

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

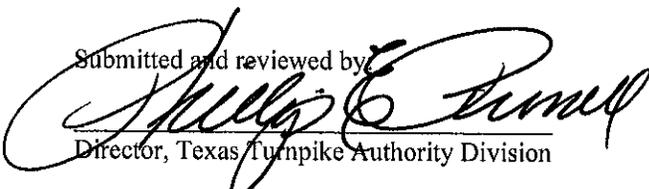
The Texas Transportation Commission (commission) finds it necessary to propose amendments to §27.2, §27.3, §27.4, §27.5 and new §27.7, §27.8, and §27.9, all relating to design-build contracts and comprehensive development agreements, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed amendments and new sections, 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.

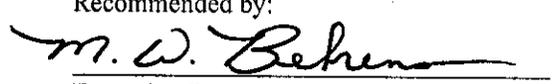
IT IS THEREFORE ORDERED by the commission that the amendments to §27.2, §27.3, §27.4, §27.5 and new §27.7, §27.8, and §27.9 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

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

110750 NOV 16 06

Minute
Number

Date
Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §27.2, definitions, §27.3, general rules for
4 private involvement, §27.4, solicited proposals, §27.5,
5 unsolicited proposals, and new §27.7, design-build contracts,
6 §27.8, conflict of interest and ethics policies, and §27.9,
7 sanctions, all concerning comprehensive development agreements.

8

9 EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTIONS

10 Under Transportation Code, §223.203(e)(1), the Texas
11 Transportation Commission (commission) is required to adopt
12 rules establishing criteria for the prequalification of a
13 private entity to submit a detailed proposal to provide services
14 under a design-build contract that include the precertification
15 requirements applicable to providers of engineering services and
16 the qualification requirements for bidders on highway
17 construction contracts. Rules for design-build projects adopted
18 pursuant to that subsection are also required to provide for an
19 expedited selection process that includes design innovation as a
20 selection criterion.

21

22 The amendments and new sections implement requirements to adopt
23 an ethics policy applicable to comprehensive development
24 agreement procurements. The ethics policy is required to
25 include conflict of interest guidelines applicable to private

1 entities interested in participating in the department's
2 comprehensive development agreement program and provisions
3 relating to the acceptance of gifts and benefits by department
4 employees. The amendments and new sections also prescribe rules
5 of contact that regulate communications between proposers or any
6 of its team members and the commission, department, and third
7 parties involved in a procurement. The commission has
8 prescribed conflict of interest provisions and communications
9 restrictions in order to provide a fair and unbiased
10 comprehensive development agreement procurement process and to
11 ensure high standards of ethics and fairness in the
12 administration of the comprehensive development agreement
13 program.

14
15 The amendments and new sections concerning sanctions are
16 applicable to private entities participating in the department's
17 comprehensive development agreement program. The new provisions
18 are modeled after the department's existing rules pertaining to
19 contractor sanctions. The purpose of these provisions is to
20 ensure high standards of ethics and fairness in the
21 administration of the comprehensive development agreement
22 program and to provide the department the appropriate remedy
23 should a private entity engage in prohibited conduct.

24

25 In order to ensure the efficient administration of the

1 comprehensive development agreement program and to ensure the
2 commission and department further evaluate only those proposals
3 that provide for the most efficient use of department resources,
4 the amendments and new sections also clarify that the
5 department, rather than the commission, approves the short list
6 of entities considered most qualified to submit detailed
7 proposals for a project, and prescribe additional information
8 that must be contained in an unsolicited proposal, as well as
9 additional criteria the commission will consider in determining
10 whether to authorize the issuance of a request for competing
11 proposals and qualifications for a project described in an
12 unsolicited proposal.

13
14 The amendments and new sections finally make revisions necessary
15 to ensure consistency in the processing of solicited and
16 unsolicited proposals, and to make other nonsubstantive changes.

17
18 Amended §27.2, Definitions, defines words and terms used in new
19 §§27.7-27.9. The definition of conflict of interest is
20 consistent with the Federal Highway Administration's
21 organizational conflict of interest regulations contained in 23
22 CFR §636.116, and is intended to provide a fair and unbiased
23 comprehensive development agreement procurement process. That
24 definition, and other definitions used in new §27.8, Conflict of
25 interest and ethics policies, are authorized by Transportation

1 Code, §223.209, which provides that the commission shall adopt
2 rules, procedures, and guidelines governing selection of a
3 developer for a comprehensive development agreement and
4 negotiations to promote fairness, obtain private participants in
5 projects, and promote confidence among those participants.

6 Other amendments to §27.2 make grammatical and other
7 nonsubstantive changes and renumber existing provisions.

8
9 Amended §27.3(e) adds terminology used in comprehensive
10 development agreement procurement documents, recognizes that
11 procurement documents will include additional rules of contact
12 required by §27.8(d), and makes grammatical changes. Amended
13 §27.3(l) and (o) clarify that those provisions apply to projects
14 eligible for development under a comprehensive development
15 agreement. Amended §27.3(p) makes a grammatical change, and
16 §27.3(q) is removed as a result of the proposal of conflict of
17 interest and ethics policies in new §27.8.

18
19 In order to ensure the efficient administration of the
20 comprehensive development agreement program, amended §27.4(d)
21 clarifies that the department, rather than the commission,
22 approves the short list of entities considered most qualified to
23 submit detailed proposals for a project, and makes
24 nonsubstantive changes. Other amendments in §27.4 clarify that
25 certain provisions apply to projects eligible for development

1 under a comprehensive development agreement, and clarify that
2 project financing is an authorized part of a comprehensive
3 development agreement.

4
5 In order to ensure the efficient administration of the
6 comprehensive development agreement program and the selection
7 and scheduling of projects developed under the program, and to
8 ensure the commission and department further evaluate only those
9 proposals that provide for the most efficient use of department
10 resources, amended §27.5(b) prescribes additional information
11 that must be contained in an unsolicited proposal for a
12 comprehensive development agreement project. The additional
13 information will better allow the commission and the department
14 to assess any unsolicited proposals consistent with the
15 department's goals and limited financial and personnel
16 resources. Those goals include better control by the department
17 over the development, delivery, and scheduling of projects,
18 which should improve the nature and substance of unsolicited
19 proposals received by the department.

20
21 Amended §27.5(c) prescribes additional criteria on which a
22 recommendation to the commission to issue a request for
23 competing proposals and qualifications will be based. These
24 criteria, and the additional information required to be
25 contained in a proposal under §27.5(b), are intended to ensure

1 that the commission and department further evaluate only those
2 proposals that best meet the department's transportation
3 planning goals and policies and that provide for the most
4 efficient use of limited department and proposer resources.

5
6 Amended §27.5, Unsolicited proposals, also makes revisions
7 necessary to ensure consistency in the processing of solicited
8 and unsolicited proposals, makes changes to ensure consistency
9 in terminology used in this subchapter, and to make other
10 nonsubstantive changes to better clarify the requirements of
11 this section.

12
13 Under new §27.7, Design-build contracts, the department will be
14 authorized to prequalify private entities to submit detailed
15 proposals to provide services under a design-build contract.
16 Those contracts may be procured, as determined by the
17 department, using a one-step process where entities are
18 prequalified to respond to a request for proposals, and the
19 department may enter into a design-build contract based solely
20 on an evaluation of detailed proposals submitted in response to
21 a request for proposals. This is unlike other types of
22 comprehensive development agreements where a two-step
23 procurement process is used, first to short-list the most
24 qualified proposers to submit detailed proposals, and then to
25 select the proposer whose detailed proposal provides the best

1 value. As the prequalification process authorized under new
2 §27.7 is a substitute for the evaluation of qualification
3 submittals pursuant to a request for qualifications, each entity
4 that is part of a proposer team that intends to submit a
5 detailed proposal must be prequalified or precertified in
6 accordance with the requirements of §27.7.

7

8 New §27.7(a) sets out the applicability of the new rule to
9 design-build contracts under the department's comprehensive
10 development agreement program.

11

12 New §27.7(b) provides a process for the prequalification of
13 providers of construction, maintenance, and operations services
14 to propose on design-build contracts under the department's
15 comprehensive development agreement program. Private entities
16 that are prequalified will be eligible to propose on design-
17 build contracts in response to a request for proposals.

18

19 New §27.7(c) provides a process for the precertification of
20 providers of engineering, architectural, or surveying services
21 to propose on design-build contracts under the department's
22 comprehensive development agreement program. Private entities
23 that are precertified will be eligible to propose on design-
24 build contracts in response to a request for proposals.

25

1 New §27.7(d) provides a process for the administrative
2 qualification of providers of engineering, architectural, or
3 surveying services on design-build contracts as required by the
4 department's audit office. Administrative qualification
5 includes an examination of a private entity's accounting system,
6 an audit of its indirect cost rate, salary rates, and direct
7 costs.

8
9 New §27.7(e) sets out the evaluation process for design-build
10 contract proposals submitted in response to a request for
11 proposals, and provides design innovation as a required
12 criterion. The evaluation process will be comprised of an
13 evaluation of detailed proposals received from prequalified
14 private entities only. The department will not issue a request
15 for qualifications to qualify entities to submit detailed
16 proposals.

17
18 New §27.8, Conflict of interest and ethics policies, prescribes
19 ethical standards of conduct applicable to private entities,
20 including consultants and subconsultants, participating in the
21 department's comprehensive development agreement program. A
22 private entity's failure to comply with these standards of
23 conduct may result in the private entity's preclusion from
24 participation in a project or sanctions being imposed under
25 §27.9, Sanctions.

1

2 New §27.8(b) prohibits a proposer, developer, consultant, or
3 subconsultant participating in the comprehensive development
4 agreement program, or an affiliate of any of those entities,
5 from offering, giving, or agreeing to give a gift or benefit to
6 a member of the commission or to a department employee whose
7 work for the department includes the performance of procurement
8 services relating to a comprehensive development agreement
9 project, or who participates in the administration of a
10 comprehensive development agreement. Section 27.8(b) provides
11 certain exceptions to this prohibition for department
12 consultants and subconsultants that are not a member of a
13 proposer or developer team, consistent with state laws relating
14 to gifts to public servants. No exceptions are made for
15 proposers or developers because of the appearance of impropriety
16 or competitive advantage that would result from the offer or
17 acceptance of a gift or benefit.

18

19 New §27.8(c) prescribes department policy on conflicts of
20 interest relating to consultants and subconsultants
21 participating in the comprehensive development agreement
22 program. This policy is necessary to protect the integrity and
23 fairness of the program and all procurements carried out by the
24 department as part of the program.

25

1 Section 27.8(c)(2) provides that this policy applies to all
2 comprehensive development agreement projects undertaken by the
3 department, and applies to consultants and subconsultants and
4 their individual employees who participated in the performance
5 of services for the department. The policy may by extension
6 prohibit or restrict the ability of a proposer to have a
7 consultant or subconsultant participate on the proposer team as
8 an equity owner or team member, act as a consultant or
9 subconsultant to the proposer, or have a financial interest in
10 the proposer or an equity owner or team member of the proposer.

11
12 Section 27.8(c)(3) prescribes the period of time in which a
13 conflict of interest will be deemed to exist, and the period of
14 time the resulting prohibition or restriction provided in
15 §27.8(c) will continue. Section 27.8(c)(4) provides that if a
16 conflict of interest is determined to apply to an individual, it
17 will not apply to the individual's new place of employment,
18 other than an affiliate of its previous employer. The
19 prohibition or restriction will continue to apply to the
20 individual for the prescribed period of time. Section
21 27.8(c)(5) clarifies that the requirements of §27.8(c) do not
22 limit, modify, or otherwise alter the applicability of the
23 Federal Highway Administration's organizational conflict of
24 interest regulations, which the department must comply with in
25 the case of a federal-aid project.

1

2 Section 27.8(c)(6) prescribes general conflict of interest
3 standards, which generally prohibit a consultant providing
4 consultant services to the department with respect to a
5 comprehensive development agreement project from being a
6 proposer or participating as an equity owner, team member,
7 consultant, or subconsultant of or to a proposer for that
8 project, or having a financial interest in any of the foregoing
9 entities with respect to that project. Except as provided in
10 §27.8(c)(8) and (9), this prohibition would not apply to
11 participation in a different comprehensive development agreement
12 project.

13

14 Section 27.8(c)(7) contains exceptions to the prohibitions in
15 §27.8(c)(6) for consultants providing preliminary engineering
16 and architectural services, environmental services, and traffic
17 and revenue services. Section 27.8(c)(8) prohibits consultants
18 actively engaged and performing procurement services or
19 financial services with respect to a comprehensive development
20 agreement project from being a proposer or participating as an
21 equity owner, team member, consultant, or subconsultant of or to
22 a proposer for that project or any other comprehensive
23 development agreement project, or having a financial interest in
24 any of the foregoing entities with respect to any comprehensive
25 development agreement project. Consultants providing those

1 services have access to information that could provide a
2 competitive advantage to a proposer.

3
4 Section 27.8(c)(9) prescribes conditions for consultants that
5 have completed the performance of consultant services for the
6 department to be a proposer or to participate as an equity
7 owner, team member, consultant, or subconsultant of or to a
8 proposer for a comprehensive development agreement project, or
9 to have a financial interest in any of the foregoing entities
10 with respect to a comprehensive development agreement project.

11
12 Section 27.8(c)(10) prescribes the process for a consultant,
13 proposer, or developer to submit a request for a determination
14 as to whether certain participation in a comprehensive
15 development agreement project, or the performance of particular
16 services with respect to a comprehensive development agreement
17 project would constitute a conflict of interest, or to request
18 approval of an exception to the applicability of the conflict of
19 interest policies, including an appeal of a previous
20 determination that a conflict of interest exists. Section
21 27.8(c)(10) also prescribes the criteria that will be considered
22 by the executive director in reviewing a request.

23
24 Section 27.8(c)(11) concerns the applicability of the conflict
25 of interest policies where a consultant is providing more than

1 one category of consultant services to the department. Section
2 27.8(c)(12) concerns the eligibility of an entity participating
3 with respect to a comprehensive development agreement project as
4 a proposer or developer, or as an equity owner, team member,
5 consultant, or subconsultant of or to a proposer or developer,
6 or having a financial interest in any of the foregoing entities
7 to provide consultant services (other than procurement services)
8 to the department for another comprehensive development
9 agreement project.

10
11 Section 27.8(c)(13) allows the department to restrict the scope
12 of services a consultant or subconsultant may be eligible to
13 perform for the department in order to further the intent and
14 goals of §27.8(c), and to condition a determination that a
15 conflict of interest does not exist or an exception to the
16 applicability of the conflict of interest policies as
17 appropriate to further the intent and goals of §27.8(c),
18 including by requiring the consultant, subconsultant, proposer,
19 or developer to execute confidentiality agreements, institute
20 ethical walls, or segregate certain personnel from participation
21 in a project or the performance of consultant services.

22
23 Section 27.8(c)(14) provides that the provisions in §27.8(c) do
24 not address every situation that may arise in the context of the
25 department's comprehensive development agreement program nor

1 require a particular decision or determination by the executive
2 director. The department retains the ultimate and sole
3 discretion to determine on a case-by-case basis whether a
4 conflict of interest exists and what actions may be appropriate
5 to avoid, neutralize, or mitigate any actual or potential
6 conflict, or the appearance of any conflict.

7
8 In order to provide a fair and unbiased procurement process, new
9 §27.8(d) prescribes rules of contact regulating communications
10 between proposers for a comprehensive development agreement
11 project or any of its team members and the commission, the
12 department, and third parties involved in the procurement. The
13 prescribed rules must be contained in a request for
14 qualifications, request for proposals, or request for competing
15 proposals and qualifications. The rules of contact generally
16 prohibit any ex parte communication regarding the project,
17 request for qualifications, request for proposals, or request
18 for competing proposals and qualifications or the procurement
19 with any member of the commission or with any department staff,
20 advisors, contractors, or consultants involved in the
21 procurement until the earliest of the execution and delivery of
22 the comprehensive development agreement, the rejection of all
23 qualifications submittals or proposals by the department, or the
24 cancellation of the procurement.

25

1 Certain communications may be allowed by the department in
2 exceptional circumstances, and confidential communications may
3 be made to a department employee not involved in the
4 procurement. Section 27.8(d) allows the executive director to
5 disqualify a proposer from the procurement and participation in
6 the project at issue or to impose another sanction under §27.9
7 if it is determined that a proposer has engaged in any improper
8 communications in violation of the rules of contact. Section
9 27.8(e) provides certain exceptions to the rules of contact.

10

11 New §27.9, Sanctions, is authorized by Transportation Code,
12 §223.209, which provides that the commission shall adopt rules,
13 procedures, and guidelines governing selection of a developer
14 for a comprehensive development agreement and negotiations to
15 promote fairness, obtain private participants in projects, and
16 promote confidence among those participants.

17

18 Section 27.9(a) pertains to general sanction procedures.
19 Subsection (a)(1) provides that a copy of the sanction rules
20 will be included in certain procurement documents issued by the
21 department. However, non-compliance with this provision will
22 not affect the applicability of the sanction rules. Subsection
23 (a)(2) references the criteria the department will consider when
24 referring a private entity to the executive director for
25 sanction action. Subsection (a)(3) sets forth the method by

1 which a private entity will be notified of sanction action, the
2 contents of such notice, as well as the effective date of the
3 sanction. Subsection (a)(4) provides that the executive
4 director and the private entity may modify the procedure for
5 considering the sanction. Subsection (a)(5) specifies that
6 sanction action does not affect the private entity's obligations
7 under a comprehensive development agreement or any other
8 agreement with the department nor does the action limit
9 potential remedies available to the commission. Subsection
10 (a)(6) provides that the term "private entity" also encompasses
11 any affiliated entities and identifies what constitutes an
12 affiliated entity. Subsection (a)(7) indicates that the private
13 entity will be held responsible for the acts of individuals or
14 other entities acting on behalf of the private entity.

15
16 Section 27.9(b) relates to the hearing process applicable to
17 sanction actions. Subsection (b)(1) indicates that the private
18 entity has the opportunity for a hearing as provided in §1.21 of
19 the department's rules (pertaining to Procedures in Contested
20 Cases). Subsection (b)(2) provides for a stay of sanctions
21 (except for suspension action) pending the hearing process.
22 Subsection (b)(3) specifies that the commission may reduce,
23 eliminate or modify the sanction in the public interest.
24 Subsection (b)(4) provides an exception to the hearing process
25 if the private entity is sanctioned through the use of a

1 reprimand.
2
3 Section 27.9(c) creates guidelines for the application of
4 sanctions. Subsection (c)(1) indicates that the executive
5 director will determine whether a private entity has committed a
6 sanctionable act or omission. Subsection (c)(2) provides that
7 the executive director will consider all facts and
8 circumstances, including the seriousness of the act or omission
9 and any mitigating circumstances, in determining whether or not
10 a private entity will be sanctioned. Subsection (c)(3) sets
11 forth a non-exclusive list of mitigating circumstances which may
12 be considered by the executive director in deciding whether or
13 not to impose sanctions. Subsection (c)(4) explains that the
14 executive director will determine the level of sanction to be
15 imposed on the private entity. Subsection (c)(5) sets forth the
16 concept of progressive sanction action, whereby the executive
17 director may use increasingly more severe sanctions to achieve
18 compliance with the department's policies and procedures.
19 Subsection (c)(6) indicates that multiple violations by a
20 private entity may result in multiple sanctions which may be
21 imposed consecutively or in any order. Subsection (c)(7)
22 authorizes the imposition of a lesser sanction as opposed to the
23 maximum sanction permitted by the rules. Subsection (c)(8)
24 grants the executive director the discretion to reduce,
25 eliminate, or modify a sanction in the best interest of the

1 state or the comprehensive development agreement program.

2
3 Section 27.9(d) relates to suspension action. Subsection (d)(1)
4 provides that the executive director may immediately suspend a
5 private entity without a prior hearing if the private entity is
6 notified of a debarment. Subsection (d)(2) indicates that a
7 suspension terminates when a final order is entered after a
8 hearing or when ordered by the executive director.

9
10 Section 27.9(e) details the grounds for sanction action,
11 specific sanction levels and subsequent use of sanction
12 information. Subsection (e)(1) enumerates the specific acts or
13 omissions for which the executive director may sanction a
14 private entity. Subsection (e)(2) provides that the executive
15 director will determine the sanction level and sets forth the
16 four levels of sanction action, ranging from reprimand to
17 permanent debarment. Subsection (e)(3) indicates that a
18 debarment may not be for more than the period of debarment
19 established by the state or federal agency on whose actions the
20 debarment is based. Subsection (e)(4) allows the department to
21 consider any sanction imposed against a private entity during
22 the evaluation of qualification submittals and other proposals
23 submitted by the private entity during a procurement process.

24
25 FISCAL NOTE

1 James Bass, Chief Financial Officer, has determined that for
2 each of the first five years the amendments and new sections as
3 proposed are in effect, there will be no fiscal implications for
4 state or local governments as a result of enforcing or
5 administering the amendments and new sections. There are no
6 anticipated economic costs for persons required to comply with
7 the amendments and new sections as proposed.

8
9 Phillip Russell, Director, Texas Turnpike Authority Division,
10 has certified that there will be no significant impact on local
11 economies or overall employment as a result of enforcing or
12 administering the amendments and new sections.

13

14 PUBLIC BENEFIT

15 Mr. Russell has also determined that for each year of the first
16 five years the sections are in effect, the public benefit
17 anticipated as a result of enforcing or administering the
18 amendments and new sections will be to ensure there is a fair
19 and unbiased comprehensive development agreement procurement
20 process, to ensure high standards of ethics and fairness in the
21 administration of the comprehensive development agreement
22 program, and to provide an expedited selection process for
23 comprehensive development agreements relating to design-build
24 contracts. There will be no adverse economic effect on small
25 businesses.

1

2 SUBMITTAL OF COMMENTS

3 Written comments on the proposed amendments and new sections may
4 be submitted to Phillip Russell, Director, Texas Turnpike
5 Authority Division, Texas Department of Transportation, 125 East
6 11th Street, Austin, Texas 78701-2483. The deadline for receipt
7 of comments is 5:00 p.m. on January 2, 2007.

8

9 STATUTORY AUTHORITY

10 The amendments and new sections are proposed under
11 Transportation Code, §201.101, which provides the commission
12 with the authority to establish rules for the conduct of the
13 work of the department, and more specifically, Transportation
14 Code, §223.203, which provides that the commission shall adopt
15 rules establishing criteria for the prequalification of a
16 private entity to submit a detailed proposal to provide services
17 under a design-build contract, and Transportation Code,
18 §223.209, which provides that the commission shall adopt rules,
19 procedures, and guidelines governing selection of a developer
20 for a comprehensive development agreement and negotiations to
21 promote fairness, obtain private participants in projects, and
22 promote confidence among those participants.

23

24 CROSS REFERENCE TO STATUTE

25 Transportation Code, Chapter 223, Subchapter E.

1 SUBCHAPTER A. COMPREHENSIVE DEVELOPMENT AGREEMENTS

2 §27.2. Definitions. The following words and terms, when used
3 in this subchapter, shall have the following meanings, unless
4 the context clearly indicates otherwise.

5 (1) Affiliate--An entity that directly or indirectly
6 controls, is controlled by, or is under common control with a
7 private entity.

8 (2) Certification of eligibility status form--A notarized
9 form describing any suspension, voluntary exclusion,
10 ineligibility determination actions by an agency of the federal
11 government, indictment, conviction, or civil judgment involving
12 fraud or official misconduct, each with respect to the proposer
13 or any person associated with the proposer in the capacity of
14 owner, partner, director, officer, principal investor, project
15 director/supervisor, manager, auditor, or a position involving
16 the administration of federal funds, covering the three-year
17 period immediately preceding the date of the qualification
18 statement.

19 (3) [~~1~~] Commission--The Texas Transportation
20 Commission.

21 (4) [~~2~~] Comprehensive development agreement--An
22 agreement with a private entity that, at a minimum, provides for
23 the design and construction, reconstruction, extension,

1 expansion, or improvement of an eligible project and may also
2 provide for the financing, acquisition, maintenance, or
3 operation of an eligible project.

4 (5) Confidential questionnaire--A prequalification form
5 reflecting detailed financial and experience data.

6 (6) Conflict of interest--A circumstance arising out of
7 the existing or past activities, business interests, contractual
8 relationships, or organizational structure of a consultant,
9 proposer, or developer, where:

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

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

15 (C) the private entity has an unfair competitive
16 advantage;

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

20 (E) there is a reasonable perception or appearance of
21 impropriety or unfair competitive advantage benefiting the
22 private entity or a third party as a result of the private
23 entity's participation in a comprehensive development agreement

1 project.

2 (7) Consultant--An individual or business entity,
3 including any division or affiliate of the entity, retained by
4 the department to provide consultant services in connection with
5 a comprehensive development agreement project. The term
6 includes an individual or business entity providing or that has
7 provided services under contract to a consultant, either
8 directly or through a subconsultant, at any level.

9 (8) Consultant services--All services provided to the
10 department by an independent contractor under a best value or
11 qualifications based procurement method, including architectural
12 and engineering services, right-of-way acquisition services,
13 environmental services, planning services, procurement services,
14 traffic and revenue services, project oversight services,
15 financial services (including financial advisory and banking
16 services), and legal services.

17 (9) Control--The possession, directly or indirectly, of
18 the power to cause the direction of the management of the
19 entity, whether through voting securities, by contract, family
20 relationship, or otherwise.

21 (10) Debarment--Disqualification of a private entity from
22 submitting a qualification submittal or other proposal to the
23 department, as described in §§27.3 - 27.5 of this subchapter,

1 entering into a comprehensive development agreement, or
2 participating as a member of a proposer or developer team.

3 (11) [~~3~~] Department--The Texas Department of
4 Transportation.

5 (12) [~~4~~] Design--Includes planning services, technical
6 assistance, and technical studies provided in support of the
7 environmental review process undertaken with respect to an
8 eligible [a] project, as well as surveys, investigations, the
9 development of reports, studies, plans and specifications, and
10 other professional services provided for an eligible [a]
11 project.

12 (13) Design-build contract--a comprehensive development
13 agreement that includes the design and construction of a toll
14 project, does not include the financing of a toll project, and
15 may include the acquisition, maintenance, or operation of a toll
16 project.

17 (14) Developer--A private entity (including any division
18 or affiliate of the entity) that has entered into a
19 comprehensive development agreement with the department.

20 (15) [~~5~~] Eligible project--A project described in
21 Transportation Code, §223.201, and including a:

22 (A) toll project;

23 (B) facility or a combination of facilities on the

1 Trans-Texas Corridor, as defined in §24.11 of this title

2 (relating to Comprehensive Development Agreements);

3 (C) state highway improvement project that includes
4 both tolled and nontolled lanes and that may include nontolled
5 appurtenant facilities;

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

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

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

13 (16) Environmental and planning services--Some or all of
14 the following services provided to the department with respect
15 to a comprehensive development agreement project:

16 (A) the study and evaluation of alternatives and
17 potential environmental impacts of the proposed project;

18 (B) preparation of environmental analysis and impact
19 documents relating to the project, including facility and
20 corridor analyses and draft and final environmental impact
21 statements; and

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

1 (17) [~~6~~] Executive director--The executive director of
2 the department or designee not below the level of assistant
3 executive director.

4 (18) Financial services--Some or all of the following
5 services provided to the department with respect to a
6 comprehensive development agreement project:

7 (A) acting in the capacity of financial advisor to the
8 department by providing advice on finance-related issues,
9 including development of short-term or long-term finance
10 strategy and plans of finance for individual projects or on an
11 ongoing basis;

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

13 (C) acting as underwriter (either lead or co-lead) for
14 a revenue bond issuance on a comprehensive development agreement
15 project or facility, but excluding underwriters for bonds that
16 are not related to a comprehensive development agreement
17 project.

18 (19) Gift or benefit--Anything reasonably regarded as
19 pecuniary gain or pecuniary advantage, including any benefit or
20 favor to another person in whose welfare the beneficiary has a
21 direct and substantial interest, regardless of whether the donor
22 is reimbursed. The term includes, but is not limited to, cash,
23 loans, meals, lodging, services, tickets, door prizes, free

1 entry to entertainment or sporting events, transportation, or
2 hunting or fishing trips.

3 (20) Legal services--Some or all of the following
4 services with respect to a comprehensive development agreement
5 project:

6 (A) providing advice on legal issues and strategies
7 relating to project environmental approvals, planning,
8 procurement, financing, contract administration, risk
9 management, and disputes, claims, or litigation; and

10 (B) reviewing, drafting, and negotiating procurement
11 documents, project contracts, and other documents.

12 (21) Preliminary engineering and architectural services--
13 Preparation of preliminary design and architectural documents
14 and reports, utility and right-of-way mapping, and provision of
15 similar technical documents that will be incorporated by others
16 into a request for qualifications, request for competing
17 proposals and qualifications, or request for proposals, but not
18 including the evaluation or selection of alignments in
19 connection with the development of environmental documents,
20 assistance with development of the solicitation documents,
21 developer scope of work/technical provisions, evaluation
22 criteria for a procurement, or other items that would constitute
23 environmental services or procurement services.

1 (22) Procurement services--Some or all of the following
2 services provided to the department with respect to a
3 comprehensive development agreement project:

4 (A) development of procurement strategy;

5 (B) development and preparation of the solicitation
6 documents, developer scope of work/technical provisions, or
7 contract documents;

8 (C) implementation and administration of the
9 solicitation;

10 (D) preparation or implementation of any evaluation
11 criteria, process, or procedures;

12 (E) evaluation of proposer submissions (e.g.,
13 qualification submittals and proposals);

14 (F) negotiation of the contract; and

15 (G) any other activities determined by the department
16 as related to a procurement.

17 (23) Project oversight services--Some or all of the
18 following services provided to the department with respect to a
19 comprehensive development agreement project after award of the
20 comprehensive development agreement:

21 (A) design review;

22 (B) construction oversight and inspection;

23 (C) quality control and quality assurance;

1 (D) project management and overview;
2 (E) contract administration;
3 (F) claims management;
4 (G) public relations and community outreach;
5 (H) right of way acquisition services; and
6 (I) appraisal, legal description, condemnation package,
7 and utility assembly review.

8 (24) [~~+7~~] Proposal review fee--A fee prescribed by these
9 rules that is required to be tendered with any unsolicited
10 proposal.

11 (25) Proposer--A private entity, including any division
12 or affiliate of the entity, that has submitted a statement of
13 qualifications, proposal, or other submission in order to
14 participate in an ongoing procurement for the development,
15 design, construction, financing, operation, or maintenance of an
16 eligible project under a comprehensive development agreement.

17 (26) Reprimand--A formal, written warning that documents
18 an act or omission committed by the private entity.

19 (27) [~~+8~~] Request for proposals--A request for submittal
20 of a detailed proposal from private entities to acquire, design,
21 develop, finance, construct, reconstruct, extend, expand,
22 maintain, or operate an eligible project.

23 (28) [~~+9~~] Request for qualifications--A request for

1 submission by a private entity of a description of that entity's
2 experience, technical competence, and capability to complete an
3 eligible [a-proposed] project, and such other information as the
4 department considers relevant or necessary.

5 (29) Sanction--Debarment, suspension, prohibition against
6 participation in particular procurement opportunities, or
7 reprimand.

8 (30) Subconsultant--An individual or business entity that
9 performs or performed work on behalf of a consultant as part of
10 the performance of the consultant's work for the department,
11 either directly or through a subconsultant at any level.

12 (31) Suspension--Immediate, temporary disqualification of
13 a private entity from submitting a qualification submittal or
14 other proposal to the department, as described in §§27.3 - 27.5
15 of this subchapter, entering into a comprehensive development
16 agreement, or participating as a member of a proposer or
17 developer team. Suspension differs from debarment in that it
18 may take effect prior to and during the hearing process.

19 (32) [~~40~~] Toll project--Has the meaning assigned by
20 Transportation Code, §201.001.

21 (33) Traffic and revenue services--Some or all of the
22 following services provided to the department with respect to a
23 comprehensive development agreement project:

1 (A) conducting draft and investment grade traffic and
2 revenue studies, toll elasticity studies, toll feasibility
3 studies, toll pricing studies, or studies or analyses of a
4 similar nature, including peer review studies; and

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

8

9 §27.3. General Rules for Private Involvement.

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

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

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

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

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

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

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

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

14 (7) negotiate with a proposer to include aspects of
15 unsuccessful proposals for that project in the comprehensive
16 development agreement;

17 (8) request or obtain additional information about any
18 proposal from any source;

19 (9) modify, issue addenda to, or cancel any request for
20 qualifications or request for proposals;

21 (10) waive deficiencies in a qualifications submittal or
22 proposal, accept and review a non-conforming qualifications
23 submittal or proposal, or permit clarifications or supplements

1 to a qualifications submittal or proposal;

2 (11) revise, supplement, or make substitutions for all or
3 any part of these rules; or

4 (12) retain or return all or any portion of the fees
5 required to be paid by proposers under this subchapter, as
6 provided in subsection (h) of this section.

7 (c) Costs incurred by proposers. Except as provided in
8 §27.4(f) of this subchapter, under no circumstances will the
9 state, the department, or any of their agents, representatives,
10 consultants, directors, officers, or employees be liable for, or
11 otherwise obligated to, reimburse the costs incurred by
12 proposers, whether or not selected for negotiations, in
13 developing solicited or unsolicited proposals or in negotiating
14 agreements.

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

21 (e) Procedure for communications. If a proposer has a
22 question or request for clarification regarding these rules or
23 any request for qualifications or request for proposals issued

1 by the department, the proposer shall submit the question or
2 request for clarification in writing to the person responsible
3 for receiving those [~~all~~] submissions, as designated in the
4 request for qualifications or request for proposals, and the
5 department will provide the responses in writing. The proposer
6 shall also comply with any other provisions in the request for
7 qualifications or request for proposals regulating
8 communications.

9 (f) Compliance with rules. In submitting any proposal, the
10 proposer shall be deemed to have unconditionally and irrevocably
11 consented and agreed to the foregoing provisions and all other
12 provisions of this subchapter.

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

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

16 (h) Proposal review fee. A nonnegotiable proposal review
17 fee shall be required for any unsolicited proposal submitted
18 under this subchapter and applied by the department to offset
19 the cost of processing and reviewing the proposal. An
20 unsolicited proposal for a project in the department's unified
21 transportation program must be accompanied by a proposal review
22 fee of \$5,000. An unsolicited proposal for a project that is
23 not in the department's unified transportation program must be

1 accompanied by a proposal review fee of \$10,000. The executive
2 director may approve a proposal review fee for a particular
3 project in a lower amount. In approving a lower fee, the
4 executive director shall consider the complexity of the project.
5 Failure to submit the required proposal review fee shall bar the
6 department's consideration of the applicable proposal. All fees
7 shall be submitted in the form of a cashier's check made payable
8 to the department. A proposal review fee that is submitted with
9 a proposal for a project that is not an eligible project, or
10 that the department is not otherwise legally authorized to
11 accept shall be returned to the proposer. All other proposal
12 review fees are nonrefundable.

13 (i) Sufficiency of proposal. All proposals, whether
14 solicited or unsolicited, should be as thorough and detailed as
15 possible so that the department may properly evaluate the
16 potential feasibility of the proposed project as well as the
17 capabilities of the proposer and its team members to provide the
18 proposed services and complete the proposed project.

19 (j) Project studies. Studies that the department deems
20 necessary as to route designation, civil engineering, traffic
21 and revenue, environmental compliance, and any other matters
22 will be assigned, conducted, and paid for as negotiated between
23 the department and the successful proposer and set forth in the

1 comprehensive development agreement or in any separate contract
2 for consultant services. Unless otherwise provided in the
3 request for proposals, the department will favor proposals in
4 which the costs for studies will be advanced by the private
5 entity, particularly if the advance is at the private entity's
6 risk. The department may elect to pay, in whole or in part, the
7 costs for such studies in its sole discretion. The department
8 may require that the financial plan for each proposal provide
9 for reimbursement of all related expenses incurred by the
10 department, as well as any department study funds utilized in
11 connection with the project.

12 (k) Proposer's additional responsibilities. The
13 department, in its sole discretion, may authorize the successful
14 proposer to seek licensing, permitting, approvals, and
15 participation required from other governmental entities and
16 private parties, subject to such oversight and review by the
17 department as specified in the comprehensive development
18 agreement or in any separate contract for consultant services.

19 (l) Proposer's work on environmental review of eligible
20 project. The department may solicit proposals or accept
21 unsolicited proposals in which the proposer is responsible for
22 providing assistance in the environmental review and clearance
23 of an eligible [~~the proposed~~] project, including the preparation

1 of environmental impact assessments and analyses and the
2 provision of technical assistance and technical studies to the
3 department or its environmental consultant relating to the
4 environmental review and clearance of the proposed project. The
5 environmental review and the documentation of that review shall
6 at all times be conducted as directed by the department and
7 subject to the oversight of the department, and shall comply
8 with all requirements of state and federal law, applicable
9 federal regulations, and the National Environmental Policy Act
10 (42 U.S.C. §4321 et seq.), if applicable, including but not
11 limited to the study of alternatives to the proposed project and
12 any proposed alignments, procedural requirements, and the
13 completion of any and all environmental documents required to be
14 completed by the department and any federal agency acting as a
15 lead agency. The department:

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

18 (2) shall specify the level of design, alternatives to be
19 reviewed, impacts to consider, and other information to be
20 provided by the private entity or its consultants or
21 subcontractors; and

22 (3) shall independently review any studies and
23 conclusions reached by the private entity or its consultants or

1 subcontractors before their inclusion in an environmental
2 document.

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

21 (n) Public meetings and hearings. All public meetings or
22 hearings required to be held pursuant to applicable law or
23 regulation will be directed and overseen by the department, with

1 participation by such other parties as it deems appropriate.

2 (o) Additional matters. Any matter not specifically
3 addressed in this subchapter which pertains to the acquisition,
4 design, development, financing, construction, reconstruction,
5 extension, expansion, maintenance, or operation of an eligible
6 [a] project pursuant to this subchapter, shall be deemed to be
7 within the primary purview of the commission, and all decisions
8 pertaining thereto, whether or not addressed in this subchapter,
9 shall be as determined by the commission, subject to the
10 provisions of applicable law.

11 (p) Performance and payment security. The department shall
12 require a private entity entering into a comprehensive
13 development agreement to provide a performance and payment bond
14 or an alternative form of security in an amount that, in the
15 department's sole determination, [~~that~~] is sufficient to ensure
16 the proper performance of the agreement, and to protect the
17 department and payment bond beneficiaries supplying labor or
18 materials to the private entity or a subcontractor of the
19 private entity. Bonds and alternate forms of security shall be
20 in the form and contain the provisions required in the request
21 for proposals or the comprehensive development agreement, with
22 such changes or modifications as the department determines to be
23 in the best interest of the state. In addition to, or in lieu

1 of, performance and payment bonds, the department may require:

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

4 (2) United States bonds or notes, accompanied by a duly
5 executed power of attorney and agreement authorizing the
6 collection or sale of the bonds or notes in the event of the
7 default of the private entity or a subcontractor of the private
8 entity, or such other act or event that, under the terms of the
9 comprehensive development agreement, would allow the department
10 to draw upon or access such security;

11 (3) an irrevocable letter of credit issued or confirmed
12 by a financial institution to the benefit of the department,
13 meeting the credit rating and other requirements prescribed by
14 the department, and providing coverage for a period of at least
15 one year following final acceptance of the project and
16 completion of any warranty period;

17 (4) an irrevocable letter signed by a guarantor meeting
18 the net worth or other financial requirements prescribed in the
19 request for proposals or comprehensive development agreement,
20 and which guarantees, to the extent required under the request
21 for proposals or comprehensive development agreement, the full
22 and prompt payment and performance when due of the private
23 entity's obligations under the comprehensive development

1 agreement and other documents and agreements executed by the
2 private entity in connection with the comprehensive development
3 agreement; or

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

6 ~~[(g) Ethics policy. The department shall adopt an ethics~~
7 ~~policy applicable to comprehensive development agreement~~
8 ~~procurements that includes:~~

9 ~~[(1) conflict of interest guidelines applicable to~~
10 ~~private entities interested in participating in the department's~~
11 ~~comprehensive development agreement program.]~~

12 ~~[(2) conflict of interest requirements applicable to~~
13 ~~department employees and consultants involved in the~~
14 ~~comprehensive development agreement program, including~~
15 ~~provisions relating to impermissible interests held by an~~
16 ~~employee or consultant in a proposer or project; and]~~

17 ~~[(3) provisions relating to the acceptance of gifts and~~
18 ~~benefits by department employees.]~~

19

20 §27.4. Solicited Proposals.

21 (a) Applicability. If the department develops a concept
22 for private participation in an eligible project, it will
23 solicit participation in accordance with the requirements of

1 this section.

2 (b) Request for qualifications - notice. If authorized by
3 the commission to issue a request for qualifications for an
4 eligible project, the department will set forth the basic
5 criteria for professional experience, technical competence, and
6 capability to complete a proposed project, and such other
7 information as the department considers relevant or necessary in
8 the request for qualifications and will publish it at a minimum
9 in the *Texas Register* and in one or more newspapers of general
10 circulation in this state. The department may also elect to
11 furnish the request for qualifications to businesses in the
12 private sector that the department otherwise believes might be
13 interested and qualified to participate in the project which is
14 the subject of the request for qualifications.

15 (c) Request for qualifications - content. At its sole
16 option, the department may elect to furnish conceptual designs,
17 fundamental details, technical studies and reports or detailed
18 plans of the proposed project in the request for qualifications.
19 The request for qualifications may request one or more
20 conceptual approaches to bring the project to fruition.

21 (d) Request for qualifications - evaluation. The
22 department, after evaluating the qualification submittals
23 [~~submissions~~] received in response to a request for

1 qualifications, will identify and approve a "short-list" that is
2 composed of those entities that are [~~will be~~] considered most
3 qualified to submit detailed proposals for a proposed project.
4 In evaluating the qualification submittals [~~submissions~~], the
5 department will consider such qualities that the department
6 considers relevant to the project, which may include the private
7 entity's financial condition, management stability, technical
8 capability, experience, staffing, and organizational structure.
9 The request for qualifications will include the criteria used to
10 evaluate the qualification submittals [~~submissions~~] and the
11 relative weight given to the criteria. The department shall
12 advise each entity providing a qualification submittal
13 [~~submission~~] whether it is on the short-list [~~"short-list"~~] of
14 qualified entities.

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

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

23 (2) the feasibility of developing the project as

1 proposed;

2 (3) detailed engineering or architectural designs;

3 (4) the proposer's ability to meet schedules;

4 (5) a detailed financial plan, including costing
5 methodology, cost proposals, and project financing approach; or

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

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

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

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

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

1 this section 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.

12 (j) 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 comprehensive
17 development agreement to the apparent best value proposer.
18 Award may be subject to the successful completion of
19 negotiations, any necessary federal action, execution by the
20 executive director of the comprehensive development agreement,
21 and satisfaction of such other conditions that are identified in
22 the request for proposals or by the commission. The proposers
23 will be notified in writing of the department's rankings. The

1 department shall also make the rankings available to the public.

2 (k) Negotiations with selected entity. If authorized by
3 the commission, the department will attempt to negotiate a
4 comprehensive development agreement with the apparent best value
5 proposer to design, develop, construct, finance, reconstruct,
6 extend, expand, maintain, or operate the project and (if
7 included in the request for proposals) an environmental
8 consultant contract. If a comprehensive development agreement
9 satisfactory to the department cannot be negotiated with that
10 proposer, or if, in the course of negotiations, it appears that
11 the proposal will not provide the department with the overall
12 best value, the department will formally end negotiations with
13 that proposer and, in its sole discretion, either:

14 (1) reject all proposals;

15 (2) modify the request for proposals and begin again the
16 submission of proposals; or

17 (3) proceed to the next most highly ranked proposal and
18 attempt to negotiate a comprehensive development agreement with
19 that entity in accordance with this paragraph.

20 (l) Negotiations with environmental consultant. If an
21 environmental consultant contract satisfactory to the department
22 cannot be negotiated with the selected consultant, the
23 department may elect to terminate negotiations and proceed with

1 the negotiation of the comprehensive development agreement only.

2

3 §27.5. Unsolicited Proposals.

4 (a) Applicability. Private entities may submit unsolicited
5 proposals to the department requesting participation in an
6 eligible project. Unsolicited proposals that comply with the
7 requirements of this section shall be processed in accordance
8 with the requirements of this section.

9 (b) Proposal contents. A proposal requesting department
10 participation in a proposed project shall be filed with the
11 department and must include the following information:

12 (1) the limits, scope, and location of the proposed
13 project, including, where applicable, project length, project
14 termini, number of lanes and lane miles, number and type of
15 structures, and preliminary right-of-way requirements;

16 (2) all proposed interconnections with other
17 transportation facilities and improvements to those facilities
18 that will be necessary if the project is developed;

19 (3) if available, a conceptual project design and
20 preliminary geotechnical information;

21 (4) information describing how the project will be
22 consistent with the Statewide Transportation Plan and, if
23 appropriate, with the metropolitan transportation plan developed

1 by the metropolitan planning organization;

2 (5) [~~2~~] the results expected from project
3 implementation, including anticipated financial performance and
4 improvement to mobility and capacity, and the critical factors
5 for the project's success;

6 (6) [~~3~~] all studies previously completed by the
7 proposer concerning the project;

8 (7) [~~4~~] information concerning the experience,
9 expertise, technical competence, and qualifications of the
10 proposer and of each member of the proposer's management team
11 and of other key employees, consultants, and subcontractors,
12 including the name, address, and professional designation of
13 each member of the proposer's management team and of other key
14 employees, consultants, and subcontractors, the capability of
15 the proposer to undertake the proposed project, and information
16 responsive to the evaluation criteria listed in §27.4(d) of this
17 subchapter;

18 (8) [~~5~~] a specific description of the level and nature
19 of participation sought from the department, including technical
20 support and financial participation, and the desired schedule
21 for that participation;

22 (9) [~~6~~] to the extent then available, information
23 relevant to the department's performance of its environmental

1 review responsibilities under §27.3(1) and (m) of this
2 subchapter;

3 (10) [~~7~~] a description of potential social, economic,
4 and environmental impacts and potentially competing facilities,
5 including the potential impacts of competing facilities on the
6 proposed project;

7 (11) [~~8~~] other information of probable interest to the
8 department; and

9 (12) [~~9~~] the proposal review fee required by §27.3(h)
10 of this subchapter.

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

1 project:

2 (1) enhances the state transportation network, based on
3 the project's:

4 (A) compatibility with existing and planned
5 transportation facilities;

6 (B) furtherance of state, regional, and local
7 transportation plans, programs, policies, and goals; and

8 (C) consistency with system planning objectives and
9 priorities and projects under development;

10 (2) is ready to proceed to procurement, based on project
11 constraints and characteristics, financial resources designated
12 or available for the proposed project, the status of
13 environmental approvals, project acceptability, and whether
14 meaningful competition can be generated; and

15 (3) such other criteria as the department deems relevant.

16 [~~(1) is compatible with existing and planned~~
17 ~~transportation facilities; and]~~

18 [~~(2) furthers state, regional, and local transportation~~
19 ~~plans, programs, policies, and goals, as well as such other~~
20 ~~criteria as the department deems relevant.]~~

21 (d) Approval to request competing proposals and
22 qualifications. If the recommendation is that the department
23 further evaluate the proposal and its requested participation in

1 the applicable project, and the commission approves that
2 recommendation, the department will publish notice of that
3 decision and provide an opportunity for the submission of
4 competing proposals and qualifications as provided in this
5 section. The department will publish a notice in the *Texas*
6 *Register* and in one or more newspapers of general circulation in
7 this state. The notice will state that the department has
8 received an unsolicited proposal under these rules, that it
9 intends to evaluate the proposal, that it may negotiate a
10 comprehensive development agreement with the proposer based on
11 the proposal, and that it will accept for simultaneous
12 consideration any competing proposals and qualifications that
13 the department receives in accordance with these rules within 45
14 days of the initial publication of the notice in the *Texas*
15 *Register*, or such additional time as authorized by commission
16 order. In determining whether to authorize additional time for
17 submission of competing proposals and qualifications, the
18 commission will consider the complexity of the proposed project.
19 The notice will summarize the proposed project, and identify its
20 proposed location and any proposed interconnections with other
21 transportation facilities. The request for competing proposals
22 and qualifications [~~notice~~] will [~~also~~] specify the criteria
23 that will be used to evaluate the proposals, and the relative

1 weight given to the criteria. The department may provide
2 traffic counts, forecasts, conceptual designs, and other
3 available technical studies, reports, and data either in the
4 request for competing proposals and qualifications or upon
5 request of any entity responding to the request. The department
6 may also elect to furnish the request for competing proposals
7 and qualifications to businesses in the private sector that the
8 department otherwise believes might be interested and qualified
9 to participate in the project which is the subject of the
10 request for competing proposals and qualifications.

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

21 (f) Exclusive procedure to consider competing proposals and
22 qualifications submittals. Failure by a prospective proposer to
23 submit a competing proposal and qualification submittal within

1 the 45-day period or such additional time as authorized by the
2 commission, shall preclude the proposal and qualification
3 submittal from consideration by the department unless and until
4 the department terminates consideration of, or negotiations on,
5 the original unsolicited proposal, as supplemented in response
6 to the request for competing proposals and qualifications, and
7 any and all competing proposals and qualification submittals
8 received within that time period. The department shall not be
9 obligated to grant requests to extend the time period to submit
10 competing proposals and qualification submittals. The receipt
11 of one or more competing unsolicited proposals during that
12 period will not trigger the posting or publication of a new
13 notice or the commencement of any new time period.

14 (g) Noncompeting proposals. If the department receives
15 proposals that have certain characteristics in common with the
16 original unsolicited proposal, yet differ in other material
17 respects, the department reserves the right, in its sole
18 discretion, to treat such a proposal as either a competing
19 proposal and qualification submittal or a noncompeting proposal.
20 Because of the consequences to a proposer of failing to submit
21 ~~[a proposal that the department could later deem]~~ a competing
22 proposal and qualification submittal within the 45-day period,
23 or such additional time as authorized by the commission,

1 prospective proposers are strongly urged to monitor the
2 department's notices of unsolicited proposals received, and be
3 prepared to submit within that time period if they perceive that
4 a proposal they are considering or are preparing bears certain
5 similarities to, or has characteristics in common with, an
6 unsolicited proposal which is the subject of a notice. A
7 proposal that is deemed to be noncompeting will be evaluated as
8 a new unsolicited proposal in accordance with this section.

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

1 and approve a short-list that is composed of those proposers
2 that are [~~will be~~] considered most qualified to submit detailed
3 proposals for the proposed project, and the process will proceed
4 in the manner described in §27.4(e)-(1) of this subchapter.

5 (i) Evaluation of proposals - no competing proposals and
6 qualification submittals. If no properly submitted competing
7 proposal and qualification submittal is received, the department
8 will evaluate the revised proposal submitted by the original
9 proposer [~~unsolicited proposal, as supplemented in response to~~
10 ~~the request for competing proposals and qualifications~~],
11 proceeding, to the extent applicable, in the manner described in
12 §27.4(h)-(1) of this subchapter.

13
14 §27.7. Design-Build Contracts

15 (a) Applicability. The department may prequalify a private
16 entity to submit a detailed proposal to provide services under a
17 design-build contract. The department is not required to
18 publish a request for qualifications for a design-build
19 contract, and may enter into a design-build contract based
20 solely on an evaluation of detailed proposals submitted by
21 prequalified private entities in response to a request for
22 proposals. If the department develops a concept for private
23 participation in an eligible design-build project, or proceeds

1 with the further evaluation of an unsolicited proposal for an
2 eligible design-build project, and chooses to prequalify private
3 entities to submit a detailed proposal without publishing a
4 request for qualifications, it will proceed in accordance with
5 the requirements of this section. Each entity comprising a team
6 that intends to submit a detailed proposal must be prequalified
7 or precertified in accordance with the requirements of this
8 section.

9 (b) Prequalification.

10 (1) Audited financial qualification of construction,
11 maintenance, and operations providers. Unless waived under
12 subparagraph (B) of this paragraph, to be eligible to propose on
13 a design-build contract as a provider of construction services,
14 maintenance services, or operations services, a potential
15 proposer must be prequalified in accordance with subparagraph
16 (A) of this paragraph.

17 (A) Requirements.

18 (i) To be prequalified to propose, either
19 individually or as a member of the proposers' team, as a
20 provider of construction, maintenance, or operations services on
21 a design-build contract, a private entity must:

22 (I) submit a completed confidential questionnaire
23 to the department's Construction Division in Austin at any time,

1 but at least 120 days prior to the due date for a response to a
2 request for proposals, in a form prescribed by the department,
3 which shall include certain information concerning the
4 proposer's equipment, experience, and financial condition;

5 (II) have its certified public accountant submit
6 the audited and other financial information required by the
7 current edition of the department's Bulletin Number 2, titled
8 "Contractor's Financial Resources";

9 (III) demonstrate it has the financial capacity to
10 complete, operate, and maintain, as applicable, a specific
11 project. Factors that will be considered in assessing a
12 proposer's financial capacity include:

13 (-a-) the proposer's current financial strength;

14 (-b-) the proposer's credit quality;

15 (-c-) any claims, litigation, or equivalent
16 current or pending against the proposer;

17 (IV) demonstrate, if it will be the prime provider
18 of construction services under a contract, that it is capable of
19 obtaining payment and performance bonds in the amount of \$250
20 million, or 100% of the construction cost of the project,
21 whichever is less, from a surety rated in the top two categories
22 by two nationally recognized rating agencies or at least A minus
23 (A-) or better and Class VIII or better by A.M. Best and

1 Company, or an alternative form of security in the amount of
2 \$250 million, or 100% of the construction cost of the project,
3 whichever is less, in accordance with §27.3 of this subchapter
4 (relating to General Rules for Private Involvement);

5 (V) satisfactorily comply with any technical
6 qualification requirements determined by the department to be
7 necessary for a specific project; and

8 (VI) for the purpose of proposing on federal-aid
9 projects, properly complete the Certification of Eligibility
10 Status form contained in the Confidential Questionnaire.

11 (ii) The department will make its examination and
12 determination based on the information submitted, and advise the
13 potential proposer of its approved design-build contract
14 capacity. Information adverse to the potential proposer
15 contained in the Certification of Eligibility Status form will
16 be reviewed by the department and the Federal Highway
17 Administration, and may result in the proposer being declared
18 ineligible to submit proposals on federal-aid projects.

19 (iii) Satisfactory audited financial information and
20 financial capacity will grant a 36-month period of
21 prequalification from the date of the department's
22 determination.

23 (iv) The department may require current audited

1 information at any time if circumstances develop which are
2 factors that could alter the firm's financial condition,
3 ownership structure, affiliation status, or ability to operate
4 as an on-going concern. The potential proposer must immediately
5 notify the department in writing of any material changes in its
6 financial condition that occur while the department is
7 conducting its examination.

8 (v) The department may grant a 90 day grace period of
9 prequalification, for the purpose of preparing and submitting
10 current audited information prior to the expiration of the 90
11 day period of prequalification.

12 (B) Waiver.

13 (i) The department will waive the audited financial
14 qualification requirements of subparagraph (A) of this paragraph
15 if the department's estimate is \$10,000,000 or less unless the
16 executive director or the director's designee determines that
17 audited financial qualification should be required due to:

18 (I) safety considerations;

19 (II) the complexity of the work; or

20 (III) the potential impact of the work on adjacent
21 property owners.

22 (ii) To be eligible to propose on a design-build
23 contract for which the audited financial qualification

1 requirements have been waived under clause (i) of this
2 subparagraph, a proposer must:

3 (I) submit a proposer's questionnaire, in a form
4 prescribed by the department, which includes certain information
5 concerning a proposer's equipment and experience;

6 (II) submit unaudited and other data as required in
7 the instructions to the proposer's questionnaire;

8 (III) demonstrate it has the financial capacity to
9 complete, operate, and maintain, as applicable, a specific
10 project. Factors that will be considered in assessing a
11 proposer's financial capacity include:

12 (-a-) the proposer's current financial strength;

13 (-b-) the proposer's credit quality;

14 (-c-) any claims, litigation, or equivalent

15 current or pending against the proposer;

16 (IV) demonstrate, if it will be the prime provider
17 of construction services under a contract, it is capable of
18 obtaining payment and performance bonds from a surety rated in
19 the top two categories by two nationally recognized rating
20 agencies or at least A minus (A-) or better and Class VIII or
21 better by A.M. Best and Company, in an amount that is sufficient
22 to ensure the proper performance of any agreement and protects
23 the department and payment bond beneficiaries supplying labor or

1 materials to the proposer or a subcontractor of the proposer, or
2 an alternative form of security in accordance with §27.3 of this
3 subchapter;

4 (V) satisfactorily comply with any technical
5 qualification requirements determined by the department to be
6 necessary on a specific project; and

7 (VI) for a federal-aid project, properly complete
8 the Certification of Eligibility Status form contained in the
9 proposer's questionnaire. Information adverse to the potential
10 proposer contained in the certification will be reviewed by the
11 department and by the Federal Highway Administration, and may
12 result in the proposer being declared ineligible to submit a
13 proposal on a federal-aid project).

14 (iii) The department will make its examination and
15 determination based on the information submitted, and advise the
16 proposer of its approved design-build contract capacity.

17 (I) A proposer with no prior experience in
18 construction, maintenance, or operations, or a negative working
19 capital position (i.e., financial statements indicate that
20 current liabilities exceed current assets), will receive a
21 design-build contract capacity of not less than \$1,000,000.

22 (II) An experienced proposer with sufficient
23 working capital and financial capability, as determined by the

1 department, will receive a design-build contract capacity of:

2 (-a-) not less than \$10,000,000 for a proposer
3 submitting compiled financial information if the proposer has at
4 least one year experience in construction, maintenance, or
5 operations and has satisfactorily completed at least two
6 projects in these fields;

7 (-b-) not less than \$25,000,000 for a proposer
8 submitting compiled financial information if the proposer has at
9 least two years experience in construction, maintenance, or
10 operations and has satisfactorily completed at least four
11 projects in these fields. Those contractors possessing more
12 than two years experience but less than five years experience
13 will be granted at least an additional \$5,000,000 in design-
14 build contract capacity for each additional year of experience
15 in construction, maintenance, or operations; and

16 (-c-) over \$50,000,000 for a proposer submitting
17 reviewed financial information if the proposer has at least five
18 years of experience in construction, maintenance, or operations
19 and has satisfactorily completed at least four projects in these
20 fields.

21 (2) Financial statements. For purposes of this section:

22 (A) An audited financial statement involves an
23 examination of the accounting system, records, and financial

1 statements by an independent certified public accountant in
2 accordance with generally accepted auditing standards. Based on
3 the examination, the auditor expresses an opinion concerning the
4 fairness of the financial statements in conformity with
5 generally accepted accounting principles.

6 (B) A reviewed financial statement is substantially
7 less in scope than an audited financial statement, and consists
8 primarily of inquiries of proposer personnel and analytical
9 procedures applied to financial data by an independent certified
10 public accountant. Only negative assurance is expressed by the
11 auditor, meaning the auditor is not aware of any material
12 modifications that should be made in order for the financial
13 statements to conform to generally accepted accounting
14 principles.

15 (C) A compiled financial statement is limited to
16 presenting in the form of financial statements information that
17 is the representation of management. No opinion or any other
18 form of assurance is expressed on the statements by the auditor.

19 (c) Precertification.

20 (1) Contract Eligibility. To be eligible to perform work
21 on a design-build contract in the categories approved according
22 to §9.43 of this title (relating to Precertification
23 Requirements), a prime provider and a subprovider must be

1 precertified in accordance with this section unless:

2 (A) the anticipated work in an individual work category
3 is less than 2.5% of the contract; or

4 (B) the department has waived the precertification
5 requirements for a contract that is less than \$10,000,000.

6 (2) Application.

7 (A) Registered architects, registered professional
8 engineers, registered or licensed professional surveyors, and
9 other technical staff who desire to be precertified by the
10 department to perform engineering, architectural, or surveying
11 work on design-build contracts, shall submit a completed
12 precertification application to the department for review and
13 determination of precertification status.

14 (B) An application form prescribed by the department
15 may be obtained by contacting the Texas Department of
16 Transportation, Design Division, 125 East 11th Street, Austin,
17 Texas 78701-2483, or through the department's web site.

18 (C) The application form will request information
19 concerning the experience of the individual.

20 (D) The precertification web site will include:

21 (i) a copy of the application form;

22 (ii) instructions concerning submittal of information
23 for precertification, including format and length restrictions

1 for data to be submitted; and

2 (iii) the requirements for precertification in each
3 category.

4 (E) The submittal date for review deadlines as
5 described in paragraph (3) of this subsection shall be the date
6 the precertification application is received by the department.

7 (F) The precertification of a provider by the
8 department does not guarantee that work will be awarded to that
9 provider.

10 (3) Deadline. When precertification is required as
11 described in paragraph (1) of this subsection, prime providers
12 and subproviders must be precertified in the technical
13 categories by the due date for responses to a request for
14 proposals to be eligible to submit a response.

15 (4) Data management. The department will maintain the
16 qualification information submitted in the precertification
17 application by the firm for an employee.

18 (5) Firm and employee status.

19 (A) A firm may be precertified in a work category if
20 the firm has a current employee precertified in the category.

21 (B) A firm employee may be precertified in a work
22 category if the employee possesses the skills and experience to
23 meet the requirements. An employee is not precertified based on

1 the firm's experience.

2 (C) A precertification will transfer with the employee
3 if the employee leaves the firm.

4 (D) The department may review a firm's information to
5 evaluate whether the support, equipment, and other resources
6 necessary to do the work are provided to the employee.

7 (E) A firm with one employee who is precertified in
8 multiple work categories is precertified in those categories.
9 When required, prime providers and subproviders must be
10 precertified in the categories of work they will be performing;
11 however, a provider or subprovider is not required to be
12 precertified in every category of work involved in the contract,
13 unless it will be performing in a lead capacity on all
14 categories of work.

15 (6) Review process.

16 (A) An individual, and therefore the firm, will be
17 precertified within 60 days of receipt of complete and accurate
18 information for the submittal, or notified in writing within the
19 same time period that they did not meet the requirements for
20 precertification or that additional submittals will be required
21 for review.

22 (B) If the submittal is incomplete, a firm will be
23 requested to submit additional information for review. The firm

1 shall submit such information within 30 days of receipt of the
2 department's request for such information. If the information
3 is not provided within 30 days after receipt of the request, the
4 application for precertification will be processed with the
5 information available. The department will make a determination
6 on precertification status within 60 days of receipt of the
7 additional information.

8 (C) The department will consider the following factors
9 in reviewing the precertification applications:

- 10 (i) current license or registration;
11 (ii) personal experience and training; and
12 (iii) work category requirements as maintained on the
13 department's web site.

14 (7) Updates. A firm must report any change in the
15 information included in the original application no later than
16 45 days after the change occurs.

17 (8) Appeal. A firm may appeal denial of precertification
18 by submitting additional information to the department within 30
19 days of receipt of written notification of denial. This
20 information shall justify why the applicant meets the
21 requirements for precertification. The department will review
22 the information and make a determination regarding
23 precertification. A firm may file a written complaint regarding

1 precertification denial with the executive director or his or
2 her designee.

3 (9) Precertification requirements.

4 (A) Eligible employees. A firm may be precertified in
5 the technical work categories maintained on the department's web
6 site by providing the listed requirements. A firm may only
7 submit an application for an individual who is employed by that
8 firm at the time of submittal for precertification.

9 (B) Experience. The experience used to meet
10 requirements may be either prior to or after licensure unless
11 otherwise stated in a specific category. For the purpose of
12 experience for precertification, the employee may be licensed to
13 practice in any state for which that experience is recognized by
14 the:

15 (i) Texas Board of Professional Engineers for
16 engineers;

17 (ii) Texas Board of Architectural Examiners for
18 architects; or

19 (iii) Texas Board of Professional Land Surveying for
20 land surveyors.

21 (10) Work categories. The approved precertification work
22 category definitions and requirements will be maintained on the
23 department's web site. The commission, by minute order, may

1 add, revise, or delete a work category.

2 (d) Administrative qualification.

3 (1) Exception. Administrative qualification is not
4 necessary for non-engineering firms and provider services
5 included in Group 6 - bridge inspection, Group 12 - materials
6 inspection and testing, Group 14 - geotechnical services, Group
7 15 - surveying and mapping, and/or Group 16 - architecture as
8 listed on the department's web site for precertification.
9 Providers' compensation for these services is typically based on
10 units of service rates.

11 (2) Time to provide information. Prime providers and
12 subproviders may provide information described in this
13 subsection prior to prequalification. If the information is not
14 furnished before prequalification, it must be provided within 90
15 days after prequalification. The administrative qualification
16 submittal is a separate submittal from the precertification
17 submittal, and is submitted to the Texas Department of
18 Transportation, Audit Office, 125 E. 11th Street, Austin, Texas
19 78701-2483. Administrative qualification submittals will not be
20 received by the Design Division. Submission prior to selection
21 is encouraged to facilitate timely contract execution
22 requirements.

23 (3) Evaluation factors. The department will consider the

1 following factors in determining administrative qualifications
2 of prime providers or subproviders.

3 (A) Adequate accounting system. The prime provider or
4 subproviders must demonstrate the existence of an adequate
5 accounting system that meets the department's audit
6 requirements, as evidenced by certification by an independent
7 certified public accountant or governmental agency. The system
8 must be adequate to support all billings made to the department
9 and other clients.

10 (B) Indirect cost rate audit. The prime provider or
11 subprovider must submit an indirect cost rate audit for the time
12 period specified in clause (iii) of this subparagraph performed
13 by an independent certified public accountant, an agency of the
14 federal government, another state transportation agency, or a
15 local transit agency except as provided in clauses (iv) and (v)
16 of this subparagraph. If the audit is performed by an
17 independent certified public accountant, the provider or
18 subprovider must assure that the department will be given access
19 to the audit work papers.

20 (i) The audit report shall include statements that
21 the audit was performed in accordance with generally accepted
22 auditing standards and the indirect cost rate was developed in
23 accordance with the Federal Acquisition Regulations System, 48

1 CFR Part 31.

2 (I) AASHTO Uniform Audit and Accounting Guide is
3 acceptable guidance for the audit of the indirect cost rate.

4 (II) Department requirements that differ from the
5 AASHTO guide are contained in the Indirect Cost Rate Guidance
6 available through the department's website.

7 (ii) The department may perform indirect cost rate
8 audits of any prime provider or subprovider under contract to,
9 or desiring to do business with the department. These audits
10 will be conducted consistent with the criteria outlined in this
11 subsection.

12 (iii) The end of the fiscal period of the audit
13 report must be within eighteen months of the provider selection.

14 (iv) The department may contract with a prime
15 provider or allow utilization of a subprovider lacking an
16 approved indirect cost rate audit if:

17 (I) the value of the contract is less than
18 \$250,000;

19 (II) the prime provider or subprovider can
20 adequately document and support all proposed costs; and

21 (III) all other qualification requirements of this
22 subsection are met.

23 (v) Prime providers or subproviders who have been in

1 operation with an accounting system acceptable to the department
2 for less than one fiscal year since organization or
3 comprehensive reorganization shall prepare a projected indirect
4 cost rate for the first fiscal year of operation. The indirect
5 cost rate will be supported by estimated expenditures and be in
6 accordance with the Indirect Cost Rate guidance referred to in
7 subparagraph (A) of this paragraph. The department's Audit
8 Office will review the estimate and establish a provisional
9 indirect cost rate for use in contract negotiations.

10 (C) Salary rates. The department will consider current
11 salary rates, range of rates, or average rates by job
12 classification.

13 (D) Direct costs. The department will consider other
14 direct costs such as copies, Computer Aided Design and Drafting
15 (CADD), or other direct costs.

16 (4) Prohibited actions. Administrative qualification
17 information obtained through this section will not be made
18 available by the department's Audit Office prior to execution of
19 a contract.

20 (e) Requests for proposals for design-build contracts.

21 (1) Requests for proposals. If authorized by the
22 commission, the department will issue a request for proposals
23 from all private entities prequalified in accordance with this

1 relating to a project under this subchapter, or who participates
2 in the administration of a comprehensive development agreement.
3 Notwithstanding this prohibition, a consultant or subconsultant
4 (unless a member of a proposer or developer team, if authorized
5 under subsection (c) of this section) may:

6 (1) pay for an ordinary business lunch; and

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

11 (c) Conflicts of interest.

12 (1) Purpose. This subsection prescribes department
13 policy on conflicts of interest relating to consultants and
14 subconsultants participating in the comprehensive development
15 agreement program, and thereby:

16 (A) protects the integrity and fairness of the program
17 and all procurements carried out by the department as part of
18 the program;

19 (B) avoids circumstances where a consultant, proposer,
20 or developer obtains, or appears to obtain, an unfair
21 competitive advantage as a result of work performed by a
22 consultant or subconsultant;

23 (C) provides guidance to private entities so they may

1 assess, and make informed business decisions concerning their
2 participation in the program; and

3 (D) protects the department's interests and
4 confidential and sensitive project-specific and programmatic
5 information.

6 (2) Applicability. This subsection applies to all
7 comprehensive development agreement projects undertaken by the
8 department. This subsection applies to consultants and
9 subconsultants, and to individual employees of consultants and
10 subconsultants who participated in the performance of services
11 for the department. To the extent that the department has
12 previously consented in writing to a consultant's or
13 subconsultant's performance of services that are in conflict
14 with this subsection, participation on a proposer team as an
15 equity owner or team member, acting as a consultant or
16 subconsultant to a proposer, or having a financial interest in a
17 proposer or an equity owner or team member of a proposer, this
18 subsection does not modify or alter the prior consent. The
19 foregoing does not prevent, however, the application of this
20 subsection to the consultant or subconsultant for other
21 projects, including taking into account the performance of
22 services on the project for which consent was obtained. This
23 subsection may by extension prohibit or restrict the ability of

1 a proposer to have a consultant or subconsultant participate on
2 the proposer team as an equity owner or team member, act as a
3 consultant or subconsultant to the proposer, or have a financial
4 interest in the proposer or an equity owner or team member of
5 the proposer.

6 (3) Period in which a conflict of interest applies. If
7 the executive director determines that the performance of
8 services by a consultant or subconsultant raises a conflict of
9 interest, the resulting prohibition or restriction provided in
10 this subsection continues:

11 (A) for the private entity until one year after the
12 date of the determination; and

13 (B) for an individual that is an employee of or was
14 employed by the consultant or subconsultant and who participated
15 in the performance of services for the department:

16 (i) until five years after the date of the
17 determination for those projects for which the individual was
18 materially involved in providing services to the department; and

19 (ii) until one year from the date of the
20 determination for projects for which the individual was not
21 materially involved in providing services to the department.

22 (4) Application to new firm. If a conflict of interest
23 is determined to apply to an individual pursuant to paragraph

1 section, and the process will proceed in the manner described in
2 §27.4(e)-(1) of this subchapter.

3 (2) Additional evaluation criteria. In addition to the
4 evaluation criteria set forth in §27.4(e)-(1), design innovation
5 shall also be a criterion in evaluation of proposals submitted
6 in response to a request for proposals for a design-build
7 contract.

8
9 §27.8. Conflict of Interest and Ethics Policies.

10 (a) Purpose. This section prescribes ethical standards of
11 conduct applicable to private entities, including consultants
12 and subconsultants, participating in the department's
13 comprehensive development agreement program. A private entity's
14 failure to comply with these standards of conduct may result in
15 the private entity's preclusion from participation in a project
16 or sanctions being imposed under §27.9 of this subchapter
17 (relating to Sanctions).

18 (b) Gifts and benefits. A proposer, developer, consultant,
19 or subconsultant participating in the comprehensive development
20 agreement program, or an affiliate of any of those entities, may
21 not offer, give, or agree to give a gift or benefit to a member
22 of the commission or to a department employee whose work for the
23 department includes the performance of procurement services

1 (3)(B) of this subsection, the conflict of interest and
2 prohibition with respect to the individual will not apply to the
3 individual's new place of employment. If the new employer is
4 otherwise eligible to perform consultant services, the new
5 employer will remain eligible despite the employment of the
6 individual. This paragraph does not apply to an individual
7 employed by an affiliate of its previous employer, and the
8 conflict of interest and prohibition with respect to the
9 individual will apply to such affiliate.

10 (5) Federal requirements. For federal-aid projects, the
11 department must comply with the Federal Highway Administration's
12 organizational conflict of interest regulations (found in 23 CFR
13 §636.116). The requirements of this subsection do not limit,
14 modify, or otherwise alter the effect of those regulations, and
15 will be applied consistent with those regulations.

16 (6) General conflict of interest standards. Except as
17 provided in paragraph (7) of this subsection, no consultant
18 providing consultant services to the department with respect to
19 a comprehensive development agreement project may be a proposer
20 or participate as an equity owner, team member, consultant, or
21 subconsultant of or to a proposer for that project, or have a
22 financial interest in any of the foregoing entities with respect
23 to that project. Except as provided in paragraphs (8) and (9)

1 of this subsection, a consultant performing consultant services
2 for a comprehensive development agreement project will not be
3 prohibited from participating on a different comprehensive
4 development agreement project as a proposer or participating as
5 an equity owner, team member, consultant, or subconsultant of or
6 to a proposer for the different project, or having a financial
7 interest in any of the foregoing entities with respect to the
8 different project.

9 (7) Providing services for the same project. A
10 consultant that is actively providing preliminary engineering
11 and architectural services to the department with respect to a
12 comprehensive development agreement project, or that performed
13 and completed environmental or traffic and revenue services for
14 a comprehensive development agreement project, may be a proposer
15 or participate as an equity owner, team member, consultant, or
16 subconsultant of or to a proposer for the same project, or have
17 a financial interest in any of the foregoing entities with
18 respect to that project, provided the executive director issues
19 a written determination under paragraph (10) of this subsection
20 that:

21 (A) the consultant will not, or in the case of the
22 previous performance of consultant services did not, have access
23 to or obtain knowledge of confidential or sensitive information,

1 procedures, policies and processes that could provide an unfair
2 competitive advantage with respect to the procurement for that
3 project;

4 (B) the data and information provided to the consultant
5 in the performance of the consultant services is either
6 irrelevant to the procurement for that project or is available
7 on an equal and timely basis to all proposers;

8 (C) the work products from the consultant incorporated
9 into or relevant to the procurement for that project are
10 generally available on an equal and timely basis to all
11 proposers;

12 (D) with respect to environmental services, a record of
13 decision or finding of no significant impact has been issued for
14 the project; and

15 (E) with respect to traffic and revenue services, there
16 will be no impact on the project's plan of finance, including
17 the ability to obtain and close funding and potential sources of
18 funding.

19 (8) Procurement and financial services. A consultant
20 actively engaged and performing procurement services or
21 financial services with respect to a comprehensive development
22 agreement project may not be a proposer or participate as an
23 equity owner, team member, consultant, or subconsultant of or to

1 a proposer for that project or any other comprehensive
2 development agreement project, or have a financial interest in
3 any of the foregoing entities with respect to any comprehensive
4 development agreement project.

5 (9) Completed services. A consultant that performed
6 consultant services for a comprehensive development agreement
7 project and completed the services may be a proposer or
8 participate as an equity owner, team member, subconsultant or
9 consultant of or to a proposer on a different comprehensive
10 development agreement project, or have a financial interest in
11 any of the foregoing entities with respect to a different
12 project, provided that the executive director issues a written
13 determination under paragraph (10) of this subsection that the
14 conditions in paragraph (7) (A)-(C) have been met.

15 (10) Requests for determinations or exceptions. A
16 consultant, proposer, or developer may submit a request to the
17 executive director for a determination whether participation in
18 a comprehensive development agreement project or the performance
19 of particular services with respect to a comprehensive
20 development agreement project would constitute a conflict of
21 interest, or to request approval of an exception to the
22 applicability of this subsection to those services. A request
23 for approval of an exception may be made if a consultant,

1 proposer, or developer desires to appeal a previous
2 determination by the executive director that a conflict of
3 interest exists. The executive director will forward a request
4 to the department's Office of General Counsel for analysis and
5 recommendation prior to issuing a decision. In determining
6 whether a conflict of interest exists, or whether to approve an
7 exception, the executive director shall consider:

8 (A) the extent to which the firm or individual employee
9 obtained access to or the ability to gain knowledge of
10 confidential or sensitive information, procedures, policies, and
11 processes concerning the comprehensive development agreement
12 program or a particular project or procurement that could
13 provide an unfair competitive advantage with respect to the
14 procurement or project at issue;

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

16 (C) the particular circumstances of each procurement;

17 (D) the specialized expertise needed by the department
18 and proposers to implement the procurement;

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

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

23 (G) the potential impact on the procurement and project

1 at issue, including competition.

2 (11) Multiple services. If a consultant is providing
3 more than one category of consultant services to the department
4 and there are differences in the standards, restrictions, and
5 limitations applicable to those categories, the standards,
6 restrictions, and limitations applicable to a category that are
7 more stringent will be applied.

8 (12) Participation on proposer or developer team. A
9 consultant participating with respect to a comprehensive
10 development agreement project as a proposer or developer, or as
11 an equity owner, team member, consultant, or subconsultant of or
12 to a proposer or developer, or having a financial interest in
13 any of the foregoing entities, is eligible to provide consultant
14 services (other than procurement services) to the department for
15 another comprehensive development agreement project, provided
16 that, once the consultant is retained to perform consultant
17 services for the department, the restrictions in this subsection
18 shall apply.

19 (13) Restriction of services and conditions to approvals
20 and exceptions. In instances where the executive director has
21 issued a written determination under paragraph (10) of this
22 subsection that a conflict of interest does not exist
23 (including, in particular, where the conditions prescribed in

1 paragraphs (7) and (9) of this subsection have been met), or
2 grants an exception to the application of this subsection under
3 paragraph (10), the department may still, in its discretion:

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

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

14 (14) Provisions are nonexclusive. The provisions in this
15 subsection do not address every situation that may arise in the
16 context of the department's comprehensive development agreement
17 program nor require a particular decision or determination by
18 the executive director when faced with facts similar to those
19 described in this subsection. The department retains the
20 ultimate and sole discretion to determine on a case-by-case
21 basis whether a conflict of interest exists and what actions may
22 be appropriate to avoid, neutralize, or mitigate any actual or
23 potential conflict, or the appearance of any conflict. The

1 provisions of this subsection shall not be construed to preclude
2 or condone any conduct with regard to projects other than
3 projects under a comprehensive development agreement. The
4 department will continue to evaluate other projects based on its
5 traditional conflict of interest standards.

6 (d) Rules of contact. In order to provide a fair and
7 unbiased procurement process, a request for qualifications,
8 request for proposals, or request for competing proposals and
9 qualifications will contain rules of contact regulating
10 communications between proposers or any of its team members and
11 the commission, the department, and third parties involved in
12 the procurement. Communication includes face-to-face,
13 telephone, facsimile, electronic-mail (e-mail), or formal
14 written communication. The rules of contact become effective
15 upon the issuance of the request for qualifications, request for
16 proposals, or request for competing proposals and
17 qualifications. The rules of contact will include provisions:

18 (1) prohibiting a proposer or any of its team members
19 from communicating with another proposer or its team members
20 with regard to the project, request for qualifications, request
21 for proposals, or request for competing proposals and
22 qualifications, or either team's qualifications submittal or
23 proposal;

1 (2) requiring each proposer to designate one or more
2 representatives responsible for contact with the department, and
3 requiring the proposer to correspond with the department
4 regarding the project, request for qualifications, request for
5 proposals, or request for competing proposals and qualifications
6 only through the department's authorized representatives and the
7 proposer's designated representatives;

8 (3) prohibiting any ex parte communication regarding the
9 project, request for qualifications, request for proposals, or
10 request for competing proposals and qualifications or the
11 procurement with any member of the commission or with any
12 department staff, advisors, contractors, or consultants involved
13 in the procurement until the earliest of the execution and
14 delivery of the comprehensive development agreement, the
15 rejection of all qualifications submittals or proposals by the
16 department, or the cancellation of the procurement;

17 (4) permitting communications in exceptional
18 circumstances and designating department personnel authorized to
19 approve such communications, and providing that the restrictions
20 on communications shall not preclude or restrict communications
21 with regard to matters unrelated to the request for
22 qualifications, request for proposals, or request for competing
23 proposals and qualifications, or participation in public

1 meetings of the commission or any public or proposer workshop
2 related to the project, request for qualifications, request for
3 proposals, or request for competing proposals and
4 qualifications;

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

12 (6) authorizing the executive director to disqualify a
13 proposer from the procurement and participation in the project
14 at issue or to impose another sanction under §27.9 of this
15 subchapter if it is determined that a proposer has engaged in
16 any improper communications in violation of the rules of
17 contact.

18 (e) Exceptions to rules of contact. Notwithstanding
19 subsection (d)(1) of this section:

20 (1) subcontractors that are shared between two or more
21 proposer teams may communicate with members of each of those
22 teams so long as those proposers establish a protocol to ensure
23 that the subcontractor will not act as a conduit of information

1 between the teams; and

2 (2) the prohibition provided by that subsection does not
3 apply to public discussions regarding the project, request for
4 qualifications, request for proposals, or request for competing
5 proposals and qualifications at any department sponsored
6 informational meetings.

7

8 §27.9. Sanctions.

9 (a) Procedure.

10 (1) Notification of rules. A copy of this section will
11 be included in each request for qualifications, request for
12 proposals, and request for competing proposals and
13 qualifications issued under this subchapter. Failure to comply
14 with this subsection does not affect the applicability of this
15 section.

16 (2) Referral to executive director. In determining
17 whether to refer a private entity to the executive director for
18 possible sanctions, the department will consider the criteria
19 set forth in subsection (c)(3) of this section.

20 (3) Notice of sanctions. The department will notify the
21 private entity of a sanction by certified mail within five days
22 after the executive director's decision to impose the sanction.
23 The notice will summarize the facts and circumstances underlying

1 the sanction, identify the effective date and period of the
2 sanction, and state that the private entity may petition for a
3 hearing within 10 days after receiving notice of the sanction.
4 Except as provided in subsection (b) of this section, a sanction
5 is effective on the date specified in the notice.

6 (4) Agreed modification of procedure. The procedure for
7 considering a sanction may be modified by agreement of the
8 executive director and the private entity.

9 (5) Contractual obligations unaffected. The imposition
10 of sanctions does not affect a private entity's obligations
11 under a comprehensive development agreement or any other
12 agreement with the department or limit the commission's
13 contractual remedies thereunder.

14 (6) Affiliated entities included. References to the term
15 "private entity" also include an affiliate of the private
16 entity, provided that the affiliate is an entity:

17 (i) which directly or indirectly through one or more
18 intermediaries controls, is controlled by, or is under common
19 control with, the private entity or any of its members,
20 partners, or shareholders holding a 10% or greater interest in
21 the private entity; or

22 (ii) for which 10% or more of the equity interest in
23 such entity is held directly or indirectly by the private

1 entity, any of the private entity's members, partners or 10% or
2 greater shareholders or any affiliate of the private entity
3 under subparagraph (i) of this paragraph.

4 (7) Responsibility for acts of others. The conduct of an
5 individual or other entity acting on behalf of the private
6 entity may be imputed to the private entity.

7 (b) Opportunity for hearing.

8 (1) Availability of hearing. The private entity will be
9 given the opportunity for a hearing after receiving notice of a
10 sanction and may petition for a hearing as provided in §1.21 et
11 seq. of this title (relating to Procedures in Contested Cases).
12 The petition must be filed within 10 days after the private
13 entity receives notice of the sanction.

14 (2) Stay of sanctions pending hearing. A sanction,
15 except a suspension, is automatically stayed from the date a
16 petition for hearing is filed until a final order is entered by
17 the commission. On entry of a final order imposing the sanction
18 or dismissing the hearing, the full term of the sanction will be
19 reinstated as if it were first imposed on the date of the final
20 order unless the commission specifically orders that a lesser
21 sanction be imposed.

22 (3) Commission discretion. In the public interest, the
23 commission may reduce, eliminate, or modify sanctions imposed

1 under this section at any time.

2 (4) Exception. The opportunity for a hearing described
3 in subsection (b)(1) of this section does not apply to a private
4 entity that has been sanctioned through the use of a reprimand.
5 In such cases, the private entity may submit written
6 documentation disputing the reprimand to the executive director
7 for further consideration.

8 (c) Application of sanctions.

9 (1) Determination of offense. The executive director
10 will determine whether a private entity has committed an act or
11 omission listed under subsection (e)(1) of this section.

12 (2) Consideration of all circumstances. The existence of
13 grounds for imposing a sanction does not mandate that a private
14 entity be sanctioned. The seriousness of the acts or omissions
15 (including the existence of and elapsed time since previous acts
16 or omissions) and any mitigating circumstances will be
17 considered before sanctions are imposed.

18 (3) Mitigating circumstances. The executive director
19 will consider mitigating circumstances (or lack thereof) in
20 deciding whether to impose sanctions. Mitigating circumstances
21 may include:

22 (i) the private entity's culpability;

23 (ii) the level of impact the sanction will have on a

1 particular comprehensive development agreement project;

2 (iii) whether, in light of all facts and circumstances,
3 a severe sanction is necessary to protect the interest of the
4 state and the integrity of the comprehensive development
5 agreement program;

6 (iv) restitution paid by the private entity or a third
7 party for damages suffered by a governmental entity as a result
8 of the private entity's actions;

9 (v) cooperation by the private entity with a
10 governmental entity in the investigation of bidding crimes,
11 including the provision of a full and complete account of the
12 private entity's involvement; and

13 (vi) the private entity's disassociation from
14 individuals and firms that have been involved in a bidding
15 crime.

16 (4) Determination of sanction level. The executive
17 director, after consideration of all circumstances (including
18 any mitigating circumstances) will determine a sanction level
19 described in subsection (e)(2) of this section to be imposed on
20 the private entity.

21 (5) Progressive sanctions. If the private entity has
22 previously been sanctioned, the executive director may use
23 increasingly more severe sanctions in order to achieve the

1 private entity's compliance with department policies and
2 procedures. Every effort will be made to resolve the situation
3 with the imposition of the least severe sanction that is
4 appropriate for the circumstances under consideration. However,
5 in cases where the act or omission is of such a nature that
6 progressive sanction action is not in the best interest of the
7 state or the comprehensive development agreement program, a more
8 severe sanction may be imposed even if such act or omission is
9 the first act or omission by the private entity which warrants
10 sanction action.

11 (6) Consecutive sanctions. In the case of multiple
12 violations by the same private entity arising out of separate
13 occurrences, the executive director may impose multiple
14 sanctions consecutively and in any order.

15 (7) Imposition of lesser sanctions. A lesser sanction
16 may be imposed instead of the maximum sanction permitted.

17 (8) Executive director discretion. In the best interest
18 of the state or the comprehensive development agreement program,
19 the executive director may reduce, eliminate, or modify
20 sanctions at any time.

21 (d) Suspension.

22 (1) Grounds. The executive director may immediately
23 suspend a private entity without a prior hearing if the private

1 entity is notified of debarment under subsection (e) of this
2 section.

3 (2) Duration. A suspension will terminate when a final
4 order is entered after a hearing or when ordered by the
5 executive director.

6 (e) Sanctions.

7 (1) Grounds. The executive director may sanction a
8 private entity for the following reasons:

9 (i) conviction of a bidding crime as defined in §9.101
10 of this title (relating to Contractor Sanctions), a plea of
11 guilty or nolo contendere to a charge of a bidding crime, or a
12 public admission to a bidding crime, whether made by the private
13 entity or by an individual or other entity that acted on behalf
14 of the private entity;

15 (ii) conviction of the private entity for an offense
16 indicating a lack of moral or ethical integrity, such as bribery
17 or payment of kickbacks or secret rebates to agents of a
18 governmental entity, if the offense reflects on the business
19 practices of the private entity;

20 (iii) commission of acts indicating a lack of moral or
21 ethical integrity and reflecting on the business practices of
22 the private entity, if the executive director has probable cause
23 to believe that the acts have been committed;

1 (iv) disqualification of the private entity by a state
2 or by an agency of the federal government for any of the reasons
3 listed in this section;

4 (v) failure of the private entity to notify the
5 department promptly of a conviction of a bidding crime or
6 debarment for any reason by a state or by an agency of the
7 federal government;

8 (vi) the private entity is declared in default on a
9 comprehensive development agreement in accordance with the terms
10 of that agreement;

11 (vii) violation of the conflict of interest provisions
12 applicable to private entities participating in the department's
13 comprehensive development agreement program as set forth in
14 §27.8 of this subchapter;

15 (viii) violation of the provision relating to offering,
16 conferring, or agreeing to confer gifts and benefits to
17 department employees as set forth in §27.8 of this subchapter
18 (relating to Conflict of Interest and Ethics Policies); or

19 (ix) any other grounds described in §9.106(a) of this
20 title (relating to Contractor Sanctions) exist.

21 (2) Sanction levels. The executive director will
22 determine the level of sanction appropriate for the
23 circumstances under consideration.

1 (i) Level 1. Reprimand. After four reprimands in one
2 calendar year, any subsequent act or omission committed by the
3 private entity will result in the imposition of a more severe
4 sanction.

5 (ii) Level 2. Prohibition against the private entity's
6 participation in a particular procurement.

7 (iii) Level 3. Debarment of the private entity for a
8 period of no more than 36 months.

9 (iv) Level 4. Permanent debarment of the private
10 entity.

11 (3) Exception. Debarment under paragraph (2)(iv) of this
12 subsection may not be for more than the period of debarment
13 established by the state or federal agency on whose actions the
14 debarment is based.

15 (4) Use of sanction information. Information pertaining
16 to any sanction(s) imposed against a private entity may be
17 considered by the department during the evaluation of
18 qualification submittals and other proposals submitted by the
19 private entity during a procurement process. Use of this
20 information is limited to sanction action(s) which occurred
21 within 10 years of the date the qualification submittal or other
22 proposal is received by the department.

23

NOTE: Additions underlined
Deletions in []]
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Exhibit B