

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

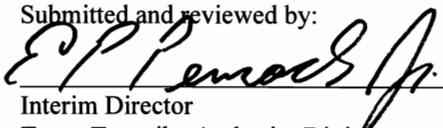
The Texas Transportation Commission (commission) finds it necessary to propose new §9.150, Purpose, §9.151, Definitions, §9.152, General Rules for Design-Build Contracts, §9.153, Solicitation of Proposals, §9.154, Protest Procedures, and §9.155, Conflict of Interest and Ethics Policies, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed new sections, attached to this minute order as Exhibits A and B, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the General Counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the commission that new §§9.150 - 9.155 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:


Interim Director
Texas Turnpike Authority Division

Recommended by:


Executive Director
112907 NOV 17 11

Minute Number Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes new
3 §9.150, Purpose, §9.151, Definitions, §9.152, General Rules for
4 Design-Build Contracts, §9.153, Solicitation of Proposals,
5 §9.154, Protest Procedures, and §9.155, Conflict of Interest and
6 Ethics Policies, all concerning new Subchapter I, Design-Build
7 Contracts.

8

9 EXPLANATION OF PROPOSED NEW SECTIONS

10 Senate Bill 1420, 82nd Legislature, Regular Session, 2011, added
11 Transportation Code, Chapter 223, Subchapter F, authorizing the
12 department to enter into, in each fiscal year, up to three
13 design-build contracts for highway projects with a construction
14 cost estimate of \$50 million or more, and prescribing the
15 requirements for entering into a design-build contract. The
16 proposed new sections prescribe the procurement process to be
17 followed by the department for a design-build contract and
18 conditions on private participation in design-build contracts.

19

20 The new sections prescribe requirements for qualifications
21 submittals and proposals submitted in response to requests for
22 qualifications and requests for proposals issued by the
23 department, address the manner by which the department intends
24 to conduct procurements, including the manner of evaluating
25 submissions received from private entities, address certain
26 responsibilities of the department and private entities under

1 design-build contracts, prescribe protest procedures in
2 connection with the procurement of design-build contracts, and
3 prescribe ethical standards of conduct and rules of contact
4 applicable to private entities participating in the department's
5 design-build program.

6

7 New §9.150 describes the purpose of the new sections.

8

9 New §9.151 defines words and terms used in the new sections.

10

11 New §9.152 prescribes general rules for private involvement in
12 design-build projects. This section describes the rights
13 reserved by the department in administering design-build
14 procurements. Those rights include the right to negotiate with
15 a proposer to include aspects of unsuccessful proposals for that
16 project in the design-build contract, and to waive deficiencies
17 in a qualifications submittal or proposal, accept and review a
18 non-conforming qualifications submittal or proposal, or permit
19 clarifications or supplements to a qualifications submittal or
20 proposal. The design-build statutes authorize the department to
21 include in negotiations of the design-build contract the
22 possible inclusion of aspects of unsuccessful proposals.
23 Applicable law also allows the department to waive minor
24 deficiencies in a qualifications submittal or proposal and to
25 permit clarifications. The exercise of these rights will allow
26 the department to enhance competition in procurements and to

1 obtain the best value for the department.

2

3 In order to appropriately manage state funds, §9.152 provides
4 that, except for the payment of stipends to unsuccessful
5 proposers for proposer work product as required by law, under no
6 circumstances will the state, the department, or any of their
7 agents, representatives, consultants, directors, officers, or
8 employees be liable for, or otherwise obligated to reimburse,
9 the costs incurred by proposers in developing proposals or in
10 negotiating agreements.

11

12 New §9.152 provides that all qualifications submittals or
13 proposals submitted to the department become the property of the
14 department and may be subject to the Public Information Act,
15 Government Code, Chapter 552. Section 9.152 also recognizes
16 that a proposer's designation in its proposal of information it
17 claims is excepted from disclosure is subject to the concurrence
18 of the Office of the Attorney General. Section 9.152 also
19 addresses certain responsibilities of the department and private
20 entities under design-build contracts, and provides that such
21 matters will be assigned, conducted, and paid for as negotiated
22 between the department and the successful proposer and set forth
23 in the design-build contract.

24

25 In order to comply with the requirements of the Council on
26 Environmental Quality regulations implementing the requirements

1 of the National Environmental Policy Act (42 U.S.C. §4321 et
2 seq.), and to prevent actual or apparent conflicts of interest,
3 new §9.152 prescribes requirements relating to the department's
4 solicitation or acceptance of proposals in which the proposer is
5 responsible for providing assistance in the environmental review
6 and clearance of a proposed highway project. The intent of
7 those requirements is to ensure the objectivity of the
8 environmental review and the selection of a project alternative.
9 Section 9.152 recognizes that the department will contract
10 separately with an environmental consultant, and that a design-
11 build contract must include provisions relating to making
12 modifications to the agreement necessary to address requirements
13 in the final environmental documents, and the fact that the
14 agreement may be terminated if the "no-build" alternative is
15 selected, or if another alternative is selected that is
16 incompatible with the requirements of the contract.

17
18 Transportation Code, §223.250 provides that the department shall
19 require a design-build contractor to provide performance and
20 payment bonds or alternative forms of security, or a combination
21 of bonds and other forms of security in connection with a
22 design-build project. New §9.152 prescribes requirements
23 relating to those bonds or other forms of security necessary to
24 ensure the proper performance of the design-build contract, to
25 protect the department and payment bond beneficiaries supplying
26 labor or materials to the private entity or a subcontractor of

1 the private entity, and to ensure financial institutions or
2 other parties providing security on behalf of the private
3 developer meet financial strength or other requirements
4 necessary to protect the department and payment bond
5 beneficiaries.

6
7 New §9.153 describes how the department will solicit private
8 participation in a highway project developed under a design-
9 build contract. Section 9.153 requires commission authorization
10 to issue a request for qualifications or request for proposals,
11 and prescribes requirements relating to the publication of
12 notice of the availability of design-build procurement
13 documents. To comply with the requirements of Transportation
14 Code, Chapter 223, Subchapter F, and to enhance competition in
15 procurements and obtain the best value for the department, new
16 §9.153 prescribes what must be included in a request for
17 qualifications and request for proposals. New §9.153 also
18 prescribes criteria that will be considered in evaluating a
19 request for qualifications or a request for proposals. Section
20 9.153 also implements the authority to enter into negotiations
21 with the proposer submitting the next highest ranking proposal
22 if the department is unable to negotiate a satisfactory contract
23 with the highest ranking proposer.

24
25 Transportation Code, §223.249 requires the department to pay to
26 an unsuccessful proposer that submits a responsive proposal for

1 a design-build contract a stipend for the work product contained
2 in the proposal that can be used by the department in the
3 performance of its functions. New §9.153 provides that the
4 commission shall approve the amount of the payment to be
5 stipulated in the request for proposals, and prescribes criteria
6 to be considered by the commission in determining the amount of
7 the payment.

8

9 New §9.154 prescribes exclusive procedures for protests filed by
10 proposers for projects to be developed under a design-build
11 contract. These procedures are intended to provide an informal
12 process for resolving protests raised by proposers relating to
13 the terms of procurement documents, responsiveness or short-
14 listing determinations, and the award of a design-build
15 contract. The commission believes providing an informal process
16 for resolving protests will lead to a design-build program and
17 procurement process that is more transparent and that will
18 promote fairness, obtain private participants in projects, and
19 promote confidence among those participants. By submitting a
20 proposal, a proposer agrees to the exclusive protest procedure
21 and agrees the decision on the protest is final and conclusive.

22

23 New §9.154 prescribes requirements for informal discussions
24 before certain protests may be filed with the department,
25 prescribes deadlines for protests, prescribes the information
26 that must be contained in a protest and where it shall be filed,

1 authorizes other proposers to file statements in support of or
2 in opposition to the protest, and provides that the protest
3 shall be decided on the basis of written submissions.

4
5 New §9.154 provides that the request for qualifications or
6 request for proposals will specify the department employee
7 assigned the responsibility for issuing a decision on the
8 protest within 30 days of its filing. In order to ensure an
9 objective evaluation of the protest by a person not involved in
10 proposal evaluations, the designated employee may not be a
11 member of a subcommittee or committee involved in the evaluation
12 of proposals for the project. Section 9.154 also prescribes
13 requirements for the protestant's payment of the department's
14 costs if a protest is denied. This is intended to ensure that
15 only legitimate protests are filed.

16
17 There has been an increasing number of ethical and conflict of
18 interest issues that have arisen in connection with the
19 department's comprehensive development agreement program,
20 particularly issues relating to consultants interested in
21 potentially working for both the department and for a proposer
22 for a project to be developed under a comprehensive development
23 agreement. The department anticipates that similar issues will
24 arise in connection with the design-build program. One of the
25 purposes of new §9.155 is to protect the integrity and fairness
26 of the design-build program and all procurements carried out by

1 the department as a part of the program by avoiding
2 circumstances where certain consultants or proposers obtain, or
3 have the appearance of obtaining, an unfair competitive
4 advantage as a result of work performed for the department or
5 that raise other actual or apparent conflicts of interest.

6
7 New §9.155 prescribes conflict of interest provisions,
8 provisions relating to the acceptance of gifts and benefits by
9 department employees, and communications restrictions in order
10 to provide a fair and unbiased design-build contract procurement
11 process and to ensure high standards of ethics and fairness in
12 the administration of the design-build program. The provisions
13 of §9.155 are intended to reduce impacts on competition by
14 ensuring there are a sufficient number of qualified firms
15 available to participate as part of proposer teams, while
16 protecting the integrity and fairness of the design-build
17 program and all procurements carried out by the department as
18 part of the program. A private entity's failure to comply with
19 these standards of conduct may result in the private entity's
20 preclusion from participation in a project or sanctions being
21 imposed under Title 43, Texas Administrative Code, Chapter 10.

22
23 New §9.155(b) prohibits a proposer, developer, consultant, or
24 subconsultant participating in the design-build program, or an
25 affiliate of any of those entities, from offering, giving, or
26 agreeing to give a gift or benefit to a member of the commission

1 or to a department employee whose work for the department
2 includes the performance of procurement services relating to a
3 design-build project, or who participates in the administration
4 of a design-build contract. Section 9.155(b) provides certain
5 exceptions to this prohibition for department consultants and
6 subconsultants that are not a member of a proposer or developer
7 team, consistent with state laws relating to gifts to public
8 servants. No exceptions are made for proposers or developers
9 because of the appearance of impropriety or competitive
10 advantage that would result from the offer or acceptance of a
11 gift or benefit.

12

13 New §9.155(c) prescribes department policy on conflicts of
14 interest relating to consultants and subconsultants
15 participating in the design-build program. Section 9.155(c)(2)
16 provides that this policy applies to all design-build projects
17 undertaken by the department under Transportation Code, Chapter
18 223, Subchapter F, and applies to consultants and subconsultants
19 and their individual employees who participated in the
20 performance of services for the department. The policy may by
21 extension prohibit or restrict the ability of a proposer to have
22 a consultant or subconsultant participate on the proposer team
23 as an equity owner or team member, act as a consultant or
24 subconsultant to the proposer, or have a financial interest in
25 the proposer or an equity owner or team member of the proposer.

26

1 Section 9.155(c)(3) prescribes the period of time in which a
2 conflict of interest will be deemed to exist, and the period of
3 time the resulting prohibition or restriction provided in
4 §9.155(c) will continue. Section 9.155(c)(4) provides that if a
5 conflict of interest is determined to apply to an individual, it
6 will not apply to the individual's new place of employment,
7 other than an affiliate of its previous employer. The
8 prohibition or restriction will continue to apply to the
9 individual for the prescribed period of time. Section
10 9.155(c)(5) clarifies that the requirements of §9.155(c) do not
11 limit, modify, or otherwise alter the applicability of the
12 Federal Highway Administration's organizational conflict of
13 interest regulations, which the department must comply with in
14 the case of a federal-aid project.

15
16 Section 9.155(c)(6) prescribes general conflict of interest
17 standards, which generally prohibit a consultant providing
18 consultant services to the department with respect to a design-
19 build project from being a proposer or participating as an
20 equity owner, team member, consultant, or subconsultant of or to
21 a proposer for that project, or having a financial interest in
22 any of the foregoing entities with respect to that project.
23 Subject to the requirements of §9.155(c)(8), this prohibition
24 would not apply to participation in a different design-build
25 project.

26

1 Section 9.155(c)(7) contains exceptions to the prohibitions in
2 §9.155(c)(6) for consultants providing preliminary engineering
3 and architectural services, environmental services, and traffic
4 and revenue services. Section 9.155(c)(8) allows consultants
5 actively engaged and performing procurement services or
6 financial services with respect to a design-build project to be
7 a proposer or to participate as an equity owner, team member,
8 consultant, or subconsultant of or to a proposer for another
9 design-build project, or to have a financial interest in any of
10 the foregoing entities with respect to another design-build
11 project, provided that the consultant will thereafter be
12 prohibited from reviewing alternative technical concepts and
13 proposals for the project for which the consultant is providing
14 services to the department until a contract for the project is
15 entered into, and the consultant must institute ethical walls or
16 other safeguards required by the department.

17

18 Section 9.155(c)(9) prescribes the process for a consultant,
19 proposer, or developer to submit a request for a determination
20 as to whether certain participation in a design-build project,
21 or the performance of particular services with respect to a
22 design-build project would constitute a conflict of interest, or
23 to request approval of an exception to the applicability of the
24 conflict of interest policies, including an appeal of a previous
25 determination that a conflict of interest exists. Section
26 9.155(c)(9) also prescribes the criteria that will be considered

1 by the executive director in reviewing a request.

2

3 Section 9.155(c)(10) concerns the applicability of the conflict
4 of interest policies where a consultant is providing more than
5 one category of consultant services to the department. Section
6 9.155(c)(11) concerns the eligibility of an entity participating
7 with respect to a design-build project as a proposer or
8 developer, or as an equity owner, team member, consultant, or
9 subconsultant of or to a proposer or developer, or having a
10 financial interest in any of the foregoing entities to provide
11 consultant services to the department for another design-build
12 project.

13

14 Section 9.155(c)(12) allows the department to restrict the scope
15 of services a consultant or subconsultant may be eligible to
16 perform for the department in order to further the intent and
17 goals of §9.155(c), and to condition a determination that a
18 conflict of interest does not exist or an exception to the
19 applicability of the conflict of interest policies as
20 appropriate to further the intent and goals of §9.155(c),
21 including by requiring the consultant, subconsultant, proposer,
22 or developer to execute confidentiality agreements, institute
23 ethical walls, or segregate certain personnel from participation
24 in a project or the performance of consultant services.

25

26 Section 9.155(c)(13) provides that the provisions in §9.155(c)

1 do not address every situation that may arise in the context of
2 the department's design-build program nor require a particular
3 decision or determination by the executive director. The
4 department retains the ultimate and sole discretion to determine
5 on a case-by-case basis whether a conflict of interest exists
6 and what actions may be appropriate to avoid, neutralize, or
7 mitigate any actual or potential conflict, or the appearance of
8 any conflict.

9
10 Section 9.155(c)(14) provides that a consultant providing
11 procurement or financial services with respect to a
12 comprehensive development agreement project may be a proposer or
13 participate as an equity owner, team member, consultant, or
14 subconsultant of or to a proposer for a design-build project, or
15 may have a financial interest in any of the foregoing entities
16 with respect to a design-build project under the conditions
17 prescribed in §9.155(c)(8).

18
19 In order to provide a fair and unbiased procurement process, new
20 §9.155(d) prescribes rules of contact regulating communications
21 between proposers for a design-build project or any of its team
22 members and the commission, the department, and third parties
23 involved in the procurement. The prescribed rules must be
24 contained in a request for qualifications and may be modified in
25 the request for proposals. The rules of contact generally
26 prohibit any ex parte communication regarding the project,

1 request for qualifications, request for proposals or the
2 procurement with any member of the commission or with any
3 department staff, advisors, contractors, or consultants involved
4 in the procurement until the earliest of the execution and
5 delivery of the design-build contract, the rejection of all
6 qualifications submittals or proposals by the department, or the
7 cancellation of the procurement.

8

9 Certain communications may be allowed by the department in
10 exceptional circumstances, and confidential communications may
11 be made to a department employee not involved in the
12 procurement. Section 9.155(d) allows the executive director to
13 disqualify a proposer from the procurement and participation in
14 the project at issue or to impose another sanction under Title
15 43, Texas Administrative Code, Chapter 10 if it is determined
16 that a proposer has engaged in any improper communications in
17 violation of the rules of contact. Section 9.155(e) provides
18 certain exceptions to the rules of contact.

19

20 FISCAL NOTE

21 James Bass, Chief Financial Officer, has determined that for
22 each of the first five years the new sections as proposed are in
23 effect, there will be fiscal implications for state or local
24 governments as a result of enforcing or administering the new
25 sections. The fiscal impact cannot be quantified with any
26 certainty as it will depend on the number and type of highway

1 projects developed by the department under a design-build
2 contract.

3
4 Ed Pensock, Interim Director, Texas Turnpike Authority Division,
5 has certified that there will be no significant impact on local
6 economies or overall employment as a result of enforcing or
7 administering the new sections.

8

9 PUBLIC BENEFIT AND COST

10 Mr. Pensock has also determined that for each year of the first
11 five years in which the sections are in effect, the public
12 benefit anticipated as a result of enforcing or administering
13 the new sections will be to provide an efficient and transparent
14 procurement process for design-build contracts, thereby allowing
15 the department to enhance competition in procurements and to
16 obtain the best value for the department, as well as to
17 facilitate agreements with private participants in design-build
18 projects. There are no anticipated economic costs for persons
19 required to comply with the sections as proposed. There will be
20 no adverse economic effect on small businesses.

21

22 SUBMITTAL OF COMMENTS

23 Written comments on the proposed new §§9.150 - 9.155 may be
24 submitted to Ed Pensock, Interim Director, Texas Turnpike
25 Authority Division, Texas Department of Transportation, 125 East
26 11th Street, Austin, Texas 78701-2483. The deadline for receipt

1 of comments is 5:00 p.m. on January 2, 2012.

2

3 STATUTORY AUTHORITY

4 The new sections are proposed under Transportation Code,
5 §201.101, which provides the commission with the authority to
6 establish rules for the conduct of the work of the department.

7

8 CROSS REFERENCE TO STATUTE

9 Transportation Code, Chapter 223, Subchapter F.

1 SUBCHAPTER I. DESIGN-BUILD CONTRACTS

2 §9.150. Purpose. Senate Bill 1420, 82nd Legislature, Regular
3 Session, 2011, added Transportation Code, Chapter 223,
4 Subchapter F, authorizing the department to enter into, in each
5 fiscal year, up to three design-build contracts for highway
6 projects with a construction cost estimate of \$50 million or
7 more for each project, and prescribing the requirements for
8 entering into a design-build contract. This subchapter
9 prescribes the procurement process to be followed by the
10 department for a design-build contract and conditions on private
11 participation in design-build contracts.

12
13 §9.151. Definitions. The following words and terms, when used
14 in this subchapter, have the following meanings, unless the
15 context clearly indicates otherwise.

16 (1) Affiliate--An entity that directly or indirectly
17 controls, is controlled by, or is under common control with a
18 private entity.

19 (2) Commission--The Texas Transportation Commission.

20 (3) Conflict of interest--A circumstance arising out of
21 the existing or past activities, business interests, contractual
22 relationships, or organizational structure of a consultant,
23 proposer, or design-build contractor, where:

1 (A) the private entity is or may be unable to give
2 impartial assistance or advice to the department;

3 (B) the private entity's objectivity in performing the
4 scope of work sought by the department is or might be otherwise
5 impaired;

6 (C) the private entity has an unfair competitive
7 advantage;

8 (D) the private entity's performance of services on
9 behalf of the department provides or may provide an unfair
10 competitive advantage to a third party; or

11 (E) there is a reasonable perception or appearance of
12 impropriety or unfair competitive advantage benefiting the
13 private entity or a third party as a result of the private
14 entity's participation in a design-build project.

15 (4) Consultant--An individual or business entity,
16 including any division or affiliate of the entity, retained by
17 the department to provide consultant services in connection with
18 a design-build project. The term includes an individual or
19 business entity providing or that has provided services under
20 contract to a consultant, either directly or through a
21 subconsultant, at any level.

22 (5) Consultant services--All services provided to the
23 department by an independent contractor under a best value or

1 qualifications based procurement method, including architectural
2 and engineering services, right-of-way acquisition services,
3 environmental services, procurement services, traffic and
4 revenue services, project oversight services, financial services
5 including financial advisory and banking services, and legal
6 services.

7 (6) Control--The possession, directly or indirectly, of
8 the power to cause the direction of the management of the
9 entity, whether through voting securities, by contract, family
10 relationship, or otherwise.

11 (7) Department--The Texas Department of Transportation.

12 (8) Design--Includes planning services, technical
13 assistance, and technical studies provided in support of the
14 environmental review process undertaken with respect to a
15 highway project, as well as surveys, investigations, the
16 development of reports, studies, plans and specifications, and
17 other professional services provided for a highway project.

18 (9) Design-build contract--An agreement that includes
19 both design and construction services for the construction,
20 expansion, extension, related capital maintenance,
21 rehabilitation, alteration, or repair of a highway project.

22 (10) Design-build contractor--A partnership, corporation,
23 or other legal entity or team that includes at a minimum an

1 engineering firm and a construction contractor qualified to
2 engage in the construction of highway projects in Texas.

3 (11) Design-build program--The department's program for
4 the procurement, implementation, and administration of design-
5 build contracts under this subchapter.

6 (12) Environmental services--Some or all of the following
7 services provided to the department with respect to a project
8 developed under a design-build contract:

9 (A) the study and evaluation of alternatives and
10 potential environmental impacts of the proposed project;

11 (B) preparation of environmental analysis and impact
12 documents relating to the project, including facility and
13 corridor analyses and draft and final environmental assessments
14 and environmental impact statements; and

15 (C) planning associated with the environmental
16 approval, permitting, and clearance process for the project.

17 (13) Executive director--The executive director of the
18 department or designee not below the level of a person in a
19 senior leadership position who reports directly to the executive
20 director.

21 (14) Financial services--Some or all of the following
22 services provided to the department with respect to a project
23 developed under a design-build contract:

1 (A) acting in the capacity of financial advisor to the
2 department by providing advice on finance-related issues,
3 including development of short-term or long-term finance
4 strategy and plans of finance for individual projects or on an
5 ongoing basis;

6 (B) identifying and pursuing sources of funds; and

7 (C) acting as underwriter, either lead or co-lead for a
8 revenue bond issuance on a project or facility, but excluding
9 underwriters for bonds that are not related to a project
10 developed under a design-build contract.

11 (15) Gift or benefit--Anything reasonably regarded as
12 pecuniary gain or pecuniary advantage, including any benefit or
13 favor to another person in whose welfare the beneficiary has a
14 direct and substantial interest, regardless of whether the donor
15 is reimbursed. The term includes, but is not limited to, cash,
16 loans, meals, lodging, services, tickets, door prizes, free
17 entry to entertainment or sporting events, transportation, or
18 hunting or fishing trips.

19 (16) Legal services--Some or all of the following
20 services with respect to a project developed under a design-
21 build contract:

22 (A) providing advice on legal issues and strategies
23 relating to project environmental approvals, planning,

1 procurement, financing, contract administration, risk
2 management, and disputes, claims, or litigation; and

3 (B) reviewing, drafting, and negotiating procurement
4 documents, project contracts, and other documents.

5 (17) Preliminary engineering and architectural services--
6 Preparation of preliminary design and architectural documents
7 and reports, utility and right-of-way mapping, and provision of
8 similar technical documents that will be incorporated by others
9 into a request for qualifications or request for proposals, but
10 not including the evaluation or selection of alignments in
11 connection with the development of environmental documents,
12 assistance with development of the solicitation documents,
13 design-build contractor scope of work/technical provisions,
14 evaluation criteria for a procurement, or other items that would
15 constitute environmental services or procurement services.

16 (18) Procurement services--Some or all of the following
17 services provided to the department with respect to a project
18 developed under a design-build contract:

19 (A) development of procurement strategy;

20 (B) development and preparation of the solicitation
21 documents, design-build contractor scope of work/technical
22 provisions, or contract documents;

23 (C) implementation and administration of the

1 solicitation;

2 (D) preparation or implementation of any evaluation

3 criteria, process, or procedures;

4 (E) evaluation of proposer submissions (e.g.,

5 qualification submittals and proposals);

6 (F) negotiation of the contract; and

7 (G) any other activities determined by the department

8 as related to a procurement.

9 (19) Project oversight services--Some or all of the
10 following services provided to the department with respect to a
11 project developed under a design-build contract after award of
12 the contract:

13 (A) design review;

14 (B) construction oversight and inspection;

15 (C) quality control and quality assurance;

16 (D) project management and overview;

17 (E) contract administration;

18 (F) claims management;

19 (G) public relations and community outreach;

20 (H) right of way acquisition services; and

21 (I) appraisal, legal description, condemnation package,

22 and utility assembly review.

23 (20) Proposer--A private entity, including any division

1 or affiliate of the entity, that has submitted a statement of
2 qualifications, proposal, or other submission in order to
3 participate in an ongoing procurement for the design,
4 construction, expansion, extension, related capital maintenance,
5 rehabilitation, alteration, or repair of a project developed
6 under a design-build contract.

7 (21) Request for proposals--A request for submittal of a
8 detailed proposal from private entities to design, develop,
9 construct, expand, extend, provide capital maintenance,
10 rehabilitate, alter, or repair a highway project.

11 (22) Request for qualifications--A request for submission
12 by a private entity of a description of that entity's
13 experience, technical competence and ability to develop a
14 highway project, and such other information as the department
15 considers relevant or necessary.

16 (23) Subconsultant--An individual or business entity that
17 performs or performed work on behalf of a consultant as part of
18 the performance of the consultant's work for the department,
19 either directly or through a subconsultant at any level.

20 (24) Traffic and revenue services--Some or all of the
21 following services provided to the department with respect to a
22 project developed under a design-build contract:

23 (A) conducting draft and investment grade traffic and

1 revenue studies, toll elasticity studies, toll feasibility
2 studies, toll pricing studies, or studies or analyses of a
3 similar nature, including peer review studies; and

4 (B) data mining and preparation of reports, analyses,
5 and projections in connection with the traffic and projected
6 revenues.

7

8 §9.152. General Rules for Design-Build Contracts.

9 (a) Applicability. The rules in this subchapter address
10 the manner by which the department intends to evaluate
11 submissions received from private entities in response to
12 requests for qualifications and requests for proposals issued by
13 the department.

14 (b) Reservation of rights. The department reserves all
15 rights available to it by law in administering these rules,
16 including without limitation the right in its sole discretion
17 to:

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

20 (2) reject any and all qualifications submittals or
21 proposals at any time;

22 (3) terminate evaluation of any and all qualifications
23 submittals or proposals at any time;

1 (4) suspend, discontinue, or terminate negotiations with
2 any proposer at any time prior to the actual authorized
3 execution of a design-build contract by all parties;

4 (5) negotiate with a proposer without being bound by any
5 provision in its proposal;

6 (6) negotiate with a proposer to include aspects of
7 unsuccessful proposals for that project in the design-build
8 contract;

9 (7) request or obtain additional information about any
10 proposal from any source;

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

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

17 (10) revise, supplement, or make substitutions for all or
18 any part of these rules.

19 (c) Costs incurred by proposers. Except as provided in
20 §9.153(f) of this subchapter (relating to Solicitation of
21 Proposals), under no circumstances will the state, the
22 department, or any of their agents, representatives,
23 consultants, directors, officers, or employees be liable for, or

1 otherwise obligated to reimburse, the costs incurred by
2 proposers, whether or not selected for negotiations, in
3 developing proposals or in negotiating agreements.

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

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

21 (f) Compliance with rules. In submitting any proposal, the
22 proposer shall be deemed to have unconditionally and irrevocably
23 consented and agreed to the foregoing provisions and all other

1 provisions of this subchapter.

2 (g) Proposer information submitted to department. All
3 qualifications submittals or proposals submitted to the
4 department become the property of the department and may be
5 subject to the Public Information Act, Government Code, Chapter
6 552. Proposers should familiarize themselves with the
7 provisions of the Public Information Act. In no event shall the
8 state, the department, or any of their agents, representatives,
9 consultants, directors, officers, or employees be liable to a
10 proposer for the disclosure of all or a portion of a proposal
11 submitted under this subchapter. Except as otherwise expressly
12 specified in the request for qualifications or request for
13 proposals, if the department receives a request for public
14 disclosure of all or any portion of a qualifications submittal
15 or proposal, the department will notify the applicable proposer
16 of the request and inform that proposer that it has an
17 opportunity to assert, in writing, a claimed exception under the
18 Public Information Act or other applicable law within the time
19 period specified in the department's notice and allowed under
20 the Public Information Act. If a proposer has special concerns
21 about information it desires to make available to the
22 department, but which it believes constitutes a trade secret,
23 proprietary information or other information excepted from

1 disclosure, the proposer should specifically and conspicuously
2 designate that information as such in its qualifications
3 submittal or proposal. The proposer's designation shall not be
4 dispositive of the trade secret, proprietary, or exempted nature
5 of the information so designated.

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

12 (i) Project studies. Studies that the department deems
13 necessary as to route designation, civil engineering,
14 environmental compliance, and any other matters will be
15 assigned, conducted, and paid for as negotiated between the
16 department and the successful proposer and set forth in the
17 design-build contract.

18 (j) Proposer's additional responsibilities. The
19 department, in its sole discretion, may authorize the successful
20 proposer to seek licensing, permitting, approvals, and
21 participation required from other governmental entities and
22 private parties, subject to such oversight and review by the
23 department as specified in the design-build contract.

1 (k) Proposer's work on environmental review of eligible
2 project. The department may solicit proposals in which the
3 proposer is responsible for providing assistance in the
4 environmental review and clearance of an eligible project,
5 including the provision of technical assistance and technical
6 studies to the department or its environmental consultant
7 relating to the environmental review and clearance of the
8 proposed project. The environmental review and the
9 documentation of that review shall at all times be conducted as
10 directed by the department and subject to the oversight of the
11 department, and shall comply with all requirements of state and
12 federal law, applicable federal regulations, and the National
13 Environmental Policy Act (42 U.S.C. §4321 et seq.), if
14 applicable, including but not limited to the study of
15 alternatives to the proposed project and any proposed
16 alignments, procedural requirements, and the completion of any
17 and all environmental documents required to be completed by the
18 department and any federal agency acting as a lead agency. The
19 department:

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

22 (2) shall specify the level of design and other
23 information to be provided by the private entity or its

1 consultants or subcontractors; and

2 (3) shall independently review any studies and
3 conclusions reached by the private entity or its consultants or
4 subcontractors before their inclusion in an environmental
5 document.

6 (1) Effect of environmental requirements on design-build
7 contract. Completion of the environmental review, including
8 obtaining approvals required under the National Environmental
9 Policy Act, is required before the private entity may be
10 authorized to conduct and complete the final design and start
11 construction of a project. Additionally, all applicable state
12 and federal environmental permits and approvals must be obtained
13 before the private entity may start construction of the portion
14 of a project requiring the permit or approval. Unless and until
15 that occurs, the department is not bound to any further
16 development of the project. The department, and any federal
17 agency acting as a lead agency, may select an alternative other
18 than the one in the proposed project, including the "no-build"
19 alternative. A design-build contract shall provide that the
20 agreement will be modified as necessary to address requirements
21 in the final environmental documents, and shall provide that the
22 agreement may be terminated if the "no-build" alternative is
23 selected or if another alternative is selected that is

1 incompatible with the requirements of the agreement.

2 (m) Public meetings and hearings. All public meetings or
3 hearings required to be held under applicable law or regulation
4 will be directed and overseen by the department, with
5 participation by such other parties as it deems appropriate.

6 (n) Additional matters. Any matter not specifically
7 addressed in this subchapter that pertains to the construction,
8 expansion, extension, related capital maintenance,
9 rehabilitation, alteration, or repair of a highway project
10 pursuant to this subchapter, shall be deemed to be within the
11 primary purview of the commission, and all decisions pertaining
12 thereto, whether or not addressed in this subchapter, shall be
13 as determined by the commission, subject to the provisions of
14 applicable law.

15 (o) Performance and payment security. The department shall
16 require a private entity entering into a design-build contract
17 to provide a performance and payment bond or an alternative form
18 of security, or a combination of bonds and other forms of
19 security, in an amount that, in the department's sole
20 determination, is sufficient to ensure the proper performance of
21 the agreement, and to protect the department and payment bond
22 beneficiaries supplying labor or materials to the private entity
23 or a subcontractor of the private entity. Bonds and alternate

1 forms of security shall be in the form and contain the
2 provisions required in the request for proposals or the design-
3 build contract, with such changes or modifications as the
4 department determines to be in the best interest of the state.
5 In addition to, or in lieu of, performance and payment bonds,
6 the department may require:

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

9 (2) United States bonds or notes, accompanied by a duly
10 executed power of attorney and agreement authorizing the
11 collection or sale of the bonds or notes in the event of the
12 default of the private entity or a subcontractor of the private
13 entity, or such other act or event that, under the terms of the
14 design-build contract, would allow the department to draw upon
15 or access that security;

16 (3) an irrevocable letter of credit issued or confirmed
17 by a financial institution to the benefit of the department,
18 meeting the credit rating and other requirements prescribed by
19 the department, and providing coverage for a period of at least
20 one year following final acceptance of the project or, if there
21 is a warranty period, at least one year following completion of
22 the warranty period;

23 (4) an irrevocable letter signed by a guarantor meeting

1 the net worth or other financial requirements prescribed in the
2 request for proposals or design-build contract, and which
3 guarantees, to the extent required under the request for
4 proposals or design-build contract, the full and prompt payment
5 and performance when due of the private entity's obligations
6 under the design-build contract; or

7 (5) any other form of security deemed suitable by the
8 department.

9

10 §9.153. Solicitation of Proposals.

11 (a) Request for qualifications - notice. If authorized by
12 the commission to issue a request for qualifications for a
13 highway project, the department will set forth the basic
14 criteria for qualifications, experience, technical competence
15 and ability to develop the project, and such other information
16 as the department considers relevant or necessary in the request
17 for qualifications. The department will publish notice
18 advertising the issuance of the request for qualifications in
19 the *Texas Register* and will post the notice and the request for
20 qualifications on the department's Internet website. The
21 department may also elect to furnish the request for
22 qualifications to businesses in the private sector that the
23 department otherwise believes might be interested and qualified

1 to participate in the project that is the subject of the request
2 for qualifications.

3 (b) Request for qualifications - content. At its sole
4 option, the department may elect to furnish conceptual designs,
5 fundamental details, technical studies and reports or detailed
6 plans of the proposed project in the request for qualifications,
7 and may request conceptual approaches to bringing the project to
8 fruition. A request for qualifications must include:

9 (1) information regarding the proposed project's
10 location, scope, and limits;

11 (2) information regarding funding that may be available
12 for the project;

13 (3) criteria that will be used to evaluate the
14 qualifications submittals;

15 (4) the relative weight to be given to the criteria;

16 (5) the deadline by which qualifications submittals must
17 be received by the department; and

18 (6) any other information the department considers
19 relevant or necessary.

20 (c) Request for qualifications - evaluation. The
21 department, after evaluating the qualification submittals
22 received in response to a request for qualifications, will
23 identify and approve a "short-list" that is composed of those

1 entities that are considered most qualified to submit detailed
2 proposals for a proposed project. In evaluating the
3 qualification submittals, the department will consider such
4 qualities that the department considers relevant to the project,
5 including a proposer's qualifications, experience, technical
6 competence, and ability to develop the project, and that may
7 include the private entity's financial condition, management
8 stability, staffing, and organizational structure. The
9 department may interview entities responding to a request for
10 qualifications. The department shall short-list at least two
11 private entities to submit proposals, but may not short-list
12 more private entities than the number of private entities
13 designated in the request for qualifications if a maximum number
14 is designated. The department shall advise each entity
15 providing a qualifications submittal whether it is on the short-
16 list of qualified entities.

17 (d) Requests for proposals. If authorized by the
18 commission, the department will issue a request for proposals
19 from all private entities qualified for the short-list,
20 consisting of the submission of detailed documentation regarding
21 the project. A request for proposals must include:

- 22 (1) information on the overall project goals;
- 23 (2) publicly available cost estimates for the design-

- 1 build portion of the project;
- 2 (3) materials specifications;
- 3 (4) special material requirements;
- 4 (5) a schematic design approximately 30 percent complete;
- 5 (6) known utilities;
- 6 (7) quality assurance and quality control requirements;
- 7 (8) the location of relevant structures;
- 8 (9) notice of any rules or goals adopted by the
- 9 department relating to awarding contracts to disadvantaged
- 10 business enterprises or small business enterprises;
- 11 (10) available geotechnical or other information related
- 12 to the project;
- 13 (11) the status of any environmental review of the
- 14 project;
- 15 (12) detailed instructions for preparing the technical
- 16 proposal, including a description of the form and level of
- 17 completeness of drawings expected;
- 18 (13) the relative weighting of the technical and cost
- 19 proposals and the formula by which the proposals will be
- 20 evaluated and ranked, which must allocate at least 70 percent of
- 21 weighting to the cost proposal;
- 22 (14) the criteria to be used in evaluating the technical
- 23 proposals, and the relative weighting of those criteria;

1 (15) the proposed form of design-build contract; and
2 (16) any other information the department considers
3 relevant or necessary.

4 (e) Request for proposals - submittal requirements. The
5 request for proposals must require the submission of a sealed
6 technical proposal and a separate sealed cost proposal no later
7 than the 180th day after the issuance of the request for
8 proposals, and that provide information relating to:

- 9 (1) the feasibility of developing the project as
10 proposed;
- 11 (2) the proposed solutions to anticipated problems;
- 12 (3) the ability of the proposer to meet schedules;
- 13 (4) the engineering design proposed;
- 14 (5) the cost of delivering the project;
- 15 (6) the estimated number of days required to complete the
16 project; and
- 17 (7) any other information requested by the department.

18 (f) Requests for proposals - payment for work product. The
19 request for proposals shall stipulate an amount of money, as
20 authorized under Transportation Code, §223.249, that the
21 department will pay to an unsuccessful proposer that submits a
22 proposal that is responsive to the requirements of the request
23 for proposals. The commission shall approve the amount of the

1 payment to be stipulated in the request for proposals, which
2 must be a minimum of twenty-five hundredths of one percent of
3 the contract amount. The request for proposals shall provide
4 for the payment of a partial amount in the event the procurement
5 is terminated. In determining the amount of the payment, the
6 commission shall consider:

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

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

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

13 (g) Request for proposals - evaluation. The proposals will
14 be evaluated by the department based on those evaluation
15 criteria the department deems appropriate for the project
16 including those criteria deemed appropriate by the department to
17 maximize the overall performance of the project and the
18 resulting benefits to the state. Specific evaluation criteria
19 and requests for pertinent information will be set forth in the
20 request for proposals. The department shall first open,
21 evaluate, and score each responsive technical proposal, and
22 shall subsequently open, evaluate, and score the cost proposals
23 from proposers that submitted a responsive technical proposal

1 and assign points on the basis of the weighting specified in the
2 request for proposals.

3 (h) Apparent best value proposal. Based on the evaluation
4 using the evaluation criteria described under subsection (g) of
5 this section and set forth in the request for proposals, the
6 department will rank all proposals that are complete, responsive
7 to the request for proposals, and in conformance with the
8 requirements of this subchapter, in accordance with the formula
9 provided in the request for proposals. The department may
10 select the private entity whose proposal offers the apparent
11 best value to the department.

12 (i) Selection of entity. The department shall submit a
13 recommendation to the commission regarding approval of the
14 proposal determined to provide the apparent best value to the
15 department. The commission may approve or disapprove the
16 recommendation, and if approved, will award the design-build
17 contract to the apparent best value proposer. Award may be
18 subject to the successful completion of negotiations, any
19 necessary federal action, execution by the executive director of
20 the design-build contract, and satisfaction of such other
21 conditions that are identified in the request for proposals or
22 by the commission. The proposers will be notified in writing of
23 the department's rankings. The department shall also make the

1 rankings available to the public.

2 (j) Negotiations with selected entity. If authorized by
3 the commission, the department will attempt to negotiate a
4 design-build contract with the apparent best value proposer. If
5 a design-build contract satisfactory to the department cannot be
6 negotiated with that proposer, or if, in the course of
7 negotiations, it appears that the proposal will not provide the
8 department with the overall best value, the department will
9 formally and in writing end negotiations with that proposer and,
10 in its sole discretion, either:

11 (1) reject all proposals;

12 (2) modify the request for proposals and begin again the
13 submission of proposals; or

14 (3) proceed to the next most highly ranked proposal and
15 attempt to negotiate a design-build contract with that entity in
16 accordance with this paragraph.

17

18 §9.154. Protest Procedures.

19 (a) Applicability. This section prescribes exclusive
20 procedures for protests regarding:

21 (1) allegations that the terms of a request for
22 qualifications or request for proposals are wholly ambiguous,
23 contrary to legal requirements applicable to the procurement, or

1 exceed the department's authority;

2 (2) a determination as to whether a qualifications
3 submittal or proposal is responsive to the requirements of the
4 request for qualifications or request for proposals, as
5 applicable;

6 (3) short-listing determinations; and

7 (4) award of a design-build contract.

8 (b) Required early communication for certain protests.

9 Protests concerning the issues described in subsection (a)(1) of
10 this section may be filed only after the proposer has informally
11 discussed the nature and basis of the protest with the
12 department, following the procedures for those discussions
13 prescribed in the request for qualifications or request for
14 proposals, as applicable.

15 (c) Deadlines for protests.

16 (1) Protests concerning the issues described in
17 subsection (a)(1) of this section must be filed as soon as the
18 basis for the protest is known, but no later than 20 calendar
19 days prior to the date for submission of the qualifications
20 submittal or proposal, unless the protest relates to an addendum
21 to the request, in which case the protest must be filed no later
22 than 5 business days after the addendum is issued.

23 (2) Protests concerning the issues described in

1 subsection (a)(2) of this section must be filed no later than 5
2 business days after receipt of the notification of non-
3 responsiveness.

4 (3) Protests concerning the issues described in
5 subsection (a)(3) and (4) of this section must be filed no later
6 than 10 business days after the earliest of the notification of
7 short-listing or intent to award, and the public announcement of
8 the short-listing determination or the apparent best value
9 proposer.

10 (d) Content of protest. Protests shall completely and
11 succinctly state the grounds for protest, its legal authority,
12 and its factual basis, and shall include all factual and legal
13 documentation in sufficient detail to establish the merits of
14 the protest. Statements shall be sworn and submitted under
15 penalty of perjury.

16 (e) Filing of protest. Protests shall be filed in the
17 manner and at the address specified in the request for
18 qualifications or request for proposals, and a copy of the
19 protest shall be submitted to all other proposers for the
20 project.

21 (f) Comments from other proposers. Other proposers may
22 file statements in support of or in opposition to the protest
23 within 7 days of the filing of the protest. The department

1 shall promptly forward copies of all those statements to the
2 protestant. Any statements shall be sworn and submitted under
3 penalty of perjury.

4 (g) Burden of proof. The protestant shall have the burden
5 of proving its protest. No hearing will be held on the protest.
6 The protest shall be decided on the basis of written
7 submissions.

8 (h) Decision on protest. The department employee specified
9 in the request for qualifications or request for proposals, as
10 applicable, shall issue a decision on the protest within 30 days
11 of the filing of the protest. The designated employee shall not
12 be a member of a committee or subcommittee involved in the
13 evaluation of qualifications submittals or proposals for the
14 project.

15 (i) Protestant's payment of costs. If a protest is denied,
16 the proposer filing the protest shall be liable for the
17 department's costs reasonably incurred to defend against or
18 resolve the protest, including legal and consultant fees and
19 costs, and any unavoidable damages sustained by the department
20 as a consequence of the protest.

21 (j) Rights and obligations of proposers. Each proposer, by
22 submitting its proposal, expressly recognizes the limitation on
23 its rights to protest provided in this section, and expressly

1 waives all other rights and remedies and agrees that the
2 decision on the protest is final and conclusive. If a proposer
3 disregards, disputes, or does not follow the exclusive protest
4 remedies provided in this section, it shall indemnify and hold
5 the department and its officers, employees, agents, and
6 consultants harmless from and against all liabilities, fees and
7 costs, including legal and consultant fees and costs, and
8 damages incurred or suffered as a result of that proposer's
9 actions. Each proposer, by submitting a proposal, shall be
10 deemed to have irrevocably and unconditionally agreed to this
11 indemnity obligation.

12

13 §9.155. Conflict of Interest and Ethics Policies.

14 (a) Purpose. This section prescribes ethical standards of
15 conduct applicable to private entities, including consultants
16 and subconsultants, participating in the department's design-
17 build program. A private entity's failure to comply with these
18 standards of conduct may result in the private entity's
19 preclusion from participation in a project or sanctions being
20 imposed under Chapter 10 of this title (relating to Ethical
21 Conduct by Entities Doing Business with the Department).

22 (b) Gifts and benefits. A proposer, design-build
23 contractor, consultant, or subconsultant participating in the

1 design-build program, or an affiliate of any of those entities,
2 may not offer, give, or agree to give a gift or benefit to a
3 member of the commission or to a department employee whose work
4 for the department includes the performance of procurement
5 services relating to a project under this subchapter, or who
6 participates in the administration of a design-build contract.
7 Notwithstanding this prohibition, a consultant or subconsultant,
8 unless a member of a proposer or design-build contractor team,
9 if authorized under subsection (c) of this section may:

10 (1) pay for a working meal on an occasional basis,
11 provided that the payment for a working meal is reciprocated to
12 the extent practical, and the meal is not lavish or extravagant;
13 and

14 (2) offer, give, or agree to give a token item that does
15 not exceed an estimated value of \$25 (excluding cash, checks,
16 stocks, bonds, or similar items), where the item is distributed
17 generally as a normal means of advertising.

18 (c) Conflicts of interest.

19 (1) Purpose. This subsection prescribes department
20 policy on conflicts of interest relating to consultants and
21 subconsultants participating in the design-build program, and
22 thereby:

23 (A) protects the integrity and fairness of the program

1 and all procurements carried out by the department as part of
2 the program;

3 (B) avoids circumstances where a consultant, proposer,
4 or design-build contractor obtains, or appears to obtain, an
5 unfair competitive advantage as a result of work performed by a
6 consultant or subconsultant;

7 (C) provides guidance to private entities so they may
8 assess and make informed business decisions concerning their
9 participation in the program; and

10 (D) protects the department's interests and
11 confidential and sensitive project-specific and programmatic
12 information.

13 (2) Applicability. This subsection applies to all
14 projects undertaken by the department under this subchapter.
15 This subsection applies to consultants and subconsultants, and
16 to individual employees of consultants and subconsultants who
17 participated in the performance of services for the department.
18 A reference in this subsection to a consultant or subconsultant
19 also means individual employees of a consultant or subconsultant
20 who participated in the performance of services for the
21 department. To the extent that the department has previously
22 consented in writing to a consultant's or subconsultant's
23 performance of services that are in conflict with this

1 subsection, participation on a proposer team as an equity owner
2 or team member, acting as a consultant or subconsultant to a
3 proposer, or having a financial interest in a proposer or an
4 equity owner or team member of a proposer, this subsection does
5 not modify or alter the prior consent. The foregoing does not
6 prevent, however, the application of this subsection to the
7 consultant or subconsultant for other projects, including taking
8 into account the performance of services on the project for
9 which consent was obtained. This subsection may by extension
10 prohibit or restrict the ability of a proposer to have a
11 consultant or subconsultant participate on the proposer team as
12 an equity owner or team member, act as a consultant or
13 subconsultant to the proposer, or have a financial interest in
14 the proposer or an equity owner or team member of the proposer.

15 (3) Period in which a conflict of interest applies. If a
16 determination is made under this subsection that the performance
17 of services by a consultant or subconsultant raises a conflict
18 of interest, the resulting prohibition or restriction provided
19 in this subsection continues, both for the private entity and
20 any individual that is an employee of or was employed by the
21 private entity and participated in the performance of services
22 for the department, until the date the performance of services
23 ends and all work product prepared by the entity and other

1 information and data provided to the entity in the performance
2 of services is publicly available, provided that, for a private
3 entity or individual performing procurement services, the
4 resulting prohibition or restriction shall end no earlier than
5 the execution of the design-build contract or cancellation of
6 the procurement for the project for which the private entity or
7 individual is performing services.

8 (4) Application to new firm. If a conflict of interest
9 is determined to apply to an individual under paragraph (3) of
10 this subsection and the individual changes employers, the
11 conflict of interest and prohibition with respect to the
12 individual will not apply to the individual's new employer. If
13 the new employer is otherwise eligible to perform consultant
14 services, the new employer will remain eligible despite the
15 employment of the individual. This paragraph does not apply to
16 an individual employed by an affiliate of its previous employer,
17 and the conflict of interest and prohibition with respect to the
18 individual will apply to that affiliate.

19 (5) Federal requirements. For federal-aid projects, the
20 department must comply with the Federal Highway Administration's
21 organizational conflict of interest regulations (found in 23
22 C.F.R. §636.116). The requirements of this subsection do not
23 limit, modify, or otherwise alter the effect of those

1 regulations, and will be applied consistent with those
2 regulations.

3 (6) General conflict of interest standards. Except as
4 provided in paragraph (7) of this subsection, a consultant that
5 is providing consultant services to the department with respect
6 to a design-build project may not be a proposer or participate
7 as an equity owner, team member, consultant, or subconsultant of
8 or to a proposer for that project, or have a financial interest
9 in any of the foregoing entities with respect to that project.
10 Subject to the requirements of paragraph (8) of this subsection,
11 a consultant that is performing consultant services for a
12 design-build project will not be prohibited from participating
13 on a different design-build project as a proposer or
14 participating as an equity owner, team member, consultant, or
15 subconsultant of or to a proposer for the different project, or
16 having a financial interest in any of the foregoing entities
17 with respect to the different project.

18 (7) Providing services for the same project. A
19 consultant that is actively providing preliminary engineering
20 and architectural services to the department with respect to a
21 design-build project, or that performed and completed
22 environmental or traffic and revenue services for a design-build
23 project, may be a proposer or participate as an equity owner,

1 team member, consultant, or subconsultant of or to a proposer
2 for the same project, or have a financial interest in any of the
3 foregoing entities with respect to that project, provided:

4 (A) with respect to a consultant providing preliminary
5 engineering and architectural services, all work product
6 prepared by the consultant and other information and data
7 provided to the consultant in the performance of services is
8 made available to all proposers prior to the issuance of the
9 final request for proposals for that project; or

10 (B) the executive director issues a written
11 determination under paragraph (9) of this subsection that:

12 (i) the consultant will not, or in the case of the
13 previous performance of consultant services did not, have access
14 to or obtain knowledge of confidential or sensitive information,
15 procedures, policies, and processes that could provide an unfair
16 competitive advantage with respect to the procurement for that
17 project;

18 (ii) the data and information provided to the
19 consultant in the performance of the consultant services is
20 either irrelevant to the procurement for that project or is
21 available on an equal and timely basis to all proposers;

22 (iii) the work products from the consultant
23 incorporated into or relevant to the procurement for that

1 project are generally available on an equal and timely basis to
2 all proposers; and

3 (iv) with respect to environmental services, a record
4 of decision or finding of no significant impact has been issued
5 for the project.

6 (8) Procurement and financial services. A consultant
7 actively engaged and performing procurement services or
8 financial services with respect to a design-build project may be
9 a proposer or participate as an equity owner, team member,
10 consultant, or subconsultant of or to a proposer for another
11 design-build project, or may have a financial interest in any of
12 the foregoing entities with respect to another design-build
13 project, provided that, beginning at the time that the
14 consultant becomes a proposer or participates as part of or
15 acquires a financial interest in a proposer with respect to the
16 other design-build project, as described by this paragraph, the
17 consultant is prohibited from reviewing alternative technical
18 concepts and proposals for the project for which the consultant
19 is providing services to the department until a contract for the
20 project is entered into, and the consultant must institute
21 ethical walls or other safeguards required by the department.

22 (9) Requests for determinations or exceptions. A
23 consultant, proposer, or design-build contractor may submit a

1 request to the executive director for a determination whether
2 participation in a design-build project or the performance of
3 particular services with respect to a design-build project would
4 constitute a conflict of interest, or for approval of an
5 exception to the applicability of this subsection to those
6 services. A request for approval of an exception may be made if
7 a consultant, proposer, or design-build contractor desires to
8 appeal a previous determination that a conflict of interest
9 exists. The executive director will forward a request to the
10 department's Office of General Counsel for analysis and
11 recommendation prior to issuing a decision. In determining
12 whether a conflict of interest exists, or whether to approve an
13 exception, the executive director shall consider:

14 (A) the extent to which the firm or individual employee
15 obtained access to or the ability to gain knowledge of
16 confidential or sensitive information, procedures, policies, and
17 processes concerning the design-build program or a particular
18 project or procurement that could provide an unfair competitive
19 advantage with respect to the procurement or project at issue;

20 (B) the type of consulting services at issue;

21 (C) the particular circumstances of each procurement;

22 (D) the specialized expertise needed by the department
23 and proposers to implement the procurement;

1 (E) the past, current, or future working relationship
2 between the consultant and the department;

3 (F) the period of time between the potential conflict
4 situation and the project at issue; and

5 (G) the potential impact on the procurement and project
6 at issue, including competition.

7 (10) Multiple services. If a consultant is providing
8 more than one category of consultant services to the department
9 and there are differences in the standards, restrictions, and
10 limitations applicable to those categories, the standards,
11 restrictions, and limitations applicable to a category that are
12 more stringent apply.

13 (11) Participation on proposer or design-build contractor
14 team. A consultant participating with respect to a design-build
15 project as a proposer or design-build contractor, or as an
16 equity owner, team member, consultant, or subconsultant of or to
17 a proposer or design-build contractor, or having a financial
18 interest in any of the foregoing entities, is eligible to
19 provide consultant services to the department for another
20 design-build project, provided that, when the consultant is
21 retained to perform consultant services for the department, the
22 restrictions in this subsection shall apply.

23 (12) Restriction of services and conditions to approvals

1 and exceptions. In instances where a written determination
2 under paragraph (9) of this subsection that a conflict of
3 interest does not exist, including, in particular, where the
4 conditions prescribed in paragraph (7) of this subsection have
5 been met, or that grants an exception to the application of this
6 subsection, the department may still, in its discretion:

7 (A) restrict the scope of services the consultant or
8 subconsultant may be eligible to perform for the department in
9 order to further the intent and goals of this subsection; and

10 (B) condition an approval, determination, or exception
11 as the executive director determines appropriate to further the
12 intent and goals of this subsection, including by requiring the
13 consultant, subconsultant, proposer, or design-build contractor
14 to execute confidentiality agreements, institute ethical walls,
15 or segregate certain personnel from participation in a project
16 or the performance of consultant services.

17 (13) Provisions are nonexclusive. The provisions in this
18 subsection do not address every situation that may arise in the
19 context of the department's design-build program nor require a
20 particular decision or determination when faced with facts
21 similar to those described in this subsection. The department
22 retains the ultimate and sole discretion to determine on a case-
23 by-case basis whether a conflict of interest exists and what

1 actions may be appropriate to avoid, neutralize, or mitigate any
2 actual or potential conflict, or the appearance of any conflict.
3 Except as provided in paragraph (14) of this subsection, the
4 provisions of this subsection shall not be construed to preclude
5 or condone any conduct with regard to projects other than
6 projects under a design-build contract. The department will
7 continue to evaluate other projects based on applicable rules
8 and its traditional conflict of interest standards.

9 (14) Comprehensive development agreement projects. A
10 consultant providing procurement or financial services with
11 respect to a comprehensive development agreement project
12 described in Chapter 27, Subchapter A of this title (relating to
13 Comprehensive Development Agreements) may be a proposer or
14 participate as an equity owner, team member, consultant, or
15 subconsultant of or to a proposer for a design-build project, or
16 may have a financial interest in any of the foregoing entities
17 with respect to a design-build project, under the conditions
18 described in paragraph (8) of this subsection.

19 (d) Rules of contact. In order to provide a fair and
20 unbiased procurement process, a request for qualifications will
21 contain rules of contact regulating communications between
22 proposers or any of its team members and the commission, the
23 department, and third parties involved in the procurement.

1 Communication includes face-to-face, telephone, facsimile,
2 electronic-mail (e-mail), or formal written communication. The
3 rules of contact become effective upon the issuance of the
4 request for qualifications and may be modified in the request
5 for proposals. The rules of contact will include provisions:

6 (1) prohibiting a proposer or any of its team members
7 from communicating with another proposer or its team members
8 with regard to the project, request for qualifications, or
9 request for proposals, or either team's qualifications submittal
10 or proposal;

11 (2) requiring each proposer to designate one or more
12 representatives responsible for contact with the department, and
13 requiring the proposer to correspond with the department
14 regarding the project, request for qualifications, or request
15 for proposals only through the department's authorized
16 representatives and the proposer's designated representatives;

17 (3) prohibiting any ex parte communication regarding the
18 project, request for qualifications, or request for proposals or
19 the procurement with any member of the commission or with any
20 department staff, advisors, contractors, or consultants involved
21 in the procurement until the earliest of the execution and
22 delivery of the design-build contract, the rejection of all
23 qualifications submittals or proposals by the department, or the

1 cancellation of the procurement;

2 (4) permitting communications in exceptional
3 circumstances and designating department personnel authorized to
4 approve those communications, and providing that the
5 restrictions on communications shall not preclude or restrict
6 communications with regard to matters unrelated to the project,
7 request for qualifications or request for proposals, or
8 participation in public meetings of the commission or any public
9 or proposer workshop related to the project, request for
10 qualifications, or request for proposals;

11 (5) designating a department employee not involved in the
12 procurement to act as an ombudsman who is authorized to receive
13 confidential communications, including questions, comments, or
14 complaints regarding the procurement and who, after removing, to
15 the extent practicable, any information identifying the
16 proposer, forwards the communications to the employees
17 designated as the department's authorized representatives; and

18 (6) authorizing the executive director to disqualify a
19 proposer from the procurement and participation in the project
20 at issue or to impose another sanction under Chapter 10 of this
21 title (relating to Ethical Conduct by Entities Doing Business
22 with the Department) if it is determined that a proposer has
23 engaged in any improper communications in violation of the rules

1 of contact.

2 (e) Exceptions to rules of contact. Notwithstanding

3 subsection (d)(1) of this section:

4 (1) minor or specialty subcontractors that are shared
5 between two or more proposer teams may communicate with members
6 of each of those teams so long as those proposers establish a
7 protocol to ensure that the subcontractor will not act as a
8 conduit of information between the teams; and

9 (2) the prohibition provided by that subsection does not
10 apply to public discussions regarding the project, request for
11 qualifications, or request for proposals at any department
12 sponsored informational meetings.