

US 77 FROM KINGSVILLE TO DRISCOLL PROJECT DESIGN-BUILD CONTRACT TERM SHEET

This document provides background information and summarizes the major terms of the for the design and construction of the US 77 from Kingsville to Driscoll Project (the “Project”), to be entered into by the Texas Department of Transportation (“TxDOT”), and a firm (the “Design-Build Contractor”) to be selected based on responses to a Request for Proposals (the “RFP”). This document is intended as a general description of certain major contract terms and is not a restatement or interpretation of the contract requirements. There are numerous details, exceptions and qualifications associated with the provisions described below which can only be ascertained by reviewing the Design-Build Contract (the “DB Contract”) itself.

DESCRIPTION OF PROJECT

Project scope components include the design, construction and maintenance of an upgrade to interstate standards of US 77 between Kingsville and Driscoll in Kleberg and Nueces Counties. Except as otherwise specified, all work for design and construction (the “Work”) will be the responsibility of the Design-Build Contractor. See Exhibit A hereto for further details regarding the Project.

TxDOT currently anticipates that the DB Contract will address the maintenance of completed Project facilities in several ways, including (i) giving TxDOT the sole right to retain all maintenance responsibility; (ii) giving TxDOT the sole right to exercise one or more options to have the Design-Build Contractor assume capital maintenance responsibility for a specified period; and (iii) requiring that the Design-Build Contractor provide certain Project warranties for specified periods. A general description of the major terms for the capital maintenance options is provided in a separate Capital Maintenance Term Sheet.

The parties intend for the DB Contract to be a fixed price, lump sum contract obligating Design-Build Contractor to complete the Work by the deadlines set forth in the DB Contract and in a manner satisfactory to TxDOT, for the agreed price (the “Price”), subject only to certain specified limited exceptions.

CONTRACT OVERVIEW	
Design-Build Contractor & Agreement Date	To be determined
Scope of Work	<p>DB Contract requires Design-Build Contractor to design, construct (with quality and durability) and maintain the Project. Design-Build Contractor's Work includes the obligation to furnish a complete design for the Project meeting all DB Contract requirements, to construct the Project as designed and in accordance with all requirements, and otherwise to comply with all DB Contract requirements.</p> <p>See <u>Exhibit A</u> for further details regarding the Scope of Work.</p>
Notices to Proceed	<p>TxDOT anticipates issuing NTP1 concurrently with execution of the DB Contract. Issuance of NTP1 authorizes Design-Build Contractor to perform the portion of the Work necessary to obtain TxDOT's approval of the project management plan and to enter the Project Right of Way TxDOT owns in order to conduct surveys and site investigations, including geotechnical, hazardous materials and utilities investigations.</p> <p>TxDOT anticipates issuing NTP2 within 90 days after issuance of NTP1. NTP2, authorizing performance of the remainder of the Work, is conditioned upon approval by TxDOT of the project management plan.</p> <p>The proposal price will remain valid without escalation until 90 days after the Proposal Due Date if Developer doesn't cause the Delay. After such time, the price will be subject to escalation (based on the ENR Construction Cost Index) until issuance of NTP1. If NTP1 is not issued within 365 days from the Proposal Due Date, Design-Build Contractor may terminate the DB Contract.</p>
Contract Documents	The Contract Documents include the DB Contract and exhibits (including federal requirements), Technical Provisions, design documents, specifications, plans, and all amendments to the foregoing and all Change Orders issued.
Contract Documents (Proposal)	The Proposal (to the extent that it is consistent with or exceeds the requirements of the other Contract Documents) will also be a Contract Document, such that commitments made by the Design-Build Contractor in the Proposal relating to the Work will be binding.
PRICE, SECURITY & PAYMENTS	
Price	<p>This is a lump sum contract, to be paid based on progress.</p> <p>The only changes to Price are via change order, value engineering, or, potentially, an incentive payment for early opening of the Project.</p>

<p>BONDS:</p> <p>Proposal, Performance, Payment, Retainage & Warranty</p>	<p>Required Bonds:</p> <p>Proposal Bond in the amount of \$3,000,000 will remain in place as security for performance of Design-Build Contractor’s obligations. Upon receipt of the performance and payment bonds (and other documents required for NTP1) the Proposal Bond will be released.</p> <p>Payment and Performance Bonds in the amount of \$ 60,000,000 will be required as security for Design-Build Contractor’s obligations as a condition to issuance of NTP1.</p> <p>Performance Bond in the amount of \$ 60,000,000 will be required (on or before NTP2) and will be released upon Final Acceptance and the receipt of the Warranty Bond.</p> <p>Payment Bond in the amount of \$ 60,000,000 is required (on or before NTP2) and will be released upon: (a) receipt of (i) evidence that all claims against the Payment Bond have been fully paid and (ii) unconditional releases of Liens and stop notices, or (b) expiration of the statutory period for filing a claim against the Payment Bond if no claims have been filed.</p> <p>Retainage Bond in the amount of 10% of the Price will be required (on or before NTP2) as a guaranty for the protection of any claimants and TxDOT for overpayments, Liquidated Damages, and other deductions or damages owed by the Design-Build Contractor.</p> <p>Warranty Bond in the amount of 10% of the Price is required (as a condition to Final Acceptance) to guarantee performance of the Work required to be performed during the Warranty period.</p> <p>If the Price is increased in connection with a Change Order, TxDOT may, in its sole discretion, require a corresponding proportionate increase in the amount of each bond.</p>
<p>Parent Guaranty</p>	<p>A guaranty of the Design-Build Contractor’s obligations from a Guarantor approved by TxDOT will be required if the Design-Build Contractor is a newly formed or limited liability entity, if the Design-Build Contractor submitted parent company financial statements in response to the RFQ or RFP or if the Design-Build Contractor fails to meet certain net worth requirements.</p>
<p>Value Engineering</p>	<p>TxDOT and Design-Build Contractor will share in any savings resulting from value engineering proposals by Design-Build Contractor.</p>
<p>Mobilization</p>	<p>Design-Build Contractor will be entitled to payment for mobilization in installments, in an amount equal to the bid item price for mobilization, not to exceed 10% of the Price.</p>
<p>Payment Obligations & Progress Payment Limitations</p>	<p>TxDOT will make payments based on progress as evidenced by a monthly Draw Request submitted by Design-Build Contractor. The invoice will have to conform strictly with the format prescribed by the Corpus Christi District. The Maximum Payment Schedule establishes the cap on cumulative progress payments. If Design-Build Contractor falls behind schedule, no progress payments will be paid until a recovery schedule is approved in writing.</p>

COMPLETION DEADLINES, SCHEDULE AND DELAY	
Completion Deadlines	<p>The anticipated deadline for Substantial Completion of the Project is Spring 2016 .</p> <p>The Final Acceptance deadline is 120 days after Substantial Completion.</p> <p>Extensions of completion deadlines are allowed only under limited circumstances. (See Change Order section below.)</p>
Schedule	<p>Design-Build Contractor must perform the Work in accordance with an approved comprehensive critical path schedule. The baseline schedule will be the schedule submitted with the Proposal and any changes must be approved by TxDOT as a condition to NTP2. The schedule will be updated monthly during the Project and used for payment, planning and monitoring progress of the Work. If Design-Build Contractor falls behind schedule, a recovery schedule to regain lost time is required or TxDOT may withhold payments.</p>
Delay	<p>Liquidated damages will be assessed for delays in meeting the deadlines for Substantial Completion and Final Acceptance. TxDOT will have the right to terminate the DB Contract if completion of the Project is delayed for more than a year . (See Liquidated Damages section below.)</p>
CONTRACT RIGHTS & RESPONSIBILITIES	
Right of Way	<p>Design-Build Contractor will be responsible for acquiring ROW and for condemnation support services. TxDOT will pay property owners the purchase price for parcels that are within the right of way lines on the NEPA approvals.</p> <p>Design-Build Contractor may request that additional right of way be acquired. TxDOT pays the acquisition cost if additional parcels are necessary due to a TxDOT-Directed Change or Force Majeure event. Design-Build Contractor is responsible for the acquisition cost for parcels acquired for any other reason.</p> <p>Design-Build Contractor is responsible for the cost of any temporary construction easements or other temporary property interests.</p>
Design and Construction	<p>Design-Build Contractor is responsible for design and construction in accordance with the Contract Documents.</p>
Design Liability	<p>Design-Build Contractor assumes full responsibility and liability with respect to design of the Project, including correction of any errors, omissions, inconsistencies or other defects in the Schematic Design affecting constructability.</p>
QA/QC	<p>Design-Build Contractor is required to establish and implement a comprehensive, TxDOT-approved quality assurance and quality control program. Quality assurance will be provided by independent quality assurance firm(s) retained by Design-Build Contractor.</p>

Design and Construction Oversight	TxDOT will have the right at all times to monitor, inspect, sample, measure, attend, observe or conduct tests and investigations, and conduct any other oversight respecting any part or aspect of the Project or the Work, to the extent necessary or advisable to: (a) comply with FHWA, U.S. Army Corps of Engineers or other applicable federal agency requirements, and (b) verify Design-Build Contractor's compliance with the Contract Documents. Design-Build Contractor at all times will coordinate and cooperate, and require its Subcontractors to coordinate and cooperate, with TxDOT and its Authorized Representative to facilitate TxDOT's oversight activities.
Standards	Design-Build Contractor must design and construct the Project in general conformity with the Schematic Design, in accordance with all professional engineering principles and construction practices generally accepted in the State as the standard in the industry, in a good and workmanlike manner, free from defects and in accordance with the terms and conditions set forth in the Contract Documents, including the Technical Provisions. Design-Build Contractor will be required to obtain TxDOT approval to make modifications to the specified components of the Basic Configuration.
Warranties	<p>The Warranty Term for the Project will commence upon Final Acceptance by TxDOT. The Warranties will remain in effect until one year after Final Acceptance, except that Warranties for elements of the Project that will be owned by Persons other than TxDOT (such as Utility Owners) will commence as of the date of acceptance thereof by such Persons and will end one year thereafter. Extended Warranties will apply to repaired, replaced or corrected Work, not to exceed two years after Project Final Acceptance.</p> <p>The Warranties apply notwithstanding maintenance work performed by TxDOT or the Maintenance Contractor during the Warranty period.</p>
ENVIRONMENTAL & PERFORMANCE RISKS	
Permits & Approvals	TxDOT has obtained or will obtain key specified permits and governmental approvals as specified in the Contract Documents. The Design-Build Contractor will be entitled to a Change Order to compensate the Design-Build Contractor for any increased costs due to changes in the final NEPA approval and USACE Section 404 permit from the draft requirements included in the request for proposals. Design-Build Contractor will be responsible for obtaining all other permits and government approvals.
New Environmental Approvals	Design-Build Contractor is responsible for obtaining all new environmental approvals or changes to existing approvals. If a new or revised environmental approval becomes necessary for any reason other than for a TxDOT-Directed Change or Force Majeure Event, Design-Build Contractor bears full responsibility for all costs and delays.
Environmental Compliance	Design-Build Contractor shall be responsible for performance of all environmental mitigation measures and compliance with all other conditions and requirements of the Contract Documents and Environmental Approvals, including TxDOT-Provided Approvals and similar Governmental Approvals for the Project.
CONTRACT CHANGES & COSTS OUTSIDE THE CONTRACT	

Change Orders	A TxDOT signed Change Order or Directive Letter is required for any increase to price or time extension. TxDOT may issue unilateral Change Orders. Design-Build Contractor will prepare a scope of work, cost estimate, delay analysis and other information for each Request for Change Order. Change Orders requesting a time extension must also provide an alternative Change Order form including an acceleration schedule. Change Orders are subject to strict requirements (including notice & delivery).
Differing Site Conditions	Change Orders for additional costs due to Differing Site Conditions will be allowed for subsurface or surface physical conditions of an unusual nature, differing materially from those ordinarily encountered in the area. Design-Build Contractor will be responsible for the first \$1 million of additional costs for each occurrence of Differing Site Conditions up to the sum of \$5 million for all such costs. Design-Build Contractor will not be allowed any time extension or delay damages for delays due to Differing Site Conditions.
Deviations	Design-Build Contractor may deviate from the Schematic Design as it deems advisable, provided that it obtains prior written approval by TxDOT and/or an approved Change Order with respect to any deviation from the Basic Configuration. Changes in the Work which have no net cost effect on the Price may be approved in writing by TxDOT as a Deviation without requiring a Change Order.
Nonconforming Work	TxDOT may, but is not obligated to, accept any nonconforming work without requiring it to be fully corrected, in which case the Price will be decreased. TxDOT may require nonconforming work to be remedied or removed/replaced and may deduct the cost.
TxDOT-Directed Changes	Design-Build Contractor will be entitled to a Change Order providing for price adjustment and/or a time extension for: Change in the scope of the Work directed by TxDOT. Suspensions of the Work on the critical path by TxDOT for its convenience for more than 48 hours per suspension. Any new environmental approvals necessitated by a TxDOT-Directed Change.
Hazardous Materials	Design-Build Contractor is entitled to price increase for direct costs due to discovery of hazmat within the Schematic ROW. Design-Build Contractor is entitled to an extension of Completion Deadlines if the hazmat discovery results in delays to a Critical Path. Design-Build Contractor is not entitled to an extension of any Completion Deadline for investigation or characterization of hazmat. Design-Build Contractor is not entitled to an increase in price for remediation costs resulting from its own acts or omissions, or hazardous materials brought onto the Site by Design-Build Contractor. Design-Build Contractor is not entitled to any increase in price or time with respect to: (a) immaterial quantities, (b) hazmat that could have been avoided by reasonable design modifications or construction techniques, (c) costs that could have been avoided, (d) hazmat on Additional Properties designated by the Design-Build Contractor, or (e) hazmat encountered during the demolition of buildings, fixtures or other improvements within the Site.

<p>Utilities</p>	<p>Design-Build Contractor is responsible for performing all necessary utility adjustment work and is not entitled to a Change Order for performance of adjustment work that was initially anticipated to be performed by a Utility Owner.</p> <p>Design-Build Contractor is not entitled to any time extensions on account of delays attributable to utilities, except for delays affecting the Critical Path due to (a) New Utilities requiring adjustment and (b) uncooperative utility owners that do not enter into adjustment agreements.</p> <p>Design-Build Contractor is entitled to a price increase for (a) an Unidentified Utility located within the Schematic ROW to the extent that Design-Build Contractor's costs increase by more than \$50,000 per utility, and (b) a New Utility.</p>
<p>Force Majeure Events (Definition)</p>	<p>Design-Build Contractor will be entitled to additional time and/or compensation for <u>specified</u> force majeure events (provided they are beyond Design-Build Contractor's control and not due to act or omission by Design-Build Contractor or its contractors, etc.) which materially and adversely affect Design-Build Contractor's obligations and which could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by Design-Build Contractor: <i>The following are typical examples, which will be specified in more detail in the DB Contract:</i></p> <p>Any earthquake, tornado, hurricane or other natural disaster causing direct physical damage to the Project;</p> <p>Any epidemic in the Project area;</p> <p>Any blockade, rebellion, war, riot, act of sabotage or civil commotion that causes direct physical damage to the Project;</p> <p>Discovery of any archaeological, paleontological or cultural resources not disclosed or discoverable through reasonable investigation prior to the Proposal Due Date;</p> <p>Discovery of any species listed as threatened or endangered if their existence was not disclosed or discoverable through reasonable investigation prior to the Proposal Due Date;</p> <p>Material change in law;</p> <p>Third party hazmat spill;</p> <p>Issuance of a TRO or other form of injunction by a court that prohibits prosecution of a material portion of the Work;</p> <p>Suspension, termination, denial or failure to obtain or non-renewal of any TxDOT-Provided Approval;</p> <p>The addition of any new condition or requirement in the NEPA Approval based on the Schematic Design and the Schematic ROW.</p>
<p>Matters Not Eligible for Change Orders</p>	<p>Design-Build Contractor is responsible for all risks not specifically accepted by TxDOT; examples of specific exclusions will be identified in the DB Contract.</p>
<p>BUSINESS RISKS</p>	

<p>Insurance</p>	<p>Design-Build Contractor is required to provide insurance coverage specified in the DB Contract, which must include at a minimum: commercial general liability, workers' compensation and employer's liability; bodily injury/property damage and comprehensive business auto liability, professional liability coverage, builder's risk, and pollution liability. Subcontractor insurance requirements are also specified in the DB Contract.</p> <p>TxDOT and its members, directors, officers, employees, agents and Project consultants must be additional insureds, except on the professional liability policy.</p>
<p>Design-Build Contractor Defaults</p>	<p>Failure to begin Work within 30 days following issuance of NTP1, or failure to commence and diligently perform the Construction Work;</p> <p>Failure to complete the Work by the applicable Completion Deadline; Failure to perform the Work in accordance with the Contract Documents,</p> <p>Suspending or ceasing the Work or failure to continuously and diligently prosecute the Work;</p> <p>Failure to obtain or maintain any insurance, bonds, guarantees, letters of credit or other performance security as and when required under the DB Contract;</p> <p>Voluntary or involuntary assignment or transfer of all or any portion of the DB Contract;</p> <p>Failure to make payment when due for labor or equipment or failure to make payment to TxDOT when due of any amounts owing to TxDOT;</p> <p>Failure to timely observe or perform any other material obligation, term or condition under the DB Contract;</p> <p>Material misrepresentation by Design-Build Contractor;</p> <p>Voluntary or involuntary bankruptcy or insolvency;</p> <p>Default under the Capital Maintenance Agreement.</p>
<p>Cure of Design-Build Contractor Defaults</p>	<p>Design-Build Contractor will have an opportunity to cure certain Design-Build Contractor Defaults, as described in the DB Contract documents.</p>
<p>TxDOT Remedies for Design-Build Contractor Default</p>	<p>TxDOT will have the right to exercise one or more of the following remedies in the event of an uncured Design-Build Contractor Default:</p> <p>Right to terminate;</p> <p>Right to deduct amounts (including interest) payable to TxDOT from amounts owing to Design-Build Contractor;</p> <p>Right to recover damages;</p> <p>Right to take immediate action in the event of emergency or danger;</p> <p>Right to draw on, enforce and collect any bonds, letters of credit, guaranty, or other performance security available to TxDOT for Design-Build Contractor Default; and</p> <p>Other remedies as provided by Law.</p>

Design-Build Contractor's Right to Stop Work	Design-Build Contractor has the right to stop Work if TxDOT fails to make an undisputed payment due within 15 business days after TxDOT's receipt of written notice of nonpayment from Design-Build Contractor. If such nonpayment continues for more than 180 days, upon written notice from Design-Build Contractor to TxDOT, the nonpayment may be deemed a Termination for Convenience.
Suspension	TxDOT may order Design-Build Contractor to suspend all or any part of the Work for the period of time that TxDOT deems appropriate. Such suspension for convenience will be considered a TxDOT-Directed Change, except for brief suspensions (less than 48 hours each), for which Design-Build Contractor will be entitled to a time extension but not compensation.
Termination	<p>Design-Build Contractor may terminate the DB Contract if NTP1 is not issued by TxDOT on or before 270 days after the Proposal Date. After issuance of NTP1, Design-Build Contractor has no unilateral right to terminate, except in the event of non-payment after a specified period, or a suspension of work for more than one year.</p> <p>TxDOT may terminate the DB Contract for public convenience or for Design-Build Contractor's default.</p>
Liquidated Damages	<p>Per day liquidated damages in the amount specified in the DB Contract will be assessed for delay in reaching Substantial Completion by the Completion Deadline, for up to 180 days of delay. Per day liquidated damages in amount of specified in the DB Contract will be assessed for delay in Final Acceptance beyond the Acceptance Deadline.</p> <p>Liquidated damages will be assessed for unavailability of the Project Manager, Deputy Project Managers, and other Key Personnel.</p>
Indemnification	Design-Build Contractor indemnifies TxDOT, State of Texas and their agents/employees for Design-Build Contractor errors, omissions, negligence, or willful misconduct, breach of the DB Contract, Design-Build Contractor release of hazmat, and failure to comply with applicable laws or Governmental Approvals, among other things
OTHER CONTRACT PROVISIONS	
Dispute Resolution	<p>Partnering meetings, for dispute resolution, conducted by a mutually agreed upon facilitator are to include key personnel and executives of both parties. Costs of partnering are to be shared equally by the parties.</p> <p>Informal and voluntary dispute resolution alternatives are encouraged and preferred in lieu of the more formal process described in detail in the DB Contract.</p> <p>If partnering and informal dispute resolution fails to resolve an issue and Design-Build Contractor elects to pursue a formal Dispute with TxDOT, the Dispute shall be resolved pursuant to Texas Transportation Code Section 201.112 and the dispute resolution procedures established thereunder, as the same may be amended from time to time.</p>
Records and Documentation	Design-Build Contractor must maintain all records and documents in accordance with Texas State Records Retention Schedule.

Price Proposal Documents (PPDs)	Design-Build Contractor's detailed Proposal pricing information will be kept at TxDOT's Procurement office. PPDs are available for review by and any dispute resolver(s). Change Order documentation will be added to PPDs. PPDs will be maintained until: (a) 180 days from the later of Final Acceptance or termination of the DB Contract; (b) all Claims or Disputes regarding the Work have been settled; and (c) Final Payment has been made and accepted.
DBE Provisions; Subcontractors	TxDOT's DBE Program for design-build contracts is based on TxDOT's standard DBE Program with certain modifications to accommodate the design-build approach. After execution of the DB Contract, Design-Build Contractor must select subcontractors based on procedures approved by TxDOT. Design-Build Contractor will flow down required terms into subcontracts. Subcontracts will be fully assignable to TxDOT. Dispute procedures involving Subcontractors contain additional requirements.
Key Personnel	Certain job categories of key personnel for the Project are identified. Key personnel may not be substituted without TxDOT's prior written consent. Liquidated damages may be assessed for unavailability of certain key personnel.
Assignment	Design-Build Contractor may not assign its interests in the DB Contract without TxDOT's prior written consent. TxDOT may assign its interests in the DB Contract: (a) without Design-Build Contractor's consent, to any to any other Person that succeeds to the governmental powers and authority of TxDOT; and (b) to others with prior written consent of Design-Build Contractor.

EXHIBIT A

Design-Build Contractor shall be responsible for the design, construction and maintenance of the roadways for the Project, which includes the following:

The US 77 Upgrade project area extends 122 miles along US 77 from I-37 in Corpus Christi to US 83 in Harlingen, with proposed improvements between Robstown and Combes. TxDOT is proposing new overpasses, new interchanges, new one-way frontage roads, upgrades to existing ramps, and conversion of two-way frontage roads to one-way frontage roads. While much of the remaining upgrade project would be located within existing right of way, certain upgrade locations in Kleberg and Nueces counties would require additional right of way ranging from 35 to 200 feet adjacent to US 77. The department has developed a 10-mile break-out project from the US 77 Upgrade project to be referred as the US 77 upgrade from Kingsville to Driscoll (the “Project”).

The Project components include the design, construction and maintenance of the roadways shown on the Preliminary Schematic located on the Project Website, which includes the following:

- US 77 from FM 1898/E. Corral Ave to CR 16
 - Mainlanes
 - Frontage Roads
 - City Street connections
 - Tie-in tapers to existing US 77