

TRANSPORTATION CODE  
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 BY PUBLICATION. (a) The department shall publish notice of the time and place at which bids on a contract will be opened and the contract awarded.

(b) The notice must be published in a newspaper published in the county in which the improvement is to be made once a week for at least two weeks before the time set for awarding the contract and in two other newspapers that the department may designate.

(c) Instead of the notice required by Subsection (b), if the department estimates that the contract involves an amount less than \$300,000, notice may be published in two successive issues of a newspaper published in the county in which the improvement is to be made.

(d) If a newspaper is not published in the county in which the improvement is to be made, notice shall be published in a newspaper published in the county:

- (1) nearest the county seat of the county in which the improvement is to be made; and
- (2) in which a newspaper is published.

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.

Sec. 223.003. NOTICE BY MAIL. (a) A person may apply to have the name of the person placed on a mailinglist to receive notice of any proposed contracts.

(b) The department shall mail the notice to each person on that mailing list.

(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 mailing 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.

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, Sec. 1, eff. Sept. 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. The aggregate amount of payments at any time may not exceed 95 percent of the value of the work done.

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

Sec. 223.010. DEPOSIT AND INVESTMENT OF RETAINED AMOUNT. (a) Five percent of the contract price shall be retained until the entire improvement has been completed and accepted, except as provided by Subsections (h) and (i).

(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) Four percent of the contract price shall be retained until the entire improvement has been completed and accepted on any contract that includes the use of recycled materials.

(i) This subsection applies only to a contract that provides for a separate vegetative establishment, maintenance, or performance period following construction of an improvement. Before the entire improvement is accepted, the department may release a portion of the amount retained under Subsection (a) at the time construction of the improvement is completed but no more than the amount sufficient to ensure compliance with the contract.

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.

Sec. 223.011. PARTIAL PAYMENT EXCEPTION: MAINTENANCE AND PRECONSTRUCTION CONTRACTS. The limitation on partial payments provided by Section 223.009 and the retainage requirement under Section 223.010(a) do not apply to a contract for:

(1) maintenance; or  
(2) the making of all necessary plans and surveys preliminary to construction, reconstruction, or maintenance.  
Added by Acts 1997, 75th Leg., ch. 165, Sec. 30.14(a), eff. Sept. 1, 1997.

Sec. 223.012. CONTRACTOR PERFORMANCE. (a) The department shall:

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

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

(3) conduct a review to determine whether commission rules or state law should be changed to realize significant cost and time savings on state highway construction and maintenance projects.

(b) Not later than December 1, 1998, the department shall file a report with the governor, the lieutenant governor, and the speaker of the house of representatives containing:

(1) the results of the review conducted under Subsection (a)(3); and

(2) recommendations on legislation the commission determines is necessary to realize significant cost and time savings on state highway construction and maintenance.

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

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 V.T.C.A., 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 Texas Building and Procurement Commission.

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; Acts 2005, 79th Leg., ch. 281, Sec. 2.20, eff. June 14, 2005.

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 less than \$15,000; 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. The department shall use the cost accounting procedures and instructions developed by the State Council on Competitive Government under Section 2162.102(c)(2), Government Code, in determining its cost. On request, the State Council on Competitive Government shall provide technical assistance to the department about the cost accounting procedures and instructions.

(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; Acts 2005, 79th Leg., ch. 638, Sec. 1, eff. June 17, 2005; Acts 2005, 79th Leg., ch. 728, Sec. 20.002, eff. Sept. 1, 2005.

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. 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 steel 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.

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.

#### 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) facility or a combination of facilities on the Trans-Texas Corridor;

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

(4) state highway improvement project in which the private entity has an interest in the project; or

(5) 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.

(b) In this subchapter, "comprehensive development agreement" means an agreement that, at a minimum, provides for the design and construction, 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 authority to enter into comprehensive development agreements provided by this section expires on August 31, 2011.

(g) The department may combine in a comprehensive development agreement under this subchapter a toll project and a rail facility as defined by Section 91.001.

Added by Acts 2005, 79th Leg., ch. 281, Sec. 2.21, eff. June 14, 2005.

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, 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.

(g) In issuing a request for 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).

(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.

(m) The department shall 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. The 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.

Added by Acts 2005, 79th Leg., ch. 281, Sec. 2.21, eff. June 14, 2005.

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, 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, 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 or Section 227.023 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, Sec. 2.21, eff. June 14, 2005.

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, 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 or Section 227.023(c) 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 or under Section 227.023(c) 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 or Section 227.023(c) 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 or Section 227.023(c) 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) Except as provided by this section, 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. The comprehensive development agreement may be for a term not longer than 70 years if the agreement:

(1) contains 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; and

(2) outlines the benefit the state will derive from having a term longer than 50 years.

Added by Acts 2005, 79th Leg., ch. 281, Sec. 2.21, eff. June 14, 2005.

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, Sec. 2.21, eff. June 14, 2005.