



**CENTRAL TEXAS
Regional Mobility Authority**

AGENDA ITEM #5 SUMMARY

Amend the Policy Code relating to procurement policies to develop a transportation project using a design-build method or through a comprehensive development agreement.

Strategic Plan Relevance: Innovation

Department: Law

Associated Costs: None

Funding Source: Not applicable

Board Action Required: Yes

Description of Matter:

The 82nd Legislature enacted significant changes to laws governing the Mobility Authority's use of the design-build method (including a design-build-finance method) to develop a transportation project. The Legislature also amended state law provisions that authorize use by the Mobility Authority of a comprehensive development agreement to develop specific transportation projects identified by the Legislature. As now defined by state law, a comprehensive development agreement (a "CDA") is also sometimes referred to a public-private partnership (a "P3") or a concession agreement.

The proposed Policy Code amendments revise procurement policies to incorporate the state law process and requirements the Mobility Authority must follow to procure a design-build contract or a CDA to develop a transportation project, and replace any existing provisions of the Policy Code that are inconsistent with the 2011 legislative changes.

Reference documentation:

Redlined draft of proposed changes to the Policy Code and adopting Resolution

Contact for further information: Andrew Martin, General Counsel

1 **401.303 Use of Engineer or Engineering Firm and Other Professional**
2 **Services**

3 (a) The authority must select or designate an engineer or a qualified engineering firm that is
4 independent of the design-build contractor to act as the authority's representative during the
5 procurement of a design-build contract.

6 (b) The engineer representative selected or designated under this section may be:

7 (1) an engineer that is an employee of the authority;

8 (2) the authority's general engineering consultant, if any; or

9 (3) a qualified engineer or engineering firm hired by the authority pursuant to the Professional
10 Services Procurement Act, Chapter 2254, Government Code.

11 (c) The authority must provide or contract for, independently of the design build contractor, the
12 following services as necessary for acceptance of the transportation project by the authority:

13 (1) inspection services;

14 (2) construction materials engineering and testing; and

15 (3) verification testing services.

16 (d) The authority shall ensure that the engineering services contracted for under this section are
17 selected based on demonstrated competence and qualifications, in accordance with applicable law.

18 **401.304 Requests for Qualifications**

19 (a) The authority must solicit proposals for a design-build contract by issuing a Request for
20 Qualifications ("RFQ").

21 (b) The authority shall publish a notice advertising the issuance of the RFQ in the *Texas Register*
22 and on the authority's website, and shall publish the RFQ on the authority's website.

23 (c) An RFQ issued under this subchapter shall include:

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

25 (2) information regarding funding that may be available for the project and a description of the
26 financing to be requested from the design-build contractor, as applicable;

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

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

1 (5) the deadline by which proposals must be received by the authority.

2 **401.305 Withdrawal of an RFQ**

3 The authority may withdraw an RFQ at any time.

4 **401.306 Evaluation of Responses to an RFQ**

5 (a) If the authority receives only one responsive proposal to an RFQ, the authority shall terminate
6 the procurement.

7 (b) The authority shall evaluate each qualifications statement received in response to an RFQ
8 based on the criteria identified in the request.

9 (c) The authority may interview responding proposers.

10 (d) Based on the evaluation of qualifications statements and interviews, if any, the authority shall
11 qualify or short-list at least two, but no more than five, proposers to submit detailed proposals.

12 **401.307 Requests For Detailed Proposals**

13 (a) The authority shall issue a request for detailed proposals (“RFDP”) to proposers qualified or
14 short-listed under Section 401.306.

15 (b) Before issuing an RFDP under this section, the authority may issue a draft RFDP to the
16 proposers eligible under Subsection (a) for purposes of receiving their input.

17 (c) An RFDP must include:

18 (1) information on the overall project goals;

19 (2) the authority’s cost estimates for the design-build portion of the work;

20 (3) materials specifications;

21 (4) special material requirements;

22 (5) a schematic design approximately 30 percent complete;

23 (6) known utilities, provided that the authority is not required to undertake an effort to locate
24 utilities;

25 (7) quality assurance and quality control requirements;

26 (8) the location of relevant structures;

27 (9) notice of authority rules or goals relating to awarding contracts to disadvantaged businesses;

- 1 (10) available geotechnical or other other information related to the project;
- 2 (11) the status of any environmental review of the project;
- 3 (12) detailed instructions for preparing the technical proposal required by Section 401.309,
4 including a description of the form and level of completeness of drawings expected;
- 5 (13) the relative weighting of the technical and cost proposals required by this section and the
6 formula by which the proposals will be evaluated and ranked, provided that the formula shall
7 allocate at least 70 percent of the weighting to the cost proposal;
- 8 (14) the criteria and weighting for each element of the technical proposal;
- 9 (15) the risks and costs that should be assumed by the design-build contractor, including
10 (A) all risks and costs associated with:
11 (i) scope changes and modifications, as requested by the authority;
12 (ii) unknown or differing site conditions;
13 (iii) environmental clearance and other regulatory permitting for the project; and
14 (iv) natural disasters and other force majeure events; and
15 (B) all costs associated with property acquisition, excluding costs associated with acquiring a
16 temporary easement or work area associated with staging or construction for the project;
- 17 (16) a general form of the design-build contract that the authority proposes if the terms of the
18 contract may be modified as a result of negotiations prior to contract execution; and
- 19 (17) the deadline established by Section 401.310 by which responses to the RFDP must be
20 received.

21 **401.308 Alternative Technical Concepts**

- 22 (a) The authority may provide for the submission of alternative technical concepts by a proposer
23 in the response to the RFDP.
- 24 (b) If the authority provides for the submission of alternative technical concepts, the authority
25 must prescribe the process for notifying a proposer whether the proposer's alternative technical
26 concepts are approved for inclusion in a technical proposal.

27 **401.309 Separate Technical and Cost Proposals**

- 28 (a) Each response submitted to an RFDP shall include a sealed technical proposal and a separate
29 sealed cost proposal.

- 1 (b) The technical proposal must address:
- 2 (1) the proposer's qualifications and demonstrated technical competence, provided that the
3 proposer shall not be requested to resubmit any information that was submitted and evaluated
4 pursuant to Section 401.304;
- 5 (2) the feasibility of developing the project as proposed, including identification of anticipated
6 problems;
- 7 (3) the proposed solutions to anticipated problems;
- 8 (4) the ability of the proposer to meet schedules;
- 9 (5) the conceptual engineering design proposed; and
- 10 (6) any other information requested by the authority.
- 11 (c) The cost proposal must include:
- 12 (1) the cost of delivering the project;
- 13 (2) the estimated number of days required to complete the project; and
- 14 (3) any terms for financing for the project that the proposer plans to provide.

15 **401.310 Deadline for Response to RFDP**

16 The authority shall establish a time, date, and location for submittal of a response to an RFDP,
17 which deadline shall be no later than the 180th day after the RFDP is issued to each proposer
18 qualified or short-listed under Section 401.306.

19 **401.311 Withdrawal of an RFDP**

- 20 (a) The authority may withdraw a RFDP at any time prior to the submission deadline for detailed
21 proposals. In such event the authority shall have no liability to the entities chosen to submit detailed
22 proposals.
- 23 (b) If the authority provides for the submission of ATCs and/or VACs, the authority shall
24 establish a process for submission and review of ATCs and/or VACs prior to submission of a
25 technical proposal. Only those ATCs and/or VACs approved by the authority may be included in an
26 entity's technical proposal. The authority shall notify a proposer whether its ATCs and/or VACs are
27 approved for inclusion in the technical proposal.
- 28 (c) The authority may conduct meetings with or interview proposers submitting a response to an
29 RFDP.
- 30

1 **401.312 Unapproved Changes to Team**

2 The authority may reject as nonresponsive a proposal from a proposer qualified or short-listed
3 under Section 401.306 that makes a significant change to the composition of the proposer's design-
4 build team as initially submitted if that change was not approved by the authority as provided in the
5 RFQ.

6 **401.313 Evaluation and Ranking of Responses to an RFDP**

7 (a) The authority shall first open, evaluate, and score each responsive technical proposal
8 submitted on the basis of the criteria described in the RFDP and assign points on the basis of the
9 weighting specified in the request for detailed proposals.

10 (b) After completing the scoring required by Subsection (a), the authority shall subsequently open,
11 evaluate, and score each cost proposal based on criteria set forth in the RFDP and assign points on
12 the basis of the weighting specified in the request for detailed proposals. The authority shall rank
13 the proposers in accordance with the formula provided in the request for detailed proposals.

14 (c) The authority shall then rank the proposers in accordance with the formula provided in the
15 RFDP.

16 **401.314 Stipend for Unsuccessful Proposers**

17 (a) Pursuant to the provisions of the RFDP, the authority shall pay an unsuccessful proposer that
18 submits a responsive proposal to the RFDP a stipend for work product contained in the proposal.
19 The stipend must be specified in the initial RFDP in an amount of at least two-tenths of one percent
20 of the contract amount, but may not exceed the value of the work product contained in the proposal
21 to the authority. In the event the authority determines that the value of the work product is less than
22 the stipend amount, the authority must provide the proposer with a detailed explanation of the
23 valuation, including the methodology and assumptions used in determining value.

24 (b) After payment of the stipend, the authority may make use of any work product contained in
25 the unsuccessful proposal, including the techniques, methods, processes, and information contained
26 in the proposal.

27 (c) The use by the authority of any design element contained in an unsuccessful proposal is at the
28 sole risk and discretion of the authority and does not confer liability on the recipient of the stipend
29 under this section.

30 (d) The authority may provide in the RFDP for the payment of a partial stipend in the event a
31 procurement is terminated prior to securing project financing and execution of a design-build
32 contract.

33

1 **401.315 Contract Negotiations**

2 (a) After ranking the proposers under Section 401.313, the authority shall first attempt to
3 negotiate a contract with the highest-ranked proposer.

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

8 (c) If the authority has committed in the RFDP to paying a stipend to unsuccessful proposers in
9 accordance with Section 401.314, the authority may include in the negotiations alternative technical
10 concepts proposed by other proposers.

11 (d) The authority may establish a deadline for the completion of negotiations with a proposer for
12 a design-build contract. If a design-build contract has not been executed by that deadline, the
13 authority may terminate the negotiation under Subsection (b) or, at its discretion, may extend the
14 deadline for negotiating a design-build contract with that proposer.

15 (e) Notwithstanding the foregoing, the authority may terminate the procurement process at any
16 time upon a determination that continuation of the process or development of a project through a
17 design-build contract is not in the authority's best interest. If the procurement process is terminated
18 after the deadline for responses to the RFDP under Section 401.310, the authority shall have no
19 liability to any proposer other than paying the stipend in accordance with the terms of Section
20 401.314.

21 **401.316 Performance and Payment Security**

22 (a) The authority shall require a design-build contractor to provide:

23 (1) a performance and payment bond;

24 (2) an alternative form of security; or

25 (3) a combination of a performance and payment bond and alternative security.

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

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

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

- 1 (e) The authority may require one or more of the following alternative forms of security:
- 2 (1) a cashier's check drawn on a financial entity specified by the authority;
- 3 (2) a United States bond or note;
- 4 (3) an irrevocable bank letter of credit drawn from a federal or Texas chartered bank; or
- 5 (4) any other form of security determined suitable by the authority.

6 Subchapter B. COMPREHENSIVE DEVELOPMENT AGREEMENTS

7 **401.350 Comprehensive Development Agreement Allowed**

- 8 (a) The authority may enter into a comprehensive development agreement (a "CDA") for a
- 9 transportation project authorized by state law in accordance with requirements and procedures
- 10 established by this subchapter.
- 11 (b) The authority may enter into a CDA with a private entity that, at a minimum:
- 12 (1) provides for the design and construction of a transportation project;
- 13 (2) may provide for the financing, acquisition, maintenance, or operation of a transportation
- 14 project; and
- 15 (3) entitles the private entity to:
 - 16 (A) a leasehold interest in the transportation project; or
 - 17 (B) the right to operate or retain revenue from the operation of the transportation project.
- 18 (c) The authority may negotiate provisions relating to professional and consulting services
- 19 provided in connection with a CDA.

20 **401.351 Confidentiality of Negotiations for a CDA**

- 21 (a) The authority shall use its best efforts to protect the confidentiality of information made
- 22 confidential by Sections 370.307 and 371.052(d), Transportation Code, as established by state law
- 23 and detailed in Subsection (b).
- 24 (b) The following information in the possession of the authority or its agents is confidential, is
- 25 not subject to disclosure, inspection, or copying under Chapter 552, Government Code, and is not
- 26 subject to disclosure, discovery, subpoena, or other means of legal compulsion for its release until a
- 27 final contract for a proposed CDA project is entered into:
 - 28 (1) all or part of a proposal submitted by a private entity for a CDA, except:

- 1 (A) information regarding the proposed transportation project's location, scope, and limits;
2 and
- 3 (B) information regarding the proposing private entity's qualifications, experience, technical
4 competence, and capability to develop the project;
- 5 (2) supplemental information or material submitted by a private entity in connection with a
6 proposal submitted under this subchapter; and
- 7 (3) information created or collected by an authority or its agent during consideration of a
8 proposal submitted under this subchapter, including without limitation financial forecasts and
9 traffic and revenue reports prepared by or for the authority before the authority enters into a
10 CDA.
- 11 (c) After the authority completes its final ranking of proposals under Section 401.358, the final
12 rankings of each proposal under each of the published criteria are not confidential.
- 13 (d) After the authority enters into a CDA, financial forecasts and traffic revenue reports prepared
14 by or for the authority before it entered into the CDA are public information.

15 **401.352 Competitive Procurement Process for a CDA**

- 16 (a) The authority may consider an unsolicited proposal to enter into a CDA or may solicit
17 proposals for a CDA in accordance with this subchapter.
- 18 (b) The competitive bidding requirements for highway projects as specified under Chapter 223,
19 Transportation Code, and Chapter 2254, the Texas Professional Services Procurement Act,
20 Government Code, do not apply to a CDA.

21 **401.353 Filing an Unsolicited Proposal for a CDA**

- 22 (a) An unsolicited proposal for a CDA filed with the authority shall comply with the requirements
23 and procedures established by this section.
- 24 (b) An unsolicited proposal filed with the authority must include a \$20,000.00 non-refundable
25 review fee payable to the authority.
- 26 (c) An unsolicited proposal must also include the following information:
- 27 (1) the proposed transportation project location, scope, and limits;
- 28 (2) information regarding the proposing private entity's qualifications, experience, technical
29 competence, and capability to develop the project;
- 30 (3) a proposed financial plan for the proposed project that includes, at a minimum:
- 31 (A) projected project costs;

- 1 (B) proposed sources of funds; and
- 2 (4) the name and business address of each person and business entity with a substantial interest in
3 the business entity that is the proposing private entity filing the unsolicited proposal, as the
4 terms “business entity” and “substantial interest” are defined under Chapter 171, Government
5 Code, and the name and business address of each consultant or subconsultant the private
6 entity anticipates using if the private entity develops the proposed project.

7 **401.354 Review of an Unsolicited Proposal**

- 8 (a) An unsolicited proposal shall be reviewed by the executive director, who may interview, and
9 who may request additional information from, the proposing private entity. Based on that review,
10 the executive director shall make a recommendation to the board on whether the board should
11 consider further evaluation of the unsolicited proposal.
- 12 (b) If the board authorizes further evaluation of an unsolicited proposal, then the board shall
13 direct the executive director to issue an RFQ under Section 401.355.

14 **401.355 Authority Solicitation of Requests for Qualifications**

- 15 (a) Under this subchapter, the authority may solicit proposals for a CDA to develop a
16 transportation project or for competing proposals to an unsolicited proposal filed with the authority
17 by issuing an RFQ relating to the transportation project.
- 18 (b) The authority shall publish a notice advertising the issuance of the RFQ in the *Texas Register*
19 and on the authority’s website, and shall publish the RFQ on the authority’s website.
- 20 (c) An RFQ issued under this section shall include the following:
- 21 (1) a description of the project;
- 22 (2) the information a private entity must provide in response to the RFQ regarding:
- 23 (A) the private entity's qualifications, experience, technical competence, and capability to
24 develop the project;
- 25 (B) the private entity’s proposed financial plan for the proposed project that includes, at a
26 minimum:
- 27 (i) projected project costs; and
- 28 (ii) proposed sources of funds; and
- 29 (3) the criteria to be used by the authority to evaluate proposals received in response to the RFQ;
- 30 (4) the relative weight given to the criteria; and

1 (5) the deadline by which proposals must be received by the authority.

2 (d) A proposal submitted in response to an RFQ issued under this section must include, at a
3 minimum, the information required to be submitted under Subsection (c)(2), and, if the RFQ solicits
4 competing proposals to an unsolicited proposal filed under Section 401.353, the fee required by
5 Section 401.353(b).

6 (e) The authority may withdraw the RFQ at any time, and may then publish a new RFQ for a
7 CDA in accordance with this section.

8 **401.356 Evaluation of the Responses to a Request for Qualifications**

9 (a) The executive director shall review each response received to an RFQ issued under Section
10 401.355 based on the criteria and relative weighting established in the RFQ. The executive director
11 may include an interview as part of the review process.

12 (b) After completing the review, the executive director shall make a recommendation to the board
13 on whether the board should consider further evaluation of a CDA for the project.

14 (c) If the board decides to proceed with further evaluation of a CDA for the project, the board
15 shall direct the executive director to issue a request for detailed proposals (an “RFDP”) under
16 Section 401.357.

17 (d) If the authority has received and reviewed more than one proposal from a private entity under
18 Section 401.353, Section 401.355, or both, the board shall qualify at least two private entities to
19 respond to the RFDP issued under Section 401.357.

20 (e) If only one private entity has filed a proposal with the authority under this subchapter, the
21 board may request a response from the sole private entity to an RFDP issued under Section 401.357.

22 **401.357 Request for Detailed Proposals**

23 (a) Before issuing an RFDP, the authority may solicit input from all private entities qualified
24 under Section 401.356 and from any other person.

25 (b) The authority shall issue an RFDP to all private entities qualified under Section 401.356. The
26 authority shall mail or hand deliver the RFDP directly to the private entity.

27 (c) The RFDP must contain the following information:

28 (1) instructions for preparing the proposal and the items included therein;

29 (2) the criteria to be used by the authority to evaluate the detailed proposals, including factors
30 related to:

31 (A) oversight of the toll project;

- 1 (B) maintenance and operations costs of the toll project;
- 2 (C) the structure and rates of tolls;
- 3 (D) economic development impacts of the toll project;
- 4 (E) benefits and impacts of the toll project; and
- 5 (F) any other factors the authority determines appropriate;
- 6 (3) the relative weight to be given to the criteria;
- 7 (4) a stipulated amount to be paid to unsuccessful proposers subject to Section 401.362, if any,
- 8 including any terms and conditions relating to payment of the stipulated amount;
- 9 (5) the general form of a CDA sought by the authority, including any matters relating to the CDA
- 10 the authority considers advantageous to the authority; and
- 11 (6) the date and time by which the detailed proposal must be received by the authority.
- 12 (d) An RFDP under this subchapter may require the private entity to provide additional
- 13 information relating to:
 - 14 (1) the private entity's qualifications and demonstrated technical competence;
 - 15 (2) the feasibility of developing the project as proposed;
 - 16 (3) detailed engineering or architectural designs;
 - 17 (4) the private entity's ability to meet schedules;
 - 18 (5) costing methodology; and
 - 19 (6) any other information the authority considers relevant or necessary to fully assess the private
 - 20 entity's proposal.
- 21 (e) The RFDP may require a responding private entity to submit a sealed technical proposal and a
- 22 separate, sealed cost proposal.
- 23 (f) The authority may withdraw an RFDP at any time. In such event the authority shall have no
- 24 liability to a private entity chosen to submit a detailed proposal, except as may be specified in the
- 25 RFDP regarding a stipulated amount offered under Subsection (c)(4) and Section 401.362.
- 26 (g) After the authority has issued an RFDP under this section, the authority may solicit input
- 27 regarding alternative technical concepts.

28 **401.358 Evaluation and Ranking of Detailed CDA Proposals**

1 The authority shall evaluate and rank each detailed proposal received based on the criteria described
2 in the RFDP and shall identify the private entity whose proposal offers the best value to the
3 authority. The authority may interview the private entities as part of its evaluation process.

4 **401.359 Post-Submissions Discussions**

5 (a) After the authority has evaluated and ranked the detailed proposals in accordance with Section
6 401.358, the authority may enter into discussions with the private entity whose proposal offers the
7 apparent best value provided, The discussions under this section shall be limited to

8 (1) incorporation of aspects of other detailed proposals for the purpose of achieving the overall
9 best value for the authority;

10 (2) clarifications and minor adjustments in scheduling, designs, operating characteristics, cash
11 flow, and similar items; and

12 (3) other matters that have arisen since the submission of the detailed proposal.

13 (b) If at any point in discussions under Subsection (a), it appears to the authority that the highest
14 ranking proposal will not provide the authority with the overall best value, the authority may end
15 discussions with the highest-ranking private entity and enter into discussions with the private entity
16 submitting the next-highest ranking proposal.

17 (c) The authority may withdraw a request issued under Section 401.357 at any time. The authority
18 may then publish a new request for competing proposals and qualifications under Section 401.355.

19 **401.360 Negotiations for CDA**

20 (a) Subsequent to the discussions conducted pursuant to Section 401.359 and provided the
21 authority has not terminated or withdrawn the procurement, the authority and the highest-ranking
22 proposer shall attempt to negotiate the specific terms of a CDA.

23 (b) The authority shall prescribe the general form of the CDA and may include any matter therein
24 considered advantageous to the authority.

25 (c) The authority may establish a deadline for the completion of negotiations for a CDA. If an
26 agreement has not been executed within that time, the authority may terminate the negotiations, or,
27 at its discretion, may extend the time for negotiating an agreement.

28 (d) In the event an agreement is not negotiated within the time specified by the authority, or if the
29 parties otherwise agree to cease negotiations, the authority may commence negotiations with the
30 second-ranked proposer or it may terminate the process of pursuing a CDA for the project which is
31 the subject of the procurement process.

32 (e) Notwithstanding the foregoing, the authority may terminate the procurement process,
33 including the negotiations for a CDA, at any time upon a determination that continuation of the

1 process or development of a project through a CDA is not in the authority's best interest. In such
2 event, the authority shall have no liability to any proposer other than paying the stipend in
3 accordance with the terms of Section 401.362 if detailed proposals have been submitted to the
4 authority.

5 **401.361 Property Subject to a CDA**

6 (a) A transportation project (excluding a public utility facility) that is the subject of a CDA is
7 public property and belongs to the authority.

8 (b) The authority may lease rights-of-ways, grant easements, issue franchises, licenses, permits or
9 any other lawful form of use to enable a private entity to construct, operate, and maintain a
10 transportation project, including supplemental facilities. At the termination of any such agreement,
11 the transportation project shall be returned to the authority in a state of maintenance deemed
12 adequate by the authority and at no additional cost to the authority.

13 **401.362 Payment by Authority for Submission of Detailed CDA Proposal**

14 (a) The authority may pay an unsuccessful private entity that submits a response to an RFDP
15 issued under Section 401.357 a stipulated amount of the final contract price for any costs incurred in
16 preparing that proposal. A stipulated amount may not exceed the value of any work product
17 contained in the proposal that can, as determined by the authority, be used by the authority in the
18 performance of its functions. The use by the authority of any design element contained in an
19 unsuccessful proposal is at the sole risk and discretion of the authority and does not confer liability
20 on the recipient of the stipulated amount under this section.

21 (b) After payment of a stipulated amount under Subsection (a):

22 (1) the authority owns the exclusive rights to, and may make use of any work product contained
23 in, the proposal, including the technologies, techniques, methods, processes, and information
24 contained in the project design; and

25 (2) the work product contained in the proposal becomes the property of the authority.

26 **401.363 Performance and Payment Security**

27 (a) The authority shall require any private entity entering into a CDA under this subchapter to
28 provide a performance and payment bond or an alternative form of security in an amount sufficient
29 to:

30 (1) insure the proper performance of the agreement; and

31 (2) protect:

32 (A) the authority; and

1 (B) payment bond beneficiaries who have a direct contractual relationship with the private
2 entity and subcontractors of the private entity who supply labor or materials.

3 (b) A performance and payment bond or alternative form of security shall be in an amount equal
4 to the cost of constructing or maintaining the project.

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

8 (d) A performance and payment bond or alternative form of security is not required for the
9 portion of a CDA that includes only design or planning services, the performance of preliminary
10 studies, or the acquisition of real property.

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

13 (f) If the authority prescribes requirements for alternative forms of security, in addition to
14 performance and payment bonds the authority may require the following alternative forms of
15 security :

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

17 (2) a United States bond or note;

18 (3) an irrevocable bank letter of credit; or

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

20 **401.364 Review by Attorney General**

21 (a) The authority may not enter into a CDA unless the Texas Attorney General reviews the
22 proposed agreement and determines the CDA is legally sufficient, in accordance with Subchapter B,
23 Chapter 371, Transportation Code.

24 (b) The authority may require the private entity who intends to enter into a CDA with the
25 authority to pay the examination fee assessed by the attorney general for the legal sufficiency review
26 required by Section 371.051, Transportation Code.

27 SECTION 1. Section 401.002(a)(8), Article 1, Chapter 4, Policy Code is amended to
28 read as follows:

29 (8) Comprehensive Development Agreement: An agreement entered into and subject to the
30 requirements of Subchapter B, Article 7 of this chapter.

**GENERAL MEETING OF THE BOARD OF DIRECTORS
OF THE
CENTRAL TEXAS REGIONAL MOBILITY AUTHORITY**

RESOLUTION NO. 12-___

**AMENDING THE POLICY CODE RELATING TO PROCUREMENT POLICIES FOR
THE USE OF A DESIGN-BUILD METHOD OR A COMPREHENSIVE
DEVELOPMENT AGREEMENT TO DEVELOP A TRANSPORTATION PROJECT.**

WHEREAS, the 82nd Texas Legislature enacted S.B. 1420 that, among other provisions, established the authority and required procedures for the Central Texas Regional Mobility Authority to use a design-build method or a comprehensive development agreement to develop and finance certain transportation projects; and

WHEREAS, by Resolution No. 12-016 adopted February 29, 2012, the Board of Directors adopted the Mobility Authority Policy Code (“Policy Code”); and

WHEREAS, the Executive Director recommends that the Board of Directors amend the Policy Code to incorporate and implement state law requirements that authorize procurement and use of a design-build contract and a comprehensive development agreement, as set forth in Attachment “A” to this resolution.

NOW THEREFORE, BE IT RESOLVED, that the Board of Directors hereby adopts the amendments to the Policy Code set forth in Attachment “A” to this resolution.

Adopted by the Board of Directors of the Central Texas Regional Mobility Authority on the 28th day of March, 2012.

Submitted and reviewed by:

Approved:

Andrew Martin
General Counsel for the Central
Texas Regional Mobility Authority

Ray A. Wilkerson
Chairman, Board of Directors
Resolution Number: 12-___
Date Passed: 3/28/2012

Exhibit A

Policy Code Amendments (on the following 18 pages)

1 Attachment "A" to Resolution 12-____

2 SECTION 1. Article 7, Chapter 4, Policy Code is amended to read as follows:

3 **Article 7. DESIGN-BUILD CONTRACT; COMPREHENSIVE**
4 **DEVELOPMENT AGREEMENTS.**

5 Subchapter A. DESIGN-BUILD PROCUREMENT

6 **401.300 Design-Build Contract for a Transportation Project**

7 (a) The authority may use the design-build method to procure the design, construction, financing,
8 expansion, extension, related capital maintenance, rehabilitation, alteration, or repair of a
9 transportation project. In using the design-build method and in entering into a contract for the
10 services of a design-build contractor, the authority and the design-build contractor shall follow the
11 procedures and requirements of this subchapter.

12 (b) The authority may enter into not more than two design-build contracts in any fiscal year.

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

14 (1) a leasehold interest in the transportation project; or

15 (2) the right to operate or retain revenue from the operation of the transportation project.

16 **401.301 Definitions**

17 In this subchapter:

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

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

24 **401.302 Procurement Process**

25 (a) The authority must solicit proposals for a design-build contract under this subchapter.

26 (b) The Professional Services Procurement Act, Chapter 2254, Government Code, does not apply
27 to a design-build contract.

1 **401.303 Use of Engineer or Engineering Firm and Other Professional**
2 **Services**

3 (a) The authority must select or designate an engineer or a qualified engineering firm that is
4 independent of the design-build contractor to act as the authority’s representative during the
5 procurement of a design-build contract.

6 (b) The engineer representative selected or designated under this section may be:

7 (1) an engineer that is an employee of the authority;

8 (2) the authority’s general engineering consultant, if any; or

9 (3) a qualified engineer or engineering firm hired by the authority pursuant to the Professional
10 Services Procurement Act, Chapter 2254, Government Code.

11 (c) The authority must provide or contract for, independently of the design build contractor, the
12 following services as necessary for acceptance of the transportation project by the authority:

13 (1) inspection services;

14 (2) construction materials engineering and testing; and

15 (3) verification testing services.

16 (d) The authority shall ensure that the engineering services contracted for under this section are
17 selected based on demonstrated competence and qualifications, in accordance with applicable law.

18 **401.304 Requests for Qualifications**

19 (a) The authority must solicit proposals for a design-build contract by issuing a Request for
20 Qualifications (“RFQ”).

21 (b) The authority shall publish a notice advertising the issuance of the RFQ in the *Texas Register*
22 and on the authority’s website, and shall publish the RFQ on the authority’s website.

23 (c) An RFQ issued under this subchapter shall include:

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

25 (2) information regarding funding that may be available for the project and a description of the
26 financing to be requested from the design-build contractor, as applicable;

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

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

1 (5) the deadline by which proposals must be received by the authority.

2 **401.305 Withdrawal of an RFQ**

3 The authority may withdraw an RFQ at any time.

4 **401.306 Evaluation of Responses to an RFQ**

5 (a) If the authority receives only one responsive proposal to an RFQ, the authority shall terminate
6 the procurement.

7 (b) The authority shall evaluate each qualifications statement received in response to an RFQ
8 based on the criteria identified in the request.

9 (c) The authority may interview responding proposers.

10 (d) Based on the evaluation of qualifications statements and interviews, if any, the authority shall
11 qualify or short-list at least two, but no more than five, proposers to submit detailed proposals.

12 **401.307 Requests For Detailed Proposals**

13 (a) The authority shall issue a request for detailed proposals (“RFDP”) to proposers qualified or
14 short-listed under Section 401.306.

15 (b) Before issuing an RFDP under this section, the authority may issue a draft RFDP to the
16 proposers eligible under Subsection (a) for purposes of receiving their input.

17 (c) An RFDP must include:

18 (1) information on the overall project goals;

19 (2) the authority’s cost estimates for the design-build portion of the work;

20 (3) materials specifications;

21 (4) special material requirements;

22 (5) a schematic design approximately 30 percent complete;

23 (6) known utilities, provided that the authority is not required to undertake an effort to locate
24 utilities;

25 (7) quality assurance and quality control requirements;

26 (8) the location of relevant structures;

27 (9) notice of authority rules or goals relating to awarding contracts to disadvantaged businesses;

- 1 (10) available geotechnical or other other information related to the project;
- 2 (11) the status of any environmental review of the project;
- 3 (12) detailed instructions for preparing the technical proposal required by Section 401.309,
4 including a description of the form and level of completeness of drawings expected;
- 5 (13) the relative weighting of the technical and cost proposals required by this section and the
6 formula by which the proposals will be evaluated and ranked, provided that the formula shall
7 allocate at least 70 percent of the weighting to the cost proposal;
- 8 (14) the criteria and weighting for each element of the technical proposal;
- 9 (15) the risks and costs that should be assumed by the design-build contractor, including
- 10 (A) all risks and costs associated with:
- 11 (i) scope changes and modifications, as requested by the authority;
- 12 (ii) unknown or differing site conditions;
- 13 (iii) environmental clearance and other regulatory permitting for the project; and
- 14 (iv) natural disasters and other force majeure events; and
- 15 (B) all costs associated with property acquisition, excluding costs associated with acquiring a
16 temporary easement or work area associated with staging or construction for the project;
- 17 (16) a general form of the design-build contract that the authority proposes if the terms of the
18 contract may be modified as a result of negotiations prior to contract execution; and
- 19 (17) the deadline established by Section 401.310 by which responses to the RFDP must be
20 received.

21 **401.308 Alternative Technical Concepts**

- 22 (a) The authority may provide for the submission of alternative technical concepts by a proposer
23 in the response to the RFDP.
- 24 (b) If the authority provides for the submission of alternative technical concepts, the authority
25 must prescribe the process for notifying a proposer whether the proposer's alternative technical
26 concepts are approved for inclusion in a technical proposal.

27 **401.309 Separate Technical and Cost Proposals**

- 28 (a) Each response submitted to an RFDP shall include a sealed technical proposal and a separate
29 sealed cost proposal.

1 (b) The technical proposal must address:

2 (1) the proposer's qualifications and demonstrated technical competence, provided that the
3 proposer shall not be requested to resubmit any information that was submitted and evaluated
4 pursuant to Section 401.304;

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

7 (3) the proposed solutions to anticipated problems;

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

9 (5) the conceptual engineering design proposed; and

10 (6) any other information requested by the authority.

11 (c) The cost proposal must include:

12 (1) the cost of delivering the project;

13 (2) the estimated number of days required to complete the project; and

14 (3) any terms for financing for the project that the proposer plans to provide.

15 **401.310 Deadline for Response to RFDP**

16 The authority shall establish a time, date, and location for submittal of a response to an RFDP,
17 which deadline shall be no later than the 180th day after the RFDP is issued to each proposer
18 qualified or short-listed under Section 401.306.

19 **401.311 Withdrawal of an RFDP**

20 (a) The authority may withdraw a RFDP at any time prior to the submission deadline for detailed
21 proposals. In such event the authority shall have no liability to the entities chosen to submit detailed
22 proposals.

23 (b) If the authority provides for the submission of ATCs and/or VACs, the authority shall
24 establish a process for submission and review of ATCs and/or VACs prior to submission of a
25 technical proposal. Only those ATCs and/or VACs approved by the authority may be included in an
26 entity's technical proposal. The authority shall notify a proposer whether its ATCs and/or VACs are
27 approved for inclusion in the technical proposal.

28 (c) The authority may conduct meetings with or interview proposers submitting a response to an
29 RFDP.

30

1 **401.312 Unapproved Changes to Team**

2 The authority may reject as nonresponsive a proposal from a proposer qualified or short-listed
3 under Section 401.306 that makes a significant change to the composition of the proposer's design-
4 build team as initially submitted if that change was not approved by the authority as provided in the
5 RFQ.

6 **401.313 Evaluation and Ranking of Responses to an RFDP**

7 (a) The authority shall first open, evaluate, and score each responsive technical proposal
8 submitted on the basis of the criteria described in the RFDP and assign points on the basis of the
9 weighting specified in the request for detailed proposals.

10 (b) After completing the scoring required by Subsection (a), the authority shall subsequently open,
11 evaluate, and score each cost proposal based on criteria set forth in the RFDP and assign points on
12 the basis of the weighting specified in the request for detailed proposals. The authority shall rank
13 the proposers in accordance with the formula provided in the request for detailed proposals.

14 (c) The authority shall then rank the proposers in accordance with the formula provided in the
15 RFDP.

16 **401.314 Stipend for Unsuccessful Proposers**

17 (a) Pursuant to the provisions of the RFDP, the authority shall pay an unsuccessful proposer that
18 submits a responsive proposal to the RFDP a stipend for work product contained in the proposal.
19 The stipend must be specified in the initial RFDP in an amount of at least two-tenths of one percent
20 of the contract amount, but may not exceed the value of the work product contained in the proposal
21 to the authority. In the event the authority determines that the value of the work product is less than
22 the stipend amount, the authority must provide the proposer with a detailed explanation of the
23 valuation, including the methodology and assumptions used in determining value.

24 (b) After payment of the stipend, the authority may make use of any work product contained in
25 the unsuccessful proposal, including the techniques, methods, processes, and information contained
26 in the proposal.

27 (c) The use by the authority of any design element contained in an unsuccessful proposal is at the
28 sole risk and discretion of the authority and does not confer liability on the recipient of the stipend
29 under this section.

30 (d) The authority may provide in the RFDP for the payment of a partial stipend in the event a
31 procurement is terminated prior to securing project financing and execution of a design-build
32 contract.

33

1 **401.315 Contract Negotiations**

2 (a) After ranking the proposers under Section 401.313, the authority shall first attempt to
3 negotiate a contract with the highest-ranked proposer.

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

8 (c) If the authority has committed in the RFDP to paying a stipend to unsuccessful proposers in
9 accordance with Section 401.314, the authority may include in the negotiations alternative technical
10 concepts proposed by other proposers.

11 (d) The authority may establish a deadline for the completion of negotiations with a proposer for
12 a design-build contract. If a design-build contract has not been executed by that deadline, the
13 authority may terminate the negotiation under Subsection (b) or, at its discretion, may extend the
14 deadline for negotiating a design-build contract with that proposer.

15 (e) Notwithstanding the foregoing, the authority may terminate the procurement process at any
16 time upon a determination that continuation of the process or development of a project through a
17 design-build contract is not in the authority's best interest. If the procurement process is terminated
18 after the deadline for responses to the RFDP under Section 401.310, the authority shall have no
19 liability to any proposer other than paying the stipend in accordance with the terms of Section
20 401.314.

21 **401.316 Performance and Payment Security**

22 (a) The authority shall require a design-build contractor to provide:

23 (1) a performance and payment bond;

24 (2) an alternative form of security; or

25 (3) a combination of a performance and payment bond and alternative security.

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

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

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

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

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

3 (2) a United States bond or note;

4 (3) an irrevocable bank letter of credit drawn from a federal or Texas chartered bank; or

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

6 Subchapter B. COMPREHENSIVE DEVELOPMENT AGREEMENTS

7 ~~(4)~~ **401.350 401.053 Comprehensive Development Agreements Allowed.**

8 (a) The authority may enter into a comprehensive development agreement (a "CDA") for a
9 transportation project authorized by state law in accordance with requirements and procedures
10 established by this subchapter.

11 (b) The authority may enter into a ~~comprehensive development agreement (CDA)~~ with a private
12 entity ~~to construct, maintain, repair, operate, extend, or expand a transportation project. A CDA~~
13 ~~shall that~~, at a minimum:

14 (1) ~~provides~~ for the design and construction of a transportation project; ~~and~~

15 (2) may ~~also~~ provide for the financing, acquisition, maintenance, or operation of a transportation
16 project; ~~and~~

17 (3) entitles the private entity to:

18 (A) a leasehold interest in the transportation project; or

19 (B) the right to operate or retain revenue from the operation of the transportation project.

20 (c) The authority ~~may is also allowed to~~ negotiate provisions relating to professional and
21 consulting services provided in connection with a CDA.

22 **401.351 Confidentiality of Negotiations for a CDA**

23 (a) The authority shall use its best efforts to protect the confidentiality of information made
24 confidential by Sections 370.307 and 371.052(d), Transportation Code, as established by state law
25 and detailed in Subsection (b).

26 (b) The following information in the possession of the authority or its agents is confidential, is
27 not subject to disclosure, inspection, or copying under Chapter 552, Government Code, and is not
28 subject to disclosure, discovery, subpoena, or other means of legal compulsion for its release until a
29 final contract for a proposed CDA project is entered into:

- 1 (1) all or part of a proposal submitted by a private entity for a CDA, except:
- 2 (A) information regarding the proposed transportation project's location, scope, and limits;
- 3 and
- 4 (B) information regarding the proposing private entity's qualifications, experience, technical
- 5 competence, and capability to develop the project;
- 6 (2) supplemental information or material submitted by a private entity in connection with a
- 7 proposal submitted under this subchapter; and
- 8 (3) information created or collected by an authority or its agent during consideration of a
- 9 proposal submitted under this subchapter, including without limitation financial forecasts and
- 10 traffic and revenue reports prepared by or for the authority before the authority enters into a
- 11 CDA.
- 12 (c) After the authority completes its final ranking of proposals under Section 401.358, the final
- 13 rankings of each proposal under each of the published criteria are not confidential.
- 14 (d) After the authority enters into a CDA, financial forecasts and traffic revenue reports prepared
- 15 by or for the authority before it entered into the CDA are public information.

16 ~~(a)~~ **401.352 401.054 Competitive Procurement Process For a CDA.**

- 17 (a) The authority may ~~either accept consider an~~ unsolicited proposals ~~to enter into relating to a~~
- 18 CDA or ~~may~~ solicit proposals ~~for relating to a~~ CDA in accordance with this ~~article~~ subchapter.
- 19 (b) The competitive bidding requirements for highway projects as specified under Chapter 223,
- 20 Transportation Code, and Chapter 2254, the Texas Professional Services Procurement Act,
- 21 Government Code, do not apply to a CDA.

22 ~~(b)~~ **401.353 401.055 Filing an Unsolicited Proposals for a CDA.**

- 23 ~~The authority may accept An~~ unsolicited proposals ~~for a project proposer to be developed~~
- 24 ~~through a CDA~~ filed with the authority shall comply with the requirements and procedures
- 25 established by this section.
- 26 (b) -An unsolicited proposal ~~must be filed with~~ filed with the authority must include and be
- 27 ~~accompanied by~~ a \$20,000.00 non-refundable review fee payable to the authority.
- 28 (c) -An unsolicited proposal must also include the following information:
- 29 ~~(1)~~ (1) the proposed transportation project location, scope, and limits;
- 30 ~~(2)~~ (2) information regarding the proposing private entity's qualifications, experience, technical
- 31 competence, and capability to develop the project;

1 ~~(2)~~(3) a proposed financial plan for the proposed project that includes, at a minimum:

2 ~~(3)~~(A) projected project costs; ~~and~~

3 ~~(A)~~(B) proposed sources of funds; and

4 (4) the name and business address of each person and business entity with a substantial interest in
5 the business entity that is the proposing private entity filing the unsolicited proposal, as the
6 terms “business entity” and “substantial interest” are defined under Chapter 171, Government
7 Code, and the name and business address of each consultant or subconsultant the private
8 entity anticipates using if the private entity develops the proposed project~~the identity of any~~
9 ~~member of, or proposed subconsultant for, the proposing entity or team who is also~~
10 ~~performing work, directly or as a subconsultant, for the authority.~~

11 ~~(4)~~**401.354 Review of an Unsolicited Proposal**

12 ~~(e)~~(a) ~~An u~~Unsolicited proposals shall be reviewed by the executive director, who authority staff
13 ~~and/or consultants. The staff/consultants may~~ interview, and who may request additional
14 information from, the ~~proposer~~proposing private entity. Based on ~~that its~~ review, the executive
15 director staff will shall make an initial recommendation to the board ~~(or a designated committee~~
16 ~~thereof) on as to~~ whether the board authority should consider authorize further evaluation of the
17 unsolicited proposal.

18 ~~(f)~~(b) If the board authority authorizes further evaluation of an unsolicited proposal, then the board
19 shall direct the executive director to issue authority shall publish a request for qualifications (an
20 RFQ) under in accordance with the requirements of Section 401.355. Evaluation of proposals
21 submitted in response to RFQs shall occur in accordance with the provisions of Section 401.057.

22 ~~(g)~~**401.355 401.056 Authority Solicitation of Requests for Qualifications:**

23 (a) Under this subchapter, tThe authority may solicit proposals for a CDA to develop a
24 transportation project or for competing proposals to an unsolicited proposal filed with the authority
25 by issuing ana RFQ relating to the a CDA transportation project.

26 ~~(h)~~(b) The authority shall publish a RFQ (or a notice advertising the issuance of of availability of a
27 the RFQ) in the Texas Register and post it on the authority’s website, and shall publish the RFQ on
28 the authority’s website.

29 ~~(i)~~—

30 ~~(j)~~(c) An RFQ issued ~~by the authority under this section~~ shall include the following ~~information:~~

31 ~~(k)~~(1) a description of the project;

32 (2) the information a private entity must provide in response to the RFQ regarding:

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

3 (B) the private entity's proposed financial plan for the proposed project that includes, at a
4 minimum:

5 (i) projected project costs; and

6 (ii) proposed sources of funds; and

7 ~~(4)(3)~~ the criteria to be used by the authority to evaluate the proposals received in response to the
8 RFQ;

9 ~~(2)(4)~~ the relative weight given to the criteria; and

10 ~~(3)(5)~~ the deadline by which proposals must be received by the authority.

11 ~~(4)~~—A proposal submitted in response to ~~a an~~ RFQ issued ~~under this article, or a competing~~
12 ~~proposal submitted in response to a RFQ issued~~ under this sectionSection 401.055(e), must include,
13 at a minimum, the information required to be submitted under Subsection (c)(2), and, if the RFQ
14 solicits competing proposals to an unsolicited proposal filed under Section 401.353, the fee required
15 by Section 401.353(b), following:

16 ~~(m)~~—~~information regarding the proposer's qualifications, experience, technical competence, and~~
17 ~~capability to develop the project;~~

18 ~~(n)~~—~~a proposed financial plan for the proposed project that includes, at a minimum:~~

19 ~~(o)~~—~~projected project costs, and~~

20 ~~(p)~~—~~proposed sources of funds;~~

21 ~~(q)~~—~~such additional information that the authority requests within the RFQ;~~

22 ~~(r)~~—~~the identity of any member of, or proposed subconsultant for, the proposing entity or team~~
23 ~~who is also performing work, directly or as a subconsultant, for the authority; and~~

24 ~~(s)(d)~~ in the case of a competing proposal submitted in response to a RFQ published by the
25 authority after receipt of an unsolicited proposal, a \$20,000 non-refundable proposal review fee.

26 ~~(t)(e)~~ The authority may withdraw the a-RFQ at any time, and may then publish a new RFQ for a
27 CDA in accordance with this section.

28 ~~(t)~~ **401.356 401.057—Evaluation of the Responses to a Request For**
29 **Qualifications.**

1 ~~(v)~~(a) The ~~executive director authority~~ shall review ~~each responses received~~ to an RFQ issued under
2 ~~submitted in accordance with~~ Section ~~401.057~~401.355 based on the criteria ~~and relative weighting~~
3 ~~established in described in~~ the RFQ. ~~The authority shall evaluate all proposals received, and shall~~
4 ~~determine which proposers will qualify to submit detailed proposals in accordance with the~~
5 ~~requirements of Section 401.058.~~ The ~~executive director authority~~ may include an interview as part
6 of ~~the its review evaluation~~ process.

7 (b) ~~After completing the review, the executive director shall make a recommendation to the board~~
8 ~~on whether the board should consider further evaluation of a CDA for the project.~~

9 (c) ~~If the board decides to proceed with further evaluation of a CDA for the project, the board~~
10 ~~shall direct the executive director to issue a request for detailed proposals (an "RFDP") under~~
11 ~~Section 401.357~~ ~~The authority must qualify at least two private entities to submit.~~

12 (d) ~~If the authority has received and reviewed more than one proposal from a private entity under~~
13 ~~Section 401.353, Section 401.355, or both, the board shall qualify at least two private entities to~~
14 ~~respond to the RFDP issued under Section 401.357~~ ~~detailed proposals in accordance with the~~
15 ~~procedures under Section 401.058, unless the authority does not receive more than one (1) proposal~~
16 ~~in response to a RFQ.~~

17 ~~(w)~~(c) ~~If only one (1) private entity has filed a proposal with the authority under this subchapter,~~
18 ~~responds to a RFQ (or no entity submits a response to a RFQ issued after receipt of an unsolicited~~
19 ~~proposal) the board authority may request a response from the sole private entity to an RFDP issued~~
20 ~~under Section 401.357~~ ~~a detailed proposal from, and may attempt to negotiate a CDA with, the sole~~
21 ~~proposer.~~

22 ~~(x)~~401.357 ~~401.058~~ **Requests for Detailed Proposals:**

23 (a) ~~Before issuing an RFDP, the authority may solicit input from all private entities qualified~~
24 ~~under Section 401.356 and from any other person.~~

25 (b) ~~The authority shall issue an request for detailed proposals (RFDP) from to all private entities~~
26 ~~proposers qualified under in accordance with~~ Section ~~401.356~~401.057. The authority shall mail ~~or~~
27 ~~hand deliver the a~~ RFDP directly to the ~~private entity, proposer's main address as designated in the~~
28 ~~response to the RFQ, and such~~

29 ~~(v)~~(c) ~~The~~ RFDP must contain the following information:

30 (1) ~~instructions for preparing the proposal and the items included therein;~~

31 (2) ~~the criteria to which will be used by the authority to evaluate the detailed proposals, including~~
32 ~~factors related to:~~

33 (A) ~~oversight of the toll project;~~

1 (B) maintenance and operations costs of the toll project;

2 (C) the structure and rates of tolls;

3 (D) economic development impacts of the toll project;

4 (E) benefits and impacts of the toll project; and

5 (A)(F) any other factors the authority determines appropriate;

6 ~~(B)(3)~~ the relative weight to be given to the criteria;

7 (4) a stipulated amount to be paid to unsuccessful proposers subject to Section 401.362, if any,
8 including any terms and conditions relating to payment of the stipulated amount;

9 ~~(2)(5)~~ the general form of a CDA sought by the authority, including any matters relating to the CDA
10 the authority considers advantageous to the authority; -and

11 ~~(3)(6)~~ the ~~deadline~~-date and time by which the detailed proposals must be received by the authority.

12 ~~(7)(d)~~ An RFDP under this ~~articlesubchapter~~ may require the private entity proposers to provide
13 additional information relating to ~~the following~~:

14 ~~(aa)(1)~~ the private entity's proposer's qualifications and demonstrated technical competence;

15 ~~(1)(2)~~ the feasibility of developing the project as proposed;

16 ~~(2)(3)~~ detailed engineering or architectural designs;

17 ~~(3)(4)~~ the private entity's proposer's ability to meet schedules;

18 ~~(4)(5)~~ costing methodology; and

19 (6) any other information the authority considers relevant or necessary to fully assess the private
20 entity's proposalproject.

21 ~~(5)(e)~~ The RFDP may require a responding private entity to submit a sealed technical proposal and a
22 separate, sealed cost proposal.

23 ~~(bb)(f)~~ The authority may withdraw an RFDP at any time ~~prior to the submission deadline for~~
24 ~~detailed proposals~~. In such event the authority shall have no liability to a private the entityies chosen
25 to submit a detailed proposals, except as may be specified in the RFDP regarding a stipulated
26 amount offered under Subsection (c)(4) and Section 401.362.

27 ~~(cc)~~ ~~In developing and preparing to issue a RFDP in accordance with Section 401.058, the~~
28 ~~authority may solicit input from entities qualified under Section 401.057 or any other person.~~

1 ~~(dd)(g)~~ After the authority has issued ~~an~~ RFDP under ~~this section~~Section 401.058, the authority
2 may solicit input ~~from the proposers~~ regarding alternative technical concepts.

3 ~~(ee)~~401.358 ~~401.059~~ **Evaluation and Ranking of Detailed CDA Proposals.**

4 The authority shall evaluate and rank each detailed proposal received based on the criteria described
5 in the RFDP and shall identify the ~~private entity proposer~~ whose proposal offers the best value to
6 the authority. The authority may interview the ~~private entities proposers~~ as part of its evaluation
7 process.

8 401.359 ~~401.060~~ **Post-Submissions Discussions.**

9 (a) After the authority has evaluated and ranked the detailed proposals in accordance with Section
10 ~~401.059~~401.358, the authority may enter into discussions with the ~~private entity proposer~~ whose
11 proposal offers the apparent best value provided, ~~that t~~The discussions under this section shall must
12 be limited to

13 (1) ~~-~~incorporation of aspects of other detailed proposals for the purpose of achieving the overall
14 best value for the authority;

15 (2) ~~-~~clarifications and minor adjustments in scheduling, designs, operating characteristics, cash
16 flow, and similar items;

17 ~~(ff)(3)~~ ~~-~~other matters that have arisen since the submission of the detailed proposal.

18 ~~(gg)(b)~~ If at any point in discussions under ~~S~~ubsection (a), it appears to the authority that the
19 highest-~~r~~anking proposal will not provide the authority with the overall best value, the authority
20 may ~~end discussions with the highest-ranking private entity and~~ enter into discussions with the
21 ~~private entity proposer~~ submitting the next-highest ranking proposal.

22 ~~(hh)(c)~~ ~~If, after receipt of detailed proposals, the authority determines that development of a project~~
23 ~~through a CDA is not in the best interest of the authority, or the authority determines for any other~~
24 ~~reason that it does not desire to continue the procurement, t~~The authority may withdraw a request
25 issued under Section 401.357 at any time. The authority may then publish a new request for
26 competing proposals and qualifications under Section 401.355.~~terminate the process and, in such~~
27 ~~event, it shall not be required to negotiate a CDA with any of the proposers.~~

28 ~~(ii)~~401.360 ~~401.061~~ **Negotiations for CDA.**

29 ~~(jj)(a)~~ Subsequent to the discussions conducted pursuant to Section ~~401.060~~401.359 and provided
30 the authority has not terminated or withdrawn the procurement, the authority and the highest-
31 ranking proposer shall attempt to negotiate the specific terms of a CDA.

32 ~~(kk)(b)~~ The authority shall prescribe the general form of the CDA and may include any matter
33 therein considered advantageous to the authority.

1 ~~(ff)(c)~~ The authority may establish a deadline for the completion of negotiations for a CDA. If an
2 agreement has not been executed within that time, the authority may terminate the negotiations, or,
3 at its discretion, may extend the time for negotiating an agreement.

4 ~~(mm)(d)~~ _____ In the event an agreement is not negotiated within the time specified by the
5 authority, or if the parties otherwise agree to cease negotiations, the authority may commence
6 negotiations with the second-ranked proposer or it may terminate the process of pursuing a CDA
7 for the project which is the subject of the procurement process.

8 ~~(nn)~~ Notwithstanding the foregoing, the authority may terminate the procurement process,
9 including the negotiations for a CDA, at any time upon a determination that continuation of the
10 process or development of a project through a CDA is not in the authority's best interest. In such
11 event, the authority shall have no liability to any proposer other than paying the stipend in
12 accordance with the terms of Section 401.362 if detailed proposals have been submitted to the
13 authority.

14 ~~(oo)(e)~~ _____

15 ~~(pp)~~ ~~401.062 CDA Projects with Private Equity Investment.~~

16 ~~(qq)~~ If a project to be developed through a CDA involves an equity investment by the proposer,
17 the terms to be negotiated by the authority and the proposer may include, but shall not be limited to:

18 ~~(rr)~~ methods to determine the applicable cost, profit, and project distribution between the
19 proposer and the authority;

20 ~~(1)~~ reasonable methods to determine and clarify toll rates or user fees;

21 ~~(2)~~ acceptable safety and policing standards; and

22 ~~(3)~~ other applicable professional, consulting, construction, operational and maintenance
23 standards, expenses and costs.

24 ~~(ss)~~ The authority may only enter into a CDA with private equity investment if the project which
25 is the subject of the CDA is identified in TxDOT's unified transportation program or is located on a
26 transportation corridor identified in a statewide transportation plan.

27 ~~(tt)~~ The authority may not incur a financial obligation for a private entity that constructs,
28 maintains, or operates a transportation project. A CDA must include a provision authorizing the
29 authority to purchase the interest of a private equity investor in a transportation project.

30 ~~(uu)~~ 401.361 ~~401.063~~ Authority Property Subject to a CDA:

31 ~~(a)~~ A transportation project (excluding a public utility facility) that is the subject of a CDA is
32 public property and belongs to the authority.

~~(vv)~~(b) ~~provided that~~ The authority may lease rights-of-ways, grant easements, issue franchises, licenses, permits or any other lawful form of use to enable a private entity to construct, operate, and maintain a transportation project, including supplemental facilities. At the termination of any such agreement, the transportation project shall be returned to the authority in a state of maintenance deemed adequate by the authority and at no additional cost to the authority.

~~(ww)~~**401.362 401.064 Payment by Authority for Submission of Detailed CDA Proposals.**

~~(xx)~~(a) The authority ~~shall~~ may pay an unsuccessful ~~private entity proposer~~ that submits a ~~detailed proposal in~~ response to an RFDP ~~issued~~ under Section 401.357 a stipulated amount of the final contract price for any costs incurred in preparing that ~~detailed~~ proposal. ~~A stipulated Such~~ amount may not exceed the ~~lesser of the amount identified in the RFDP or the~~ value of any work product contained in the proposal that can, as determined by the authority, be used by the authority in the performance of its functions. ~~The use~~ Use by the authority of any design element contained in an unsuccessful ~~detailed~~ proposal is at the sole risk and discretion of the authority and does not confer liability on the recipient of the stipulated amount under this section.

~~(b)~~ After payment of ~~a the~~ stipulated amount ~~under Subsection (a):~~

~~(1)~~ the authority ~~shall own~~s the exclusive rights to, and may make use of, any work product contained in, the ~~detailed~~ proposal, including ~~the~~ technologies, techniques, methods, processes, and information contained in the project design; ~~and~~

~~(yy)~~~~(2)~~ ~~In addition,~~ the work product contained in the proposal becomes the property of the authority.

~~(1)~~ ~~401.065 Confidentiality of Negotiations for CDAs.~~

~~(zz)~~ ~~The authority shall use its best efforts to protect the confidentiality of information generated and/or submitted in connection with the process for entering into a CDA to the extent permitted by Section 370.307, Transportation Code. The authority shall notify any proposer whose information is submitted in connection with the process for entering into a CDA is the subject of a Public Information Act request received by the authority.~~

~~401.001~~**401.363 401.066 Performance and Payment Security.**

~~(a)~~ The authority shall require any private entity entering ~~onto~~ into a CDA ~~under this subchapter~~ to provide a performance and payment bond or an alternative form of security in an amount sufficient to:

~~(1)~~ insure the proper performance of the agreement; and

~~(2)~~ protect:

1 (A) —the authority; and

2 (B) —payment bond beneficiaries who have a direct contractual relationship with the private
3 entity ~~and or a~~ subcontractors of the private entity ~~who to~~ supply labor or materials.

4 (b) —A performance ~~and or~~ payment bond or alternative form of security shall be in an amount
5 equal to the cost of constructing or maintaining the project.

6 ~~(a)(c) , provided that if~~ If the authority determines that it is impracticable for a private entity to
7 provide security in ~~the such~~ amount described by Subsection (b), the authority shall set the amount
8 of the bonds or alternative form of security.

9 ~~(b)(d) A performance and payment or performance bond or alternative form of security is not~~
10 required for that portion of a CDA that includes only design or planning services, the performance
11 of preliminary studies, or the acquisition of real property.

12 ~~(c) — An alternative form of security may not be utilized unless requested by the private entity~~
13 ~~proposing to enter into a CDA. Such request shall include an explanation as to why an alternative~~
14 ~~form of security is appropriate, the form of alternative security to be utilized, and the benefits and~~
15 ~~protections provided to the authority through use of the requested form of alternative security. A~~
16 ~~decision on whether to accept alternative forms of security, in whole or in part, shall be at the sole~~
17 ~~discretion of the authority.~~

18 ~~(d) — A payment or performance bond or alternative form of security is not required for that~~
19 ~~portion of a CDA that includes only design or planning services, the performance of preliminary~~
20 ~~studies, or the acquisition of real property.~~

21 (e) ~~In no event may~~ The amount of the payment security must not be less than the amount of
22 the performance security.

23 (f) If the authority prescribes requirements for alternative forms of security, in addition to
24 performance and payment bonds the authority may require the following a Alternative forms of
25 security ~~may be permitted or required in the following forms:~~

26 ~~(1)~~ (1) a cashier's check drawn on a financial entity specified by the authority;

27 ~~(2)~~ (2) a United States bond or nNote;

28 ~~(3)~~ (3) an irrevocable bank letter of credit; or

29 ~~(4)~~ (4) any other form of security determined suitable by the authority.

30 **401.364 Review by Attorney General**

1 (a) The authority may not enter into a CDA unless the Texas Attorney General reviews the
2 proposed agreement and determines the CDA is legally sufficient, in accordance with Subchapter B,
3 Chapter 371, Transportation Code.

4 (b) The authority may require the private entity who intends to enter into a CDA with the
5 authority to pay the examination fee assessed by the attorney general for the legal sufficiency review
6 required by Section 371.051, Transportation Code.

7 SECTION 1. Section 401.002(a)(8), Article 1, Chapter 4, Policy Code is amended to
8 read as follows:

9 (8) Comprehensive Development Agreement: An agreement entered into and subject to the
10 requirements of Subchapter B, Article 7 of this chapter~~with a private entity that at a~~
11 ~~minimum provides for the design and construction of a transportation project and may also~~
12 ~~provide for financing, acquisition, maintenance or operation of a transportation project.~~