

TRANSPORTATION CODE

TITLE 6. ROADWAYS

SUBTITLE B. STATE HIGHWAY SYSTEM

CHAPTER 223. BIDS AND CONTRACTS FOR HIGHWAY PROJECTS

SUBCHAPTER A. COMPETITIVE BIDS

Sec. 223.001. CONTRACT REQUIRING COMPETITIVE BIDS. The department shall submit for competitive bids each contract for:

(1) the improvement of a highway that is part of the state highway system; or

(2) materials to be used in the construction or maintenance of that highway.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 223.002. NOTICE OF BIDS. The department shall give notice regarding the time and place at which bids on a contract will be opened and the contract awarded. The commission by rule shall determine the most effective method for providing the notice required by this section.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 165, Sec. 30.13(a), eff. Sept. 1, 1997.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1345 (S.B. [1420](#)), Sec. 30, eff. September 1, 2011.

Sec. 223.003. NOTICE OF PROPOSED CONTRACTS. (a) A person may apply to have the name of the person placed on a list to receive notice of any proposed contracts.

(b) The department shall send the notice to each person on that list. The department may send the notice by mail or electronically to an e-mail address designated by the person.

(c) The department may require each applicant to pay an annual subscription fee set by the department in an amount not to exceed the average annual costs of sending notices to the applicant.

(d) The department shall deposit money received under this

section to the credit of the state highway fund.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 165, Sec. 30.13(b), eff. Sept. 1, 1997. Amended by:

Acts 2017, 85th Leg., R.S., Ch. 951 (S.B. 1877), Sec. 1, eff. June 15, 2017.

Acts 2017, 85th Leg., R.S., Ch. 951 (S.B. 1877), Sec. 2, eff. June 15, 2017.

Sec. 223.004. FILING, OPENING, AND REJECTION OF BIDS. (a) Except as provided by Section 223.005, a bid submitted under this subchapter must be sealed and filed with the director or the director's designee in Austin and shall be opened at a public meeting by the director or the director's designee.

(b) All bidders may attend the opening and all bids shall be opened in their presence.

(c) The commission by rule may prescribe conditions under which a bid may be rejected by the department.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 165, Sec. 30.13(c), eff. Sept. 1, 1997.

Sec. 223.0041. AWARD OF CONTRACTS. (a) Except as provided by Section 223.005, all bids received and not rejected by the department shall be tabulated and forwarded to the commission.

(b) The commission may accept or reject the bids. Except as provided in Subsection (c), if the bids are accepted, the commission shall award the contract to the lowest bidder, subject to Section 223.045.

(c) For a maintenance contract involving an amount less than \$300,000, if the lowest bidder withdraws its bid prior to contract award or fails to execute the contract, the director may recommend to the commission that the contract be awarded to the second lowest bidder. The commission may award the maintenance contract to the second lowest bidder if the second lowest bidder agrees to accept the unit bid prices of the lowest bidder. The commission shall adopt rules governing the conditions under which the department will allow the withdrawal of the bid of the lowest bidder and

consider awarding a maintenance contract to the second lowest bidder.

Added by Acts 1999, 76th Leg., ch. 82, Sec. 1, eff. Aug. 30, 1999.

Amended by:

Acts 2005, 79th Leg., Ch. 809 (S.B. 573), Sec. 1, eff. September 1, 2005.

Sec. 223.0042. CONTRACT INFORMATION ON INTERNET WEBSITE. The department shall make available on the department's Internet website a listing describing each contract awarded by the commission for a highway construction project. The listing must include for each project:

(1) the funding program source contract awardee, including subcontractors and historically underutilized business and disadvantaged business enterprise participants and percentage of contract; and

(2) each department transportation district in which the contract will be performed.

Added by Acts 2001, 77th Leg., ch. 271, Sec. 1, eff. Sept. 1, 2001.

Sec. 223.005. BIDS ON CONTRACTS INVOLVING LESS THAN \$300,000. (a) The commission by rule may allow bids on a contract estimated by the department to involve an amount less than \$300,000 to be filed with the district engineer at the headquarters for the district in which the improvement is to be made and opened and read at a public meeting held by the district engineer or the district engineer's designee.

(b) The commission may delegate to the director or the director's designee the right to:

(1) accept or reject bids received, subject to Section 223.045; and

(2) award a contract to the lowest bidder.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 165, Sec. 30.13(d), eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 82, Sec. 2, eff. Aug. 30, 1999.

Sec. 223.006. CONTRACTOR'S BOND. A successful bidder under

this subchapter shall post a bond in an amount provided by law conditioned on the faithful compliance with the bidder's bid and performance of the contract and made payable to the department for the use and benefit of the state highway fund.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 223.007. CONTRACTS. (a) The commission shall prescribe the form of the contract and may include any matter the commission considers advantageous to the state.

(b) Contract forms shall be uniform as near as possible.

(c) A contract must be:

(1) made in the name of the state;

(2) signed by the director or the director's designee;

(3) approved by at least two members of the commission or a designee under Section [2103.064\(a\)](#), Government Code; and

(4) signed by the successful bidder.

(d) The commission may delegate its authority under Subsections (a) and (b) to the director, who may delegate the delegated authority to an employee of the department who holds the rank of division director or higher.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 165, Sec. 30.13(e), eff. Sept. 1, 1997.

Sec. 223.008. NO LIABILITY IN EXCESS OF AVAILABLE FUNDS. A contract may not be made under this subchapter that will create a liability on the state in excess of funds available for that purpose under Subchapter A, Chapter [222](#).

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 223.009. PARTIAL PAYMENT. A contract may provide for partial payments to the contractor.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 313 (H.B. [2075](#)), Sec. 1, eff. June 15, 2007.

Sec. 223.010. DEPOSIT AND INVESTMENT OF RETAINED AMOUNT.

(a) The department may retain up to five percent of the contract price. The department may continue to retain the amount until the entire improvement has been completed and accepted or release the retained amount at any time before the improvement is accepted.

(b) At the request of the contractor and with the approval of the department and the comptroller, the amount retained may be deposited under a trust agreement with a state or national bank that has its main office or a branch office in this state and is selected by the contractor.

(c) The department shall provide a trust agreement that protects the interests of the state.

(d) The bank, acting as escrow agent and by instructions from the contractor, may reinvest the retained amount in a certificate of deposit issued by a state or national bank that has its main office or a branch office in this state, bank time deposit, or other similar investment prescribed by the trust agreement.

(e) Interest earned under the trust agreement shall be paid to the contractor unless specified otherwise under the trust agreement.

(f) The escrow agent is responsible for all investments and amounts resulting from the deposits of the retained amount until released from that responsibility under the trust agreement.

(g) The contractor shall pay all expenses incident to the deposit and all charges made by the escrow agent for custody of the securities and forwarding of interest on those securities. Those expenses or charges may not apply to the contract or to the state.

(h) Repealed by Acts 2007, 80th Leg., R.S., Ch. 313, Sec. 3, eff. June 15, 2007.

(i) Repealed by Acts 2007, 80th Leg., R.S., Ch. 313, Sec. 3, eff. June 15, 2007.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 1423, Sec. 18.01, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 344, Sec. 5.014, eff. Sept. 1, 1999; Acts 1999, 76th Leg., ch. 902, Sec. 1, eff. June 18, 1999; Acts 1999, 76th Leg., ch. 1261, Sec. 1, eff. Sept. 1, 1999; Acts 2001, 77th Leg., ch. 1420, Sec. 21.001(102), 21.002(19), eff. Sept. 1, 2001.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 313 (H.B. 2075), Sec. 2, eff. June 15, 2007.

Acts 2007, 80th Leg., R.S., Ch. 313 (H.B. 2075), Sec. 3, eff. June 15, 2007.

Sec. 223.012. CONTRACTOR PERFORMANCE. (a) The commission shall adopt rules to:

(1) establish a range of contract remedies to be included in all low-bid highway improvement contracts, including enforceable corrective action plans and criteria for prohibiting contractors with significant project completion delays from bidding on new projects, and develop a process and criteria for when to apply each contract remedy;

(2) develop and implement a schedule for liquidated damages that accurately reflects the costs associated with project completion delays, including administrative and travel delays; and

(3) develop a contractor performance evaluation process and an evaluation tool that:

(A) allows for the review of contractor bidding capacity to ensure that contractors meet each quality, safety, and timeliness standard established by the commission; and

(B) contains criteria for modifying a contractor's bidding capacity for competitively bid highway improvement contracts when appropriate.

(b) In developing the rules required by Subsection (a)(1), the commission must:

(1) consult with industry contractors; and

(2) consider contract remedies used by:

(A) other state agencies; and

(B) departments of transportation in other states.

(c) The rules adopted under Subsection (a)(2) must:

(1) include criteria for identifying projects that have a significant impact on the traveling public; and

(2) require the department to calculate project-specific liquidated damages for projects described by Subdivision (1) that reflect the true cost of travel delays.

(d) In developing the evaluation tool required by Subsection (a)(3), the commission must consult with industry contractors.

(e) The rules adopted under Subsection (a)(3) must:

(1) provide for a process for contractors to appeal the contractors' evaluations; and

(2) include criteria for the use of the evaluations by the department to address contractor performance problems.

(f) Rules adopted under this section must require:

(1) contractual provisions providing for the consideration of sufficient time; and

(2) the department to consider any events outside a contractor's control before assessing a penalty against the contractor.

Added by Acts 1997, 75th Leg., ch. 1171, Sec. 1.22, eff. Sept. 1, 1997.

Amended by:

Acts 2017, 85th Leg., R.S., Ch. 533 (S.B. [312](#)), Sec. 23, eff. September 1, 2017.

Sec. 223.013. ELECTRONIC BIDDING SYSTEM. (a) The department may establish an electronic bidding system for highway construction and maintenance contracts.

(b) The system must permit a qualified vendor to electronically submit a bid, including any contract, signature, or verification of a guaranty check by a financial institution.

(c) That part of Section [223.004](#)(a) requiring a bid to be opened at a public hearing of the commission does not apply to an electronically submitted bid. A copy of each electronically submitted bid shall be publicly posted within 48 hours after bids are opened.

(d) After the electronic bidding system is established, the department shall take the actions necessary to recover the department's costs of manually processing bids from a person who does not submit an electronic bid.

Added by Acts 1997, 75th Leg., ch. 1171, Sec. 1.22, eff. Sept. 1, 1997.

Sec. 223.014. BID GUARANTY. (a) The commission by rule shall provide a method by which a bidder may submit a bid guaranty. A rule may authorize the use of an electronic funds transfer, a check, including an electronic check, a money order, an escrow account, a trust account, a credit card issued by a financial institution chartered by a state or the United States or by a nationally recognized credit organization approved by the department, or another method the commission determines to be suitable. The department may require the payment of a discount or service charge for the use of a credit card.

(b) The department may establish one or more escrow accounts in the state highway fund for the prepayment of bid guaranties. The bid guaranties and any fees the department establishes to administer this subsection shall be administered in accordance with an agreement approved by the department. Notwithstanding any other law and as specified in the agreement, any available accumulated interest and other income earned on money in an escrow account shall be paid to the bidder or credited to the escrow account.

(c) The department shall deposit each administrative fee and discount and service charge collected under this section to the credit of the state highway fund.

(d) The commission's rules may not prohibit a bidder from submitting a bid guaranty by use of a cashier's check, money order, or teller's check.

Added by Acts 2001, 77th Leg., ch. 55, Sec. 1, eff. May 8, 2001.

Sec. 223.015. DEPOSIT AND INVESTMENT OF BID GUARANTY. (a) The department may authorize the use of a trust account for the purpose of providing a required bid guaranty.

(b) The guaranty shall be deposited in accordance with a trust agreement with a state or nationally chartered financial institution that has its main office or a branch office in this state and that is selected by the bidder.

(c) The department shall prescribe a trust agreement that protects the interests of this state.

(d) Interest earned under the trust agreement shall be paid



to the bidder unless specified otherwise in the trust agreement.

(e) The applicable financial institution is responsible for all amounts resulting from the deposit of the guaranty until released from that responsibility in accordance with the trust agreement.

(f) The bidder shall pay all expenses incident to the deposit and all charges imposed by the financial institution for custody of the guaranties and forwarding of interest on a bid guaranty. The expenses may not be included in the bid and are not otherwise the responsibility of the state.

(g) On the request of a bidder, the financial institution may reinvest the guaranty amounts in a certificate of deposit or another similar instrument prescribed by the trust agreement. The certificate of deposit or other instrument must be issued by a state or nationally chartered financial institution that has its main office or a branch office in this state.

(h) On request, the financial institution shall certify and verify to the department the amount on deposit. The trust agreement must specify the method for providing the required information.

Added by Acts 2001, 77th Leg., ch. 55, Sec. 1, eff. May 8, 2001.

Sec. 223.016. FORM OF PROPOSAL GUARANTY. If the department by rule requires a proposal guaranty as a condition of bidding for a contract, the guaranty may be in the form of:

(1) a cashier's check or money order drawn on a financial entity specified by the department; or

(2) a bid bond issued by a surety authorized to do business in this state; or

(3) any other method determined to be suitable by the department.

Added by Acts 2001, 77th Leg., ch. 833, Sec. 1, eff. Jan. 1, 2002.

Renumbered from Transportation Code Sec. 223.014 by Acts 2003, 78th Leg., ch. 1275, Sec. 2(126), eff. Sept. 1, 2003.

#### SUBCHAPTER B. CONTRACT PROVISIONS

Sec. 223.041. ENGINEERING AND DESIGN CONTRACTS. (a) The

department shall use private sector engineering-related services to assist in accomplishing its activities in providing transportation projects. For the purpose of this section, engineering-related services means engineering, land surveying, environmental, transportation feasibility and financial, architectural, real estate appraisal, and materials laboratory services. These engineering-related services are for highway improvements, right-of-way acquisition, and aviation improvements.

(b) The department, in setting a minimum level of expenditures in these engineering-related activities that will be paid to the private sector providers, shall provide that the expenditure level for a state fiscal year in all strategies paid to private sector providers for all department engineering-related services for transportation projects is not less than 35 percent of the total funds appropriated in Strategy A.1.1. Plan/Design/Manage and Strategy A.1.2. of the General Appropriations Act for that state fiscal biennium. The department shall attempt to make expenditures for engineering-related services with private sector providers under this subsection with historically underutilized businesses, as defined by Section [2161.001](#), Government Code, in an amount consistent with the applicable provisions of the Government Code, any applicable state disparity study, and in accordance with the good-faith-effort procedures outlined in the rules adopted by the comptroller.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 1122, Sec. 16, eff. Sept. 1, 1997; Acts 1997, 75th Leg., ch. 1171, Sec. 1.23, eff. Sept. 1, 1997.

Amended by:

Acts 2005, 79th Leg., Ch. 281 (H.B. [2702](#)), Sec. 2.20, eff. June 14, 2005.

Acts 2007, 80th Leg., R.S., Ch. 937 (H.B. [3560](#)), Sec. 1.112, eff. September 1, 2007.

Sec. 223.042. PRIVATIZATION OF MAINTENANCE CONTRACTS. (a) Of the amount spent in a fiscal year by the department for maintenance projects, the department shall spend not less than 50 percent through contracts awarded by competitive bids.

(b) Money spent for maintenance projects to which this section does not apply is included when computing the amount of expenditures for maintenance projects in a fiscal year.

(c) The department may award a contract under this section as a purchase of service under Subtitle D, Title 10, Government Code, if the department:

(1) estimates that the contract will involve an amount for which a formal solicitation process for the purchase of services is not required under rules relating to the delegation of purchasing authority to state agencies adopted by the comptroller under Subchapter C, Chapter 2155, Government Code; and

(2) determines that the competitive bidding procedure in this chapter is not practical.

(d) The department shall consider all of its direct and indirect costs in determining the cost of providing the services.

(e) Subsection (a) does not apply unless the department determines that a function of comparable quality and quantity can be purchased or performed at a savings by using private sector contracts.

(f) The department shall file a report with the Legislative Budget Board on September 1 of each fiscal year detailing the contracts awarded by the department under this section during the previous fiscal year.

(g) The commission shall adopt rules to administer this section.

(h) In this section, "maintenance project" means any routine or preventive maintenance activity. The term includes mowing, concrete removal and replacement, illumination maintenance, guardrail repair, fence repair, litter pick-up, herbicide spraying, pothole repair, silt and erosion control or repair, sign installation, highway overlaying, paint and bead striping, rest area maintenance, and installation of raised pavement markings.

(i) This section does not apply to the purchase of materials for maintenance projects.

(j) As an alternative to the requirements of Sections 2253.021(b) and (c), Government Code, the department may require

that a performance or payment bond under a contract awarded under this section for a maintenance project:

(1) be in an amount equal to the greatest annual amount to be paid the contractor under the contract and remain in effect for one year from the day work is resumed after any default by the contractor; or

(2) be in an amount equal to the amount to be paid the contractor during the term of the bond and be for a term of two years, renewable annually in two-year increments.

(k) A claim against a performance or payment bond issued under this section must be filed against the bond in effect on the date the basis for the claim arose.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 165, Sec. 17.19, eff. Sept. 1, 1997; Acts 2003, 78th Leg., ch. 28, Sec. 1, eff. May 12, 2003; Acts 2003, 78th Leg., ch. 274, Sec. 1, eff. June 18, 2003.

Reenacted and amended by Acts 2005, 79th Leg., Ch. 638 (H.B. [2659](#)), Sec. 1, eff. June 17, 2005; Acts 2005 79th Leg., Ch 728, Sec. [20.002](#), eff. September 1, 2005.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 849 (H.B. [3730](#)), Sec. 1, eff. June 17, 2011.

Acts 2017, 85th Leg., R.S., Ch. 24 (S.B. [706](#)), Sec. 6, eff. September 1, 2017.

Sec. 223.043. CITIZEN'S PREFERENCE IN EMPLOYMENT. In a contract for the construction, maintenance, or improvement of a designated state highway, the department may require that a citizen of the United States and of the county in which construction, maintenance, or improvement of the highway is being proposed shall be given preference in employment to perform manual labor.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 223.044. INMATE LABOR OR LABOR OF PERSONS PLACED ON COMMUNITY SUPERVISION FOR IMPROVEMENT PROJECTS. (a) The commission may authorize the department to contract with a criminal justice agency or a private correctional facility for the provision

of inmate labor or the labor of persons placed on community supervision for a state highway system improvement project.

(b) A contract with a criminal justice agency must be made in conformity with Chapter 771, Government Code.

(c) In this section, "criminal justice agency" includes:

(1) the Texas Department of Criminal Justice;

(2) a community supervision and corrections department established under Chapter 76, Government Code; and

(3) a sheriff's department operating:

(A) a county farm or workhouse established under Article 43.10, Code of Criminal Procedure; or

(B) a county correctional center established under Section 351.181, Local Government Code.

(d) A contract with a private correctional facility under this section may not provide for the transfer of public funds to the private correctional facility for the use of inmate labor.

(e) The commission may authorize the department to contract with the Texas Department of Criminal Justice for the provision of inmate labor or the labor of persons placed on community supervision for a brush control project, as defined by Section 203.001, Agriculture Code, on an area located on or adjacent to a state highway system improvement project.

(f) The State Soil and Water Conservation Board may also enter into a contract with the Texas Department of Criminal Justice for the provision of inmate labor or the labor of persons placed on community supervision to perform a brush control project described by Subsection (e) or under Chapter 203, Agriculture Code.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 795, Sec. 1, eff. June 17, 1997; Acts 1999, 76th Leg., ch. 484, Sec. 1 to 4, eff. Aug. 30, 1999.

Sec. 223.045. IRON AND STEEL PREFERENCE PROVISIONS IN IMPROVEMENT CONTRACTS. A contract awarded by the department for the improvement of the state highway system without federal aid must contain the same preference provisions for iron and steel and iron and steel products that are required under federal law for an improvement made with federal aid.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Amended by:

Acts 2017, 85th Leg., R.S., Ch. 597 (S.B. 1289), Sec. 2, eff. September 1, 2017.

Sec. 223.046. USE OF FLY ASH AND BOTTOM ASH FOR ROAD CONSTRUCTION. Design standards, guidelines, and specifications of the department, a county, or a municipality shall require that contract specifications for a road construction project allow for the use of fly ash and bottom ash resulting from combustion of coal or other fossil fuels and used for paving, bridge construction, and other appropriate road construction unless that use is technically inappropriate according to sound engineering principles or increases the cost of that construction.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 223.047. PREFERENCE FOR RUBBERIZED ASPHALT PAVING MADE FROM SCRAP TIRES. (a) If the department, a county, or a municipality uses rubberized asphalt paving, the department, county, or municipality shall use scrap tires converted to rubberized asphalt paving by a facility in this state if available.

(b) In comparing bids submitted for road construction that require paving, the department, a county, or a municipality may give a preference to a bid that provides for using, as a part of the paving material, rubberized asphalt paving described by Subsection (a) if the cost of that paving material does not exceed by more than 15 percent the bid cost of alternative paving materials for the same job. The cost of the materials must be determined by a life-cycle cost benefit analysis.

(c) In this section:

(1) "Rubberized asphalt" means an asphalt material containing at least 15 percent by weight of a reacted whole scrap tire.

(2) "Scrap tire" means a tire that can no longer be used for its original intended purpose.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 223.048. TIME OF PAYMENT. The department may not pay a contractor for highway improvement, construction, or maintenance before the 10th day of the month after the month in which the work is performed or the material is used. The department shall make payment as soon after that date as is practical.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 223.049. CONTRACT WITH LAND OWNER FOR IMPROVING ACCESS TO LAND. (a) The department may, without complying with the competitive bidding procedures of Subchapter A, contract with an owner of land, including a subdivision, adjacent to a highway that is part of the state highway system to construct an improvement on the highway right-of-way that is directly related to improving access to or from the owner's land.

(b) An owner that enters into a contract with the department under this section must:

(1) comply with applicable department design and construction standards;

(2) comply with all laws, rules, regulations, and ordinances, including environmental requirements, that would be applicable if the department were performing the work;

(3) execute a performance and payment bond in accordance with Chapter 2253, Government Code; and

(4) make available for inspection by the department all books and other records in the possession of the owner that are related to the project.

(c) State and federal funds may not be used for the design, development, financing, or construction of a highway improvement under a contract described by this section.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1129 (H.B. 628), Sec. 2.13, eff. September 1, 2011.

Sec. 223.050. PREFERENCE FOR CERTAIN PROVIDERS.

(a) Except as provided by Subsection (d), in awarding a contract to a private sector provider, the department shall give preference to a private sector provider if:

(1) the preference serves to create a positive

economic impact on job growth and job retention in this state;

(2) the transportation project for which the contract is being awarded is funded entirely from:

(A) state funds;

(B) local funds; or

(C) a combination of state and local funds; and

(3) the amount of the bid or proposal of the provider does not exceed an amount equal to 105 percent of the lowest bid or proposal received by the department for the transportation project.

(b) The department, in determining whether the preference under Subsection (a) serves to create a positive economic impact on job growth and job retention in this state, may consider a private sector provider's employment presence and business establishments in this state.

(c) This section does not apply to the procurement of professional services under Subchapter A, Chapter 2254, Government Code.

(d) The department may not give a preference under this section if:

(1) as a result of the preference, a private sector provider would not be awarded a contract; and

(2) the principal place of business of the private sector provider described by Subdivision (1) is located in a state that:

(A) borders this state; and

(B) does not give a preference to private sector providers in a manner similar to this section.

Added by Acts 2013, 83rd Leg., R.S., Ch. 1404 (H.B. 3648), Sec. 3, eff. June 14, 2013.

Text of section as added by Acts 2017, 85th Leg., R.S., Ch. 533

(S.B. 312), Sec. 24

For text of section as added by Acts 2017, 85th Leg., R.S., Ch. 1155

(S.B. 82), Sec. 1, see other Sec. 223.051.

Sec. 223.051. VERIFICATION BY CONTRACTORS. (a) In this section, "E-verify program" has the meaning assigned by Section 673.001, Government Code.



(b) The department may not award a contract for the construction, maintenance, or improvement of a highway in this state to a contractor unless the contractor and any subcontractor register with and participate in the E-verify program to verify employee information. The contractor and any subcontractor must continue to participate in the program during the term of the contract.

(c) The department shall develop procedures for the administration and enforcement of this section.

Added by Acts 2017, 85th Leg., R.S., Ch. 533 (S.B. 312), Sec. 24, eff. September 1, 2017.

Text of section as added by Acts 2017, 85th Leg., R.S., Ch. 1155  
(S.B. 82), Sec. 1

For text of section as added by Acts 2017, 85th Leg., R.S., Ch. 533  
(S.B. 312), Sec. 24, see other Sec. 223.051.

Sec. 223.051. NOTIFICATION BY CERTAIN MUNICIPALITIES OF SCHEDULED EVENT. (a) This section applies only to a municipality that:

(1) is partially located in three counties, two of which have a population of 1.8 million or more;

(2) is primarily located in a county with a population of 1.8 million or more; and

(3) has within its boundaries all or part of an international airport operated jointly by two municipalities.

(b) A contract for an improvement to a segment of the state highway system must prohibit a contractor from temporarily closing the highway, including temporarily relocating or changing an entrance or exit ramp to or from the highway, on the date that an event is scheduled to be held in a municipality in which the improvement is being proposed if, not later than 180 days before the date the event is scheduled to be held, the municipality notifies the department and the contractor of the date.

Added by Acts 2017, 85th Leg., R.S., Ch. 1155 (S.B. 82), Sec. 1, eff. September 1, 2017.

#### SUBCHAPTER C. EXPEDITED HIGHWAY IMPROVEMENT CONTRACTS

Sec. 223.101. DEFINITIONS. In this subchapter:

(1) "Highway emergency" means a situation or condition of a designated state highway that:

(A) poses an imminent threat to life or property of travelers; or

(B) substantially disrupts the orderly flow of traffic and commerce.

(2) "Highway improvement contract" means a contract awarded by the department for the construction, repair, or maintenance of a designated state highway or any part of that highway.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 223.102. AWARD OF EMERGENCY HIGHWAY IMPROVEMENT CONTRACT. As an alternative to the procedure provided by Subchapter A, in a highway emergency the department may award a highway improvement contract in accordance with rules adopted by the commission, which may include:

(1) contractor eligibility;

(2) notification of prospective bidders;

(3) bidding requirements;

(4) procedures for awarding the contract;

(5) bonding or other requirements to ensure satisfactory performance by the contractor and the protection of claimants supplying labor and materials used in performance;

(6) contract form and content; and

(7) provision for a waiver of or exception to a procedure or requirement adopted under this section.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 223.103. CERTIFICATION OF EMERGENCY. (a) Before awarding a contract under this subchapter, the director or a person the director designates must certify in writing a description of the highway emergency.

(b) A person designated under Subsection (a) may not occupy a position below the level of deputy director.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 223.104. CONTRACT REQUIREMENTS. (a) A contract awarded under this subchapter must:

- (1) be in the name of the state;
- (2) be signed by the director or a person the director designates; and
- (3) have attached a copy of the certification required by Section 223.103.

(b) A person designated under Subsection (a) may not occupy a position below the level of district engineer.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 223.105. NOTIFICATION OF COMMISSION. Not later than the fifth working day after the date on which the contract is awarded, the director shall notify in writing each member of the commission of the details of the highway emergency and the award of the contract.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

#### SUBCHAPTER D. CONTRACTS FOR ENVIRONMENTAL OR CULTURAL ASSESSMENT

Sec. 223.151. APPLICABILITY. This subchapter:

(1) applies to services of a technical expert, including an archeologist, biologist, geologist, or historian, to conduct an environmental or cultural assessment required by state or federal law for a transportation project under the authority or jurisdiction of the department; and

(2) does not apply to services defined as engineering by the Texas Board of Professional Engineers under Chapter 1001, Occupations Code.

Added by Acts 1997, 75th Leg., ch. 165, Sec. 30.15(a), eff. Sept. 1, 1997. Amended by Acts 2003, 78th Leg., ch. 1276, Sec. 14A.820, eff. Sept. 1, 2003.

Sec. 223.152. DETERMINATION BY DEPARTMENT. The department may use competitive sealed proposals to obtain services under this

subchapter if the department determines that competitive sealed bidding or informal competitive bidding is:

- (1) not practical; or
- (2) disadvantageous to the state.

Added by Acts 1997, 75th Leg., ch. 165, Sec. 30.15(a), eff. Sept. 1, 1997.

Sec. 223.153. SOLICITATION OF PROPOSALS. The department shall solicit proposals under this subchapter using the procedure by which the department procures services under Subchapter A, Chapter 2254, Government Code.

Added by Acts 1997, 75th Leg., ch. 165, Sec. 30.15(a), eff. Sept. 1, 1997.

Sec. 223.154. OPENING OF PROPOSALS; DISCLOSURE OF INFORMATION. (a) The department:

- (1) shall open each proposal received under this subchapter so as to avoid disclosure of contents to competing offerors during the process of negotiation; and

- (2) may not disclose any information to an offeror that is derived from a proposal received from another offeror.

(b) After the award of a contract under this subchapter, each proposal submitted to the department is open for public inspection, except as provided by Chapter 552, Government Code.

Added by Acts 1997, 75th Leg., ch. 165, Sec. 30.15(a), eff. Sept. 1, 1997.

Sec. 223.155. DISCUSSIONS WITH OFFERORS. (a) As provided in a request for proposals and under rules adopted by the commission, the department may discuss an acceptable or potentially acceptable proposal with the offeror to assess that offeror's ability to meet each requirement of the solicitation.

(b) To obtain the best final offer, before the department awards a contract under this subchapter, the department may permit an offeror to revise the offeror's proposal.

(c) The department shall provide each offeror an equal opportunity to discuss and revise the offeror's proposal.

Added by Acts 1997, 75th Leg., ch. 165, Sec. 30.15(a), eff. Sept. 1, 1997.

Sec. 223.156. AWARD OF CONTRACT. (a) Except as provided by Subsection (c), the department shall make a written award of a contract under this subchapter to the offeror whose proposal is the most advantageous to the state, considering price and the evaluation factors in the request for proposals.

(b) The contract file must state in writing the basis on which the award is made.

(c) If the department finds that none of the proposals is acceptable, the department shall reject all proposals.

Added by Acts 1997, 75th Leg., ch. 165, Sec. 30.15(a), eff. Sept. 1, 1997.

Sec. 223.157. RULES. The department may adopt rules to implement this subchapter.

Added by Acts 1997, 75th Leg., ch. 165, Sec. 30.15(a), eff. Sept. 1, 1997.

#### SUBCHAPTER E. COMPREHENSIVE DEVELOPMENT AGREEMENTS

Sec. 223.201. AUTHORITY. (a) Subject to Section [223.202](#), the department may enter into a comprehensive development agreement with a private entity to design, develop, finance, construct, maintain, repair, operate, extend, or expand a:

- (1) toll project;
- (2) state highway improvement project that includes both tolled and nontolled lanes and may include nontolled appurtenant facilities;
- (3) state highway improvement project in which the private entity has an interest in the project;
- (4) state highway improvement project financed wholly or partly with the proceeds of private activity bonds, as defined by Section 141(a), Internal Revenue Code of 1986; or
- (5) nontolled state highway improvement project authorized by the legislature.

(b) In this subchapter, "comprehensive development agreement" means an agreement that, at a minimum, provides for the design and construction, reconstruction, rehabilitation, expansion, or improvement of a project described in Subsection (a) and may also provide for the financing, acquisition, maintenance, or operation of a project described in Subsection (a).

(c) The department may negotiate provisions relating to professional and consulting services provided in connection with a comprehensive development agreement.

(d) Money disbursed by the department under a comprehensive development agreement is not included in the amount:

(1) required to be spent in a state fiscal biennium for engineering and design contracts under Section [223.041](#); or

(2) appropriated in Strategy A.1.1. Plan/Design/Manage of the General Appropriations Act for that biennium for the purpose of making the computation under Section [223.041](#).

(e) The department may authorize the investment of public and private money, including debt and equity participation, to finance a function described by this section.

(f) The department may enter into a comprehensive development agreement only for all or part of:

(1) the State Highway 99 (Grand Parkway) project;

(2) the Interstate Highway 35E managed lanes project in Dallas and Denton Counties from Interstate Highway 635 to U.S. Highway 380;

(3) the Interstate Highway 35W project in Tarrant County from Interstate Highway 30 to State Highway 114;

(4) the State Highway 183 managed lanes project in Tarrant and Dallas Counties from State Highway 121 to Interstate Highway 35E;

(5) the Interstate Highway 35E/U.S. Highway 67 Southern Gateway project in Dallas County, including:

(A) Interstate Highway 35E from 8th Street to Interstate Highway 20; and

(B) U.S. Highway 67 from Interstate Highway 35E to Farm-to-Market Road 1382 (Belt Line Road);

(6) the State Highway 288 project from U.S. Highway 59 to south of State Highway 6 in Brazoria County and Harris County;

(7) the U.S. Highway 290 managed lanes project in Harris County from Interstate Highway 610 to State Highway 99;

(8) the Interstate Highway 820 project from State Highway 183 to Randol Mill Road;

(9) the State Highway 114 project in Dallas County from State Highway 121 to State Highway 183;

(10) the Loop 12 project in Dallas County from State Highway 183 to Interstate Highway 35E;

(11) the Loop 9 project in Dallas and Ellis Counties from Interstate Highway 20 to U.S. Highway 67; and

(12) the U.S. Highway 181 Harbor Bridge project in Nueces County between U.S. Highway 181 at Beach Avenue and Interstate Highway 37.

(g) The department may combine in a comprehensive development agreement under this subchapter:

(1) a toll project and a rail facility as defined by Section 91.001; or

(2) two or more projects described by Subsection (f).

(h) Repealed by Acts 2011, 82nd Leg., R.S., Ch. 1345, Sec. 99, eff. June 17, 2011.

(i) The authority to enter into a comprehensive development agreement expires:

(1) August 31, 2017, for a project described by Subsection (f), other than the State Highway 99 (Grand Parkway) project and the State Highway 183 managed lanes project; and

(2) August 31, 2015, for the State Highway 183 managed lanes project.

(j) Before the department may enter into a comprehensive development agreement under Subsection (f), the department must:

(1) for a project other than the State Highway 99 (Grand Parkway) project, obtain, not later than August 31, 2017, the appropriate environmental clearance:

(A) for the project; or

(B) for the initial or base scope of the project if the project agreement provides for the phased construction of

the project; and

(2) present to the commission a full financial plan for the project, including costing methodology and cost proposals.

(k) Not later than December 1, 2014, the department shall provide a report to the commission on the status of a project described by Subsection (f). The report must include:

(1) the status of the project's environmental clearance;

(2) an explanation of any project delays; and

(3) if the procurement is not completed, the anticipated date for the completion of the procurement.

(1) In this section, "environmental clearance" means:

(1) a finding of no significant impact has been issued for the project or, as applicable, for the initial or base scope of the project; or

(2) for a project for which an environmental impact statement is prepared, a record of decision has been issued for that project or, as applicable, for the initial or base scope of the project.

(m) The department may not develop a project under this section as a project under Chapter 227.

Added by Acts 2005, 79th Leg., Ch. 281 (H.B. 2702), Sec. 2.21, eff. June 14, 2005.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 264 (S.B. 792), Sec. 4.01, eff. June 11, 2007.

Acts 2011, 82nd Leg., R.S., Ch. 259 (H.B. 1201), Sec. 7, eff. June 17, 2011.

Acts 2011, 82nd Leg., R.S., Ch. 1345 (S.B. 1420), Sec. 31, eff. June 17, 2011.

Acts 2011, 82nd Leg., R.S., Ch. 1345 (S.B. 1420), Sec. 99, eff. June 17, 2011.

Acts 2013, 83rd Leg., R.S., Ch. 1234 (S.B. 1730), Sec. 1, eff. September 1, 2013.

Sec. 223.2011. LIMITED AUTHORITY FOR CERTAIN PROJECTS USING COMPREHENSIVE DEVELOPMENT AGREEMENTS. (a) Notwithstanding



Sections [223.201\(f\)](#) and [370.305\(c\)](#), the department or an authority under Section [370.003](#) may enter into a comprehensive development agreement relating to improvements to, or construction of, all or part of:

(1) the Loop 1 (MoPac Improvement) project from Farm-to-Market Road 734 to Cesar Chavez Street;

(2) the U.S. 183 (Bergstrom Expressway) project from Springdale Road to Patton Avenue;

(3) a project consisting of the construction of:

(A) the Outer Parkway Project in Cameron County from U.S. Highway 77 to Farm-to-Market Road 1847; and

(B) the South Padre Island Second Access Causeway Project from State Highway 100 to Park Road 100;

(4) the Loop 49 project from Interstate 20 to U.S. Highway 69 (Lindale Relief Route) and from State Highway 110 to U.S. Highway 259 (Segments 6 and 7);

(5) the Loop 375 Border Highway West project in El Paso County from Race Track Drive to U.S. Highway 54;

(6) the Northeast Parkway project in El Paso County from Loop 375 east of the Railroad Drive overpass to the Texas-New Mexico border;

(7) the Loop 1604 project in Bexar County;

(8) the Hidalgo County Loop project; and

(9) the International Bridge Trade Corridor project.

(b) Before the department or an authority may enter into a comprehensive development agreement under this section, the department or the authority, as applicable, must meet the requirements under Section [223.201\(j\)](#).

(c) Not later than December 1, 2014, the department or the authority, as applicable, shall provide a report to the commission on the status of a project described by Subsection (a). The report must include:

(1) the status of the project's environmental clearance;

(2) an explanation of any project delays; and

(3) if the procurement is not completed, the anticipated date for the completion of the procurement.

(d) The department may not provide any financial assistance to an authority to pay for the costs of procuring an agreement under this section.

(e) In this section, "environmental clearance" means:

(1) a finding of no significant impact has been issued for the project or, as applicable, for the initial or base scope of the project; or

(2) for a project for which an environmental impact statement is prepared, a record of decision has been issued for that project or, as applicable, for the initial or base scope of the project.

(f) The authority to enter into a comprehensive development agreement under this section expires August 31, 2017.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1345 (S.B. [1420](#)), Sec. 32, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1234 (S.B. [1730](#)), Sec. 2, eff. September 1, 2013.

Sec. 223.2012. NORTH TARRANT EXPRESS PROJECT PROVISIONS.

(a) In this section, the North Tarrant Express project is the project described by Section [223.201\(f\)\(3\)](#) entered into on June 23, 2009.

(b) The comprehensive development agreement for the North Tarrant Express project may provide for negotiating and entering into facility agreements for future phases or segments of the project at the times that the department considers advantageous to the department.

(c) The department is not required to use any further competitive procurement process to enter into one or more related facility agreements with the developer or an entity controlled by, to be controlled by, or to be under common control with the developer under the comprehensive development agreement for the North Tarrant Express project.

(d) A facility agreement for the North Tarrant Express project must terminate on or before June 22, 2061. A facility agreement may not be extended or renewed beyond that date.

(e) The department may include or negotiate any matter in a comprehensive development agreement for the North Tarrant Express project that the department considers advantageous to the department.

(f) The comprehensive development agreement for the North Tarrant Express project may provide the developer or an entity controlled by, to be controlled by, or to be under common control with the developer with a right of first negotiation under which the developer may elect to negotiate with the department and enter into one or more related facility agreements for future phases or segments of the project.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1345 (S.B. [1420](#)), Sec. 32, eff. June 17, 2011.

Sec. 223.2013. NO EFFECT ON DEPARTMENT OBLIGATIONS. Any authority for the department to enter into a comprehensive development agreement relating to improvements to Grand Parkway (State Highway 99) does not affect the obligation of the department to comply with the applicable requirements of an agreement entered into under Section 228.0111 in connection with the Grand Parkway project, including complying with the terms and conditions for the development, construction, and operation of the Grand Parkway that are prescribed in such an agreement.

Added by Acts 2011, 82nd Leg., R.S., Ch. 459 (S.B. [1719](#)), Sec. 1, eff. June 17, 2011.

Redesignated from Transportation Code, Section [223.2012](#) by Acts 2013, 83rd Leg., R.S., Ch. 161 (S.B. [1093](#)), Sec. 22.001(44), eff. September 1, 2013.

Sec. 223.202. LIMITATION ON DEPARTMENT FINANCIAL PARTICIPATION. The amount of money disbursed by the department from the state highway fund and the Texas mobility fund during a federal fiscal year to pay the costs under comprehensive development agreements may not exceed 40 percent of the obligation authority under the federal-aid highway program that is distributed to this state for that fiscal year.

Added by Acts 2005, 79th Leg., Ch. 281 (H.B. [2702](#)), Sec. 2.21, eff.

June 14, 2005.

Sec. 223.203. PROCESS FOR ENTERING INTO COMPREHENSIVE DEVELOPMENT AGREEMENTS. (a) If the department enters into a comprehensive development agreement, the department shall use a competitive procurement process that provides the best value for the department. The department may accept unsolicited proposals for a proposed project or solicit proposals in accordance with this section.

(b) The department shall establish rules and procedures for accepting unsolicited proposals that require the private entity to include in the proposal:

(1) information regarding the proposed project location, scope, and limits;

(2) information regarding the private entity's qualifications, experience, technical competence, and capability to develop the project; and

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

(c) The department shall publish a notice advertising a request for competing proposals and qualifications in the Texas Register that includes the criteria to be used to evaluate the proposals, the relative weight given to the criteria, and a deadline by which proposals must be received if:

(1) the department decides to issue a request for qualifications for a proposed project; or

(2) the department authorizes the further evaluation of an unsolicited proposal.

(d) A proposal submitted in response to a request published under Subsection (c) must contain, at a minimum, the information required by Subsections (b)(2) and (3).

(e) The department may interview a private entity submitting an unsolicited proposal or responding to a request under Subsection (c). The department shall evaluate each proposal based on the criteria described in the request for competing proposals and qualifications and may qualify or shortlist private entities to submit detailed proposals under Subsection (f). The department

must qualify or shortlist at least two private entities to submit detailed proposals for a project under Subsection (f) unless the department does not receive more than one proposal or one response to a request under Subsection (c).

(e-1) Notwithstanding the requirements of this section, the department may prequalify a private entity to submit a detailed proposal to provide services under a design-build contract. The department is not required to publish a request under Subsection (c) for a design-build contract, and may enter into a design-build contract based solely on an evaluation of detailed proposals submitted in response to a request under Subsection (f) by prequalified private entities. The commission shall adopt rules establishing criteria for the prequalification of a private entity that include the precertification requirements applicable to providers of engineering services and the qualification requirements for bidders on highway construction contracts. Rules for design-build projects adopted pursuant to this subsection shall also provide for an expedited selection process that includes design innovation as a selection criterion.

(e-2) In this section, "design-build contract" means a comprehensive development agreement that includes the design and construction of a turnpike project, does not include the financing of a turnpike project, and may include the acquisition, maintenance, or operation of a turnpike project.

(f) The department shall issue a request for detailed proposals from all private entities qualified or shortlisted under Subsection (e) or prequalified under Subsection (e-1) if the department proceeds with the further evaluation of a proposed project. A request under this subsection may require additional information relating to:

- (1) the private entity's qualifications and demonstrated technical competence;
- (2) the feasibility of developing the project as proposed;
- (3) engineering or architectural designs;
- (4) the private entity's ability to meet schedules;
- (5) a financial plan, including costing methodology

and cost proposals; or

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

(f-1) A private entity responding to a request for detailed proposals issued under Subsection (f) may submit alternative proposals based on comprehensive development agreements having different terms, with the alternative terms in multiples of 10 years, ranging from 10 years from the later of the date of final acceptance of the project or the start of revenue operations by the private entity to 50 years from the later of the date of final acceptance of the project or the start of revenue operations by the private entity, not to exceed a total term of 52 years or any lesser term provided in a comprehensive development agreement.

(f-2) A private entity responding to a request for detailed proposals issued under Subsection (f) must identify:

(1) companies that will fill key project roles, including project management, lead design firm, quality control management, and quality assurance management; and

(2) entities that will serve as key task leaders for geotechnical, hydraulics and hydrology, structural, environmental, utility, and right-of-way issues.

(g) In issuing a request for detailed proposals under Subsection (f), the department may solicit input from entities qualified under Subsection (e) or any other person. The department may also solicit input regarding alternative technical concepts after issuing a request under Subsection (f). A technical solution presented with a proposal must be fully responsive to, and have demonstrated resources to be able to fulfill, all technical requirements for the project, including specified quality assurance and quality control program requirements, safety program requirements, and environmental program requirements. A proposal that includes a technical solution that does not meet those requirements is ineligible for further consideration.

(h) The department shall evaluate each proposal based on the criteria described in the request for detailed proposals and select the private entity whose proposal offers the apparent best value to the department.

(i) The department may enter into negotiations with the private entity whose proposal offers the apparent best value.

(j) If at any point in negotiations under Subsection (i) it appears to the department that the highest ranking proposal will not provide the department with the overall best value, the department may enter into negotiations with the private entity submitting the next highest ranking proposal.

(k) The department may withdraw a request for competing proposals and qualifications or a request for detailed proposals at any time. The department may then publish a new request for competing proposals and qualifications.

(l) The department may require that an unsolicited proposal be accompanied by a nonrefundable fee sufficient to cover all or part of its cost to review the proposal.

(l-1) A private entity selected for a comprehensive development agreement may not make changes to the companies or entities identified under Subsection (f-2) unless the original company or entity:

(1) is no longer in business, is unable to fulfill its legal, financial, or business obligations, or can no longer meet the terms of the teaming agreement with the private entity;

(2) voluntarily removes itself from the team;

(3) fails to provide a sufficient number of qualified personnel to fulfill the duties identified during the proposal stage; or

(4) fails to negotiate in good faith in a timely manner in accordance with provisions established in the teaming agreement proposed for the project.

(l-2) If the private entity makes team changes in violation of Subsection (l-1), any cost savings resulting from the change accrue to the state and not to the private entity.

(m) The department may pay an unsuccessful private entity that submits a responsive proposal in response to a request for detailed proposals under Subsection (f) a stipulated amount in exchange for the work product contained in that proposal. A stipulated amount must be stated in the request for proposals and may not exceed the value of any work product contained in the

proposal that can, as determined by the department, be used by the department in the performance of its functions. The use by the department of any design element contained in an unsuccessful proposal is at the sole risk and discretion of the department and does not confer liability on the recipient of the stipulated amount under this section. After payment of the stipulated amount:

(1) the department owns with the unsuccessful proposer jointly the rights to, and may make use of any work product contained in, the proposal, including the technologies, techniques, methods, processes, ideas, and information contained in the project design; and

(2) the use by the unsuccessful proposer of any portion of the work product contained in the proposal is at the sole risk of the unsuccessful proposer and does not confer liability on the department.

(n) The department may prescribe the general form of a comprehensive development agreement and may include any matter the department considers advantageous to the department. The department and the private entity shall finalize the specific terms of a comprehensive development agreement.

(o) Subchapter A of this chapter and Chapter 2254, Government Code, do not apply to a comprehensive development agreement entered into under this subchapter.

(p) All teaming agreements and subconsultant agreements must be executed and provided to the department before the execution of the comprehensive development agreement.

Added by Acts 2005, 79th Leg., Ch. 281 (H.B. 2702), Sec. 2.21, eff. June 14, 2005.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 264 (S.B. 792), Sec. 1.01, eff. June 11, 2007.

Acts 2007, 80th Leg., R.S., Ch. 264 (S.B. 792), Sec. 2.01, eff. June 11, 2007.

Acts 2011, 82nd Leg., R.S., Ch. 1345 (S.B. 1420), Sec. 33, eff. September 1, 2011.

Sec. 223.204. CONFIDENTIALITY OF INFORMATION. (a) To



encourage private entities to submit proposals under this subchapter, the following information is confidential, is not subject to disclosure, inspection, or copying under Chapter 552, Government Code, and is not subject to disclosure, discovery, subpoena, or other means of legal compulsion for its release until a final contract for a proposed project is entered into:

(1) all or part of a proposal that is submitted by a private entity for a comprehensive development agreement, except information provided under Sections 223.203(b)(1) and (2), unless the private entity consents to the disclosure of the information;

(2) supplemental information or material submitted by a private entity in connection with a proposal for a comprehensive development agreement, unless the private entity consents to the disclosure of the information or material; and

(3) information created or collected by the department or its agent during consideration of a proposal for a comprehensive development agreement.

(b) After the department completes its final ranking of proposals under Section 223.203(h), the final rankings of each proposal under each of the published criteria are not confidential. Added by Acts 2005, 79th Leg., Ch. 281 (H.B. 2702), Sec. 2.21, eff. June 14, 2005.

Sec. 223.205. PERFORMANCE AND PAYMENT SECURITY. (a) Notwithstanding Section 223.006 and the requirements of Subchapter B, Chapter 2253, Government Code, the department shall require a private entity entering into a comprehensive development agreement under this subchapter to provide a performance and payment bond or an alternative form of security in an amount sufficient to:

(1) ensure the proper performance of the agreement; and

(2) protect:

(A) the department; and

(B) payment bond beneficiaries who have a direct contractual relationship with the private entity or a subcontractor of the private entity to supply labor or material.

(b) A performance and payment bond or alternative form of

security shall be in an amount equal to the cost of constructing or maintaining the project.

(c) If the department determines that it is impracticable for a private entity to provide security in the amount described by Subsection (b), the department shall set the amount of the bonds or the alternative forms of security.

(d) A payment or performance bond or alternative form of security is not required for the portion of an agreement that includes only design or planning services, the performance of preliminary studies, or the acquisition of real property.

(e) The amount of the payment security must not be less than the amount of the performance security.

(f) In addition to or instead of a performance and payment bond, the department may require one or more of the following alternative forms of security:

(1) a cashier's check drawn on a financial entity specified by the department;

(2) a United States bond or note;

(3) an irrevocable bank letter of credit; or

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

(g) The department by rule shall prescribe requirements for an alternative form of security provided under this section.

Added by Acts 2005, 79th Leg., Ch. 281 (H.B. 2702), Sec. 2.21, eff. June 14, 2005.

Sec. 223.206. OWNERSHIP OF HIGHWAY. (a) A state highway or another facility described by Section 223.201(a) that is the subject of a comprehensive development agreement with a private entity, including the facilities acquired or constructed on the project, is public property and shall be owned by the department.

(b) Notwithstanding Subsection (a), the department may enter into an agreement that provides for the lease of rights-of-way, the granting of easements, the issuance of franchises, licenses, or permits, or any lawful uses to enable a private entity to construct, operate, and maintain a project, including supplemental facilities. At the termination of the

agreement, the highway or other facilities are to be in a state of proper maintenance as determined by the department and shall be returned to the department in satisfactory condition at no further cost.

(c) A highway asset or toll project that is used or leased by a private entity under Section 202.052 or 228.053 for a commercial purpose is not exempt from ad valorem taxation and is subject to local zoning regulations and building standards.

(d) The department may not enter into a comprehensive development agreement with a private entity under this subchapter that provides for the lease, license, or other use of rights-of-way or related property by the private entity for the purpose of constructing, operating, or maintaining an ancillary facility that is used for commercial purposes.

Added by Acts 2005, 79th Leg., Ch. 281 (H.B. 2702), Sec. 2.21, eff. June 14, 2005.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 259 (H.B. 1201), Sec. 8, eff. June 17, 2011.

Sec. 223.207. LIABILITY FOR PRIVATE OBLIGATIONS. The department may not incur a financial obligation for a private entity that designs, develops, finances, constructs, maintains, or operates a state highway or other facility under this subchapter. The state or a political subdivision of the state is not liable for any financial or other obligations of a project solely because a private entity constructs, finances, or operates any part of the project.

Added by Acts 2005, 79th Leg., Ch. 281 (H.B. 2702), Sec. 2.21, eff. June 14, 2005.

Sec. 223.208. TERMS OF PRIVATE PARTICIPATION. (a) The department shall negotiate the terms of private participation under this subchapter, including:

(1) methods to determine the applicable cost, profit, and project distribution among the private participants and the department;

(2) reasonable methods to determine and classify toll rates and responsibility for the setting of tolls;

(3) acceptable safety and policing standards; and

(4) other applicable professional, consulting, construction, operation, and maintenance standards, expenses, and costs.

(b) A comprehensive development agreement entered into under this subchapter may include any provision that the department considers appropriate, including provisions:

(1) providing for the purchase by the department, under terms and conditions agreed to by the parties, of the interest of a private participant in the comprehensive development agreement and related property, including any interest in a highway or other facility designed, developed, financed, constructed, operated, or maintained under the comprehensive development agreement;

(2) establishing the purchase price for the interest of a private participant in the comprehensive development agreement and related property, which price may be determined in accordance with the methodology established by the parties in the comprehensive development agreement;

(3) providing for the payment of obligations incurred pursuant to the comprehensive development agreement, including any obligation to pay the purchase price for the interest of a private participant in the comprehensive development agreement, from any lawfully available source, including securing such obligations by a pledge of revenues of the commission or the department derived from the applicable project, which pledge shall have such priority as the department may establish;

(4) permitting the private participant to pledge its rights under the comprehensive development agreement;

(5) concerning the private participant's right to operate and collect revenue from the project; and

(6) restricting the right of the commission or the department to terminate the private participant's right to operate and collect revenue from the project unless and until any applicable termination payments have been made.

(c) The department may enter into a comprehensive

development agreement under this subchapter with a private participant only if the project is identified in the department's unified transportation program or is located on a transportation corridor identified in the statewide transportation plan.

(d) Section 223.207 does not apply to the obligations of the department under a comprehensive development agreement.

(e) Notwithstanding anything in Section 201.112 or other law to the contrary, and subject to compliance with the dispute resolution procedures set out in the comprehensive development agreement, an obligation of the commission or the department under a comprehensive development agreement entered into under this subchapter to make or secure payments to a person because of the termination of the agreement, including the purchase of the interest of a private participant or other investor in a project, may be enforced by mandamus against the commission, the department, and the comptroller in a district court of Travis County, and the sovereign immunity of the state is waived for that purpose. The district courts of Travis County shall have exclusive jurisdiction and venue over and to determine and adjudicate all issues necessary to adjudicate any action brought under this subsection. The remedy provided by this subsection is in addition to any legal and equitable remedies that may be available to a party to a comprehensive development agreement.

(f) A comprehensive development agreement entered into under this subchapter and any obligations incurred, issued, or owed under the agreement does not constitute a state security under Chapter 1231, Government Code.

(g) If the department enters into a comprehensive development agreement with a private participant that includes the collection by the private participant of tolls for the use of a toll project, the private participant shall submit to the department for approval:

(1) the methodology for:

(A) the setting of tolls; and

(B) increasing the amount of the tolls;

(2) a plan outlining methods the private participant will use to collect the tolls, including:

(A) any charge to be imposed as a penalty for late payment of a toll; and

(B) any charge to be imposed to recover the cost of collecting a delinquent toll; and

(3) any proposed change in an approved methodology for the setting of a toll or a plan for collecting the toll.

(h) A comprehensive development agreement with a private participant that includes the collection by the private participant of tolls for the use of a toll project may be for a term not longer than 50 years from the later of the date of final acceptance of the project or the start of revenue operations by the private participant, not to exceed a total term of 52 years. The comprehensive development agreement must contain an explicit mechanism for setting the price for the purchase by the department of the interest of the private participant in the comprehensive development agreement and related property, including any interest in a highway or other facility designed, developed, financed, constructed, operated, or maintained under the agreement.

Added by Acts 2005, 79th Leg., Ch. 281 (H.B. [2702](#)), Sec. 2.21, eff. June 14, 2005.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 264 (S.B. [792](#)), Sec. 1.02, eff. June 11, 2007.

Acts 2011, 82nd Leg., R.S., Ch. 259 (H.B. [1201](#)), Sec. 9, eff. June 17, 2011.

Sec. 223.209. RULES, PROCEDURES, AND GUIDELINES GOVERNING SELECTION AND NEGOTIATING PROCESS. (a) The commission shall adopt rules, procedures, and guidelines governing selection of a developer for a comprehensive development agreement and negotiations to promote fairness, obtain private participants in projects, and promote confidence among those participants. The rules must contain criteria relating to the qualifications of the participants and the award of the contracts.

(b) The department shall have up-to-date procedures for participation in negotiations under this subchapter.

(c) The department has exclusive judgment to determine the

terms of an agreement.

Added by Acts 2005, 79th Leg., Ch. 281 (H.B. 2702), Sec. 2.21, eff. June 14, 2005.

#### SUBCHAPTER F. DESIGN-BUILD CONTRACTS

Sec. 223.241. DEFINITIONS. In this subchapter:

(1) "Design-build contractor" means a partnership, corporation, or other legal entity or team that includes an engineering firm and a construction contractor qualified to engage in the construction of highway projects in this state.

(2) "Design-build method" means a project delivery method by which an entity contracts with a single entity to provide both design and construction services for the construction, rehabilitation, alteration, or repair of a facility.

(3) "Highway project" means:

(A) a single highway facility between two defined points in a corridor; or

(B) two or more contiguous highway facilities.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1345 (S.B. 1420), Sec. 34, eff. September 1, 2011.

Amended by:

Acts 2015, 84th Leg., R.S., Ch. 314 (H.B. 20), Sec. 6, eff. June 3, 2015.

Sec. 223.242. SCOPE OF AND LIMITATIONS ON CONTRACTS.

(a) Notwithstanding the requirements of Subchapter A and Chapter 2254, Government Code, the department may use the design-build method for the design, construction, expansion, extension, related capital maintenance, rehabilitation, alteration, or repair of a highway project.

(b) A design-build contract under this subchapter may not grant to a private entity:

(1) a leasehold interest in the highway project; or

(2) the right to operate or retain revenue from the operation of a toll project.

(b-1) A design-build contract under this subchapter may

include a maintenance agreement requiring a design-build contractor to maintain a project for an initial term of not longer than five years. The maintenance agreement may authorize the department, in its sole discretion, to exercise options extending the term of the maintenance agreement for additional periods beyond the initial maintenance term with each additional period being not longer than five years. The department shall obtain pricing for the maintenance work for each maintenance term. The department may require separate pricing for the maintenance work to be performed for each year of a maintenance term.

(c) In using the design-build method and in entering into a contract for the services of a design-build contractor, the department and the design-build contractor shall follow the procedures and requirements of this subchapter.

(d) The department may enter into a design-build contract for a highway project with a construction cost estimate of \$150 million or more to the department.

(d-1) The department may not enter into more than three contracts under this section in each fiscal year.

(e) Money disbursed by the department to pay engineering costs for the design of a project incurred by the design-build contractor under a design-build contract may not be included in the amounts under Section [223.041](#):

(1) required to be spent in a state fiscal biennium for engineering-related services; or

(2) appropriated in Strategy A.1.1, Plan/Design/Manage or Strategy A.1.2, Contracted Planning and Design of the General Appropriations Act.

(f) The department shall not use the design-build method for the construction, expansion, extension, rehabilitation, alteration, or repair of a highway project if the project is substantially designed, to the extent described by Section [223.246\(a\)\(5\)](#), by the department or another entity other than the design-build contractor.

(g) The department shall not include more than one highway project in a design-build contract.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1345 (S.B. [1420](#)), Sec. 34,



eff. September 1, 2011.

Amended by:

Acts 2015, 84th Leg., R.S., Ch. 314 (H.B. 20), Sec. 7, eff. June 3, 2015.

Sec. 223.243. USE OF ENGINEER OR ENGINEERING FIRM. (a) To act as the department's representative, independent of a design-build contractor, for the procurement process and for the duration of the work on a highway project, the department shall select or designate:

(1) an engineer;

(2) a qualified firm, selected in accordance with Section 2254.004, Government Code, who is independent of the design-build contractor; or

(3) a general engineering consultant that was previously selected by the department and is selected or designated in accordance with Section 2254.004, Government Code.

(b) The selected or designated engineer or firm has full responsibility for complying with Chapter 1001, Occupations Code. Added by Acts 2011, 82nd Leg., R.S., Ch. 1345 (S.B. 1420), Sec. 34, eff. September 1, 2011.

Sec. 223.244. OTHER PROFESSIONAL SERVICES. (a) The department shall provide or contract for, independently of the design-build contractor, the following services as necessary for the acceptance of the highway project by the department:

(1) inspection services;

(2) construction materials engineering and testing; and

(3) verification testing services.

(b) The department shall ensure that the engineering services contracted for under this section are selected based on demonstrated competence and qualifications.

(c) This section does not preclude a design-build contractor from providing construction quality assurance and quality control under a design-build contract.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1345 (S.B. 1420), Sec. 34,

eff. September 1, 2011.

Sec. 223.245. REQUEST FOR QUALIFICATIONS. (a) For any highway project to be delivered through the design-build method, the department must prepare and issue a request for qualifications. A request for qualifications must include:

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

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

(3) criteria that will be used to evaluate the qualifications statements, which must include a proposer's qualifications, experience, technical competence, and ability to develop the project;

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

(5) the deadline by which qualifications statements must be received by the department.

(b) The department shall publish notice advertising the issuance of a request for qualifications in the Texas Register and on the department's Internet website.

(c) The department shall evaluate each qualifications statement received in response to a request for qualifications based on the criteria identified in the request. The department may interview responding proposers. Based on the department's evaluation of qualifications statements and interviews, if any, the department shall qualify or short-list proposers to submit proposals.

(d) The department shall qualify or short-list at least two private entities to submit proposals under Section [223.246](#), but may not qualify or short-list more private entities than the number of private entities designated on the request for qualifications.

(e) The department may withdraw a request for qualifications or request for proposals at any time.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1345 (S.B. [1420](#)), Sec. 34, eff. September 1, 2011.

Sec. 223.246. REQUEST FOR PROPOSALS. (a) The department shall issue a request for proposals to proposers short-listed under Section 223.245. A request for proposals must include:

- (1) information on the overall project goals;
- (2) publicly available cost estimates for the design-build portion of the project;
- (3) materials specifications;
- (4) special material requirements;
- (5) a schematic design approximately 30 percent complete;
- (6) known utilities, provided that the department is not required to undertake an effort to locate utilities;
- (7) quality assurance and quality control requirements;
- (8) the location of relevant structures;
- (9) notice of any rules or goals adopted by the department relating to awarding contracts to disadvantaged business enterprises or small business enterprises;
- (10) available geotechnical or other information related to the project;
- (11) the status of any environmental review of the project;
- (12) detailed instructions for preparing the technical proposal required under Subsection (d), including a description of the form and level of completeness of drawings expected;
- (13) the relative weighting of the technical and cost proposals required under Subsection (d) and the formula by which the proposals will be evaluated and ranked; and
- (14) the criteria to be used in evaluating the technical proposals, and the relative weighting of those criteria.

(b) The formula used to evaluate proposals under Subsection (a)(13) must allocate at least 70 percent of the weighting to the cost proposal.

(c) A request for proposals must also include a general form of the design-build contract that the department proposes and that may be modified as a result of negotiations prior to contract

execution.

(d) Each response to a request for proposals must include a sealed technical proposal and a separate sealed cost proposal submitted to the department by the date specified in the request for proposals.

(e) The technical proposal must address:

(1) the proposer's qualifications and demonstrated technical competence, unless that information was submitted to the department and evaluated by the department under Section [223.245](#);

(2) the feasibility of developing the project as proposed, including identification of anticipated problems;

(3) the proposed solutions to anticipated problems;

(4) the ability of the proposer to meet schedules;

(5) the conceptual engineering design proposed; and

(6) any other information requested by the department.

(f) The department may provide for the submission of alternative technical concepts by a proposer. If the department provides for the submission of alternative technical concepts, the department must prescribe a process for notifying a proposer whether the proposer's alternative technical concepts are approved for inclusion in a technical proposal.

(g) The cost proposal must include:

(1) the cost of delivering the project; and

(2) the estimated number of days required to complete the project.

(h) A response to a request for proposals shall be due not later than the 180th day after the final request for proposals is issued by the department. This subsection does not preclude the release by the department of a draft request for proposals for purposes of receiving input from short-listed proposers.

(i) The department shall first open, evaluate, and score each responsive technical proposal submitted on the basis of the criteria described in the request for proposals and assign points on the basis of the weighting specified in the request for proposals. The department may reject as nonresponsive any proposer that makes a significant change to the composition of its design-build team as initially submitted that was not approved by

the department as provided in the request for proposals. The department shall subsequently open, evaluate, and score the cost proposals from proposers that submitted a responsive technical proposal and assign points on the basis of the weighting specified in the request for proposals. The department shall rank the proposers in accordance with the formula provided in the request for proposals.

(j) If the department receives only one response to a request for proposals, an independent bid evaluation by the department must confirm and validate that:

(1) the project procurement delivered value for the public investment; and

(2) no anticompetitive practices were involved in the procurement.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1345 (S.B. 1420), Sec. 34, eff. September 1, 2011.

Sec. 223.247. NEGOTIATION. (a) After ranking the proposers under Section 223.246(i), the department shall first attempt to negotiate a contract with the highest-ranked proposer. The department may include in the negotiations alternative technical concepts proposed by other proposers, subject to Section 223.249.

(b) If the department is unable to negotiate a satisfactory contract with the highest-ranked proposer, the department shall, formally and in writing, end all negotiations with that proposer and proceed to negotiate with the next proposer in the order of the selection ranking until a contract is reached or negotiations with all ranked proposers end.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1345 (S.B. 1420), Sec. 34, eff. September 1, 2011.

Sec. 223.248. ASSUMPTION OF RISKS AND COSTS. (a) Except as provided by Subsection (b), the department shall assume:

(1) all risks and costs associated with:

(A) changes and modifications to the scope of the project requested by the department;

(B) unknown or differing conditions at the site of the project;

(C) applicable environmental clearance and other regulatory permitting necessary for the project; and

(D) natural disasters and other force majeure events; and

(2) all costs associated with property acquisition, other than costs associated with acquiring a temporary easement or work area used for staging or constructing the project.

(b) A design-build contractor may assume some or all of the risks or costs described by Subsection (a) if the terms of the assumption are reflected in the final request for proposals, including all supplements to the request.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1345 (S.B. [1420](#)), Sec. 34, eff. September 1, 2011.

Sec. 223.249. STIPEND AMOUNT FOR UNSUCCESSFUL PROPOSERS.

(a) The department shall pay an unsuccessful proposer that submits a responsive proposal a stipend for the work product contained in the proposal that the department determines can be used by the department in the performance of the department's functions. The stipend must be a minimum of twenty-five hundredths of one percent of the contract amount and must be specified in the initial request for proposals, but may not exceed the value of the work product contained in the proposal that the department determines can be used by the department in the performance of the department's functions. If the department determines that the value of the work product is less than the stipend amount, the department shall provide the proposer with a detailed explanation of the valuation, including the methodology and assumptions used by the department in determining the value of the work product. After payment of the stipend, the department may make use of any work product contained in the unsuccessful proposal, including the techniques, methods, processes, and information contained in the proposal. The use by the department of any design element contained in an unsuccessful proposal is at the sole risk and discretion of the department and does not confer liability on the recipient of the stipend under this

subsection.

(b) In a request for proposals, the department shall provide for the payment of a partial stipend in the event that a procurement is terminated before the execution of a design-build contract.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1345 (S.B. 1420), Sec. 34, eff. September 1, 2011.

Sec. 223.250. PERFORMANCE OR PAYMENT BOND. (a) The department shall require a design-build contractor to provide:

- (1) a performance and payment bond;
- (2) an alternative form of security; or
- (3) a combination of the forms of security described

by Subdivisions (1) and (2).

(b) Except as provided by Subsection (c), a performance and payment bond, alternative form of security, or combination of the forms shall be in an amount equal to the cost of constructing or maintaining the project.

(c) If the department determines that it is impracticable for a private entity to provide security in the amount described by Subsection (b), the department shall set the amount of the security.

(d) A performance and payment bond is not required for the portion of a design-build contract under this section that includes design services only.

(e) The department may require one or more of the following alternative forms of security:

- (1) a cashier's check drawn on a financial entity specified by the department;
- (2) a United States bond or note;
- (3) an irrevocable bank letter of credit provided by a bank meeting the requirements specified in the request for proposals; or
- (4) any other form of security determined suitable by the department.

(f) Section 223.006 of this code and Chapter 2253, Government Code, do not apply to a bond or alternative form of security required under this section.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1345 (S.B. [1420](#)), Sec. 34,  
eff. September 1, 2011.