

**REQUEST FOR PROPOSALS  
TO DESIGN AND CONSTRUCT**

**ENERGY SECTOR ROADWAY REPAIR PROJECT**

**THROUGH A DESIGN-BUILD CONTRACT**

**VOLUME I  
INSTRUCTIONS TO PROPOSERS**

**A PROJECT OF THE  
TEXAS DEPARTMENT OF TRANSPORTATION**

**ISSUED SEPTEMBER 27, 2013**

**Texas Department of Transportation  
125 East 11<sup>th</sup> Street – Fifth Floor  
Austin, Texas 78701**

**KEY DATES**

<b><u>EVENT</u></b>	<b><u>DATE</u></b>
Issue Request for Proposals	September 27, 2013
Proposal Due Date	November 20, 2013
DBC Conditionally Awarded (anticipated)	December 19, 2013
DBC Executed and Delivered (anticipated)	February/March 2014

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## INSTRUCTIONS TO PROPOSERS

### (Request for Proposals: Energy Sector Roadway Repair Project)

#### SECTION 1.0 INTRODUCTION AND GENERAL PROVISIONS

##### 1.1 Introduction

This Request for Proposals (“RFP”), as may be amended, is issued by the Texas Department of Transportation (“TxDOT”), an agency of the State of Texas, to seek competitive proposals (individually, a “Proposal” and collectively, “Proposals”) for a Design-Build Contract (“DBC”). The DBC will require the successful Proposer (“Design-Build Contractor” or “DB Contractor”) to design and construct the Energy Sector Roadway Repair Project (the “Project”) as further described below. The form of DBC is included in Volume II of the RFP.

TxDOT is issuing the RFP to those Proposers shortlisted based on TxDOT’s evaluation of Qualification Statements (“QSs”) delivered to TxDOT on August 29, 2013 in response to the Request for Qualifications for the Project issued on August 2, 2013, as amended (the “RFQ”).

Proposers must comply with these Instructions to Proposers (“ITP”) during the procurement and in their responses to the RFP. Proposers shall also take the Project goals identified in Section 1.2 below into consideration in drafting their Proposals. All forms identified in this ITP are found in Exhibit D unless otherwise noted. All times in this ITP are Central Standard Time (CST) or Central Daylight Savings Time (CDT), as applicable.

The intent of this procurement is to deliver as much scope (as described below) as possible for an amount not exceeding \$150 million, inclusive of all design-build costs. Identified on Exhibit I are 31 site locations (the “Locations”) for the Project, which are listed in priority order, with Location 1 having the highest priority. Each Proposer shall indicate in its Proposal how many of the Locations the Proposer commits to complete for a Base Scope Design-Build Price not exceeding \$150 million, and in doing so shall start with Location 1 and proceed down the list in order until the Proposer has included the maximum number of Locations that the Proposer is able to include for \$150 million or less.

Each Proposer may submit only one Proposal, and that Proposal shall contain the largest base scope the Proposer can deliver. Proposers may not alter the priority order of the Locations when identifying the Proposer’s base scope. For any Locations not included in Proposer’s base bid, Proposer shall provide a lump-sum price (inclusive of all design-build costs) for each Location outside of the Proposer’s base scope, on a Location-by-Location basis. Each of these individual lump sum prices shall be an option for a period of one year following the Proposal Due Date which TxDOT may, if it desires, select to include in the Project. As such, the Location-by-Location prices for

each Location outside of the Proposer's base scope must remain open for one year following the Proposal Due Date. If the Proposer includes all 31 Locations in its base scope, no Location-by-Location prices will be required.

See Section 5.0 for a more detailed description of the evaluation and post-selection process. The RFP requires each Proposer to be prepared to act as DB Contractor for the Project if the Proposer is selected to enter into the DBC.

## **1.2 Project Goals**

TxDOT's goals for the Project are as follows:

- (a) Delivering as much base scope as possible with available funds (\$150 million);
- (b) Maintaining safe mobility through the Project area during construction of the Project while minimizing negative impacts to the public, business, communities and adjacent property owners through effective cooperation and coordination;
- (c) Securing quality services meeting or exceeding TxDOT technical requirements at fair and competitive prices;
- (d) Safe construction;
- (e) Cooperating and coordinating with TxDOT in the design and construction of the Project;
- (f) Improving mobility within the Project area after the construction period;
- (g) Achieving the earliest possible completion of the entire Project; and
- (h) Facilitating participation by DBEs consistent with the DBC Documents and applicable Laws.

## **1.3 General Project Description and Scope of DB Contractor's Obligations**

### **1.3.1 General Project Description**

The purpose of the project is to provide maintenance improvements and safety improvements, including repairs to roadways and bridges within the State highway system damaged by oversized vehicles, overweight loads, or by above normal vehicle usage in the development and production of energy resources (rehabilitate energy impacted roadways). TxDOT has concluded that harnessing private-sector creativity through a design-build approach is the best way to ensure cost-effective and expedited delivery of this Project and provide needed safety improvements and economic development benefits to the public.

Project location, scope and limits include the construction of each of the Locations. The Locations are listed in a priority order with respect to bidding; however, the construction schedule will not be required to follow the same priority order for the Locations. See Section 5 for additional information regarding Proposal evaluation and scoring.

### **1.3.2 Scope of DB Contractor's Obligations**

The DB Contractor will deliver as much scope as possible with the available funds (\$150 million). DB Contractor's obligations will generally include all efforts required to develop, design (if DB Contractor elects to change the final design plans provided by TxDOT) and construct the Project in accordance with the requirements of the DBC Documents. The DBC will require the DB Contractor to be responsible for certain maintenance activities (as set forth in the Technical Provisions) during the construction work for the Locations. With respect to Location numbers 3, 5, 9 and 13 (as shown on Exhibit I), the DBC also will obligate the DB Contractor to provide a general warranty for the work on the Project for a period of two years after substantial completion of each Location. For all other Locations, the DBC will obligate the DB Contractor to provide a warranty of materials and workmanship of the work for a period of one year after substantial completion of each such Location. In either case, the scope of the DB Contractor's warranty will not extend to elements of the design work that are in the final design plans provided by TxDOT.

### **1.3.3 Project Environmental Status**

All Locations are expected to receive environmental clearance prior to Conditional Award of the Project.

### **1.3.4 Status of Right of Way/Railroad Coordination**

It is not anticipated that any additional right-of-way will be acquired for this Project. As such, the DB Contractor will not have responsibilities under the DBC for right-of-way acquisition activities for the Project parcels; however, the DB Contractor will be responsible for acquisition costs if the DB Contractor requests the acquisition of parcels outside of the Final Design Right-of-Way.

As more fully described in the Technical Provisions, TxDOT anticipates executing a Joint Use Agreement with the Union Pacific Railroad Company with respect to a 13-mile long drainage ditch that runs adjacent to the east frontage road of I-35 and a railroad (Location 13). The Joint Use Agreement is anticipated to be completed not later than December 2014. While the DB Contractor must account for this Joint Use Agreement with respect to schedule development and related matters, the DB Contractor will not be responsible for the negotiation or execution of this Joint Use Agreement.

### **1.3.5 Status of Required Utility Work**

The DBC will require the DB Contractor to be responsible for performing or causing to be performed necessary utility relocations/adjustments in accordance with applicable standards and, with limited exceptions specified in the DBC, for the costs associated

with utility relocations/adjustments, except to the extent the utilities are legally responsible for such costs.

### **1.3.6 Status of Design**

TxDOT will be providing signed and sealed final design plans to the DB Contractor. Such design plans will be made available to Proposers in the Reference Information Documents (“RIDs”) and will be incorporated into the DBC.

## **1.4 Documents in the Request for Proposals**

The RFP consists of the following volumes, and any other documents that may be issued by Addendum, as such documents may be amended and supplemented:

- (a) Volume I – this ITP (including exhibits and forms);
- (b) Volume II – the DBC Documents; and
- (c) Volume III – the Reference Information Documents.

For order of precedence, refer to Section 1.2.1 of the DBC for DBC Documents. RIDs will be made available at the webpage described below and via a memory storage device from TxDOT. Proposers may request electronic copies on a memory storage device of available RIDs by contacting TxDOT’s Project Manager. TxDOT will charge \$25.00 (check only) for the costs of providing electronic copies on a memory storage device. With respect to certain video files from drive-through investigations of Locations, electronic copies on a memory storage device will be made available by TxDOT, with a charge of \$125 (check only) for the costs of providing such electronic copies on a memory storage device. RIDs available as of the time of issuance of this RFP will be posted to a secure SharePoint website to which short-listed Proposers will have access. Additional RIDs may subsequently become available and will be distributed to Proposers via such SharePoint website.

The RIDs are included in the RFP for the purpose of providing information to Proposers that is in TxDOT’s possession. Except as may be set forth in the DBC, TxDOT has not determined and makes no representation, warranty or guaranty as to whether the Reference Information Documents are accurate, complete or pertinent to the Proposers. Except as may be explicitly included in the DBC Documents, the Reference Information Documents will not form a part of the contract between TxDOT and DB Contractor.

## **1.5 Definitions and Acronyms**

Refer to Exhibit A hereto for the meaning of various capitalized terms and acronyms used herein, and refer to Exhibit 1 of the DBC for the meaning of capitalized terms and acronyms used but not defined herein or in Exhibit A of this ITP.

## **1.6 Procurement Schedule**

The following represents the current schedule for the procurement.

<b><u>EVENT</u></b>	<b><u>DATE and TIME</u></b>
Issue Request for Proposals	September 27, 2013
One-on-one meetings with Proposers to discuss questions regarding the RFP	Week of October 7, 2013
Deadline for first round of Proposer submittal of questions	October 9, 2013 12:00 p.m.
Last date for Proposer submittal of questions regarding the RFP	October 18, 2013 12:00 p.m.
Deadline for submittal of ATCs	October 25, 2013 12:00 p.m.
Last date for TxDOT responses to ATCs	November 8, 2013
Proposal Due Date	November 20, 2013 12:00 p.m.
Anticipated conditional award by Texas Transportation Commission	December 19, 2013
DBC Executed (anticipated)	February/March 2014

Where the RFP provides a deadline or due date for submission of documents, correspondence or other materials to TxDOT, the submission will only be considered timely if TxDOT receives the submission by the date and, if applicable, the time identified.

## **1.7 General Provisions Regarding Proposals**

### **1.7.1 Proposal Contents**

As used in this procurement, the term "Proposal" means a Proposer's complete response to the RFP, including a (a) Technical Proposal and (b) Financial Proposal. The instructions and requirements for the Technical Proposal and the Financial Proposal are set forth in Exhibits B and C, respectively, and a checklist showing the required contents of the entire Proposal is found in Exhibit E. The Proposal shall be organized in the order listed in Exhibit E, and shall be clearly indexed. Any failure to provide all the information and all completed forms (Exhibit D) in the format specified or submittal of a Proposal subject to any reservations, qualifications, conditions or assumptions may result in TxDOT's rejection of the Proposal or giving it a lower rating.

### **1.7.2 Inclusion of Proposal in DBC Documents**

As specified in the DBC, portions of the successful Proposal will become part of the DBC Documents. All other Proposal submittal information is for evaluation purposes only and will not become part of the DBC Documents.

### **1.7.3 Commitments in the Proposal**

Each Proposal will be interpreted and evaluated based on the level of commitment provided by Proposer.

### **1.7.4 Ownership of Proposal and Applicability of Public Information Act**

Subject to the exceptions specified herein, the “Rules” (defined below in Section 2.1) and in the Texas Transportation Code (the “Code”), all written and electronic correspondence, exhibits, photographs, reports, printed material, tapes, disks, designs, and other graphic and visual aids submitted to TxDOT during this procurement process, whether included in the Proposal or otherwise submitted, become the property of the State of Texas upon delivery to TxDOT, and will not be returned to the submitting parties. Consequently, all such items may be subject to Texas Government Code, Chapter 552 (the “Public Information Act” or the “Act”). Proposers should familiarize themselves with the provisions of the Act requiring disclosure of public information, and exceptions thereto. In no event shall the State of Texas, TxDOT, or any of their agents, representatives, consultants, directors, officers or employees be liable to a Proposer or Proposer team member for the disclosure of any materials or information submitted in response to the RFP. See also Section 2.6.

## **1.8 Project Costs and Funding**

TxDOT currently has allocated \$150 million for the design-build construction of these improvements. This allocation of funds includes all costs to design and construct the Project, and estimated costs reflect the currently developed final design plans and environmentally studied project components at current construction prices. TxDOT contemplates using State funds to fund the design and construction of the Project. Payments will be made in accordance with the DBC Documents. Although TxDOT anticipates using State funds, the use of federal funds has not been foreclosed.

## **1.9 Federal Requirements**

### **1.9.1 General Obligations**

In order to preserve the ability of TxDOT to use federal funding for the Project; the procurement process, the DBC Documents must comply with applicable federal Laws.

### **1.9.2 DBE Requirements**

TxDOT has determined that Disadvantaged Business Enterprise (“DBE”) requirements apply to the design and construction of the Project, and has adopted a DBE Program to provide DBEs opportunities to participate in the business activities of TxDOT as service providers, vendors, contractors, subcontractors, advisors, and consultants. TxDOT has adopted the definition of DBE set forth in 49 CFR § 26.5. Proposer’s DBE compliance obligations shall be governed by all applicable federal DBE regulations, including 49 CFR Part 26, as well as applicable requirements set forth in the DBC Documents and TxDOT’s DBE Program document.

The DBE participation goal for the Project is 7% of the Price. TxDOT's DBE requirements applicable to the DBC are set forth in Section 7.1 of the DBC, the DBE Special Provisions attached as Exhibit 6 to the DBC and TxDOT's DBE Program adopted pursuant to Title 49 CFR Part 26. As set forth in Section 3.2.9 of Exhibit B, each Proposer shall submit a certification concerning DBE requirements with its Proposal. Failure to provide the required DBE certification shall be considered a breach of the Proposal requirements and render a Proposal non-responsive.

Following conditional award of the DBC, the selected Proposer will be required to submit a detailed DBE Performance Plan describing the methods to be employed for achieving TxDOT's DBE participation goals for the Project, including Proposer's exercise of good faith efforts. Requirements for the DBE Performance Plan are set forth in the DBE Special Provisions, Exhibit 6 to the DBC. The DBE Performance Plan will be subject to review, comment and approval by TxDOT prior to and as a condition of final award of the DBC.

The selected Proposer will also be required to provide DBE commitments in the form required by TxDOT as DBE subcontractors are identified, in accordance with the DBE Special Provisions, the approved DBE Performance Plan, and TxDOT's DBE Program.

DB Contractor shall not cancel or terminate any subcontract with a DBE firm except in accordance with all requirements and provisions applicable to cancellation or termination of subcontracts with DBE firms set forth in the DBE Special Provisions in Exhibit 6 to the DBC.

## **SECTION 2.0 PROCUREMENT PROCESS**

### **2.1 Procurement Method**

The RFP is issued pursuant to Chapter 223, Subchapter F, of the Code and other applicable provisions of law pertaining to design-build contracts, Sections 9.150-9.155 of Title 43, Texas Administrative Code (the "Rules"), which became effective on March 15, 2012, and other applicable provisions of Texas and federal Law.

If an award will be made, TxDOT will award the DBC to the responsible Proposer offering a Proposal meeting the standards set by TxDOT and which is determined by TxDOT to provide the best value to TxDOT and to be in the best interest of the State of Texas. TxDOT will accept Proposals for the Project only from those Proposers TxDOT has shortlisted for the procurement based on their responses to the RFQ.

### **2.2 Communications and Other Information**

#### **2.2.1 Authorized Representative**

TxDOT has designated the following individual to be its authorized representative for the procurement (the "Authorized Representative"):

Frank Holzmann, P.E.

Texas Department of Transportation  
7600 Chevy Chase Drive, Building 2, Suite 400  
Austin, TX 78752  
E-mail: [TxDOT-TEXAS-PPP-ESR2P@txdot.gov](mailto:TxDOT-TEXAS-PPP-ESR2P@txdot.gov)

From time to time during the procurement process or during the term of the DBC, TxDOT may designate another Authorized Representative or representatives to carry out some or all of TxDOT's obligations pertaining to the Project.

### **2.2.2 Rules of Contact**

From the date of issuance of the RFQ (August 2, 2013) until September 27, 2013, the rules of contact provisions in the RFQ were applicable to this procurement. Starting on September 27, 2013, the date the RFP was issued, and ending on the earliest of (i) execution and delivery of the DBC, (ii) rejection of all Proposals by TxDOT or (iii) cancellation of the RFP, the rules of contact set forth below shall apply. These rules are designed to promote a fair and unbiased procurement process. Contact includes face-to-face, telephone, facsimile, electronic-mail (e-mail), social media, instant messages, texts, or formal written communication.

The specific rules of contact are as follows:

(a) No Proposer nor any of its team members may communicate with another Proposer or its team members with regard to the RFP or either team's Proposal, except that (i) subcontractors that are shared between two or more Proposer teams may communicate with their respective team members so long as those Proposers establish a protocol to ensure that the subcontractor will not act as a conduit of information between the teams and (ii) this prohibition does not apply to public discussions regarding the RFP at any TxDOT-sponsored informational meetings.

(b) Each Proposer shall designate one representative responsible for all communications between the Proposer and TxDOT (initially, the person identified in the QS as the sole point of contact for the Proposer), and such designated representative shall correspond with TxDOT regarding the RFP only through TxDOT's Authorized Representative (except communications with TxDOT's ombudsman as provided in subsection (c) of this Section 2.2.2 below).

(c) No Proposer or representative thereof shall have any ex-parte communications regarding the RFP or the procurement described herein with any member of the Texas Transportation Commission ("Commission"), Stakeholder or with any TxDOT staff, advisors, contractors or consultants involved with the procurement or the Project, except for communications with TxDOT consultants who have completed their services for the Project and been released by TxDOT, communications expressly permitted by the RFP or except as approved in advance by the Authorized Representative or the Chief Planning and Project Officer, in his/her sole discretion. The foregoing restriction shall not, however, preclude or restrict communications with regard

to matters unrelated to the RFP or participation in public meetings of the Commission or any public or Proposer workshop related to the RFP.

(d) Proposers shall not contact any of the Stakeholders regarding the Project, including employees, representatives, members and consultants of the Stakeholders, except as specifically approved in advance by TxDOT in writing or as set forth in this Section 2.2.2(d). Notwithstanding the foregoing:

- (i) each Proposer may set up meetings with Stakeholders that are municipal utility providers, but only to the extent that the Stakeholder's role as a municipal utility provider may be relevant for the Project, for the sole purpose of discussing utility issues in connection with the Project; provided that the Proposer shall provide written notice to TxDOT of the date, time, location and anticipated attendees of such meetings no later than three business days in advance of each such meeting; and provided, however, that the Proposer shall not discuss other Proposers or their proposals, negotiate exclusive arrangements to the detriment of other Proposers or otherwise seek an unfair competitive advantage; and
- (ii) each Proposer may contact private landowners along the Project corridor for the purpose of performing due diligence and discussing aspects of the Proposal, including temporary construction easement, staging areas and borrow; provided, however, that the Proposer shall not discuss other Proposers or their proposals, negotiate exclusive arrangements to the detriment of other Proposers or otherwise seek an unfair competitive advantage; and provided further that the Proposer shall not attempt to obtain from such landowners rights of entry during the procurement except as set forth in Section 2.7.

(e) Proposers shall not communicate with the Texas Comptroller of Public Accounts.

(f) Any communications determined by TxDOT, in its sole discretion, to be improper may result in disqualification.

(g) Any official information regarding the Project will be disseminated from TxDOT's office on Department letterhead, on the RFP Webpage or on the Project Webpage. Any official correspondence will be in writing, on TxDOT letterhead and signed by TxDOT's Authorized Representative or designee.

(h) TxDOT will not be responsible for any oral exchange or any other information or exchange that occurs outside the official process specified herein.

## **2.3 Questions and Response Process, and Addenda**

### **2.3.1 Questions and Responses Regarding the RFP**

Proposers shall be responsible for reviewing the RFP and any Addenda issued by TxDOT prior to the Proposal Due Date, and for requesting written clarification or interpretation of any perceived mistake, error or omission contained therein, or of any provision which Proposer fails to understand. Proposers shall submit requests for written clarification in accordance with this Section 2.3.1. TxDOT will consider these clarification requests in drafting addenda, if any, to the DBC Documents. TxDOT also may elect at its option to respond to such clarification requests through written responses.

TxDOT will only consider comments or questions regarding the RFP, including requests for clarification and requests to correct errors, if submitted by a shortlisted Proposer to the Authorized Representative in writing via submission to email address identified in Section 2.2.1. If it is a confidential communication regarding the procurement process, it must be submitted to TxDOT's designated ombudsman by hard copy or electronic transmission in the format prescribed herein (see Section 2.3.2 for a description of the instances in which communications may be submitted to the ombudsman). Submissions may only be made by the Proposer's designated representative, and must include the requestor's name, address, telephone and facsimile numbers, e-mail address, and the Proposer he/she represents.

Such comments or questions may be submitted at any time prior to the applicable last date specified in Section 1.6 and shall identify the document (e.g., the DBC, the Design-Build Technical Provisions, etc.) and identify the relevant section number for reference.

Proposers will be limited to 20 questions. If a question has more than one subpart, each subpart will be considered a separate question. Corrections of typographical errors, incorrect cross references or internal inconsistencies within or among the RFP documents will be excluded from the above question limitation.

Except during one-on-one meetings, no telephone or oral requests will be considered. Proposers are responsible for ensuring that any written communications clearly indicate on the first page or in the subject line, as applicable, that the material relates to the Project.

### **2.3.2 Ombudsman**

TxDOT has designated an employee who is not involved in this procurement to act as an ombudsman for the purpose of receiving written communications submitted in accordance with this Section 2.3.2 on a confidential basis regarding the procurement process. Instead of submitting written communications to TxDOT's Authorized Representative as provided in Section 2.3.1, a Proposer may submit such confidential communications, comments or complaints regarding the procurement to the ombudsman, where Proposer believes in good faith that confidentiality is essential. Please note that the deadline set forth in Section 2.3.1 applies to comments and

questions regarding the RFP that are submitted to the Ombudsman. A Proposer must submit such confidential communications in a separate document that does not include any information identifying Proposer. After receiving such confidential communications, the ombudsman shall forward only the separate document containing the confidential communication to TxDOT's Authorized Representative as identified in Section 2.2.1. If the ombudsman determines that the submitted material is not of a confidential nature or has been submitted past the applicable deadline set forth in Section 2.3.1, the ombudsman shall return the submission to Proposer and instruct Proposer to submit the communication directly to TxDOT's Authorized Representative in accordance with Section 2.3.1. TxDOT has designated the following individual who is not involved in the procurement to be the ombudsman for the procurement:

Ms. Rebecca Blewett, Esq.  
Associate General Counsel  
Texas Department of Transportation  
150 E. Riverside Drive, 4th Floor North Tower  
Austin, Texas 78704  
E-mail: Becky.Blewett@txdot.gov

All other questions and requests for clarification should be submitted to the Authorized Representative in accordance with Section 2.3.1.

### **2.3.3 Addenda**

TxDOT reserves the right, in its sole discretion, to revise, modify or change the RFP and/or procurement process at any time before the Proposal Due Date (or, if Proposal Revisions are requested pursuant to Section 5.6, prior to the due date for Proposal Revisions). Any such revisions will be implemented through issuance of Addenda to the RFP.

## **2.4 Pre-Proposal Meetings**

### **2.4.1 Informational Meetings**

TxDOT may at its option hold joint informational meetings with all Proposers at any time prior to the Proposal Due Date. Informational meetings may be held either in person or by telephonic or electronic means following notice to all Proposers.

### **2.4.2 One-on-One Meetings**

TxDOT intends to conduct one-on-one meetings with each Proposer on the date set forth in Section 1.6 to discuss issues and clarifications regarding the RFP and Proposer's ATCs. TxDOT reserves the right to disclose to all Proposers any issues raised during the one-on-one meetings, except to the extent that TxDOT determines, in its sole discretion, such disclosure would impair confidentiality of a Proposer's confidential business strategies. Participation at such meetings by the Proposers shall be mandatory. FHWA may also participate in all one-on-one meetings.

### **2.4.3 Questions and Responses During One-on-One Meetings**

During one-on-one meetings, Proposers may ask questions and TxDOT may provide responses. However, any responses provided by TxDOT during one-on-one meetings may not be relied upon unless TxDOT has either responded in writing or incorporated responses into the DBC Documents by Addenda, to the extent responses are inconsistent with the terms of the DBC Documents.

## **2.5 Confidentiality/Public Information Act Disclosure Requests**

### **2.5.1 Confidentiality Rules**

All Proposers should obtain and thoroughly familiarize themselves with the Act, Code and any Rules applicable to the issue of confidentiality and public information.

### **2.5.2 Observers During Evaluation**

Proposers are advised that observers from federal or other agencies may observe the Proposal evaluation process and will have the opportunity to review the Proposals after the Proposal Due Date. TxDOT has agreed to allow FHWA officials and their outside advisors to observe the procurement process, which includes access to the Financial Proposals. Outside observers (other than FHWA officials) will be required to sign TxDOT's standard confidentiality agreement.

### **2.5.3 Public Disclosure of Proposal Documents**

Proposers are advised that the information contained in Form J (Conflict of Interest Disclosure Statement) and the Executive Summary (described in Exhibit B, Section 3.1) of each Proposal may be publicly disclosed by TxDOT at any time, in TxDOT's sole discretion.

Prior to recommendation to the Commission of the selection of an apparent best-value Proposer, any Form M-1, M-1.1, M-1.2, M-1.3, M-1.4, M-2 or M-3 submitted by Proposers and the information contained therein shall be subject to disclosure as described in Section 2.5.3.

Proposers are advised that upon recommendation to the Commission of the selection of an apparent best-value Proposer and in TxDOT's sole discretion, TxDOT may publicly release (a) each Proposal with the exception of non-public financial statements of privately held entities, Form M-1 (Design-Build Price), Form M-1.1 (Base Scope Design Build Price Breakdown), Forms M-1.2 (Additional Scope Design Build Price Breakdown), Form M-1.3 (Location Allocation and Pricing), Form M-1.4 (ATC Cost Adjustment), Form M-2 (DB Contractor Draws/Cash Flow Table—Base Scope Design-Build Price) and Forms M-3 (DB Contractor Draws/Cash Flow Table—Additional Scope Design-Build Price) and (b) the selected apparent best-value Proposer's Forms M-1, M-1.1, M-1.2, M-1.3, M-1.4, M-2 and M-3, or any of the information contained therein. In the event TxDOT is unable to reach agreement on the DBC with the selected apparent best-value Proposer and TxDOT, in accordance with applicable law, chooses to enter

into negotiations with the next highest ranking Proposer, then the Forms M-1, M-1.1, M-1.2, M-1.3, M-1.4, M-2 and M-3 submitted by the next such highest ranking Proposer and any information contained therein may be disclosed as described in the previous sentence for the selected apparent best-value Proposer.

After recommendation to the Commission of the selection of an apparent best-value Proposer, but prior to execution of the DBC, any Forms M-1, M-1.1, M-1.2, M-1.3, M-1.4, M-2 or M-3 submitted by Proposers and the information contained therein, other than that of the apparent best-value Proposer (or that of the next highest ranking Proposer, if such Proposer is in DBC negotiations with TxDOT) shall be subject to disclosure as described in Section 2.5.3.

After final award, or in the event that the procurement is cancelled by TxDOT, TxDOT shall have the right to publicly disclose any and all portions of all the Proposals, except the non-public financial statements of privately held entities. However, the non-public financial statements of privately held entities shall be subject to disclosure as described in Section 2.5.3.

## **2.6 TxDOT Studies and Investigations**

TxDOT does not anticipate undertaking any investigative activities prior to the Proposal Due Date. To the extent TxDOT undertakes any investigative activities, the information obtained by TxDOT from such activities may be made available to Proposers in the Reference Information Documents. All information provided by TxDOT will be subject to the same limitations applicable to similar information furnished in the Reference Information Documents.

## **2.7 Site Access**

An expedited process for obtaining rights of entry to access portions of the Project is attached hereto as Exhibit F. Exhibit F includes separate right of entry documentation for TxDOT right-of-way and for applicable railroads. Subject to this Section 2.7 and pursuant to the terms of Exhibit F and subject to the Proposer obtaining any required administrative or governmental approvals, Proposers will be allowed access, through the Proposal Due Date, to those portions of the Project under TxDOT ownership that are not currently under construction, subject to the conditions specified in Exhibit F, for purposes of inspecting in-place assets and determining Site conditions through non-destructive investigations. This work may include surveys and site investigations, such as geotechnical, Hazardous Materials and Utilities investigations. The Proposer shall submit a preliminary testing plan for approval to the Authorized Representative before beginning any geotechnical investigations within the Project ROW or on the existing roadway. This plan shall indicate the proposed extent of removal or disturbance of any in place sub-grade or in place roadway material. The plan shall describe surface location and depth of testing as well as specific test description to be performed. The Proposer shall also submit the proposed method to refill and replace any removed roadway material to ensure the safe function of the in-place pavement. Finally, the

Proposer shall submit the proposed traffic control supplier and traffic control plan needed to complete any and all testing for approval.

After Conditional Award has been made, the selected Proposer will be allowed access to the Project Right of Way that TxDOT owns, in accordance with the process described in this Section 2.7, in order to conduct surveys and site investigations, including geotechnical, Hazardous Materials and Utilities investigations, and to engage in the other activities referenced in the DBC Documents that are allowed prior to NTP2.

## **2.8 Errors**

If any perceived mistake, error, or omission is identified by Proposer at any time during the procurement process in any of the documents supplied by TxDOT (including the final design plans), Proposer shall notify TxDOT in writing (via the Authorized Representative) of the perceived mistake, error or omission. Such notifications of perceived mistakes, errors or omissions shall not count towards the limit on questions set forth in Section 2.3.1.

## **2.9 Improper Conduct**

### **2.9.1 Non-Collusion**

Neither Proposer nor any of its team members shall undertake any of the prohibited activities identified in the Non-Collusion Affidavit (Form F).

### **2.9.2 Organizational Conflicts of Interest**

The Rules at 43 Texas Administrative Code § 9.155 regarding organizational conflicts of interest apply to all design-build projects, including this Project. Proposers are advised that these rules may preclude certain firms and their subsidiaries and affiliates from participating on a Proposer team.

By submitting its Proposal, each Proposer agrees that, if an organizational conflict of interest (as defined in the Rules) is thereafter discovered, Proposer must make an immediate and full written disclosure to TxDOT that includes a description of the action that Proposer has taken or proposes to take to avoid or mitigate such conflicts. If an organizational conflict of interest is determined to exist, TxDOT may, at its sole discretion, cancel the procurement, disqualify Proposer with a conflict or take other action as necessary to mitigate the conflict. If Proposer was aware of an organizational conflict of interest prior to the award of the DBC and did not disclose the conflict to TxDOT, TxDOT may pursue remedies under the DBC, including termination of the DBC for default.

## **2.10 Changes in Key Personnel**

TxDOT is under no obligation to approve requested changes in Key Personnel and may disapprove such requests at its sole discretion. If TxDOT, in its sole discretion, disapproves a proposed Key Personnel or (if applicable) its proposed alternate,

Proposer shall submit the information required above for its proposed substitute for review and approval by TxDOT in accordance with the foregoing process at least ten Business Days prior to the Proposal Due Date. The Proposal may not include any Key Personnel previously disapproved by TxDOT in writing for such Key Personnel position. A Proposer may not make any changes in its Key Personnel after receipt of TxDOT approval as specified in this Section 2.10, except as provided in the DBC Documents.

Proposers are advised that, with respect to the Safety Manager position, the Associate in Risk Management certification will no longer be considered an acceptable means of certification for the Safety Manager.

## **2.11 Sales Tax**

The Project is exempt from sales tax for certain Expendable Materials as more particularly described in the DBC Documents. The selected Proposer and its contractors and subcontractors will be required to submit a "Texas Sales and Use Tax Exemption Certification" to a seller for exempt items. The referenced form is available online to the public through the Texas Comptroller's website.

## **SECTION 3.0 ALTERNATIVE TECHNICAL CONCEPTS**

### **3.1 Alternative Technical Concepts**

"Alternative Technical Concepts" or "ATCs" are concepts that conflict with the requirements for design and construction of the Project or otherwise require a modification of the Technical Provisions but that may nevertheless be proposed in accordance with the terms and conditions set forth in this ITP. Sections 3.1 through 3.5 set forth a process for pre-Proposal review of ATCs. This process is intended to allow Proposers to incorporate innovation and creativity into the Proposals, in turn allowing TxDOT to consider Proposer ATCs in making the selection decision, to avoid delays and potential conflicts in the design associated with deferring of reviews of ATCs to the post-award period, and, ultimately, to obtain the best value for the public.

ATCs eligible for consideration hereunder shall be limited to those deviations from the requirements of the as-issued DBC Documents that result in performance and quality of the end product that is equal to or better than the performance and quality of the end product absent the deviation, as determined by TxDOT in its sole discretion. A concept is not eligible for consideration as an ATC if, in TxDOT's sole judgment, it is premised upon or would require (a) a reduction in Project scope, performance or reliability, (b) the addition of a separate TxDOT project to the DBC (such as expansion of the scope of the Project to include additional roadways), or (c) an increase in the amount of time required for Substantial Completion of the Work under the DBC. ATCs that, if implemented, would require further Environmental Evaluation and Approvals for the Project, may be allowed, provided that DB Contractor will bear the schedule and cost risk associated with such additional environmental evaluation. If DB Contractor is not able to obtain the approvals necessary to implement the ATC, DB Contractor will be

obligated to develop the Project in accordance with existing approvals without additional cost or extension of time.

With respect to Location numbers 3, 5, 9 and 13 (as identified on Exhibit I), ATCs with respect to any elements will be permissible for submission. With respect to all other Locations, ATCs will be considered only with respect to pavement design and traffic control management. All ATCs must be signed and sealed by an engineer licensed in the State of Texas.

Any ATC that has been pre-approved may be included in the Proposal, subject to the conditions set forth herein. If a Proposer is unsure whether a concept is consistent with the requirements of the RFP or if that concept would be considered an ATC by TxDOT, TxDOT recommends that Proposer submit such concept for review as an ATC.

### **3.2 Pre-Proposal Submission of ATCs**

Proposer may submit ATCs for review to TxDOT's Authorized Representative specified in Section 2.2.1 until the applicable last date and time for submittal of ATCs identified in Section 1.6. All ATCs shall be submitted in writing, with a cover sheet identifying Proposer and stating "Energy Sector Roadway Repair Project – Confidential ATCs." Proposer shall clearly identify the submittal as a request for review of an ATC under this ITP. If Proposer does not clearly designate its submittal as an ATC, the submission will not be treated as an ATC by TxDOT. ATC submittals shall include five copies of a narrative description of the ATC and technical information, including drawings, as described below.

#### **3.2.1 Pre-Proposal ATC Submittal Requirements**

Pre-Proposal ATC submissions shall include:

- (a) a sequential ATC number identifying Proposer and the ATC number (multi-part or multi-option ATCs shall be submitted as separate individual ATCs with unique sequential numbers);
- (b) a description and conceptual drawings of the configuration of the ATC or other appropriate descriptive information, including pavement design or traffic operational analysis, as appropriate;
- (c) the locations where, and an explanation of how, the ATC will be used on the Project;
- (d) any changes in roadway operation requirements associated with the ATC, including ease of operations;
- (e) any changes in future routine or capital maintenance requirements associated with the ATC (regardless of whose responsibility such maintenance will be), including ease of maintenance;

(f) any changes in the anticipated life-cycle of the item(s) comprising the ATC;

(g) any reduction in the time period necessary to design and construct the Location as well as any reduction in the time period for the Project as a whole, in each case, resulting from implementing the ATC, including, as appropriate, a description of method and commitments;

(h) references to requirements of the RFP which are inconsistent with the proposed ATC, an explanation of the nature of the deviations from said requirements, and a request for approval of such deviations;

(i) the analysis justifying use of the ATC and why the deviation, if any, from the requirements of the RFP should be allowed;

(j) if and what additional right of way will be required to implement the ATC (and Proposers are advised that they shall (i) be solely responsible for the costs of acquisition of any such right-of-way, including obtaining any necessary Environmental Evaluation and Approvals; (ii) not be entitled to any Change Order for time or money as a result of Site conditions (i.e., Hazardous Materials, Differing Site Conditions, geotechnical issues, Utilities, etc.) on such additional right-of-way; and (iii) not be entitled to any Change Order for time or money as a result of any delay, inability or cost associated with the acquisition of such right-of-way);

(k) a description of other projects where the ATC has been used, the degree of success or failure of such usage and names and contact information including phone numbers and e-mail addresses for project owner representatives that can confirm such statements;

(l) a description of added risks to TxDOT or third parties associated with implementing the ATC;

(m) a detailed estimate of any additional TxDOT, DB Contractor and third-party costs (expressed in 2013 dollars) associated with implementation of the ATC;

(n) a detailed estimate of the Design-Build Price adjustment (together with supporting documentation); and

(o) an analysis of how the ATC is equal or better in quality and performance than the requirements of the DBC Documents.

**3.2.2** Proposer shall not make any public announcement or disclosure to third parties concerning any ATC until after pre-approval (including conditional pre-approval) has been obtained. Following pre-approval (including conditional pre-approval), if a Proposer wishes to make any such announcement or disclosure, it must first notify TxDOT in writing of its intent to take such action, including details as to date and participants, and obtain TxDOT's prior written consent, in its sole discretion, to do so.

**3.2.3** If implementation of an ATC will require approval by a third party (e.g., a governmental authority), Proposer shall have full responsibility for, and bear the full risk of, obtaining any such approvals after award of the DBC and submission of data; provided, however, that TxDOT shall retain its role as liaison with any governmental authorities as more particularly described in the DBC Documents. If any required third-party approval is not subsequently granted with the result that Proposer must comply with the requirements of the original RFP, Proposer will not be entitled to a Change Order for additional compensation or time under the DBC.

**3.2.4** If TxDOT determines, based on a proposed ATC or otherwise, that the RFP contains an error, ambiguity or mistake, TxDOT reserves the right to modify the RFP to correct the error, ambiguity or mistake, regardless of any impact on a proposed ATC.

### **3.3 TxDOT Review of Pre-Proposal Submission of ATCs**

TxDOT may request additional information regarding proposed ATCs at any time and will, in each case, return responses to each Proposer regarding its ATC on or before the applicable last date set forth in Section 1.6, provided that TxDOT has received all required and requested information regarding such ATC.

TxDOT's responses will be limited to one of the following statements:

- (a) the ATC is acceptable for inclusion in the Proposal;
- (b) the ATC is not acceptable for inclusion in the Proposal;
- (c) the ATC is not acceptable in its present form, but may be acceptable upon the satisfaction, in TxDOT's sole discretion, of certain identified conditions which must be met or clarifications or modifications that must be made;
- (d) the submittal does not qualify as an ATC but may be included in Proposer's Proposal because it appears to be within the requirements of the RFP; or
- (e) the submittal does not qualify as an ATC and may not be included in the Proposer's Proposal.

In addition, if TxDOT determines that implementation of the ATC will decrease overall project costs but will result in an increase in TxDOT's costs, TxDOT will provide in the ATC approval letter the amount of the estimated increase in its costs (the "ATC Cost Adjustment"). If the ATC is in fact incorporated into such Proposer's Proposal, the ATC cost adjustment shall be added to the Design-Build Price for evaluation purposes only in accordance with Section 5.5.1.2.

TxDOT will make a preliminary determination on whether to accept and approve an ATC for submission. However, Proposer will be responsible for ensuring that the final submittal complies with the requirements of the RFP.

Approval of an ATC will constitute a change in the specific requirements of the DBC Documents associated with the approved ATC for that specific Proposer. Each Proposer, by submittal of its Proposal, acknowledges that the opportunity to submit ATCs was offered to all Proposers, and waives any right to object to TxDOT's determinations regarding acceptability of ATCs and any ATC cost adjustments made in accordance with this Section 3.3 and Section 5.5.2.1.

TxDOT's rejection of a pre-Proposal submission of an ATC will not entitle Proposer to an extension of the Proposal Due Date or the date that the ATCs are due; provided, however, that the foregoing shall not limit TxDOT's absolute and sole right to modify the Proposal Due Date or any other date in connection with this procurement.

TxDOT anticipates that its comments provided to a Proposer will be sufficient to enable Proposer to make any necessary changes to its ATCs. However, if a Proposer wishes additional clarifications regarding necessary changes, Proposer may provide a written request for clarifications under Section 2.3.1.

### **3.4 Incorporation of ATCs in the DBC Documents**

Following Conditional Award of the DBC, the ATCs that were pre-approved by TxDOT and incorporated in the Proposal by the successful Proposer shall be included in the DBC Documents. If TxDOT responded to any ATC by stating that it would be acceptable if certain conditions were met, those conditions will become part of the DBC Documents. The DBC Documents will be conformed after Conditional Award, but prior to execution of the DBC, to reflect the ATCs, including any TxDOT conditions thereto.

Prior to execution of the DBC, ATCs from unsuccessful Proposers may, in TxDOT's sole discretion, be presented to the selected DB Contractor for possible incorporation in the DBC Documents during negotiation of the final terms of the DBC pursuant to Section 5.10. In addition, following execution of the DBC, ATCs from unsuccessful Proposers may, in TxDOT's sole discretion, be presented to the selected DB Contractor as a TxDOT Change Order in accordance with the DBC.

### **3.5 Confidentiality**

Subject to the provisions of the Act and the Rules, ATCs and all communications regarding ATCs will remain confidential until a decision is made to select a Proposer or cancel the procurement, at which time all confidentiality rights, if any, shall be of no further force and effect except as otherwise allowed under the Public Information Act, applicable Law, and Section 2.6 of this ITP. The foregoing shall not preclude TxDOT from modifying the documents as necessary to comply with applicable Law or to account for information obtained by TxDOT outside of the ATC process. By submitting a Proposal, Proposer agrees, if it is not selected, to disclosure of its work product to the successful Proposer.

## **SECTION 4.0 REQUIREMENTS FOR SUBMITTAL OF PROPOSALS AND ACCEPTANCE OF DELIVERY BY TXDOT**

## **4.1 General Submittal Requirements**

Each Proposal shall include a Technical Proposal and a Financial Proposal meeting the requirements set forth in Exhibits B and C, respectively. The Proposal shall be submitted in recyclable, low-cost, sealed containers in the format and manner set forth in Sections 4.2 and 4.3.

### **4.1.1 Proposal Due Date**

The completed Proposal shall be delivered no later than the Proposal Due Date and time specified in Section 1.6.

### **4.1.2 Signatures Required**

The Proposal Letter (Form A) shall be executed by all parties making up Proposer, and shall be accompanied by evidence of signatory authorization as specified in Form A.

### **4.1.3 Requirement to Submit Compliant Proposal**

Except as permitted in accordance with Section 3.0 (ATCs), the Proposal may not include any qualifications, conditions, exceptions to or deviations from the requirements of the RFP. If the Proposal does not fully comply with the instructions and rules contained in this ITP, including the ITP Exhibits or contains an alteration or deviation or is non-compliant in any manner, it may be disqualified.

If a Proposal is deemed non-responsive or non-compliant, TxDOT may disqualify the Proposal from further consideration, in its sole discretion. Such disqualification will not result in the forfeiture of Proposer's Proposal Security.

### **4.1.4 Format**

An 8 ½ by 11-inch format is required for typed submissions and an 11 by 17-inch format is required for drawings, except that any support letters provided from parties outside the United States may be submitted in ISO A4 format and design drawings may be submitted on roll plots not to exceed 34 inches in width and 72 inches in length (and such design drawings shall be submitted on CD or DVD in PDF format and in Bentley Microstation format).

Preliminary schedule submissions shall include both a hard copy and the electronic files necessary to view and manipulate the schedule in Primavera.

Submittals must be bound with all pages numbered in a binder. Printed lines may be single-spaced with the type font size being no smaller than 12-point, other than in tables and figures, which may be prepared using 10-point font size type. The use of 11 by 17-inch foldouts for tables, graphics and maps is acceptable in the main body of the Proposal. Each 11 by 17-inch foldout will be considered one page. No page limit applies to appendices and exhibits; however, TxDOT does not commit to review any information in appendices and exhibits other than those required to be provided, and the

Proposal evaluation process will focus on the body of the Proposal and any required appendices and exhibits.

#### **4.1.5 Additional Requirements for Proposal Delivery**

The completed Proposal shall be submitted and delivered in sealed containers no later than the Proposal Due Date and time specified in Section 1.6. The Proposal is to be delivered to TxDOT at the following address:

Frank Holzmann, P.E.  
Texas Department of Transportation  
7600 Chevy Chase Drive, Building 2, Suite 400  
Austin, TX 78752

Each binder of the Proposal shall be labeled to indicate its contents and the Proposer. The original Technical and Financial Proposals shall be clearly identified as “original”; copies of the Proposals shall be sequentially numbered, labeled and bound.

### **4.2 Technical Proposal**

#### **4.2.1 General**

All of the binders comprising the original Technical Proposal, together with one electronic copy on one or more CDs or DVDs and the envelopes described in Section 4.2.2, shall be packaged in a single container, clearly addressed to TxDOT as provided herein, and labeled “[Proposer Name]: Original Technical Proposal for the TxDOT Energy Sector Roadway Repair Project.” Proposer shall provide 9 hard copies of the Technical Proposal, excluding (i) the Proposal Security (which must be submitted according to the requirements set forth below) and (ii) any roll plots, for which the Proposer shall provide four copies. The containers that include the required hard copies of the Technical Proposal shall be labeled “Copies of Technical Proposal for the TxDOT Energy Sector Roadway Repair Project.”

The one electronic copy shall be in PDF format on CD(s) or DVD(s); provided, however, that: (a) Proposal forms may be submitted in either PDF or Word format; and (b) corporate, partnership, joint venture and limited liability company documents (e.g., articles of incorporation, bylaws, partnership agreements, joint venture agreements and limited liability company operating agreements) may be submitted in hard copy only and need not be submitted electronically.

The Technical Proposal shall include information relevant to all Locations, regardless of whether all Locations are included in the Proposer’s base scope. Additionally, the Technical Proposal shall not indicate whether any particular Location is within the Proposer’s base scope or additional scope.

#### **4.2.2 Proposal Security**

One original and three hard copies of the Proposal Security shall be provided with the Technical Proposal, and shall be in a separate envelope labeled “[Proposer Name]: Proposal Security for the TxDOT Energy Sector Roadway Repair Project.”

### **4.3 Financial Proposal**

#### **4.3.1 General**

The Financial Proposal shall be submitted in two separate parts: (1) pricing information as described in Section 4.3.2 and (2) financial capacity information as described in Section 4.3.3. Each of the two parts of the Financial Proposal shall be delivered to TxDOT at the address identified in Section 4.1.5 by the Proposal Due Date.

#### **4.3.2 Pricing Information**

All parts of the Proposal that indicate pricing information shall be included in U.S. dollars in a sealed container labeled “[Proposer Name]: Financial Proposal/Pricing Information for the TxDOT Energy Sector Roadway Repair Project.” Proposer shall provide one original and six hard copies of all pricing information, including all completed pricing forms, together with one electronic copy of the completed pricing forms submitted in Word format on CD or DVD, provided, however, that Form M-2 and Forms M-3 shall be completed and submitted in Excel format on such CD or DVD.

#### **4.3.3 Financial Capacity Information**

The financial capacity information submitted in response to Exhibit C, Section 2.0 shall be submitted in binders separately from the sealed Financial Proposal/Pricing Information container. One original and six hard copies, as well as one electronic copy in PDF format on CD or DVD, of the financial capacity information shall be submitted in a container labeled “[Proposer Name]: Financial Proposal/Financial Capacity information for the TxDOT Energy Sector Roadway Repair Project.”

### **4.4 Withdrawal and Validity of Proposals**

Proposer may withdraw its Proposal at any time prior to the time due on the Proposal Due Date by means of a written request signed by the Proposer’s designated representative. Such written request shall be delivered to the address in Section 2.2.1. A withdrawal of a Proposal will not prejudice the right of a Proposer to file a new Proposal provided that it is received before the time due on the Proposal Due Date. Proposals shall be valid for a period of 180 days after the Proposal Due Date. No Proposer may withdraw its Proposal within the 180-day period, unless notified by TxDOT that (i) no DBC for the Project will be awarded by TxDOT pursuant to the RFP (ii) TxDOT has awarded the DBC to another Proposer and has received the executed DBC and other required documents, (iii) TxDOT does not intend to award the DBC to the Proposer; or (iv) such Proposer is not the apparent best-value or next highest ranking Proposer.

If the next best Proposer is notified during the 180-day period that it is selected for negotiations, such Proposer shall be automatically deemed to have extended the validity of its Proposal for the period until 270 days after the Proposal Due Date. Any Proposer may elect, in its sole discretion, to extend the validity of its Proposal beyond the time periods set forth above.

#### **4.5 Forfeiture of Proposal Security**

The dollar amount of the Proposal Security to be submitted with each Proposal shall be \$2,000,000 (see Exhibit B, Section 3.3.2). By submitting its Proposal, each Proposer understands and agrees that it shall forfeit its Proposal Security if: (i) it withdraws, repudiates or otherwise indicates in writing that it will not meet all or any part of its commitments made in its Proposal except as specifically permitted hereunder; (ii) it is selected for negotiations, but fails to negotiate in good faith with TxDOT as set forth in Section 5.10; or (iii) it is selected as the apparent best-value Proposer, but fails to provide the documents required under Sections 6.1.

### **SECTION 5.0 EVALUATION AND POST-SELECTION PROCESS**

TxDOT's goal is to create a fair and uniform basis for the evaluation of the Proposals in compliance with all applicable legal requirements governing this procurement.

The Proposal evaluation process will consist of the steps outlined herein.

#### **5.1 Best-Value Determination**

The best-value determination will be based on the responsive Proposal with the highest Total Proposal Score. The Price Score will represent up to 90 points of the Total Proposal Score, and the Technical Score will represent up to 10 points of the Total Proposal Score.

The determination of apparent best value shall be based on the highest Total Proposal Score computed based on the following formula:

$$\text{Total Proposal Score (max. 100 points)} = \text{Price Score (max. 90 points)} + \text{Technical Score (max. 10 points)}$$

The DB Price Score will be based on the following formula:

$$\text{DB Price Score} = (\text{Base Scope Score (max. 70 points)} + \text{DB Base Price Score (max. 15 points)} + \text{Total Scope DB Price Score (max. 15 points)}) * 0.90$$

$$\text{Base Scope Score} = ((\text{Base Scope Locations})/31) * 70$$

$$\text{Base DB Price Score} = ((\text{Lowest BPV})/\text{BPV}) * 15$$

$$\text{Total Scope DB Price Score} = ((\text{Lowest TPV})/\text{TPV}) * 15$$

Base Scope Locations = Number of Locations included within a Proposer's base scope as shown on Form M-1.

Lowest BPV = Lowest Base Price Value submitted by any Proposer as determined pursuant to Section 5.4.

BPV = Proposer's Base Price Value as determined pursuant to Section 5.4.

Lowest TPV = Lowest Total Price Value submitted by any Proposer as determined pursuant to Section 5.4.

TPV = Proposer's Total Price Value as determined pursuant to Section 5.4.

The Technical Score will be calculated based on the ESRC evaluation score for the Project Development Plan (maximum of 100 points) as described in Section 5.3.2. The Technical Score will be calculated using the following formula:

Technical Score = ESRC evaluation score \* 0.10

## **5.2 Pass/Fail and Responsiveness Evaluation**

Upon receipt, the Technical Proposals and the Financial Proposals will be made available for review by the relevant pass/fail and responsiveness subcommittees. They will be reviewed (a) for the Proposal's conformance to the RFP instructions regarding organization and format and responsiveness to the requirements set forth in the RFP and (b) based on the pass/fail criteria set forth below.

### **5.2.1 Technical Proposals**

Technical Proposals will be evaluated based on the following pass/fail or responsiveness criteria:

(a) The business form of Proposer, the proposed DB Contractor and any entities that will have joint and several liability (i.e., any joint venture members or partners) under the DBC or that will provide a guaranty (including any joint venture agreement, partnership agreement, operating agreement, articles of incorporation, bylaws, association agreements or equivalent documents) is consistent with the requirements of the Project and DBC Documents.

(b) Proposer has provided a DBE certification in accordance with the requirements of Exhibit B, Section 3.2.9.

(c) Proposer information, certifications, signed statements and documents as listed in Exhibit B, Section 3.2 are included in the Proposal and do not identify any material adverse information.

(d) Proposer has delivered Proposal Security in the form of a complete, properly executed proposal bond that complies with the requirements of Exhibit B, Section 3.3.

(e) Proposer has committed to achieving Substantial Completion of the Project within 540 days from NTP1.

(f) Technical Proposal as outlined in Exhibit B meets all applicable RFP requirements.

### **5.2.2 Financial Proposals**

Financial Proposals will be evaluated based on the following pass/fail criteria:

(a) Proposer's financial condition and capabilities shall not have materially adversely changed from its financial condition and capabilities as evidenced by the financial data submitted in the QS, such that Proposer continues to have the financial capacity to develop, design and construct a project of the nature and scope of the Project. Proposer has provided the financial capacity information in accordance with the requirements of Exhibit C, Section 2.0. If TxDOT determines that a Proposer has insufficient financial capacity, it will offer Proposer the opportunity to meet the financial requirement through one or more guarantors acceptable to TxDOT.

(b) Proposer has provided a Design-Build Price using Forms M-1, M-1.1, M-1.2 and M-1.3 that complies with the requirements of Exhibit C, Section 3.1.

(c) Proposer has provided the ATC Cost Adjustment (if applicable) using Form M-1.4 that complies with the requirements of Exhibit C, Section 3.1.

(d) Proposer has provided DB Contractor Draws/Cash Flow Table using Forms M-2 and M-3 that comply with the requirements of Exhibit C, Section 3.1.

(e) Proposer has provided a BPV using Form M-1 not in excess of \$150 million.

### **5.2.3 TxDOT Right to Exclude Proposals from Consideration or to Waive Mistakes**

Those Proposals not responsive to the RFP, or that do not pass the pass/fail criteria, may be excluded from further consideration, and Proposer will be so advised. TxDOT may also exclude from consideration any Proposer whose Proposal contains a material misrepresentation. TxDOT reserves the right to waive informalities, irregularities and apparent clerical mistakes which are unrelated to the substantive content of the Proposals.

## **5.3 Evaluation of Project Development Plan by DPES**

After completion of the pass/fail and responsiveness review, the Preliminary Project Baseline Schedule and the Project Development Plan will be evaluated by the Development Plan Evaluation Subcommittee (“DPES”) based on the evaluation considerations set forth below. In addition, the DPES will consider the extent to which the Proposal meets the objectives stated below and includes any improvements over the requirements of the DBC Documents, such as additional benefits and/or value to TxDOT and the public. Value-added concepts as described in Exhibit B, Section 4.1(b) shall be reviewed and evaluated based on the Proposer’s creativity and innovativeness to create a quality facility that meets or exceeds TxDOT’s requirements and objectives.

### **5.3.1 Preliminary Project Baseline Schedule Evaluation Factors**

The Preliminary Project Baseline Schedule shall address, at a minimum, the following elements:

- (a) Narrative describing the proposed execution of the work for the term of the DBC.
- (b) Preliminary Project Baseline Schedule to the levels described in the Technical Provisions for the construction period and for maintenance performed during the construction work in accordance with the Technical Provisions.
- (c) The Preliminary Project Baseline Schedule shall show achievement of Substantial Completion of the Project no later than 540 days after NTP1.

The Preliminary Project Baseline Schedule shall reflect the Proposer’s preliminary schedule with respect to all 31 Locations, regardless of whether all such Locations are included in the Proposer’s base scope. The Preliminary Project Baseline Schedule will be evaluated based on the number of days shown in the Proposal from NTP1 to Substantial Completion using the following equation, with Proposals showing achievement of Substantial Completion within 420 days from NTP1 achieving maximum score.

Preliminary Project Baseline Schedule Score = (420 days/(Number of days between NTP1 and Substantial Completion of the Project shown in the Proposer’s Preliminary Project Baseline Schedule)) \* 40

In no event will the Preliminary Project Baseline Schedule Score be greater than 40.

### **5.3.2 Project Development Plan Evaluation Factors**

The evaluation factors for the Project Development Plan are as follows:

- (a) Technical Solutions;
- (b) Project Management Plan; and

(c) Quality Management Plan.

Note that these evaluation factors mirror the components of the Project Development Plan. Refer to Exhibit B for the submittal requirements. The assigned weights for the Project Development Plan evaluation factors identified in clauses (a) through (c) above are set forth in Table 5.3 below. Elements to be addressed with respect to each of these evaluation factors are listed in Sections 5.3.2.1 through 5.3.2.3.

The evaluation factors will be evaluated and rated using qualitative ranking designations, with special attention given to the objectives presented in Sections 5.3.2.1 through 5.3.2.3, which describe the expectations of TxDOT with regard to the work to be performed and the related information to be submitted in the Project Development Plan. Along with the Project goals identified in Section 1.2, these objectives will guide TxDOT's assessment of the evaluation factors.

### 5.3.2.1 Project Management Plan

**Objective:** An organization that is designed with clear lines of responsibility, a communication strategy, quality Key Personnel and well-defined roles that respond to the Project and TxDOT that includes the following:

- integrated specialty subcontractors and subconsultants across multiple Locations;
- partnering throughout (including affected Districts and Strategic Project Office);
- empowerment of all levels of the organization to make decisions in coordination with their TxDOT counterparts and, if need be, a system to elevate issues to ensure rapid decisions;
- quality through a well-defined and executed quality plan for construction;
- a comprehensive strategy for maintenance management during construction;
- a communications strategy that addresses Project oversight by the Strategic Projects Office with District construction and maintenance input and interaction;
- a disciplined strategy for design revisions for multiple Locations, design quality and design review, safety, risk management and securing of third-party approvals; and
- a comprehensive strategy for construction management, logistics (local or shipped-in material resources), hauling, self-performing work, access, construction sequencing, minimizing public disruptions, safety, subcontracting, DBEs, and other job training across geographical Locations.

The Project Management Plan should describe the Proposer's approach to accomplishing the work and should address, at a minimum, the following elements:

- (a) General Project Management;
- (b) Construction and Traffic Management During Construction Period;
- (c) Organizational Structure and Key Personnel Roles;
- (d) Environmental and Risk Management;
- (e) Safety and Health Plan; and
- (f) Mentoring and Job Training.

See Exhibit B for additional detail regarding the specific information concerning this factor and the elements to be addressed as part of the Project Development Plan.

### **5.3.2.2 Technical Solutions**

**Objectives:** Innovative pavement design, construction and maintenance solutions that effectively respond to and address the Project's goals (set forth in Section 1.2) and requirements, including the following:

- the need to minimize traffic impact and disruption to the traveling public and surrounding communities;
- the requirement to plan and coordinate the design and construction activities with other projects;
- the environmental and community sensitivities and commitments; and
- the efficient and coordinated design and relocation of Utilities.

The Technical Solutions should describe the Proposer's proposed solutions for the Project and should address, at a minimum, the following elements:

- (a) Construction Staging, Sequencing and Traffic Management;
- (b) Maintenance of Locations during construction; and
- (c) Utilities.

See Exhibit B for additional detail regarding the specific information concerning this factor and the elements to be addressed as part of the Project Development Plan.

### 5.3.2.3 Quality Management Plan

**Objective:** To provide a Quality Management Plan that is ISO compliant, that integrates TxDOT into the quality management system and enables TxDOT to monitor, audit, and measure DB Contractor's performance in the management of design and construction of the Project.

The Quality Management Plan should address, at a minimum, the following elements:

- (a) Quality Control and Quality Acceptance Procedures; and
- (b) Organizational Structure and Quality Personnel Roles.

See Exhibit B for details regarding the specific information concerning this factor and the elements to be addressed to be submitted as part of the Project Development Plan.

### 5.3.3 Evaluation Guidelines

The DPES will review the Preliminary Project Baseline Schedule and the Project Development Plan with reference to the evaluation factors and will assign a qualitative rating for each of the evaluation factors.

### 5.3.4 Technical Score

During the evaluation, each factor will be assigned a consensus rating by TxDOT, which will be converted to points. The score of each of the evaluation factors will then be added to arrive at the total evaluation score for the Technical Proposal, with 100 maximum possible points. The Technical Score will be calculated using the following formula:

$$\text{Technical Score} = \text{total evaluation score (maximum 100)} * 0.10$$

**Table 5.3**

<b>TECHNICAL PROPOSAL</b>	<b>MAXIMUM QUALITATIVE RATING (100 POINTS)</b>
Preliminary Project Baseline Schedule	40 Points
Project Development Plan	60 Points (sub-allocated as follows)
<i>Project Management Plan</i>	<i>30 Points</i>
<i>Technical Solutions</i>	<i>20 Points</i>
<i>Quality Management Plan</i>	<i>10 Points</i>

## **5.4 Evaluation of Financial Proposal by FPES**

After completion of the pass/fail and responsiveness review, the Financial Proposal will be evaluated by the Financial Proposal Evaluation Subcommittee (“FPES”). The FPES will conduct “blind” reviews and evaluations of the pricing information included in the Financial Proposals to determine the base price value of the Financial Proposal (the “Base Price Value” or “BPV”) and the total price value of the Financial Proposal (“Total Price Value” or “TPV”). The BPV will equal the sum of A plus B, where “A” is the Base Scope Design-Build Price as determined in accordance with Section 5.4.1.1 and “B” is the ATC cost adjustment as determined in accordance with Section 5.4.2. The TPV will equal the sum of A plus B, where “A” is the Total Scope Design-Build Price as determined in accordance with Section 5.4.1.2 and “B” is the ATC cost adjustment as determined in accordance with Section 5.4.2.

### **5.4.1 Design-Build Price**

#### **5.4.1.1 Base Scope Design-Build Price**

The Base Scope Design-Build Price will be the Design-Build Price for the Proposer’s base scope as set forth on Form M-1 and calculated using Form M-2.

#### **5.4.1.2 Total Scope Design-Build Price**

The Total Scope Design-Build Price will be the Design-Build Price for the total scope of 31 Locations as set forth on Form M-1 and calculated using Forms M-2 and M-3.

### **5.4.2 ATC Cost Adjustments**

The ATC Cost Adjustment will be the costs identified by TxDOT pursuant to Section 3.3 associated with implementation of an ATC included in a Proposal and set forth by Proposer on Form M-1.4.

## **5.5 ESRC Evaluation of Technical and Financial Proposals**

Before reviewing the Financial Proposal and FPES evaluation results, the Evaluation and Selection Recommendation Committee (“ESRC”) will review the Project Development Plans and the ratings and points recommendations provided by the DPES with respect to each Project Development Plan.

After determining each Proposal’s Technical Score, the ESRC will review the Financial Proposal and FPES evaluation results and determine each Proposal’s Price Score.

At any stage, the ESRC may accept the evaluation results provided by the FPES, may request the FPES to re-perform the evaluation, or may perform the evaluation itself.

Finally, the ESRC will determine the Total Proposal Score for each Proposal based on the formula set forth in Section 5.1 and determine the rankings and the apparent best value.

## **5.6 Requests for Proposal Revisions**

TxDOT may, at any time after receipt of Proposals and prior to final award and execution of the DBC, determine that it is appropriate to request changes to the Proposals (“Proposal Revisions”). Before requesting any such Proposal Revisions, TxDOT will engage in separate discussions with each Proposer and in accordance with the procedures for proposal revisions described in 23 CFR Part 636.501 *et seq.* The request for Proposal Revisions will identify any revisions to the RFP and will specify terms and conditions applicable to the Proposal Revisions, including identifying a time and date for delivery.

Upon receipt of Proposal Revisions, the ESRC, with assistance from the appropriate subcommittees, will re-evaluate the Proposals as revised, and will revise ratings and value estimates as appropriate following the process described above.

## **5.7 Requests for Clarification**

TxDOT may at any time issue one or more requests for clarification to the individual Proposers, requesting additional information or clarification from a Proposer, or may request a Proposer to verify or certify any aspect of its Proposal. Upon receipt of requested clarifications and additional information as described above, if any, the Proposals may be re-evaluated to factor in the clarifications and additional information.

## **5.8 Identification of Apparent Best-Value Proposal**

Once the ESRC has determined a Total Proposal Score for each Proposal, assigned rankings to the Proposals based on the Total Proposal Scores (whether based on the original Proposals or Proposal Revisions), and determined the apparent best value, the ESRC will present its recommended rankings to a Steering Committee.

## **5.9 Recommendation to Commission**

The Steering Committee will review the Proposals and the recommendations and supporting information provided by the ESRC, and may accept the recommendation, reject the recommendation and cancel the procurement or request the ESRC to reconsider the recommendation.

Upon receipt of recommendations from the Steering Committee, the TxDOT Executive Director or his designee will review the recommendations and may accept the recommendation, reject the recommendation and cancel the procurement, or request the Steering Committee to reconsider the recommendation. If the Executive Director accepts the Steering Committee’s recommendation, the Executive Director will make a recommendation to the Commission regarding the rankings of Proposers and designation of the best value. The Commission will evaluate the recommendations and will determine whether to proceed with award of a DBC to the apparent best-value Proposer or take any other action. The Commission’s decision of conditional award of the DBC to the apparent best-value Proposer, as well as the rankings, will be made in a public hearing and will be considered a public announcement of intent to award the

DBC by the Commission. The Commission's decision regarding award of the DBC will be final.

## **5.10 Finalization of the DBC Documents; Post-Selection Process**

If authorized by the Commission, TxDOT will proceed with the apparent best-value Proposer to finalize the DBC Documents. TxDOT may agree to limited negotiations with the apparent best-value Proposer to clarify any remaining issues regarding scope, schedule, financing or any other information provided by that Proposer. In addition, limited negotiations may be conducted as necessary to incorporate into the DBC Documents the ideas and concepts of unsuccessful Proposers' work product. Any decision to commence limited negotiations is at TxDOT's sole discretion. By submitting its Proposal, each Proposer expressly commits to enter into the form of DBC included in the RFP, without negotiation or variation, except to fill in blanks and include information that the form of DBC indicates is required from the Proposal.

If a DBC satisfactory to TxDOT cannot be negotiated with the apparent best-value Proposer, TxDOT will end negotiations with that Proposer and take action consistent with the direction provided by the Commission. Such action may include (a) requiring the best-value Proposer to enter into the DBC in the forms included in the RFP, without variation except to fill in blanks and include information that the forms of the DBC indicate is required from the Proposal, (b) rejection of all Proposals, (c) issuance of a request for Proposal Revisions to Proposers, but only if the ATCs of one or more Proposers have not been revealed to the original successful Proposer, or (d) proceeding to the next most highly ranked Proposal to attempt to negotiate a DBC with that Proposer in accordance with this Section 5.10.

A Proposer will be deemed to have failed to engage in good faith negotiations with TxDOT and shall forfeit its Proposal Security as set forth in Section 4.6 if Proposer fails to attend and actively participate in reasonably scheduled negotiation meetings with TxDOT or insists requires terms or conditions for any documents to be negotiated or provided by DB Contractor that are inconsistent with the DBC Documents.

## **5.11 Post-Selection Deliverables**

### **5.11.1 Project Management Plan**

During the period between conditional award and final award of the DBC, the selected Proposer is encouraged to, but is not required to, submit all or portions of the Project Management Plan for review, comment and possible pre-approval.

### **5.11.2 Documents To Be Submitted Following Conditional Award**

As a condition precedent to final award of the DBC, the successful Proposer shall deliver the following to TxDOT within five Business Days after notification of conditional award:

(a) Evidence of authority to transact business in the State of Texas for all members of Proposer's team that will transact business in the State, dated no earlier than 30 days prior to the Proposal Due Date. Depending on the form of organization, such evidence may be in the form of (i) a Certificate of Authority to transact business in Texas along with a Certificate of Good Standing from the state of organization of the member; (ii) a Certificate of Good Standing from the Texas Comptroller; or (iii) other evidence acceptable to TxDOT.

(b) If not previously submitted, a copy of the final organizational documents for DB Contractor and, if DB Contractor is a limited liability company, partnership or joint venture, for each member or partner of DB Contractor. The final form of the organizational documents may not differ materially from the draft organizational documents included with the Proposal. If the DB Contractor is a joint venture, attach a letter from each joint venturer stating that the joint venturer agrees to be held jointly and severally liable for any and all of the duties and obligations of the DB Contractor under the Proposal and under any contract arising therefrom.

(c) If security for Proposer's obligations under the DBC is required by TxDOT pursuant to Exhibit B, Section 3.2.15 and Exhibit C, Section 2.0, the form of the proposed guarantees, which shall be in form and substance acceptable to TxDOT, in its sole discretion.

(d) Escrowed proposal documents as required by Section 5.11.3.

During the negotiation period, as a condition to final award, Proposer shall deliver drafts of the deliverables identified in Section 6.1, for pre-approval by TxDOT.

### **5.11.3 Escrowed Proposal Documents**

(a) DB Contractor shall deliver to TxDOT escrowed proposal documents ("EPDs") containing information regarding Proposer's assumptions made in determining the scope of work and calculating the Proposal prices and meeting all requirements of the DBC. The EPDs shall include information regarding the pricing for all components of the lump sum prices set forth in Forms M-1, M-1.1, M-1.2, M-1.3 and M-1.4. The EPDs shall include detailed information from all subcontractors identified in the Proposal and any other potential subcontractors who provided data upon which the Proposal is based. The documents shall be in sealed containers labeled "[Proposer Name]: Escrowed Proposal Materials for the Energy Sector Roadway Repair Project". TxDOT shall have the right to review the EPDs for completeness and consistency with the Proposal.

(b) Representatives of TxDOT (and/or its consultants) and the successful Proposer shall review the EPDs prior to execution of the DBC to determine whether they are complete. Such representatives shall also organize the EPDs, labeling each page so that it is obvious that each page is a part of the EPDs, and to enable a person reviewing the page out of context to determine where it can be found within the EPDs. Such representatives shall compile an index that lists each document included in the

EPDs, and briefly describes the document and its location in the EPDs. TxDOT will have the right to retain a copy of the index. After the joint review, the EPDs shall be kept in a locked cabinet in TxDOT's offices.

(c) If, following the initial review and organization, TxDOT determines that the EPDs are incomplete, TxDOT may, as a condition to final award, require the selected Proposer to supply data to make the EPDs complete.

(d) Following execution of the DBC, the EPDs will be available for joint review as specified in DBC.

## **SECTION 6.0 FINAL AWARD AND EXECUTION; POST-EXECUTION ACTIONS**

### **6.1 Final Award, Execution and Delivery of DBC**

The following are conditions precedent to final award of the DBC: (a) successful completion of negotiations; (b) receipt by TxDOT of all of the documents required by TxDOT to be provided prior to execution of the DBC; (c) execution of the DBC by the Executive Director of TxDOT or his designee; and (d) any other conditions required by the Commission. Proposer shall deliver the documents listed below to TxDOT concurrently with the executed DBC as a condition to execution of the DBC by TxDOT.

(a) For each Proposer, its general partners and its joint venture members and each other Major Participant, (i) evidence of valid registration with the Texas Secretary of State, along with a Certificate of Good Standing from the state of its organization; or (ii) evidence of the right to transact business in the State of Texas from the Texas Comptroller, in each case dated no earlier than 30 days prior to the Proposal Due Date and in form and substance acceptable to TxDOT.

(b) For entities formed after submission of the Proposal, a copy of the entity's final organizational documents, which may not differ materially from the draft organizational documents included with the Proposal.

(c) If required by TxDOT pursuant to this ITP, Proposer shall submit one or more guarantees from guarantor(s) acceptable to TxDOT, in its sole discretion, in the form of Exhibit 13 to the DBC.

(d) Evidence of approval of the final form, and of due authorization, execution, delivery and performance, of the DBC by DB Contractor and, if DB Contractor is a joint venture, by its joint venture members in a form and substance satisfactory to TxDOT.

(e) A written opinion from counsel for DB Contractor, which counsel shall be approved by TxDOT (which may be in-house or outside counsel), in substantially the form attached hereto as Form L.

(f) Evidence of insurance required to be provided by DB Contractor under the DBC Documents.

- (g) Evidence that DB Contractor and its Major Participants hold all licenses required for performance of the work under the DBC Documents.
- (h) TxDOT approved DBE Performance Plan.
- (i) A letter from a licensed Surety, rated in the top two categories by two nationally recognized rating agencies or at least A minus (A-) or better and Class VIII or better by A.M. Best and Company, signed by an authorized representative as evidenced by a current certified power of attorney, committing to provide a Performance Bond and Payment Bond, each in the amount specified and in the forms attached as Exhibits 9 and 10 to the DBC, and a Retainage Bond in the form attached as Exhibit 11 to the DBC. If multiple Surety letters are provided, the Proposal shall identify which Surety will be the lead Surety. The commitment letter may include no conditions, qualifications or reservations for underwriting or otherwise, other than a statement that the commitment is subject to award and execution of the DBC and issuance of NTP1; provided, however, that the Surety may reserve in its letter the right to reasonably approve any material adverse changes made to the DBC Documents, but excluding any changes or information reflected in the Proposal, such as ATCs and Proposer commitments;
- (k) A Job Training and Small Business Opportunity Plan as described in the DBC.
- (l) Any other requirements identified by TxDOT during pre-award negotiations.

## **6.2 Debriefings**

All Proposers submitting Proposals will be notified in writing of the results of the evaluation process. Proposers not selected for award may request a debriefing. Debriefings shall be provided after execution of the DBC. The debriefing shall be conducted by a procurement official familiar with the evaluation process, the selection decision and DBC award.

Debriefings shall be limited to discussion of the unsuccessful Proposer's Proposal and may not include specific discussion of a competing Proposal. They may provide information on areas in which the unsuccessful Proposer's Technical Proposal had weaknesses or deficiencies.

Debriefing may not include discussion or dissemination of the thoughts, notes, or rankings of individual members of the ESRC, but may include a summary of the rationale for the selection decision and DBC award.

## **6.3 Payment to Unsuccessful Proposers**

Each Proposer that submits a responsive, but unsuccessful, Proposal and that has timely executed and delivered to TxDOT a Payment for Work Product Agreement in the form attached hereto as Exhibit H shall be entitled to receive payment from TxDOT for work product that is not returned to Proposer, on the terms and conditions described herein and in the Minute Order issued by the Commission, a copy of which is attached

hereto as Exhibit G. No Proposer shall be entitled to reimbursement for any of its costs in connection with the RFP except as specified in this Section 6.3.

The stipulated payment for work product per Proposer for this procurement will be 0.25% of the successful Proposer's Design-Build Price, except that the amount of the payment may not exceed the value of the work product provided in the Proposal that can, as determined by TxDOT, be used by TxDOT in the performance of its functions. In the event the procurement is terminated before execution of the DBC, TxDOT will pay each Proposer a partial amount of \$125,000, subject to the Proposer's compliance with this Section 6.3. The invoice may be submitted no earlier than 45 days after notice of final award, including execution of the DBC, is posted on the Project Webpage, or, if final award is not made, not earlier than 30 days after cancellation of the procurement or expiration of the time period for award stated in the RFP (as such time period may be extended by mutual agreement of the apparent best-value Proposer and TxDOT), as applicable. All Proposers eligible to receive a payment for work product shall be required to submit an invoice to TxDOT in a form acceptable to TxDOT in order to receive such payment. Payments will be made within 30 days of receipt of an invoice therefor.

In submitting an executed Payment for Work Product Agreement, each Proposer agrees that TxDOT shall be entitled to use all work product that is not returned to Proposer (including ATCs, concepts, ideas, technology, techniques, methods, processes, drawings, reports, plans and specifications) contained in its Proposal or generated by or on behalf of Proposer for the purpose of developing its Proposal, in consideration for TxDOT's agreement to make payment as provided herein (including Exhibit H), without any further compensation or consideration to Proposer.

Each Proposer that timely executes and delivers to TxDOT a Payment for Work Product Agreement in the form attached hereto as Exhibit H acknowledges that TxDOT will have the right to inform the successful Proposer regarding the contents of the other Proposals after award of the DBC, and that the DBC Documents may incorporate the above-described work product or concepts based thereon. Upon Proposer's receipt of payment hereunder, this right shall extend to allow TxDOT to use such work product in the performance of its functions. As provided in Section 223.249(a) of the Code, the use of any of the work product by TxDOT is at the sole risk and discretion of TxDOT, and shall in no way be deemed to confer liability on the unsuccessful Proposer.

In no event shall any Proposer that is selected for award but fails to satisfy the award conditions set forth in Section 6.1 or that fails to timely execute and deliver the Payment for Work Product Agreement (Exhibit H) be entitled to receive a payment for work product under this Section 6.3.

## **SECTION 7.0 PROTESTS**

Subchapter I in Chapter 9 of Title 43 of the Texas Administrative Code sets forth the exclusive protest remedies available with respect to the RFP and prescribes exclusive procedures for protests regarding:

- (a) allegations that the terms of the RFP are wholly ambiguous, contrary to legal requirements applicable to the procurement, or exceed TxDOT's authority;
- (b) a determination as to whether a Proposal is responsive to the requirements of the Request for Proposals, as applicable; and
- (c) award of the DBC.

Any Proposer wishing to file a protest must do so in accordance with Subchapter I in Chapter 9 of Title 43 of the Texas Administrative Code.

## **SECTION 8.0 TxDOT RIGHTS AND DISCLAIMERS**

### **8.1 TxDOT Rights**

TxDOT may investigate the qualifications and Proposal of any Proposer under consideration, may require confirmation of information furnished by a Proposer and may require additional evidence of qualifications to perform DB Contractor's obligations under the DBC Documents. TxDOT reserves all rights described herein and available at law, including, without limitation, all rights described in Subchapter I in Chapter 9 of Title 43 of the Texas Administrative Code.

The RFP does not commit TxDOT to enter into any contract. Except as expressly set forth in Section 6.3, TxDOT and the State of Texas assume no obligations, responsibilities, or liabilities, fiscal or otherwise, to reimburse all or part of the costs incurred or alleged to have been incurred by parties considering a response to and/or responding to the RFP. All of such costs shall be borne solely by each Proposer and Proposer team.

**In no event shall TxDOT be bound by, or liable for, any obligations with respect to the Project until such time (if at all) as the DBC Documents, in form and substance satisfactory to TxDOT, has been authorized and executed by TxDOT and, then, only to the extent set forth therein. In submitting a Proposal in response to the RFP, Proposer is specifically acknowledging these disclaimers.**