

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

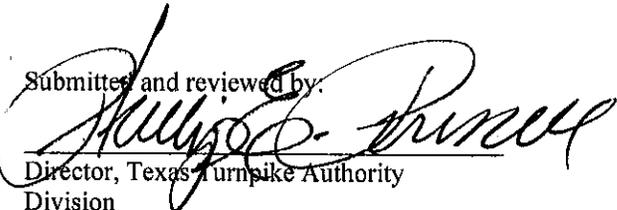
The Texas Transportation Commission (commission) finds it necessary to propose amendments to §§27.1 – 27.5 and new §27.6, relating to comprehensive development agreements, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed amendments and new section, attached to this minute order as Exhibits A and B, are incorporated by reference as though set forth at length verbatim in this minute order.

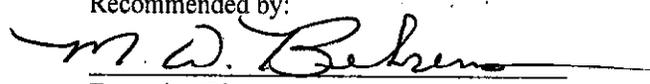
IT IS THEREFORE ORDERED by the commission that the amendments to §§27.1 – 27.5 and new §27.6 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

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:


Director, Texas Turnpike Authority
Division

Recommended by:


Executive Director

110227 SEP 29 05

Minute
Number

Date
Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §§27.1 - 27.5, and new §27.6, concerning
4 comprehensive development agreements.

5

6 EXPLANATION OF PROPOSED AMENDMENTS

7 House Bill 2702, 79th Legislature, Regular Session, 2005,
8 repealed the provisions of Transportation Code, Chapter 361,
9 relating to comprehensive development agreements, and reenacted
10 and amended those provisions in Transportation Code, Chapter
11 223, new Subchapter E (CDA statutes). New Subchapter E expands
12 the types of projects eligible for development under a
13 comprehensive development agreement (CDA), provides more
14 flexibility in determining the submittal requirements in a
15 request for qualifications or proposals, and provides more
16 flexibility in negotiating the terms of a comprehensive
17 development agreement with the apparent best value proposer.

18

19 The number of projects being developed under the department's
20 CDA program has grown substantially. Given the size of the
21 program and the size and complexity of projects developed under
22 comprehensive development agreements, there is a need to clarify
23 and expand the role of the Texas Transportation Commission
24 (commission) in the comprehensive development agreement
25 procurement process, and to amend the rules relating to that

1 process in order to ensure that the procurement process is more
2 efficient and transparent.

3
4 With the size, scope, and magnitude of the department's CDA
5 program, there has been an increasing number of ethical and
6 conflict of interest issues that have arisen, particularly
7 issues relating to consultants interested in potentially working
8 for both the department and for a proposer for a project to be
9 developed under a comprehensive development agreement, and
10 relating to department employees and consultants involved in the
11 procurement process. One purpose of the amendments and new
12 section is to protect the integrity and fairness of the CDA
13 program and all procurements carried out by the department as a
14 part of the program by avoiding circumstances where certain
15 consultants or CDA proposers obtain, or have the appearance of
16 obtaining, an unfair competitive advantage as a result of work
17 performed for the department or that raise other actual or
18 apparent conflicts of interest.

19
20 The proposed amendments and new section are necessary to comply
21 with House Bill 2702, to define the commission's role in the
22 comprehensive development agreement procurement process, and to
23 make other changes needed to make the procurement process more
24 efficient and transparent. This includes providing an informal
25 process for resolving protests raised by CDA proposers relating

1 to the terms of procurement documents, responsiveness or short-
2 listing determinations, and the award of a comprehensive
3 development agreement. The amendments make other changes to the
4 rules needed to improve readability and clarity.

5
6 Section 27.1 is amended to implement changes to the CDA statutes
7 enacted in House Bill 2702, including amendments to those
8 statutes to expand the types of projects eligible to be
9 developed under a comprehensive development agreement. The
10 amendments also recognize that one of the objectives of the CDA
11 program is to minimize department financial contributions to pay
12 project costs, given that the department does not have
13 sufficient funding to pay for all needed projects.

14
15 Section 27.2 is amended to implement changes to the CDA statutes
16 enacted in House Bill 2702, including expanding amendments to
17 those statutes to expand the types of projects eligible for
18 development under a comprehensive development agreement, to
19 clarify that a proposal review fee is only required to be
20 tendered with an unsolicited proposal, and to define additional
21 words and terms used in the rules.

22
23 Section 27.3 is amended to clarify the rights reserved by the
24 department in administering CDA procurements. The CDA statutes
25 authorize the department to include in negotiations the possible

1 inclusion in the comprehensive development agreement of aspects
2 of unsuccessful proposals. Applicable law also allows the
3 department to waive minor deficiencies in a qualifications
4 submittal or proposal and to permit clarifications. Doing so
5 would allow the department to enhance competition in
6 procurements and to continue to review what may be the proposal
7 providing the best value to the department. The amendments also
8 recognize that a proposer's designation in its proposal of
9 information it claims is excepted from disclosure is subject to
10 the concurrence of the Office of the Attorney General.

11
12 The provisions in §27.3 relating to the submission of a proposal
13 review fee are amended to provide that a review fee is only
14 required to be tendered with an unsolicited proposal, and to
15 provide for the reduction of those fees to amounts the
16 department currently anticipates would be incurred to review a
17 proposal for a particular project. Those costs will vary
18 depending on the complexity of the project and whether the
19 department has already planned for the development of the
20 project. The amendments provide for a lower fee if the project
21 is in the department's unified transportation program, and
22 authorize the executive director to approve a lower fee based on
23 the complexity of the project.

24
25 State law authorizes the refund of a fee collected or received

1 by a state agency through mistake of fact or law. Under that
2 provision, §27.3 provides that a proposal review fee that is
3 submitted with a proposal for a project that is not an eligible
4 project, or that the department is not otherwise legally
5 authorized to accept, shall be returned to the proposer. All
6 other proposal review fees are nonrefundable. Section 27.3 is
7 also amended to, as authorized under the CDA statutes, prescribe
8 additional requirements for alternative forms of security
9 provided under a comprehensive development agreement. Section
10 27.3 is further amended to require the department to adopt an
11 ethics policy applicable to comprehensive development agreement
12 procurements and to prescribe requirements for that policy.

13
14 Section 27.4 is amended to clarify that the commission must
15 approve the issuance of a request for qualifications or request
16 for proposals relating to a project to be developed under a
17 comprehensive development agreement. Section 27.4 also
18 implements changes to the CDA statutes enacted in House Bill
19 2702, makes conforming changes, and clarifies that the
20 commission must approve the amount of payment for work product
21 required to be stipulated in a request for proposals.

22
23 Section 27.4 also provides that the department will submit a
24 recommendation to the commission regarding the approval of the
25 detailed proposal determined to provide the apparent best value

1 to the department and the award of the comprehensive development
2 agreement. These amendments are consistent with current
3 practice, including current conditions to award imposed by the
4 commission for past projects.

5
6 Section 27.5 is amended to provide that the department will make
7 an initial determination whether to further evaluate an
8 unsolicited proposal. If the department determines that further
9 evaluation of the proposal is warranted, based on the criteria
10 prescribed in §27.5, a recommendation will be made to the
11 commission to issue a request for competing proposals and
12 qualifications. This amendment will provide a more efficient
13 process for rejecting proposals that do not comport with the
14 criteria established for unsolicited proposals.

15
16 Section 27.5 is also amended to require the private entity that
17 submitted the original unsolicited proposal to submit a
18 supplemental proposal in response to the request for competing
19 proposals and qualifications. The submission of a supplemental
20 proposal that contains the information required in the request
21 for competing proposals and qualifications is necessary in order
22 to provide an "apples to apples" comparison of proposals.

23 Section 27.5 is further amended to clarify that any proposal
24 that is received during the response period prescribed in a
25 request for competing proposals and qualifications that is

1 deemed by the department to be a noncompeting proposal, will be
2 evaluated as a new unsolicited proposal in accordance with the
3 requirements of §27.5.

4
5 New Section 27.6 prescribes exclusive procedures for protests
6 filed by proposers for projects to be developed under a
7 comprehensive development agreement. These procedures are
8 intended to provide an informal process for resolving protests
9 raised by CDA proposers relating to the terms of procurement
10 documents, responsiveness or short-listing determinations, and
11 the award of a comprehensive development agreement. The
12 commission believes providing an informal process for resolving
13 protests will lead to a CDA program and procurement process that
14 is more transparent and that will, as required by the CDA
15 statutes, promote fairness, obtain private participants in
16 projects, and promote confidence among those participants. By
17 submitting a proposal, a proposer agrees to the exclusive
18 protest procedure and agrees the decision on the protest is
19 final and conclusive.

20
21 Section 27.6 prescribes requirements for informal discussions
22 before certain protests may be filed with the department,
23 prescribes deadlines for protests, prescribes the information
24 that must be contained in a protest and where it shall be filed,
25 authorizes other proposers to file statements in support of or

1 in opposition to the protest, and provides that the protest
2 shall be decided on the basis of written submissions.

3
4 Section 27.6 provides that the request for qualifications,
5 request for competing proposals and qualifications, or request
6 for proposals will specify the department employee assigned the
7 responsibility for issuing a decision on the protest within 30
8 days of its filing. In order to ensure an objective evaluation
9 of the protest by a person not involved in proposal evaluations,
10 the designated employee may not be a member of a subcommittee or
11 committee involved in the evaluation of proposals for the
12 project. Section 27.6 also prescribes requirements for the
13 protestant's payment of the department's costs if a protest is
14 denied. This is intended to ensure that only legitimate
15 protests are filed.

16

17 FISCAL NOTE

18 James Bass, Chief Financial Officer, has determined that for
19 each of the first five years the amendments and new section as
20 proposed are in effect, there will be no fiscal implications for
21 state or local governments as a result of enforcing or
22 administering the amendments and new section. There are no
23 anticipated economic costs for persons required to comply with
24 the sections as proposed.

25

1 Phillip Russell, Director, Texas Turnpike Authority Division,
2 has certified that there will be no significant impact on local
3 economies or overall employment as a result of enforcing or
4 administering the amendments and new section.

5

6 PUBLIC BENEFIT

7 Mr. Russell has also determined that for each year of the first
8 five years the sections are in effect, the public benefit
9 anticipated as a result of enforcing or administering the
10 amendments and new section will be to make the comprehensive
11 development agreement procurement process more efficient and
12 transparent and to facilitate agreements with private
13 participants in those projects. There will be no adverse
14 economic effect on small businesses.

15

16 SUBMITTAL OF COMMENTS

17 Written comments on the proposed amendments and new section may
18 be submitted to Phillip Russell, Director, Texas Turnpike
19 Authority, Texas Department of Transportation, 125 East 11th
20 Street, Austin, Texas 78701-2483. The deadline for receipt of
21 comments is 5:00 p.m. on November 14, 2005.

22

23 STATUTORY AUTHORITY

24 The amendments are proposed under Transportation Code, §201.101,
25 which provides the commission with the authority to establish

1 rules for the conduct of the work of the department, and more
2 specifically, Transportation Code, §223.209, which requires the
3 commission to adopt rules governing selection of an entity for a
4 comprehensive development agreement and negotiations.

5

6 CROSS REFERENCE TO STATUTE

7 Transportation Code, Chapter 223, Subchapter E.

1 SUBCHAPTER A. COMPREHENSIVE DEVELOPMENT AGREEMENTS [~~POLICY,~~
2 ~~RULES, AND PROCEDURES FOR PRIVATE INVOLVEMENT IN DEPARTMENT~~
3 ~~TURNPIKE PROJECTS~~]
4

5 §27.1. Statement of Policy.

6 (a) It is the policy of the department to consider the
7 feasibility of private involvement in projects the department
8 ~~[every turnpike project it]~~ undertakes. The objectives of this
9 policy are to:

10 (1) expand the scope of [~~turnpike~~] projects studied;

11 (2) accelerate the construction and completion of
12 ~~[turnpike]~~ projects;

13 (3) reduce the overall costs of a [~~turnpike~~] project;

14 ~~[and]~~

15 (4) minimize department financial contributions to pay
16 the costs of a project; and

17 (5) maximize the benefits of [~~turnpike~~] project
18 facilities.

19 (b) To encourage private participation in eligible
20 projects, the department may issue requests for proposals from
21 private entities to acquire, design, develop, finance,
22 construct, reconstruct, extend, expand, maintain, or operate
23 eligible [~~turnpike~~] projects under a comprehensive development
24 agreement. The department will also accept unsolicited

1 proposals from private entities to acquire, design, develop,
2 finance, construct, reconstruct, extend, expand, maintain, or
3 operate eligible [~~turnpike~~] projects under a comprehensive
4 development agreement, and will evaluate those proposals in
5 accordance with these rules and the requirements of
6 Transportation Code, Chapter 223, Subchapter E [~~Turnpike Act~~].
7 The department will consider the extent to which private
8 involvement in existing and future [~~turnpike~~] projects of the
9 department is practicable and beneficial, and will analyze
10 whether department participation is practicable and beneficial
11 with respect to projects proposed by responsible private
12 parties. The department may formulate selection criteria for
13 its use in considering the private entities with which the
14 department may contract to undertake responsibilities for
15 eligible [~~its~~] projects, as well as for evaluation of projects
16 suggested to the department as suitable for private
17 participation.

18 (c) These rules apply to private involvement in the
19 acquisition, design, development, financing, construction,
20 reconstruction, extension, expansion, maintenance, or operation
21 of all or part [~~substantially all~~] of an eligible [~~a turnpike~~]
22 project or of multiple eligible [~~turnpike~~] projects. These
23 rules are not intended to limit or otherwise apply to the

1 department's procurement of goods and services in the ordinary
2 course of its operations, for which the department may seek
3 private participation in accordance with [~~the Turnpike Act and~~
4 ~~other~~] applicable laws, rules, and policies.

5
6 §27.2. Definitions. The following words and terms, when used
7 in this subchapter, shall have the following meanings, unless
8 the context clearly indicates otherwise.

9 (1) Commission--The Texas Transportation Commission.

10 (2) Comprehensive development agreement--An agreement
11 with a private entity that, at a minimum, provides for the
12 design and construction, reconstruction, extension, expansion,
13 or improvement of an eligible [~~a turnpike~~] project and may also
14 provide for the financing, acquisition, maintenance, or
15 operation of an eligible [~~a turnpike~~] project.

16 (3) Department--The Texas Department of Transportation.

17 (4) Design--Includes planning services, technical
18 assistance, and technical studies provided in support of the
19 environmental review process undertaken with respect to a
20 [~~turnpike~~] project, as well as surveys, investigations, the
21 development of reports, studies, plans and specifications, and
22 other professional services provided for a project.

23 (5) Eligible project--A project described in

1 Transportation Code, §223.201, and including a:

2 (A) toll project;

3 (B) facility or a combination of facilities on the
4 Trans-Texas Corridor, as defined in §24.11 of this title
5 (relating to Comprehensive Development Agreements);

6 (C) state highway improvement project that includes
7 both tolled and nontolled lanes and that may include nontolled
8 appurtenant facilities;

9 (D) state highway improvement project in which the
10 private entity has an interest in the project;

11 (E) state highway improvement project financed wholly
12 or partly with the proceeds of private activity bonds, as
13 defined by Section 141(a), Internal Revenue Code of 1986; or

14 (F) project that combines a toll project and a rail
15 facility as defined in Transportation Code, §91.001.

16 (6) Executive director--The executive director of the
17 department or designee not below the level of assistant
18 executive director.

19 (7) [~~5~~] Proposal review fee--A fee prescribed by these
20 rules that is required to [~~must~~] be tendered with any
21 unsolicited proposal [~~or with any proposal submitted under~~
22 §27.5(d) of this subchapter].

23 (8) [~~6~~] Request for proposals--A request for submittal

1 of a detailed proposal from private entities to acquire, design,
2 develop, finance, construct, reconstruct, extend, expand,
3 maintain, or operate an eligible project [~~turnpike projects~~
4 ~~pursuant to the Turnpike Act~~].

5 (9) [~~(7)~~] Request for qualifications--A request for
6 submission by a private entity of a description of that entity's
7 experience, technical competence, and capability to complete a
8 proposed project, and such other information as the department
9 considers relevant or necessary [~~a proposed financial plan for~~
10 ~~the proposed project~~].

11 [~~(8) Turnpike Act--Transportation Code, Chapter 361.~~]

12 (10) [~~(9)~~] Toll [~~Turnpike~~] project--Has the meaning
13 assigned by Transportation Code, §201.001 [~~A toll highway~~
14 ~~constructed, maintained or operated under Transportation Code,~~
15 ~~Chapter 361 as part of the state highway system and any~~
16 ~~improvement, extension or expansion to the highway, including:]~~

17 [~~(A) a facility to relieve traffic congestion and~~
18 ~~promote safety;~~]

19 [~~(B) a bridge, tunnel, overpass, underpass,~~
20 ~~interchange, entrance plaza, approach, toll house, service road,~~
21 ~~ramp, or service station;~~]

22 [~~(C) an administration, storage, or other building the~~
23 ~~department considers necessary to operate the project;~~]

1 ~~[(D) property rights, easements and interests the~~
2 ~~department acquires to construct or operate the project,]~~

3 ~~[(E) a parking area or structure, rest stop, park, and~~
4 ~~any other improvement or amenity the department considers~~
5 ~~necessary, useful, or beneficial for the operation of a turnpike~~
6 ~~project; and]~~

7 ~~[(F) a toll-free facility that is appurtenant to and~~
8 ~~necessary for the efficient operation of a turnpike project,~~
9 ~~including a service road, access road, ramp, interchange,~~
10 ~~bridge, or tunnel].~~

11

12 §27.3. General Rules for Private Involvement.

13 (a) Solicited and unsolicited proposals. The rules in this
14 subchapter address the manner by which the department intends to
15 evaluate submissions received from private entities in response
16 to requests for qualifications and proposals issued by the
17 department, as well as unsolicited proposals received by the
18 department.

19 (b) Reservation of rights. The department reserves all
20 rights available to it by law in administering these rules,
21 including without limitation the right in its sole discretion
22 to:

23 (1) withdraw a request for qualifications or a request

1 for proposals at any time, and issue a new request;

2 (2) reject any and all qualifications submittals or
3 proposals, whether solicited or unsolicited, at any time;

4 (3) terminate evaluation of any and all qualifications
5 submittals or proposals, whether solicited or unsolicited, at
6 any time;

7 (4) issue a request for qualifications relating to a
8 project described in an unsolicited proposal after the rejection
9 or termination of the evaluation of the proposal and any
10 competing proposals;

11 (5) suspend, discontinue, or terminate comprehensive
12 development agreement negotiations with any proposer at any time
13 prior to the actual authorized execution of such agreement by
14 all parties;

15 (6) negotiate with a proposer without being bound by any
16 provision in its proposal, whether solicited or unsolicited;

17 (7) negotiate with a proposer to include aspects of
18 unsuccessful proposals for that project in the comprehensive
19 development agreement;

20 (8) request or obtain additional information about any
21 proposal from any source [~~, whether solicited or unsolicited~~];

22 (9) [~~(8)~~] modify, issue addenda to, or cancel any request
23 for qualifications or request for proposals;

1 (10) waive deficiencies in a qualifications submittal or
2 proposal, accept and review a non-conforming qualifications
3 submittal or proposal, or permit clarifications or supplements
4 to a qualifications submittal or proposal;

5 (11) [+9] revise, supplement, or make substitutions for
6 all or any part of these rules; or

7 (12) [+10] retain or return all or any portion of the
8 fees required to be paid by proposers under this subchapter, as
9 provided in subsection (h) of this section.

10 (c) [~~b~~] Costs incurred by proposers. Except as provided
11 in §27.4(f) [~~n~~] of this subchapter, under no circumstances
12 will the state, the department, or any of their agents,
13 representatives, consultants, directors, officers or employees
14 be liable for, or otherwise obligated to, reimburse[~~r~~] the costs
15 incurred by proposers, whether or not selected for negotiations,
16 in developing solicited or unsolicited proposals or in
17 negotiating agreements.

18 (d) Department information. Any and all information the
19 department makes available to proposers shall be as a
20 convenience to the proposer and without representation or
21 warranty of any kind except as may be expressly specified in the
22 request for qualifications or request for proposals. Proposers
23 may not rely upon any oral responses to inquiries.

1 (e) Procedure for communications. If a proposer has a
2 question regarding these rules or any request for qualifications
3 or request for proposals issued by the department, the proposer
4 shall [~~must~~] submit the question in writing to the person
5 responsible for receiving all submissions, as designated in the
6 request for qualifications or request for proposals, and the
7 department will provide the responses [~~answers~~] in writing.

8 (f) Compliance with rules. In submitting any proposal,
9 [~~whether solicited or unsolicited,~~] the proposer shall be deemed
10 to have unconditionally and irrevocably consented and agreed to
11 the foregoing provisions and all other provisions of this
12 subchapter [~~these rules~~].

13 (g) [+e] Proposer information submitted to department.
14 All qualifications submittals or proposals [~~whether solicited~~
15 ~~or unsolicited,~~] submitted to the department become the property
16 of the department and may be, except as provided by
17 Transportation Code, §223.204 [~~§361.3023~~], subject to the Public
18 Information Act, Government Code, Chapter 552. Proposers should
19 familiarize themselves with the provisions of Transportation
20 Code, §223.204 [~~§361.3023~~] and the Public Information Act. In
21 no event shall the state, the department, or any of their
22 agents, representatives, consultants, directors, officers, or
23 employees be liable to a proposer for the disclosure of all or a

1 portion of a proposal submitted under this subchapter. If the
2 department receives a request for public disclosure of all or
3 any portion of a proposal, the department will notify the
4 applicable proposer of the request and inform such proposer that
5 it has an opportunity to assert, in writing, a claimed exception
6 under the Public Information Act or other applicable law within
7 the time period specified in the department's notice and allowed
8 under the Public Information Act. If a proposer has special
9 concerns about information it desires to make available to the
10 department, but which it believes constitutes a trade secret,
11 proprietary information or other information excepted from
12 disclosure, the proposer should specifically and conspicuously
13 designate that information as such in its proposal. The
14 proposer's designation shall not be dispositive of the trade
15 secret, proprietary, or exempted nature of the information so
16 designated.

17 (h) ~~[(d)]~~ Proposal review fee. A ~~[nonrefundable and]~~
18 nonnegotiable proposal review fee shall ~~[may]~~ be required for
19 any unsolicited proposal submitted under this subchapter and ~~[or~~
20 ~~for any proposal submitted under §27.5(d) of this subchapter.~~
21 ~~The proposal review fee shall be]~~ applied by the department to
22 offset the cost of processing and reviewing the proposal
23 ~~[applicable proposals]~~. An ~~[Any]~~ unsolicited proposal for a

1 project in the department's unified transportation program must
2 be accompanied by a proposal review fee of \$5,000 [~~\$20,000~~]. An
3 unsolicited proposal for a project that is not in the
4 department's unified transportation program must be accompanied
5 by a [The] proposal review fee of \$10,000 [~~for any proposal~~
6 ~~submitted during the period described in §27.5(d) of this~~
7 ~~subchapter shall be \$20,000, unless otherwise expressly provided~~
8 ~~in the department's notice described in that section]~~. The
9 executive director may approve a proposal review fee for a
10 particular project in a lower amount. In approving a lower fee,
11 the executive director shall consider the complexity of the
12 project. Failure to submit the required proposal review fee [7
13 ~~if any,~~] shall bar the department's consideration of the
14 applicable proposal. All fees shall be submitted in the form of
15 a cashier's check made payable to the department. A proposal
16 review fee that is submitted with a proposal for a project that
17 is not an eligible project, or that the department is not
18 otherwise legally authorized to accept shall be returned to the
19 proposer. All other proposal review fees are nonrefundable.

20 (i) [~~e~~] Sufficiency of proposal. All proposals, whether
21 solicited or unsolicited, should be as thorough and detailed as
22 possible so that the department may properly evaluate the
23 potential feasibility of the proposed project as well as the

1 capabilities of the proposer and its team members to provide the
2 proposed services and complete the proposed project.

3 (j) ~~(f)~~ Project studies. Studies that the department
4 deems necessary as to route designation, civil engineering,
5 traffic and revenue, environmental compliance, and any other
6 matters will be assigned, conducted, and paid for as negotiated
7 between the department and the successful proposer and set forth
8 in the comprehensive development agreement or in any separate
9 contract for consultant services. Unless otherwise provided in
10 the request for proposals [~~issued with respect to a solicited~~
11 ~~proposal~~], the department will favor proposals [~~whether~~
12 ~~solicited or unsolicited,~~] in which the costs for studies will
13 be advanced by the private entity, particularly if the advance
14 is at the private entity's risk [~~developer~~]. The department may
15 elect to pay [~~reserves the right to discharge~~], in whole or in
16 part, the costs for such studies in its sole discretion [~~and~~
17 ~~pursuant to the Turnpike Act~~]. The department may require that
18 the financial plan for each proposal [~~whether solicited or~~
19 ~~unsolicited,~~] provide for reimbursement of all related expenses
20 incurred by the department, as well as any department study
21 funds utilized[~~]~~ in connection with the project.

22 (k) ~~(g)~~ Proposer's additional responsibilities. The
23 department, in its sole discretion, may authorize the successful

1 proposer to seek licensing, permitting, approvals, and
2 participation required from other governmental entities and
3 private parties, subject to such oversight and review by the
4 department as specified in the comprehensive development
5 agreement or in any separate contract for consultant services.

6 (1) [~~h~~] Proposer's work on environmental review of
7 project. The department may solicit proposals or accept
8 unsolicited proposals in which the proposer is responsible for
9 providing assistance in the environmental review and clearance
10 of the proposed project, including the preparation of
11 environmental impact assessments and analyses and the provision
12 of technical assistance and technical studies to the department
13 or its environmental consultant relating to the environmental
14 review and clearance of the proposed project. The environmental
15 review and the documentation of that review shall at all times
16 be conducted as directed by the department and subject to the
17 oversight of the department, and shall comply with all
18 requirements of state and federal law, applicable federal
19 regulations, and the National Environmental Policy Act (42
20 U.S.C. §4321 et seq.), if applicable, including but not limited
21 to the study of alternatives to the proposed project and any
22 proposed alignments, procedural requirements, and the completion
23 of any and all environmental documents required to be completed

1 by the department and any federal agency acting as a lead
2 agency. The department:

3 (1) shall determine the scope of work to be performed by
4 the private entity [~~developer~~] or its consultants [~~consultant~~]
5 or subcontractors [~~subcontractor~~];

6 (2) shall specify the level of design, alternatives to be
7 reviewed, impacts to consider, and other information to be
8 provided by the private entity [~~developer~~] or its consultants
9 [~~consultant~~] or subcontractors [~~subcontractor~~]; and

10 (3) shall independently review any studies and
11 conclusions reached by the private entity [~~developer~~] or its
12 consultants [~~consultant~~] or subcontractors [~~subcontractor~~]
13 before their inclusion in an environmental document.

14 (m) [~~(i)~~] Effect of environmental requirements on
15 comprehensive development agreement. Completion of the
16 environmental review is required before the private entity
17 [~~developer~~] may be authorized to conduct and complete the final
18 design and start construction of a project. Additionally, all
19 applicable state and federal environmental permits and approvals
20 must be obtained before the private entity [~~developer~~] may start
21 construction of the portion of a project requiring the permit or
22 approval. Unless and until that occurs, the department is not
23 bound to any further development of the project. The

1 department, and any federal agency acting as a lead agency, may
2 select an alternative other than the one in the proposed
3 project, including [~~but not limited to~~] the "no-build"
4 alternative. A comprehensive development agreement shall
5 provide that the agreement will be modified as necessary to
6 address requirements in the final environmental documents, and
7 shall provide that the agreement may be terminated if the "no-
8 build" alternative is selected or if another alternative is
9 selected that is incompatible with the requirements of the
10 agreement.

11 (n) [+(+)] Public meetings and hearings. All public
12 meetings or hearings required to be held pursuant to applicable
13 law or regulation will be directed and overseen by the
14 department, with participation by such other parties as it deems
15 appropriate.

16 (o) [+(*)] Additional matters. Any matter not specifically
17 addressed in this subchapter which pertains to the acquisition,
18 design, development, financing, construction, reconstruction,
19 extension, expansion, maintenance, or operation of a [~~turnpike~~]
20 project pursuant to this subchapter, shall be deemed to be
21 within the primary purview of the commission, and all decisions
22 pertaining thereto, whether or not addressed in this subchapter,
23 shall be as determined by the commission, subject to the

1 provisions of [~~the Turnpike Act and other~~] applicable law.

2 (p) [+1+] Performance and payment security. The [~~As~~
3 ~~provided in the Turnpike Act, the~~] department shall require a
4 private entity [~~developer~~] entering into a comprehensive
5 development agreement to provide a performance and [~~or~~] payment
6 bond or an alternative form of security in an amount, in the
7 department's sole determination, that is sufficient to ensure
8 the proper performance of the agreement, and to protect the
9 department and payment bond beneficiaries supplying labor or
10 materials to the private entity [~~developer~~] or a subcontractor
11 of the private entity [~~developer~~]. Bonds and alternate forms of
12 security shall be in the form and contain the provisions
13 required in the request for proposals or the comprehensive
14 development agreement, with such changes or modifications as the
15 department determines to be in the best interest of the state.
16 In addition to, or in lieu of, performance and payment bonds,
17 the department may require:

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

20 (2) United States bonds or notes, accompanied by a duly
21 executed power of attorney and agreement authorizing the
22 collection or sale of the bonds or notes in the event of the
23 default of the private entity [~~developer~~] or a subcontractor of

1 the private entity [develope~~r~~], or such other act or event that,
2 under the terms of the comprehensive development agreement,
3 would allow the department to draw upon or access such security;

4 (3) an irrevocable letter of credit issued or confirmed
5 by a financial institution to the benefit of the department,
6 meeting the credit rating and other requirements prescribed by
7 the department, and providing coverage for a period of at least
8 one year following final acceptance of the project and
9 completion of any warranty period; [~~or~~]

10 (4) an irrevocable letter signed by a guarantor meeting
11 the net worth or other financial requirements prescribed in the
12 request for proposals or comprehensive development agreement,
13 and which guarantees, to the extent required under the request
14 for proposals or comprehensive development agreement, the full
15 and prompt payment and performance when due of the private
16 entity's [develope~~r~~'s] obligations under the comprehensive
17 development agreement and other documents and agreements
18 executed by the private entity [develope~~r~~] in connection with
19 the comprehensive development agreement; or

20 (5) any other form of security deemed suitable by the
21 department.

22 (q) Ethics policy. The department shall adopt an ethics
23 policy applicable to comprehensive development agreement

1 procurements that includes:

2 (1) conflict of interest guidelines applicable to private
3 entities interested in participating in the department's
4 comprehensive development agreement program;

5 (2) conflict of interest requirements applicable to
6 department employees and consultants involved in the
7 comprehensive development agreement program, including
8 provisions relating to impermissible interests held by an
9 employee or consultant in a proposer or project; and

10 (3) provisions relating to the acceptance of gifts and
11 benefits by department employees.

12

13 §27.4. Solicited Proposals.

14 (a) Applicability. If the department develops a concept
15 for private participation in an eligible [~~a turnpike~~] project,
16 it will solicit participation in accordance with the
17 requirements of this section.

18 (b) Request for qualifications - notice. If authorized by
19 the commission to issue a request for qualifications for an
20 eligible project, the [The] department will set forth the basic
21 criteria for professional experience, technical competence
22 [~~expertise, financial capability~~], and capability to complete a
23 proposed project, and such other information as the department

1 considers relevant or necessary [~~end-product expectations~~] in
2 the [a] request for qualifications and will publish it at a
3 minimum in the Texas Register and in one or more newspapers of
4 general circulation in this state. The department may also
5 elect to furnish the request for qualifications to businesses in
6 the private sector that the department otherwise believes might
7 be interested and qualified to participate in the [~~turnpike~~]
8 project which is the subject of the request for qualifications.

9 (c) Request for qualifications - content. At its sole
10 option, the department may elect to furnish conceptual designs,
11 fundamental details, technical studies and reports or detailed
12 plans of the proposed project in the request for qualifications.
13 The request for qualifications may request one or more
14 conceptual approaches to bring the project to fruition.

15 [~~(d) The request for qualifications may request one or more~~
16 ~~conceptual approaches to bring the turnpike project to fruition.~~
17 ~~The request for qualifications shall request a proposed~~
18 ~~financial plan for the project that includes projected project~~
19 ~~costs and proposed sources of funds].~~

20 (d) Request for qualifications - evaluation. [~~(e)~~] The
21 department, after evaluating the submissions received in
22 response to a request for qualifications, will identify those
23 entities that will be considered qualified to submit detailed

1 proposals for a proposed project. In evaluating the
2 submissions, the department will consider such qualities that
3 the department considers relevant to the project, which may
4 include the private [each] entity's financial condition,
5 management stability, technical [technological] capability,
6 experience, staffing, and organizational structure [project
7 commitment, and such other qualities that the department
8 considers relevant to the successful completion of the project].
9 The request for qualifications will include the criteria used to
10 evaluate the submissions and the relative weight given to the
11 criteria. The department shall advise each entity providing a
12 submission whether it is on the "short-list" of qualified
13 entities.

14 (e) [+f] Requests for proposals. If authorized by the
15 commission, the [-The] department will issue a request for
16 proposals from all private entities qualified for the short-
17 list, consisting of the submission of detailed documentation
18 regarding the [turnpike] project. The request for proposals may
19 require the submission of additional information relating to:

20 (1) the proposer's qualifications and demonstrated
21 technical competence;

22 (2) the feasibility of developing the project as
23 proposed;

- 1 (3) detailed engineering or architectural designs;
2 (4) the proposer's ability to meet schedules;
3 (5) a detailed financial plan, including costing
4 methodology, cost proposals, and project financing approach; or
5 (6) any other information the department considers
6 relevant or necessary.

7 (f) Requests for proposals - payment for work product. The
8 request for proposals shall, as authorized under Transportation
9 Code, §223.203(m), stipulate the maximum amount of money the
10 department will pay to an unsuccessful proposer that submits a
11 detailed proposal that is responsive to the requirements of the
12 request for proposals. The commission shall approve the amount
13 of the payment to be stipulated in the request for proposals.

14 (g) Joint proposal by private entity and environmental
15 consultant. If the department solicits proposals in which an
16 entity affiliated with the proposing private entity [~~developer~~]
17 will act as the department's environmental consultant for the
18 proposed project, the request for proposals may require the
19 submission of a consolidated joint proposal from the private
20 entity [~~developer~~] and the environmental consultant or
21 subcontractor that results in a comprehensive development
22 agreement and separate contract for environmental services.

23 (h) Detailed proposal evaluation criteria. The proposals

1 will be evaluated by the department based on those evaluation
2 criteria the department deems appropriate for the project, which
3 may include [~~as to their feasibility~~ (~~including~~] the
4 reasonableness of any [~~the~~] financial plan submitted by a
5 proposer [+], the reasonableness of the project schedule
6 [~~realistic time frame~~], reasonableness of assumptions (including
7 those related to ownership, legal liability, law enforcement,
8 and operation and maintenance of the project), forecasts,
9 financial exposure and benefit to the department, compatibility
10 with other planned or existing transportation facilities,
11 likelihood of obtaining necessary approvals and other support,
12 cost and pricing, toll rates and projected usage, scheduling,
13 environmental impact, manpower availability, use of technology,
14 governmental liaison, and project coordination, with attention
15 to efficiency, quality of finished product and such other
16 criteria, including conformity with department policies,
17 guidelines and standards, as may be deemed appropriate by the
18 department to maximize the overall performance of the project
19 and the resulting benefits to the state. Specific evaluation
20 criteria and requests for pertinent information will be set
21 forth in the request for proposals.

22 (i) Apparent best value proposal. Based on the evaluation
23 and the evaluation criteria described under subsection (h) of

1 this section~~[7]~~ and set forth in the request for proposals, the
2 department will rank all proposals that are complete, responsive
3 to the request for proposals, and in conformance with the
4 requirements of this subchapter, and may select the private
5 entity whose proposal offers the apparent best value to the
6 department. If the request for proposals provides for a
7 consolidated joint proposal to be submitted for a separate
8 environmental consultant contract as well as the comprehensive
9 development agreement, the request for proposals shall specify
10 how the two parts of the proposal will be evaluated in making
11 the overall best value determination. ~~[The proposers will be~~
12 ~~notified in writing of the department's rankings. The~~
13 ~~department shall also make the rankings available to the~~
14 ~~public.]~~

15 (j) Selection of entity. The department shall submit a
16 recommendation to the commission regarding approval of the
17 proposal determined to provide the apparent best value to the
18 department. The commission may approve or disapprove the
19 recommendation, and if approved, will award the comprehensive
20 development agreement to the apparent best value proposer.
21 Award may be subject to the successful completion of
22 negotiations, any necessary federal action, execution by the
23 executive director of the comprehensive development agreement,

1 and satisfaction of such other conditions that are identified in
2 the request for proposals or by the commission. The proposers
3 will be notified in writing of the department's rankings. The
4 department shall also make the rankings available to the public.

5 ~~[Final selection of any proposal will be dependent, in~~
6 ~~part, on the adequacy of the financial plan presented in that~~
7 ~~proposal. The department will review the adequacy of the~~
8 ~~financial plan presented in the proposal and determine if it is~~
9 ~~based on reasonable financial assumptions.]~~

10 (k) Negotiations with selected entity. If authorized by
11 the commission, ~~[Only if a proposal is determined to be~~
12 ~~financially feasible and to provide a reasonable basis for~~
13 ~~further development of the proposal will]~~ the department will
14 ~~[then]~~ attempt to negotiate a comprehensive development
15 agreement with the apparent best value proposer ~~[that party]~~ to
16 design, develop, construct, reconstruct, extend, expand,
17 maintain, ~~[repair,]~~ or operate the ~~[turnpike]~~ project and (if
18 included in the request for proposals) an environmental
19 consultant contract. ~~[The Attorney General or the Attorney~~
20 ~~General's designated representative will be included in the~~
21 ~~negotiations with the proposer.]~~ If a comprehensive development
22 agreement satisfactory to the department cannot be negotiated
23 with that proposer, or if, in the course of negotiations, it

1 appears that the proposal will not provide the department with
2 the overall best value, the department will formally end
3 negotiations with that proposer and, in its sole discretion,
4 either:

5 (1) reject all proposals;

6 (2) [~~terminate or suspend the evaluation of all~~
7 ~~proposals,~~]

8 [~~(3) cancel the request for proposals,~~]

9 [~~(4)~~] modify the request for proposals and begin again
10 the submission of proposals; or

11 (3) [~~(5)~~] proceed to the next most highly ranked proposal
12 and attempt to negotiate a comprehensive development agreement
13 with that entity [~~party~~] in accordance with this paragraph.

14 (1) Negotiations with environmental consultant. If an
15 environmental consultant contract satisfactory to the department
16 cannot be negotiated with the selected consultant, the
17 department may elect to terminate negotiations and proceed with
18 the negotiation of the comprehensive development agreement only.

19 [~~(m) If during the course of negotiations with the highest~~
20 ~~ranking proposer it appears that the proposal will not provide~~
21 ~~the department with the overall best value, the department may~~
22 ~~enter into negotiations with the proposer submitting the next~~
23 ~~highest ranking proposal.]~~

1 ~~[(n) The request for proposals shall, as authorized under~~
2 ~~Transportation Code, §361.3022(m) and other applicable law,~~
3 ~~stipulate the amount of money the department will pay to an~~
4 ~~unsuccessful proposer that submits a detailed proposal that is~~
5 ~~responsive to the requirements of the request for proposals.]~~

6

7 §27.5. Unsolicited Proposals.

8 (a) Applicability. Private entities may submit unsolicited
9 proposals to the department requesting participation in an
10 eligible ~~[a turnpike]~~ project ~~[to be constructed pursuant to the~~
11 ~~Turnpike Act]~~. Unsolicited proposals that comply with the
12 requirements of this section shall be processed in accordance
13 with the requirements of this section.

14 (b) Proposal contents. A proposal requesting department
15 participation in a proposed ~~[turnpike]~~ project shall be filed
16 with the department and must include the following information:

17 (1) the limits, scope, and location of the proposed
18 project, including all proposed interconnections with other
19 transportation facilities;

20 (2) the results expected from project implementation and
21 the critical factors for the project's success;

22 (3) all studies previously completed by the proposer
23 concerning the project;

1 (4) [~~complete~~] information concerning the experience,
2 expertise, technical competence, and qualifications of the
3 proposer and of each member of the proposer's management team
4 and of other key employees, ~~[or]~~ consultants, and
5 subcontractors, including the name, address, and professional
6 designation of each member of the proposer's management team and
7 of other key employees, ~~[or]~~ consultants, and subcontractors,
8 the capability of the proposer to undertake [~~develop~~] the
9 proposed project, and information responsive to the evaluation
10 criteria listed in §27.4(d) [~~(e)~~] of this subchapter;

11 (5) [~~a proposed financial plan for the proposed project~~
12 ~~that includes, at a minimum, projected project costs and~~
13 ~~proposed sources of funds,~~]

14 [~~(6)~~] a specific description of the level and nature of
15 participation sought from the department, including technical
16 support and financial participation;

17 (6) [~~(7)~~] to the extent then available, information
18 relevant to [~~necessary for~~] the department's performance of
19 [~~department to carry out~~] its environmental review
20 responsibilities under §27.3(l) [~~(h)~~] and (m) [~~(i)~~] of this
21 subchapter;

22 (7) [~~(8) a listing of anticipated opponents and~~] a
23 description of potential social, economic, and environmental

1 impacts [~~7~~] and potentially competing facilities [~~and~~
2 ~~proposers~~];

3 (8) [~~(9)~~] other information of probable interest to the
4 department; and

5 (9) [~~(10)~~] the proposal review fee required [~~of \$20,000~~
6 ~~in the form prescribed~~] by §27.3(h) [~~(d)~~] of this subchapter.

7 (c) Evaluation of unsolicited proposal. Any proposal
8 properly filed with the department in accordance with subsection
9 (b) of this section and accompanied by the proper proposal
10 review fee will be reviewed by the department. The department
11 may meet with the proposer as necessary to clarify the proposal,
12 or may issue requests for clarification. Based on that review
13 and any clarification, [~~an initial recommendation will be made~~
14 ~~to the commission as to whether~~] the department will determine
15 whether to [~~should~~] further evaluate its requested participation
16 in the applicable [~~turnpike~~] project. If the department
17 determines that further evaluation of the proposal is warranted,
18 a recommendation will be made to the commission to issue a
19 request for competing proposals and qualifications. That
20 recommendation shall be based on whether the proposed project:

21 (1) is compatible with existing and planned
22 transportation facilities; and

23 (2) furthers state, regional, and local transportation

1 plans, programs, policies, and goals, as well as [~~the proposal's~~
2 ~~responsiveness to~~] such other [~~evaluation~~] criteria as the
3 department deems relevant.

4 (d) Approval to request competing proposals and
5 qualifications. If the [~~initial~~] recommendation is that the
6 department further evaluate the proposal and its requested
7 participation in the applicable [~~turnpike~~] project, and the
8 commission approves that recommendation, the department will
9 publish notice of that decision and provide an opportunity for
10 the submission of competing proposals and qualifications as
11 provided in this section. The department will publish a notice
12 in the Texas Register and in one or more newspapers of general
13 circulation in this state. The notice will state that the
14 department has received an unsolicited proposal under these
15 rules [~~and the Turnpike Act~~], that it intends to evaluate the
16 proposal, that it may negotiate a comprehensive development
17 agreement with the proposer based on the proposal, and that it
18 will accept for simultaneous consideration any competing
19 proposals and qualifications that the department receives in
20 accordance with these rules within 45 days of the initial
21 publication of the notice in the Texas Register, or such
22 additional time as authorized by commission order. In
23 determining whether to authorize additional time for submission

1 of competing proposals and qualifications, the commission will
2 consider the complexity of the proposed project. The notice
3 will summarize the proposed [~~turnpike~~] project, and identify its
4 proposed location and any proposed interconnections with other
5 transportation facilities [~~, and provide a conceptual design~~].
6 [~~The department also may provide traffic counts, forecasts, and~~
7 ~~other available data either in the notice or upon request of any~~
8 ~~party responding to the notice.~~] The notice will also specify
9 the criteria that will be used to evaluate the [~~unsolicited~~
10 ~~proposal and any competing~~] proposals, and the relative weight
11 given to the criteria. The department may provide traffic
12 counts, forecasts, conceptual designs, and other available
13 technical studies, reports, and data either in the request for
14 competing proposals and qualifications or upon request of any
15 entity responding to the request.

16 (e) Submission of supplemental proposal by original
17 proposer. The private entity submitting the original
18 unsolicited proposal shall be required to submit a proposal in
19 response to the request for competing proposals and
20 qualifications. A proposal submitted by that entity and any
21 other entity in response to a request [~~a notice~~] must contain
22 the information required by subsection (b) of this section and
23 any other information required in the request.

1 (f) [(e)] Exclusive procedure to consider competing
2 proposals. Failure by a prospective proposer to submit a
3 competing proposal [~~, together with the proper proposal review~~
4 ~~fee in the form prescribed by §27.3(d) of this subchapter,~~]
5 within the 45-day period or such additional time as authorized
6 by the commission, shall preclude the proposal from
7 consideration by the department unless and until the department
8 terminates consideration of, or negotiations on, the original
9 unsolicited proposal, as supplemented in response to the request
10 for competing proposals and qualifications, and any and all
11 competing proposals received within that time period. The
12 department shall [~~will~~] not be obligated to grant requests to
13 extend the time period to submit competing proposals. The [~~+~~
14 ~~and the~~] receipt of one or more competing unsolicited proposals
15 during that period will not trigger the posting or publication
16 of a new notice or the commencement of any new time period.

17 (g) [(f)] Noncompeting proposals. If the [~~The~~] department
18 receives [~~recognizes that it may receive~~] proposals that have
19 certain characteristics in common with the original unsolicited
20 proposal, yet differ in other material respects [~~. In these~~
21 ~~eases~~], the department reserves the right, in its sole
22 discretion, to treat such a proposal as either a competing
23 proposal or a noncompeting proposal. Because of the

1 consequences to a proposer of failing to submit a proposal that
2 the department could later deem a competing proposal within the
3 45-day period, or such additional time as authorized by the
4 commission, prospective proposers are strongly urged to monitor
5 the department's notices of unsolicited proposals received, and
6 be prepared to submit within that time period if they perceive
7 that a proposal they are considering or are preparing bears
8 certain similarities to, or has characteristics in common with,
9 an unsolicited proposal which is the subject of a notice. A
10 proposal that is deemed to be noncompeting will be evaluated as
11 a new unsolicited proposal in accordance with this section.

12 (h) [(g)] Evaluation of proposals - competing proposals.

13 Upon the expiration of the 45-day period, or such additional
14 time as authorized by the commission, the department will
15 subject the original unsolicited proposal, as supplemented in
16 response to the request for competing proposals and
17 qualifications, together with any and all properly submitted
18 competing proposals, to the following evaluation process. If
19 one or more properly submitted competing proposals are received,
20 the department shall review the proposals [~~together with the~~
21 ~~original unsolicited proposal,~~] utilizing the evaluation
22 criteria set forth in §27.4(d) [(e)] of this subchapter and the
23 request for competing proposals and qualifications, and the

1 information specified in subsection (b) of this section. The
2 department will identify those proposers that will be considered
3 qualified to submit detailed proposals for the proposed project,
4 and the process will proceed in the manner described in
5 §27.4(e)-(1) [~~(e)~~-(n)] of this subchapter.

6 (i) [~~(h)~~] Evaluation of proposals - no competing proposals.

7 If no properly submitted competing proposal is received, the
8 department will evaluate the original unsolicited proposal, as
9 supplemented in response to the request for competing proposals
10 and qualifications, proceeding [~~request a detailed proposal~~
11 containing the information described in §27.4(f) of this
12 subchapter from the proposer submitting the original unsolicited
13 proposal, and will proceed], to the extent applicable, in the
14 manner described in §27.4(h)-(1) [~~(g)~~-(n)] of this subchapter.

15

16 §27.6. Protest Procedures.

17 (a) Applicability. This section prescribes exclusive
18 procedures for protests regarding:

19 (1) allegations that the terms of a request for
20 qualifications, request for competing proposals and
21 qualifications, or request for proposals are wholly ambiguous,
22 contrary to legal requirements applicable to the procurement, or
23 exceed the department's authority;

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

6 (3) short-listing determinations; and

7 (4) award of a comprehensive development agreement.

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, request for
14 competing proposals and qualifications, or request for detailed
15 proposals, as applicable.

16 (c) Deadlines for protests.

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

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

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

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

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

23 (f) Comments from other proposers. Other proposers may

1 file statements in support of or in opposition to the protest
2 within 7 days of the filing of the protest. The department
3 shall promptly forward copies of all such statements to the
4 protestant. Any statements shall be sworn and submitted under
5 penalty of perjury.

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

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

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

23 (j) Rights and obligations of proposers. Each proposer, by

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