), and
- other subject areas subsumed under the above (e.g., radiocarbon dating, core drilling, multimedia production), but not covered by professional services (e.g., land surveyors for surveying wetland boundaries).

**Excluded Work**

Services subject to procurement under Tex. Gov't Code ch. 2254, subch. A (Professional Services), and Tex. Transp. Code §223.041 (Engineering and Design contracts) shall not be performed under the scientific services contracts.

## **Section 2: Procurement**

### **Proposal Process**

Using competitive sealed proposals to award scientific service contracts is the procurement process set forth under Tex. Transp. Code ch. 223, subch. D.

TxDOT awards a scientific service contract to the technical expert that possesses the required qualifications to perform the work at fair and reasonable cost to TxDOT. TxDOT may use competitive sealed proposals to procure scientific, appraisal, right of way acquisition, and landscape architectural services.

43 TAC §9.82

### **Competitive Sealed Proposal Process**

#### **Notice**

When TxDOT elects to use competitive sealed proposals to procure appraisal, right of way acquisition, landscape architectural, and scientific services, TxDOT must post a notice on the Electronic State Business Daily. TxDOT will also publish a quarterly statewide list of project contracts to be issued and will provide upon request, or make available on TxDOT's web site, a copy of the list to community, business, and professional organizations for dissemination to their membership.

43 TAC §9.83(a)

#### **Letter of Interest**

Providers interested in performing the scientific services specified in the advertisement should submit a Letter of Interest to TxDOT via fax or regular mail to the contact person indicated in the advertisement. Upon receipt of the letter, the managing office will send the provider a Request For Proposal (RFP) packet. Prospective providers can also obtain an RFP for a particular contract by downloading it from the TxDOT Internet web site or obtain one at the proposal meeting, if one is to be held.

43 TAC §9.83(b)

#### **Request For Proposal**

The RFP packet communicates to the prospective provider what to include in its written proposal and how to submit it to TxDOT. The RFP, if completed properly, provides the technical expert a sound understanding of the project's specifications by providing an explanation of the services and deliverables it will be required to perform during the contract period.

Scientific service contracts require that payment be made upon the completion of deliverables. Therefore, deliverables need to be defined very specifically in the project's RFP, allowing the prospective provider to more easily estimate its price for performing each of the required tasks.

### **Proposal Meeting**

A proposal meeting may be either mandatory or optional at the discretion of TxDOT. If the meeting is mandatory, TxDOT will only accept proposals from providers represented at the meeting.

43 TAC §9.83(d)

### **Proposal Requirements**

Proposals are subject to the following requirements:

- the proposal shall be limited to the contents specified in the RFP packet plus the provider's price for the required services,
- all proposals must be received by the date, time, and location specified in the RFP packet,
- TxDOT will open proposals and conduct evaluations in confidence. After the contract is awarded, all proposals shall be open for public inspection, and
- a proposal which does not include all the requirements set forth in the RFP will be rejected as non-responsive and will not be considered further.

43 TAC §9.84

### **Evaluation**

TxDOT will evaluate each responsive proposal based upon the established standards communicated and set forth in the RFP. Each standard, having been assigned its own numerical weighting value previously communicated in the RFP, is scored using a numerical scale. Standards used for evaluating a proposal may vary from project to project.

43 TAC §9.85

### **Best and Final Offer**

A provider is typically awarded the contract based upon the initial score it receives on its proposal evaluation. However, there are circumstances in which TxDOT may find it beneficial to meet with the top ranked providers to discuss their best and final offer prior to the award of the contract.

If TxDOT determines discussions for best and final offers are necessary, then it must schedule individual meetings with the three top-ranked providers. In the case of multiple provider selection,

discussions will be held with a number of providers equal to the number of contracts to be awarded plus three. Discussions will include:

- any portion of the responsive proposal in order to assess a provider's ability to meet the RFP requirements,
- an opportunity for the provider to demonstrate an understanding of the project and remedy the proposal's deficiencies,
- reasonableness of fee.

Once all discussions have concluded, TxDOT will send written notification to each provider to submit its best and final offer. Once received, the revised proposals will be re-evaluated using the original scoring standards.

43 TAC §9.86

### **Selection**

These contracts are used for the award of individual or multiple contracts in which the selected entity agrees to perform work under a general scope of services. Work authorizations for specific tasks will be issued to the selected entity on an as-needed basis. Work authorizations must be issued for new projects within the two years following execution of the prime contract. Thus, the contract period for indefinite delivery contracts is four years. Work authorizations can be issued after the initial 2-year period, but only if it is necessary to complete projects that were started within the initial 2-year period after contract execution. However, new projects may not be started more than two years after contract execution. Contracts may not exceed a maximum amount payable of \$2,000,000 for a contract to provide services in a single district or \$5,000,000 to provide services in two or more districts.

43 TAC §9.87

### **Award**

TxDOT will make an award to the provider submitting the highest-ranked proposal and will notify the other providers of the selection. For multiple awardees under a single RFP, TxDOT will make awards to the highest ranked providers. If TxDOT finds that none of the proposals are acceptable, TxDOT will reject all proposals

43 TAC §9.88

## Chapter 8: Donations

### Contents:

[Section 1: Overview](#)

[Section 2: Contract Standards](#)

## Section 1: Overview

### Authority

The Texas Transportation Commission has adopted rules relating to acceptance of donations. 43 TAC ch. 1, subch. M.

For the purpose of carrying out its functions and duties, TxDOT may accept, from any source, a donation or contribution in any form, including real estate, personal property, money, materials, or services. Tex. Transp. Code §201.206.

TxDOT is authorized to exchange an interest in real property acquired but not needed for a highway purpose as whole or partial consideration for another interest in real property needed for a state highway purpose. Tex. Transp. Code §202.024.

TxDOT is authorized to acknowledge donations for highway-related services such as mowing, litter and debris pick-up, travel services, maintenance of safety rest areas, Travel Information Centers, and toll gantry facilities. 43 TAC ch. 12, subch. K.

### Definition of Donation

The term “donation” is used to include anything of value given to TxDOT. Examples of gifts and donations are:

- gifts of real property,
- cash towards the cost of a turn lane, landscaping, or traffic signal,
- literature for a conference,
- reimbursement for an employee’s travel for the purpose of being a speaker at a conference if the reimbursement is being offered by a non-governmental organization of which TxDOT is not a member.

The following are **not** considered donations:

- participation in TxDOT’s “Adopt-a-Highway” type programs governed by 43 TAC ch. 12, subch. A,
- reimbursement for travel to a meeting or as a speaker at a conference that is paid for by a governmental agency which provides funding for TxDOT, nor
- reimbursement for travel as a committee member to a meeting or as a speaker at a conference that is paid for by an organization to which TxDOT belongs such as American Association of State Highway and Transportation Officials, or a multistate pooled fund project.

## Section 2: Contract Standards

### Private Entity Participation

A private entity may participate in a TxDOT highway construction project through a gift of money or tangible goods. TxDOT may accept private participation in a TxDOT highway construction project only if it determines that the private participation will serve the interest of the traveling public. Gifts by private entities must meet the requirements of 43 TAC §1.506, including, when required, commission approval and the execution of a donation agreement.

### Approval

Acceptance of a gift or donation must be approved by the Executive Director. If the gift or donation has a value of \$500 or more, it must be acknowledged by order of the Texas Transportation Commission not later than the 90<sup>th</sup> day after the date the donation is accepted by TxDOT.

The Executive Director may approve acceptance of a gift or donation if the Executive Director determines that:

- the gift or donation will further TxDOT's responsibilities,
- the donor is not a party to a contested case before TxDOT, unless the decision in the case became final at least 30 days prior to the donation, and
- the donor is not subject to TxDOT regulation or oversight, or interested in or likely to become interested in any contract, purchase, payment, or claim with or against TxDOT. However, even in this situation, the Executive Director may approve acceptance of a gift or donation if the Executive Director determines that acceptance:
  - would provide a significant public benefit, and
  - would not influence or reasonably appear to influence TxDOT in the performance of its duties.

43 TAC §1.503

### Donations Greater than \$1,500

The donor and TxDOT must execute a donation agreement if the donation involves real estate, has an estimated value of more than \$1,500, or it is necessary to:

- warrant or indemnify TxDOT as to ownership,
- prevent possible claims that could result from the use of the property, or
- document conditions of the gift.



Agreements must comply with the requirements in 43 TAC §§ 1.504, 1.506.

### **Acknowledgment Program**

Donations to TxDOT for highway-related **services** may be acknowledged with signs located adjacent to the traveled way with the intent to inform the traveling public that a highway-related service is sponsored by a participating sponsor.

As described in 43 TAC §12.353, the acknowledgment program includes the following requirements:

- the donation may be used only for the highway-related purpose for which it is made,
- the acknowledgment program is applicable to all state highways,
- 43 TAC ch. 1, subch. M (for other types of donations such as cash) does not apply to a donation accepted under this program,
- TxDOT may contract with a vendor under 43 TAC §12.354 for services related to the program,
- the vendor will install and maintain acknowledgments, including signs,
- TxDOT or vendor may not accept donations from an individual or entity that is regulated by TxDOT or that is involved with TxDOT through a contract, purchase, payment, or claim,
- an acknowledgment may not reference an alcoholic beverage, tobacco product or sexually oriented business, product, or service,
- a donation must be acknowledged by the Texas Transportation Commission, and
- an acknowledgment must comply with all applicable laws.

## **Chapter 9: PeopleSoft Financial Supply Chain Management**

### **Contents:**

[Section 1: Overview](#)

[Section 2: PeopleSoft Policy](#)

## Section 1: Overview

### Overview

Any expenditure of state funds by state agencies for the establishment, modification, or maintenance of an individual accounting and payroll system must be in compliance with rules, user guides, manuals, and policy statements issued by the Texas Comptroller of Public Accounts, regarding the development, implementation or use of systems within the Uniform Statewide Accounting Project.

PeopleSoft is TxDOT's integrated suite of software that replaced over 22 mainframe and other outdated systems - providing a common technology platform across TxDOT's core business areas of human resources, finance, supply chain and payroll. PeopleSoft consists of three main applications: Human Capital Management (HCM), Financial Supply Chain Management (FSCM), and Enterprise Learning Management (ELM).

This chapter establishes contract management policy for FSCM, an application of PeopleSoft. The Office of Primary Responsibility is responsible for entering miscellaneous expenditure contract payment data into FSCM are the end users. Contract managers must comply with the FSCM payment procedures for miscellaneous contracts that are not construction and/or maintenance.

## Section 2: PeopleSoft Policy

### PeopleSoft as a Tool

PeopleSoft is an information technology tool that assists in contract preparation, solicitation, award, and contract management. PeopleSoft provides current information to users for budgets, expenses incurred, contract termination dates, and many other types of information. All requisitions must be entered, budget checked, and approved before moving to the contract or purchase order process.

### Contracts Versus Purchase Orders

The PeopleSoft process follows two paths: Contract and Purchase Order.

In this chapter, the term “Contract” includes:

- Work Authorization (WA) contracts (“broad-range”, including Right-of-Way and Scientific Services),
- Indefinite Deliverables contracts,
- Specific Deliverable contracts,
- Comprehensive Development Agreements (CDA),
- Private Consultants,
- Accounting Services, and
- Numerous other lesser used agreements.

In this chapter, the term “Purchase Orders” includes:

- Work Authorizations (WAs),
- Non-WA contracts,
- Interagency Contracts,
- Interlocal Contracts,
- Radio Tower Agreements, and
- Numerous other lesser used agreements.

### Processing

PeopleSoft will process 100% of all TxDOT contracts and purchase orders, other than low bid construction and maintenance contracts. In this chapter, “Contracts” and “Purchase Orders” do not include construction and contracted maintenance.

PeopleSoft is used to generate requisitions, Requests for Qualifications (RFQ), contracts, purchase orders, receipts, and reports to help manage projects. D/D employees use PeopleSoft to generate requisitions and receipts.

There are two Business Units: 601CT and 60144. When processing Professional Services and Miscellaneous Contracts (previously tracked in Segment 41), a TxDOT employee needs to request approval to be in the 601CT Business Unit. The Contract Specialist can have multiple roles. The Requisition, Requisition Approval, and Buyer roles in BUS Unit 601CT can be combined, instead of waiting on these approvals.

When processing requisitions for the purchase of goods and non-professional services (previously created in Automated Purchasing System, or APS), the TxDOT employee needs to be in 60144 Business Unit. One cannot perform both functions. A decision should be made as to which Business Unit best fits one's business needs.

## Chapter 10: Traffic Engineering Agreements

### Contents:

[Section 1: Overview](#)

[Section 2: Contract Standards](#)

[Section 3: Types of Agreements](#)

## Section 1: Overview

### Authority

TxDOT has the authority to enter into agreements with cities for location, relocation, maintenance, control, supervision, and regulation of state highways within and through the cities. Tex. Transp. Code §221.002.

TxDOT has the authority to install, operate, and maintain traffic signals on the state highway system. 43 TAC §25.5.

TxDOT has the authority to construct, maintain, and operate lighting systems on highways on the state highway system. 43 TAC §25.11.

TxDOT encourages and facilitates access to TxDOT highway facilities and their adjacent right of way for the promotion of Texas' goal of promoting the development of music, film, television, and multimedia industries in Texas while preserving the safety and convenience of the traveling public. 43 TAC § 22.13, Tex. Gov't Code ch. 485.

TxDOT is allowed to authorize the closure of a segment of the state highway system for no more than seven days, if closure serves a public purpose and is consistent with the safety and convenience of the traveling public. 43 TAC §22.12.

TxDOT may allow municipalities to erect and display signs concerning points of interest, or geographical, recreational, cultural, or civic information at the city limits on state highway right of way. 43 TAC ch. 25, subch H.

TxDOT may erect a suitable locally identifying memorial marker provided by a local government at the local government's expense at a place most suitable to TxDOT's maintenance operations. Tex. Transp. Code §225.004.

TxDOT shall mark with a historical name a farm-to-market or ranch road that follows a historical route if a county historical commission has been authorized by the Texas Historical Commission to construct such marker at the county historical commissions' expense. Tex. Transp. Code §225.005.

### Background

This chapter describes the contract standards for and types of traffic engineering agreement templates available to TxDOT.

## Section 2: Contract Standards

### When an Agreement Is Required

The most common instances requiring an agreement are when:

- the responsibility for maintenance and operation of a traffic signal is transferred from one governmental body to another,
- a proposed installation involves the use of utility poles or other physical objects owned by someone other than TxDOT,
- a traffic signal or lighting installation encroaches upon, beneath, or in the air space above private property,
- TxDOT installs a traffic signal, safety lighting, or a continuous lighting installation within the corporate limits of a city,
- a proposed installation involves a city or other entity providing materials, labor, or engineering for which TxDOT will reimburse the city or entity,
- a county requests continuous or safety lighting on-system and agrees to pay for operation and maintenance, or
- a city wishes to erect a city pride sign.

### When an Agreement Is Not Required

A written agreement is not necessary when:

- the traffic signal, safety lighting or continuous lighting system is installed by TxDOT in an unincorporated area completely within TxDOT right of way, or
- a minute order covers the responsibilities of both TxDOT and city, and the city has passed an ordinance or resolution accepting the minute order of the Texas Transportation Commission. A minute order may be used in lieu of an agreement depending on the level of detail addressing the responsibilities of each entity.

### Ordinance or Resolution

Agreements with cities must be accompanied by an ordinance or resolution authorizing the elected head of the city or a designated representative to sign the agreement.

Agreements with counties must be accompanied by an order of the commissioner's court authorizing the county judge to sign the agreement.



The city or county secretary's certificate must also accompany all agreements to verify that the ordinance or resolution was passed by the city or county. If the secretary has signed and sealed the resolution or ordinance, then a separate secretary's certificate is not required.

## Section 3: Types of Agreements

### Municipal Maintenance Agreement

The Municipal Maintenance Agreement (MMA) establishes the responsibilities of TxDOT and a city within that city's incorporated area. The MMA addresses numerous traffic issues, including, but not limited to:

- traffic signals,
- lighting,
- traffic regulations,
- speed limits,
- traffic signs (regulatory, warning, and guide),
- pavement markings (yield, stop bars, and cross walks) and parking stalls,
- school safety devices (school speed limit when flashing signs), and
- parking laws and enforcement.

The MMA includes the maintenance of many parts of the highway system within a municipality. Not all cities elect to enter into an MMA.

If a city wants to install red light cameras, an amendment must be added to the MMA.

For additional information on the MMA, contact Maintenance Division or see the *Maintenance Management Manual*.

### Traffic Signal Agreements

Traffic signal agreements are used to fix responsibilities between TxDOT and a city for the funding, installation, operation, and maintenance of traffic signals on the state highway system within a city.

### Lighting Agreements

A lighting agreement is usually required whenever TxDOT installs continuous or safety lighting in incorporated cities or under special circumstances when requested by counties.

A continuous lighting system provides relatively uniform lighting on all main lanes and direct connections and complete interchange lighting of all interchanges. Continuous lighting requires the financial cooperation of the city, because the benefits derived extend beyond enhanced safety for motorists.

Safety lighting is used at urban or rural interchanges, highway intersections, and points of night time hazards to enhance safety of the facility. If the safety lighting is within a municipality, TxDOT must enter into an agreement with the city. The type of agreement depends on whether TxDOT will maintain the system directly or contract with the city for maintenance. TxDOT installs lighting mostly on roadways on the state highway system. TxDOT occasionally installs lighting on off-system roadways as part of larger projects when no state funds are being expended.

### Utility Pole Agreements

A Utility Pole – Master Agreement is used when an existing utility pole can be used to support a TxDOT signal or lighting installation in lieu of installing a new pole.

The various utility pole agreements provide reimbursement to the pole owner for adjustments made to the pole's wires, cross arms, etc., and for providing necessary clearances between the power lines and signal cables. The agreement also provides for a nominal attachment fee.

### Film and Video Production Agreement

A person or entity producing a film, video, or other production on a segment of the state highway system or right of way must obtain approval by way of an executed Film and Video Production Agreement from TxDOT prior to initiating the activity.

The agreement grants TxDOT approval for any activity within the state highway right of way that:

- requires a closure of a segment of the state highway system,
- will otherwise disrupt the normal flow of traffic,
- could damage state highway right of way or other TxDOT facilities, or
- in any way affects the safety and convenience of the traveling public.

A person or entity desiring approval for an activity subject to this requirement should first notify the Texas Film Commission.

### Road Closure Agreements

The road closure agreements grant TxDOT approval when an individual or entity wants to conduct an activity requiring closure of a segment of the state highway system in an incorporated area for a public purpose.

The following activities do not require a road closure agreement:

- **Emergency Traffic Control.** Closure necessary for emergency traffic control and maintenance activities pursuant to an MMA.
- **Bicycle Races.** A competitive bicycle race that does not involve complete restriction of vehicular traffic and utilizes a detour is not subject to approval by TxDOT, provided that the

sponsoring organization has obtained the approval of the appropriate law enforcement agencies.

- **Routine Traffic Control.** A closure involving routine traffic control does not require TxDOT approval, provided the closure is in an incorporated area and does not take place on a controlled access highway. The district engineer should be notified at least seven days before the routine traffic control event occurs.

### **City Pride Sign Agreement**

The City Pride Sign Program is a voluntary program that allows a city to erect and maintain a sign at city expense near the city limits sign, with the names of civic organizations and other messages. The City Pride Sign Agreement is used to ensure that the city erects the sign in compliance with TxDOT specifications and requirements.

### **County Historical Commission Route Sign Agreement**

In order for TxDOT to mark a farm-to-market or ranch road with a historical name, the Texas Historical Commission must certify that the name has been in common usage in the area for at least 50 years. Any markers must be paid for by the county historical commission.

### **Named Marker or Memorial Marker Highway Sign Agreement**

A part of the highway system may be designated by the name of a person only if the person is deceased and was significant in Texas' history or in the lives of the people of Texas. Local governments may buy and furnish to TxDOT a suitable locally identifying memorial marker of a type and size that must be approved by TxDOT.

### **Private Agreements**

A private agreement is required when a TxDOT traffic signal or lighting installation encroaches upon private property. No work should be started on private property until the property owner has been furnished a fully executed copy of the agreement.

### **Modifying Standard Templates**

Contract Services should be contacted if either party wishes to modify the terms and conditions of the standard contract templates.

## Chapter 11: Vending Machines

### Contents:

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[Section 2: Vending Machine Procurements](#)

## Section 1: Overview

### Overview

State law authorizes the Department of Assistive and Rehabilitative Services (DARS) to install vending machines on state-owned or leased property. If DARS elects not to install requested vending machines then it will issue TxDOT a three-year Variance Permit, which allows services to be contracted out.

TxDOT employee owned vending machines are prohibited.

### Specific Authorities

A vending machine may be located in a state-owned or state-leased building or on state-owned or state-leased property only with the approval of the governing body of the state agency.

The state agency must file with the Texas Comptroller of Public Accounts a copy of all contracts between the state agency and the vendor.

All rentals, commissions or other net revenue the state agency receives shall be accounted for as state money and deposited to the credit of the general revenue fund unless the disposition of the revenue is governed by other law.

Texas Government Code §2203.005.

## **Section 2: Vending Machine Procurements**

### **DARS**

If DARS declines the installation and operation of vending machines, Maintenance Division will assist in the procurement process.

### **Maintenance Division**

When a D/D decides there is a need for a vending machine in its area, it should contact the Program Administrator in the Maintenance Division (MNT) to seek authorization by obtaining a Commission Minute Order.

The Program Administrator is the main point of contact for vending machines in all D/Ds and is the Vending Machine Coordinator.

MNT reviews and recommends site locations for installation of vending machines at all TxDOT safety rest areas. Vending machine installations at other TxDOT facilities or offices do not require a MNT site location and review process.

### **Reports**

The vendor must submit a monthly report to the appropriate D/D no later than the fifteenth day of each month, along with a check or warrant made payable to the State of Texas in the amount of the percentage of the monthly receipts.

### **Disputes**

Should disputes arise between the D/D and the vendor, reasonable efforts should be made to resolve it. If a dispute cannot be resolved, the D/D should consider terminating the contract as provided in the contract.

### **Audits**

State auditors shall have access to any information the auditors consider relevant to the investigation or audit. If the D/D believes an audit is necessary during the lifetime of the contract, then the Internal Audit Division is available for assistance.

## **Chapter 12: Project Development and Operating Agreements and Financial Assistance Agreements**

### **Contents:**

[Section 1: Overview](#)

[Section 2: Agreements](#)



## Section 1: Overview

### Overview

The following agreements types are each handled by the Texas Department of Transportation (TxDOT)'s General Counsel Division. Project Development Agreements involve the development, construction, maintenance or operation of toll projects by a local toll project entity, including a regional mobility authority, a regional tollway authority, a transit authority created under Texas Transportation Code, Chapters 451, 452, or 453, and a county acting under Texas Transportation Code, Chapter 284. The other agreement type found in this chapter, Financial Assistance Agreements, permit TxDOT to participate in toll facilities with a public or private entity.

### Purpose

To reflect the agreement between TxDOT and a local toll project entity regarding a transportation project that will connect to either the state highway system or to a TxDOT rail facility, or that is to be part of the state highway system;

To reflect the Texas Transportation Commission's approval of the lease, sale, or transfer of a toll project or system, including a non-tolled state highway or a segment of a non-tolled state highway converted to a toll project to a governmental entity that has the authority to operate a tolled highway or a local government corporation; or

To allow TxDOT to participate, by grant or by loan, in the cost of the acquisition, construction, maintenance, or operation of a toll facility of a public or private entity, subject to the limitations on providing grants in state law.

### Authorities

- Tex. Transp. Code §222.103;
- Tex. Transp. Code §228.002;
- Tex. Transp. Code §228.151;
- Tex. Transp. Code §362.051;
- Tex. Transp. Code §370.187;
- 43 Texas Administrative Code (TAC) §11.58 - Connections with State Highways Access;
- 43 TAC §26.34 - Project Development Agreements;
- 43 TAC §26.54 - Project Operating Agreements;
- 43 TAC §27.13 - Transfer of Toll Projects;
- 43 TAC §27.15 - Project Development of Transferred Toll Projects;

- 43 TAC §27.16 - Toll Projects within State Highway Right of Way
- 43 TAC §27.44 - Improvement of the State Highway System by Regional Tollway Authorities;
- 43 TAC §27.74 - Design and Construction Standards for County Toll Projects;
- 43 TAC ch. 27, subch. E - Financial Assistance for Toll Facilities; and
- 2 CFR Part 200.

## Section 2: Agreements

### **Project Development Agreements for the Development and Construction of Transportation Projects That Connect to the State Highway System or to a TxDOT Rail Facility**

**Definition:** An agreement between a local toll project entity and TxDOT governing the development of the project.

**Applicability:** Applies to an Regional Mobility Authority (RMA) transportation project or a regionally significant highway project of another local toll project entity that connects to the state highway system or a TxDOT rail facility.

A request for Texas Transportation Commission approval to connect to the state highway system or a TxDOT rail facility must be submitted in accordance with 43 TAC §11.58 or §26.31, as applicable.

**Agreement Terms:** The agreement shall, at a minimum, include the following:

- the responsibilities of each party concerning the design and construction of the project and Environmental Permits, Issues, and Commitments (EPIC);
- procedures governing the submittal of information to TxDOT;
- timelines governing approvals by the executive director; and
- other terms or conditions mutually agreed upon by the parties.

### **Toll and RMA Projects**

- Project Development Agreements for the Development, Construction, Maintenance or Operation of a TxDOT Toll Project
- Project Development Agreements for the Development, Construction, Maintenance or Operation of a Toll Project within the State Highway Right of Way
- Project Development Agreements for County Toll Projects that are to be Part of the State Highway System
- Agreements for the Operation of a Transportation Project by a Regional Mobility Authority
- Project Development Agreements for Transferred Toll Projects

**Definition:** An agreement between a governmental entity that has the authority to operate a tolled highway and TxDOT governing the development, design, and construction of a toll project leased, sold, or transferred under Texas Transportation Code §228.151 and 43 TAC §27.13.

**Applicability:** Applies to a toll project that was leased, sold, or transferred under 43 TAC §27.13 and is located within the right of way of a state highway.

**Agreement Terms:** The agreement shall, at a minimum, include:

- the responsibilities of each party concerning the design and construction of the project and Environmental Permits, Issues, and Commitments (EPIC);
- procedures governing the submittal of information to TxDOT;
- timelines governing approvals by the executive director, and
- other terms and conditions mutually agreed upon by the parties.

### **Financial Assistance Agreements for Project Costs to Operate Toll Facility**

Definition: An agreement with a public or private entity prescribing how TxDOT will participate in the cost of a toll facility that is not under the jurisdiction of TxDOT.

Eligibility:

- a public or private entity that is authorized by state law to construct or maintain a toll facility is eligible to submit a request for financing under Texas Transportation Code §222.103 and 43 TAC §27.53.
- a private entity is not eligible to submit a request for a grant.
- a public entity is required to repay to TxDOT any money contributed by TxDOT as participation in the cost of a toll project of the entity unless:
  - the funds are held in a subaccount created under Texas Transportation Code §228.012; or
  - either TxDOT or the entity commenced the environmental review process for the project on or before January 1, 2014.

Under 43 TAC §27.54, by granting preliminary approval of a request, the Texas Transportation Commission authorized the executive director to:

- evaluate the project's limits, scope, definition, design, and other features, and identify any which adversely affect the financing of the project, including EPIC;
- negotiate the amount, type, and timing of disbursements of financial assistance;
- if the financial assistance is required to be repaid, negotiate an interest rate, a repayment schedule, collateral securing the financial assistance, and default provisions;
- if necessary for the project's financial feasibility, negotiate provisions providing for the subordination of financial assistance provided under this subchapter to any other debt obligations for the project; and
- negotiate all other provisions necessary to complete an agreement.

The rules direct the executive director to “negotiate terms deemed necessary to comply with any requirements of preliminary approval, to protect the public’s safety, and to prudently provide for the protection of public funds while furthering the purpose of 43 TAC Chapter 27, Subchapter E.”

The rules impose additional requirements on an entity that should be included in Financial Assistance Agreements:

- The public or private entity requesting financing shall comply with applicable state and federal law, and with all terms and conditions of any agreements. If approval or concurrence of the Federal Highway Administration, the Federal Transit Administration, or any other federal agency is required, TxDOT may require that the entity requesting financing seek approval or concurrence through TxDOT. Upon request and, to the extent applicable and permitted by federal law, after reasonable advance notice and opportunity to cure from TxDOT, the entity requesting financing shall reimburse TxDOT for any federal funds that are applied by the entity requesting financing to pay costs not incurred in conformity with applicable state and federal law.
- The entity requesting financing shall maintain its books and records in accordance with generally accepted accounting principles in the United States, as promulgated by the Governmental Accounting Standards Board, the Financial Accounting Standards Board, or pursuant to applicable federal or state laws or regulations, and with all other applicable federal and state requirements, subject to any exceptions required by existing bond indentures of the entity requesting financing that are applicable to the project, and any exceptions the entity requesting financing has historically implemented that have been acceptable to the public debt markets.
- The entity requesting financing shall, at its own cost, have a full audit performed annually of its books and records by an independent certified public accountant selected by the entity requesting financing and reasonably acceptable to TxDOT. The audit must be conducted in accordance with generally accepted auditing standards promulgated by the Financial Accounting Standards Board, the Governmental Accounting Standards Board, or the standards of the Office of Management and Budget Circular A-133, Audits of States, Local Governments and Non-profit Organizations, as applicable, and with all other applicable federal and state requirements. The entity requesting financing shall cause the auditor to provide a full copy of the audit report and any other management letters or auditor's comments directly to TxDOT within a reasonable period of time after they have been provided to the governing body of the entity requesting financing.
- The entity requesting financing shall retain all work papers and reports for a minimum of four years from the date of the audit report, unless TxDOT notifies the entity in writing to extend the retention period. If requested by TxDOT, audit work papers shall be made available to TxDOT, within 30 days of request, at any time during the retention period.
- The entity requesting financing shall retain all original project files, records, accounts, and supporting documents until project completion or until all financial assistance under this subchapter has been repaid, if applicable, or for the period of time required by applicable federal and state law, if longer, unless relieved of this requirement by TxDOT in writing.