



New Texas P3 Guidelines Contain AIAI Provisions Requiring Bonding

The Texas Facilities Commission issued its Public Private Partnership (P3) late last year. The guidelines apply to all qualifying P3 projects under the Public and Private Facilities and Infrastructure Act in Chapter 2267 of the Texas Government Code. SFAA and its members worked through the Association for Investment in American Infrastructure (AIAI) to make recommendations for the contents of the guidelines based on AIAI's best practices, which include bonding. The guidelines provide that the P3 agreement must include a requirement for the delivery of letters of credit or other security for the development or operation of the project, in the forms and amounts satisfactory to the public owner, and delivery of performance and payment bonds in compliance with Chapter 2253 of the Texas Government Code (Little Miller Act) for all construction activities. A copy of the guidelines is attached.

The new guidelines essentially apply to all non-transportation projects. The P3 laws for Department of Transportation (DOT) projects, however, still permit alternative forms of security in lieu of the payment and performance bonds under Chapters 223.205, 366.404 and 370.308 of the Transportation Code. These provisions allow a cashier's check, U.S. bond or note, an irrevocable bank letter of credit or any other form of security that the DOT finds suitable.



TEXAS FACILITIES COMMISSION

PUBLIC - PRIVATE PARTNERSHIP

GUIDELINES

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EXECUTIVE SUMMARY

The 2015 Public-Private Partnership Guidelines provide an updated framework which allows for the initiation, development, and delivery of the State's public-private partnership (P3) facilities and infrastructure projects in a transparent, timely and cost effective manner. The Guidelines are intended to aid the private sector by providing a clear format for the submission of proposals in response to solicitations and for a fair proposal evaluation and selection process in accordance with Texas law. This is the responsibility of the Texas Facilities Commission and is accomplished using the Public and Private Facilities and Infrastructure Act, as amended.

The Texas P3 program's objectives and overall goals are:

- Administer a fair and efficient project development and procurement process that encourages innovation and private sector investment, creating long-term value for Texas
- Achieve cost efficiencies throughout the life of a project using appropriate transfer of risk
- Establish reliable and uniform processes and procedures to encourage private sector participation and investment
- Facilitate timely delivery of P3 projects within established laws
- Promote transparency and accountability coupled with informed decision making
- Foster efficient management of the State's financial and organizational resources

The Texas P3 project delivery framework streamlines and standardizes the process to enhance delivery of facilities and infrastructure projects in Texas. It is designed to demonstrate the phases, decision points, public engagement, and transparent nature of the procurement. These Guidelines are organized into chapters that provide details on the P3 processes within the framework and address roles and responsibilities for solicited projects.

Chapter I is an **introduction** which explains the organization of these Guidelines, the P3 program objectives, and the function of the Texas Facilities Commission. This chapter introduces the Public and Private Facilities and Infrastructure Act, and explains the roles of the Texas Facilities Commission, the Partnership Advisory Commission, the Contract Advisory Team, the Center for Alternative Finance and Procurement, and the Oversight Committee [the various state agencies that may participate in the P3 program process].

Chapter II is a set of **general provisions** which include the defined terms used in these Guidelines, a broad overview of the proposal submission and review processes, and a discussion of Texas law regarding the confidentiality of information submitted in connection with a proposal and the use of public funds.

Chapter III discusses **solicited proposals**, those that are submitted in response to a written request for proposal.

Chapter IV describes the requirements for **proposal preparation and submission**. The submission process is two-part, consisting of an initial conceptual phase and a subsequent detailed phase. This chapter provides the formatting requirements and organizational structure applicable at both the conceptual and detailed phases. The contents required of a submission

ensure that the Texas Facilities Commission (and relevant others) receives information deemed important including the identity, qualifications, and financial capacity of the proposing entity, the results of project analyses, and the anticipated community impact from a particular project.

Chapter V describes the **proposal evaluation and selection criteria**. This chapter describes the preliminary review, the two-part proposal evaluation process (conceptual and detailed), project financing, the public purpose to be served, and other factors considered by the entities charged with review and decision making in the P3 project framework.

Chapter VI discusses the **notice, posting, and hearing requirements** of the Public and Private Facilities and Infrastructure Act and other provisions of the Texas Government Code, incorporated within the P3 project framework and intended to elicit participation and comment from the public regarding proposed projects.

Chapter VII describes the **selection of a proposal** by the Texas Facilities Commission following thorough consideration of the proposed project measured against identified criteria. This chapter discusses the steps to be taken by the Texas Facilities Commission prior to negotiating a comprehensive agreement regarding the project, including publicly posting the oversight committee's review report, submission of detailed proposals to the Partnership Advisory Commission, and holding a public hearing for a final vote.

Chapter VIII discusses **interim and comprehensive agreements** between the State and the private entity regarding the project. This chapter explains the role of the Commission's Planning and Real Estate Management Division and the oversight committee in the negotiation, drafting, and review of the terms of any proposed interim or comprehensive agreement, and outlines the minimum scope of both interim and comprehensive agreements.

I. INTRODUCTION.

A. Overview.

The Texas Facilities Commission is the state agency: (1) having charge and control of all public buildings, grounds, and property; (2) acting as custodian of all state personal property; and (3) responsible for the proper care and protection of state property from damage, intrusion, or improper use. See Chapter 2165, Texas Government Code. By organizing public-private partnerships, the Commission's goal is to encourage redevelopment of underdeveloped and underutilized properties, share risk and expense, and participate in cash flow performance.

B. Declaration of Purpose.

The purpose of these Guidelines for public-private partnerships is to comply with Section 2267.052 of the Public and Private Facilities and Infrastructure Act, Chapter 2267, Texas Government Code, and to furnish the private sector with a fair and uniform format:

1. To respond to solicited proposals; and
2. To provide a fair and transparent evaluation and selection process for solicited proposals in accordance with Texas law.

C. The Public and Private Facilities and Infrastructure Act.

By enacting the Public and Private Facilities and Infrastructure Act, the Texas Legislature found that:

1. There is a public need for timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, operation, implementation, and installation of education facilities, technology and other public infrastructure, and government facilities in this state that serve a public need and purpose;
2. The public need may not be wholly satisfied by existing methods of procurement in which qualifying projects are acquired, designed, constructed, improved, renovated, expanded, equipped, maintained, operated, implemented, or installed;
3. There are inadequate resources to develop new education facilities, technology and other public infrastructure, and government facilities for the benefit of the citizens of this state, and there is demonstrated evidence that partnerships between public entities and private entities or other persons can meet these needs by improving the schedule for delivery, lowering the cost, and providing other benefits to the public;

4. Financial incentives exist under state and federal tax provisions that encourage public entities to enter into partnerships with private entities or other persons to develop qualifying projects; and

5. Authorizing private entities or other persons to develop or operate one or more qualifying projects may serve the public safety, benefit, and welfare by making the projects available to the public in a timelier or less costly fashion.

D. Qualifying Facilities and Projects.

A public-private partnership is a contractual agreement between a public agency (federal, state or local) and a private sector person or entity organized for the purpose of timely delivering services or facilities in a cost-effective manner that might not otherwise be possible using traditional sources of public financing. Through this contractual agreement, the assets and professional skills of each sector (public and private) are shared to deliver a service or facility for the use of the general public, e.g., planning, designing, financing, constructing, operating, maintaining, and owning, and each sector shares in the potential risks of the timely and efficient delivery of the service or facility. To be considered under the public-private partnership development program, a proposal must merit designation as a "qualifying project," as defined hereafter. The following authorities do not apply to a qualifying project under the Act: Chapters 2155, 2156, and 2166, Texas Government Code, any interpretations, rules, or guidelines of the Comptroller and the Texas Facilities Commission, and interpretations, rules, or guidelines developed under Chapter 2262, Texas Government Code.

E. Exclusions.

Chapter 2267 does not apply to: (1) the financing, design, construction, maintenance, or operation of a highway in the state highway system; (2) a transportation authority created under Chapter 451, 452, 453, or 460, Transportation Code; (3) any telecommunications, cable television, video service, or broadband infrastructure other than technology installed as part of a qualifying project that is essential to the project; or (4) except as provided by Section 2165.259, Texas Government Code, a qualifying project located in the Capitol Complex, as defined by Section 443.0071, Texas Government Code. The Commission may develop or operate a qualifying project in the Capitol Complex if: (1) the legislature by general law specifically authorizes the project; and (2) before the Commission enters into a comprehensive agreement for the project, the legislature individually approves the project under Section 2268.058.

F. Designated Contact.

The Commission designates the following representative to meet with private entities who are considering submitting a proposal.

Peter Maass, Deputy Executive Director
Planning and Real Estate Management Division
Texas Facilities Commission

1711 San Jacinto Blvd., 4th Floor
Austin, Texas 78701
(512) 463-9454

The Commission's designee is available by appointment only, Monday-Thursday between 9:00 a.m. – 12:00 p.m., C.S.T.

II. GENERAL PROVISIONS.

A. Definitions.

Unless otherwise specified, whenever the following terms are used in these Guidelines, they have the meanings set forth below:

"Act" means the Public and Private Facilities and Infrastructure Act, S.B. 1048, 82nd Legislature, Chapter 2267, Texas Government Code.

"Affected Jurisdiction" means any county or municipality in which all or a portion of a qualifying project is located.

"Capitol Complex" means the state-owned property within the area bounded on the north by Martin Luther King, Jr., Boulevard, bounded on the east by Trinity Street, bounded on the south by 10th Street, and bounded on the west by Lavaca Street.

"Center" means the Center for Alternative Finance and Procurement established under Section 2152.110, Texas Government Code, by the Texas Facilities Commission.

"Comprehensive Agreement" means an agreement between the contracting person and the Commission that is required prior to the development or operation of a qualifying project.

"Conceptual Proposal" means a proposal for a qualifying project received by the Commission for a conceptual level of review.

"Conceptual Stage" means the initial phase of qualifying project evaluation when the State makes a determination whether a qualifying project serves a public purpose and meets the criteria for a qualifying project, assesses the qualifications and experience of a private entity, and reviews whether the qualifying project is financially feasible and warrants further pursuit.

"Contracting Person" means a person who enters into a comprehensive or interim agreement with the Commission, and the term includes an individual, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity, or other business entity.

"Detailed Proposal" means a proposal for a qualifying project accepted by the Commission beyond a conceptual level of review that defines and establishes periods related to fixing costs, payment schedules, financing, deliverables, and project schedule.

"Detailed Stage" means the second phase of qualifying project evaluation where the State has completed the conceptual stage and accepted the proposal as a qualifying project but may request additional information regarding a qualifying project prior to entering into competitive negotiations with one or more private entities to develop an interim or comprehensive agreement.

"Develop" means to plan, design, develop, finance, lease, acquire, install, construct, or expand a qualifying project.

"Development Opportunity" means certain surface parking lots, parking garages, vacant land, and obsolete buildings or facilities approved by the Commission.

"Governmental Entity" means the Texas Facilities Commission, for the purposes of these Guidelines.

"Improvement" means: (i) a building, structure, fixture, or fence erected on or affixed to land; (ii) the installation of water, sewer, or drainage lines on, above, or under land; (iii) the paving of undeveloped land; and (iv) specialized software that in any manner is related to the control, management, maintenance, or operation of an improvement.

"Interim Agreement" means an agreement between the Commission and a contracting person, entered into before or in connection with the negotiation of a comprehensive agreement, for the development and/or operation of a qualifying project. The Interim Agreement may authorize the contracting person to begin activities or project phases relating to the proposed qualifying project for which the contracting person may be compensated, including project planning and development, design, engineering, environmental analysis and mitigation, surveying, and financial and revenue analysis, including ascertaining the availability of financing for the proposed facility or facilities.

"Lease Payment" means any form of payment, including a land lease, by a governmental entity to the contracting person for the use of a qualifying project.

"Lifecycle Cost Analysis" means an analysis that calculates cost of an asset over its entire life span and includes the cost of planning, constructing, operating, maintaining, replacing, estimates of sufficient capital improvement reserves, and when applicable, salvaging the asset. Although one proposal may have a lower initial construction cost, it may not have the lowest lifecycle cost once maintenance, replacement, and salvage value is considered.

"Operate" means to finance, maintain, improve, equip, modify, operate, or repair a qualifying project.

"Partnership Advisory Commission" or "PAC" means the advisory commission in the legislative branch established in accordance with Chapter 2268, Texas Government Code, which advises certain responsible governmental entities on proposals received under the Act.

"Private Entity" means any individual person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity, or other business entity. A private entity includes a "proposer" that submits a proposal in response to a solicitation.

"Property" means any matter or thing capable of public or private ownership.

"Proposal" means a submission by the private entity in response to a request for proposal by a responsible governmental entity or affected jurisdiction.

"Proposer" means a private entity that submits a proposal to a responsible governmental entity or affected jurisdiction.

"Public-Private Partnership Program" or "P3 Program" means the public-private partnership program implemented in accordance with the Act.

"Qualifying Project" or "Project" means: (i) any ferry, mass transit facility, vehicle parking facility, port facility, power generation facility, fuel supply facility, oil or gas pipeline, water supply facility, public work, waste treatment facility, hospital, school, medical or nursing care facility, recreational facility, public building, technology facility, or other similar facility currently available or to be made available to a governmental entity for public use, including any structure, parking area, appurtenance, and other property required to operate the structure or facility and any technology infrastructure installed in the structure or facility that is essential to the project's purpose; or (ii) any improvements necessary or desirable to real property owned by a governmental entity.

"Real property" means: (i) improved or unimproved land; (ii) an improvement; (iii) a mine or quarry; (iv) a mineral in place; (v) standing timber; or (vi) an estate or interest, other than a mortgage or deed of trust creating a lien on property or an interest securing payment or performance of an obligation, in a property described by (i) through (v).

"Request for Proposal" or "RFP" means a written request for a qualifying project or services issued by the Commission, soliciting responses including but not limited to: business plans, expressions of interest, ideas, offers, proposals, qualifications, or any combination thereof.

"Responsible Governmental Entity" means a governmental entity that has the power to develop or operate a qualifying project. For the purposes of these Guidelines, the Texas Facilities Commission is a responsible governmental entity.

"Revenue" means all revenue, income, earnings, User Fees, Lease Payments, or other Service Payments that arise out of or in connection with the development or operation of a

qualifying project, including money received as a grant or otherwise from the federal government, a governmental entity, or any agency or instrumentality of the federal government or governmental entity in aid of the project.

"Service Contract" means a contract between a governmental entity and a contracting person under Section 2267.054, Texas Government Code.

"Service Payment" means a payment to a contracting person for the delivery of services provided as part of a qualifying project under a Service Contract.

"State" means the State of Texas acting by and through the Texas Facilities Commission, an agency of the State, which acts by and through its duly-appointed Commissioners.

"State Entity" means a governmental entity described by Section 2267.001(5)(A), Texas Government Code, as including a board, commission, department, or other agency of the State.

"User Fee" means a rate, fee, or other charge imposed by a contracting person for the use of all or part of a qualifying project under a comprehensive agreement.

"Value for Money" means the optimum combination of whole-of-life costs and quality (or fitness for purpose) of the good or service to meet the user's requirement. A part of the initial proposal review, Section VI.2., of these Guidelines, the value for money analysis is a tool for determining whether a project provides more benefits to the public and the State when delivered through the P3 delivery process than when delivered through a traditional procurement method.

B. Proposal Submission.

The process for receipt and review of a proposal is initiated by a solicitation by the Commission. Private entities are required to follow a two-part proposal submission process consisting of a conceptual stage (Part 1) and a detailed stage (Part 2). The conceptual proposal and the detailed proposal shall each contain information specified in Section V., of these Guidelines on the private entity's qualifications and experience, project characteristics, project financing, anticipated public support or opposition, or both, project benefit, value, and compatibility.

The P3 program is a flexible development tool that allows the use of innovative financing methods. Private entities are urged to include innovative financing methods, including the imposition of User Fees or other forms of Service Payments, in a proposal. The contracting person can be involved in a variety of ways, from designing the facility to undertaking its financing, construction, operation, maintenance, and management. Depending on the circumstances of each qualifying project, types of public-private partnerships include but are not limited to: Build-Own-Operate (BOO), Build-Operate-Transfer (BOT) or Build-Transfer-Operate (BTO), Buy-Build-Operate (BBO), and types of contract services include but are not limited to: Operations and Maintenance; Operations, Maintenance and Management; Design-Build-Operate (DBO), including Design-Build-Operate-Transfer and Design-Build-Own-

Operate; Developer Financing; Enhanced Use Leasing, including Lease-Develop-Operate and Build-Develop-Operate; Lease-Purchase; Turnkey, and other methods allowed by law.

Notwithstanding anything contained in these Guidelines to the contrary, a responsible governmental entity may enter into a comprehensive agreement only in accordance with guidelines that require the contracting person to design and construct the qualifying project in accordance with procedures that do not materially conflict with those specified in: (1) Subchapter G, Chapter 2269, Texas Government Code, for facilities projects described by Section 2269.302 or (2) Subchapter H, Chapter 2269, for civil works projects as defined by Section 2269.351, Texas Government Code.

Proposals should be prepared simply and economically, providing a concise description of the private entity's capabilities to complete the qualifying project and the benefits derived by the State from the qualifying project. Project benefits to be considered are those occurring during the construction, renovation, expansion or improvement phase(s) and during the life cycle of the qualifying project. Proposals must include a comprehensive scope of work and a financial plan for the qualifying project, containing enough detail to allow an analysis by the Commission of the financial feasibility of the qualifying project. The cost analysis of a proposal should not be linked solely to the financing plan, as the Commission may determine to finance the qualifying project through other available means. The Commission may request in writing clarification to the submission, and the Commission may establish criteria by which the private entity may provide clarification to the submission.

The P3 program is intended to encourage proposals from the private sector that offer the provision of private financing in support of the qualifying project, which may include commensurate risk to the private entity, but may also benefit the private entity through innovative approaches to project financing, development, and use. Proposals may include in-kind consideration in an amount that is not less than the fair market value of the real property interest; including but not limited to construction of new facilities, alteration and restoration of existing facilities, and environmental remediation. The Commission shall continue to exercise full and proper due diligence in the evaluation and selection of qualifying projects. In this regard, the qualifications, capabilities, resources and other attributes of a private entity and its whole team shall be carefully examined for every qualifying project. In addition, private entities shall be held strictly accountable for representations and information provided regarding their qualifications, experience or other contents of their proposals, including all specific aspects of proposed plans to be performed by the private entity.

C. Affected Jurisdictions.

A private entity whose proposal, other than a proposal for a Service Contract, is accepted for conceptual stage evaluation under Section 2267.053, Texas Government Code, shall notify each affected jurisdiction by providing a copy of its proposal to the affected jurisdiction by certified mail or hand delivery, within three (3) business days of acceptance. The private entity is responsible for documenting delivery of the proposal.

Not later than the 60th day after the date an affected jurisdiction receives the required notice, the affected jurisdiction that is not the responsible governmental entity for the respective qualifying project shall submit in writing to the Commission any comments the affected jurisdiction has on the proposed qualifying project and indicate whether the facility or project is compatible with the local comprehensive plan, local infrastructure development plans, the capital improvements budget, or other government spending plan. The Commission shall consider the submitted comments before entering into a comprehensive agreement with a contracting person.

D. Partnership Advisory Commission.

The Partnership Advisory Commission is an advisory commission in the legislative branch that advises those governmental entities described by Section 2267.001(5)(A), Texas Government Code, on proposals received under the Act. The Partnership Advisory Commission occupies an advisory role with respect to proposals received under the Act by a board, commission, department, or other agency of the State, including an institution of higher education that elects to operate under the Act through the adoption of a resolution by the institution's board of regents.

E. Center for Alternative Finance and Procurement

The Texas Facilities Commission has established the Center for Alternative Finance and Procurement to consult with governmental entities regarding best practices for procurement and the financing of qualifying projects and to assist governmental entities in the receipt of proposals, negotiation of interim and comprehensive agreements, and management of qualifying projects under Chapters 2267 and 2268, Texas Government Code.

F. Proposal Review Fees.

Pursuant to Section 2267.052(c), Texas Government Code, the Commission is required to engage the services of qualified professionals, including an architect, professional engineer, or registered municipal advisor, not otherwise employed by the Commission, or the Center to provide independent analyses regarding the specifics, advantages, disadvantages, and long-term and short-term costs of a qualifying project unless the Commission determines that the analysis is to be performed by similarly qualified employees of the Commission. However, for a proposal with an estimated cost of \$5 million or more for construction or renovation of a qualifying project, the analysis conducted must include review by an architect, a professional engineer, and a registered municipal advisor not otherwise employed by the governmental entity.

Pursuant to Section 2267.053(d), Texas Government Code, the Commission is authorized to charge a reasonable fee to cover the costs of processing, reviewing, and evaluating the proposal, including reasonable legal fees and fees for financial, technical, and other necessary advisors or consultants.

Accordingly, as set out in Section VI., of these Guidelines, if the Commission decides to proceed with evaluation of a conceptual or detailed proposal, the Commission may authorize the

Planning and Real Estate Management Division to engage professional advisors, attorneys or consultants having appropriate experience in analyzing public-private partnership proposals and negotiating comprehensive agreements. Fees will be determined by proposal complexity on a proposal-by-proposal basis. Thereupon, the private entity shall pay the reasonable legal fees and fees for financial and technical advisors or consultants engaged by the Planning and Real Estate Management Division to the Commission in advance in the manner and amounts set out in an interim agreement between the Commission, the private entity, and the professionals engaged.

G. Texas Public Information Act.

Each proposal submitted pursuant to a RFP and these Guidelines is subject to the Texas Public Information Act. See Chapter 552, Texas Government Code. Trade secrets, proprietary information, financial records, and work product of a proposer, relating to a qualifying project proposal authorized under Chapter 2267, Texas Government Code, are excluded from disclosure under Section 552.101, Texas Government Code, and may not be posted or made available for public inspection except as otherwise agreed to by the responsible governmental entity and the proposer. After submission by a responsible governmental entity of a detailed qualifying project proposal to the Commission, the trade secrets, proprietary information, financial records, and work product of the proposer are not protected from disclosure unless expressly excepted from the requirements of Chapter 552 or considered confidential under other law. See Section 2267.066(c), Texas Government Code. However, regardless of whether the bargaining process with respect to any accepted proposal results in an interim or comprehensive agreement, the following are not open to public inspection: cost estimates relating to a proposed procurement transaction prepared by or for a responsible governmental entity, and the trade secrets or financial records of the contracting person that are not generally available to the public through regulatory disclosure. See Section 2267.066(i)-(g), Texas Government Code.

Except as specifically provided in the Texas Public Information Act¹, Chapter 552 does not authorize the withholding of information concerning the terms of any interim or comprehensive

¹ Pursuant to Section 552.153(b)(1), (2), Texas Government Code, information in the custody of the responsible governmental entity that relates to a proposal for a qualifying project authorized under Chapter 2267 is excepted from the requirements of Section 552.021 if:

(1) the information consists of memoranda or records prepared by the responsible governmental entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under Chapter 2267 for which:

(i) disclosure to the public before or after the execution of an interim or comprehensive agreement would adversely affect the financial interest or bargaining position of the responsible governmental entity, and

(ii) the basis for the determination is documented in writing by the responsible governmental entity; or

(2) the records are provided by a proposer to a responsible governmental entity or affected jurisdiction under Chapter 2267 and contain:

(i) trade secrets or financial records of the proposer that are not generally available to the public through regulatory disclosure or other means; or

(ii) work product related to a competitive bid or proposal submitted by the proposer that, if made public before the execution of an interim or comprehensive agreement, would provide a competing proposer an unjust advantage or adversely affect the financial interest or bargaining position of the responsible governmental entity or the proposer.

agreement, service contract, lease, partnership, or agreement entered into by the responsible governmental entity and the proposer, the terms of any financing arrangement that involves the use of any public money, or the performance of any person developing or operating a qualifying project under Chapter 2267, Texas Government Code. See Section 552.153(c)(1), (2), Texas Government Code. To claim an exemption for confidential and proprietary information and trade secrets, proposers should carefully review Chapter 552, Texas Government Code.

The Office of the Attorney General determines whether information may be withheld, not the Commission. The Commission will process any third-party request for disclosure of information comprising all or part of the response to the solicitation in accordance with the procedures prescribed by the Texas Public Information Act. Private entities are directed to the Attorney General's web site (www.oag.state.tx.us) which is the Commission's reference for information concerning application of the Public Information Act. The Commission's public information policy and instructions on how to submit a request are available on the Commission's website at:

<http://www.tfc.state.tx.us/divisions/commissionadmin/prog/legal-open-records/>

All inquiries must be submitted in writing addressed to Texas Facilities Commission, Attn.: Legal Department, 1711 San Jacinto Blvd., Austin, Texas 78701, with a copy to Texas Facilities Commission, Attn.: Executive Director, 1711 San Jacinto Blvd., Austin, Texas 78701.

H. Use of Public Funds.

The State's constitutional and statutory requirements as they apply to appropriation and expenditure of public funds apply to any interim or comprehensive development agreement entered into under the P3 program. Accordingly, the processes and procedural requirements associated with the expenditure or obligation of public funds shall be incorporated into planning for any qualifying projects.

I. Applicability of Other Laws.

The laws of the United States and the State of Texas are incorporated in these Guidelines by reference for all purposes. Compliance by each private entity is mandatory. In the event of any conflict between these Guidelines and any federal or state statutory or administrative authority, the terms of the respective statutory or administrative authority shall control.

III. PROPOSALS.

The Commission may request proposals from private entities for purposes that constitute a qualifying project. All solicitations shall be by issuance of a written RFP. The procedures and requirements applicable to any particular solicited proposal shall be specified in the solicitation for that proposal. The response to any RFP shall include the same submissions and in the same format set out in Section IV., of these Guidelines. Unsolicited proposals will not be accepted or considered.

IV. PROPOSAL PREPARATION AND SUBMISSION: Conceptual Stage (Part 1).

The Commission shall not be liable for any cost incurred by the private entities in preparing, submitting or presenting the proposal and in satisfying any demonstration or other requirements for an unsuccessful proposal.

1. All proposals must be organized in the manner outlined below and submitted with the applicable review fee defined in these Guidelines. No page limitation is imposed, but brevity is appreciated. All proposals shall be submitted as one (1) original and three (3) copies and one (1) electronic media which may be protected. The original copy containing original signatures shall be marked ORIGINAL on the cover letter.

2. Private entities shall also submit trade secrets, financial records, proprietary or other confidential records exempt from disclosure under Government Code Section 552.101 in a separate, sealed envelope, designated on the cover as **CONFIDENTIAL MATERIALS**. Include a cover letter listing all exempt material. Clearly mark in all caps as **CONFIDENTIAL** any material believed to be proprietary information protected from disclosure under applicable law. Failure to mark information as such may lead to its disclosure as publicly available records.

3. Proposals shall be packaged and submitted in the following format:

a. Pages shall be numbered and organized by paginated table of contents corresponding to the tabbed sections identified below.

b. The proposal shall be divided into tabbed sections as follows:

- TAB 1: Executive Summary
- TAB 2: Private Entity and Team
- TAB 3: Qualifications and Financial Capacity
- TAB 4: Proposal
- TAB 5: Project Analyses
- TAB 6: Community Impact
- TAB 7: Miscellaneous
- TAB 8: Addenda

c. The contents shall be printed on 3-hole punched 8½" x 11" paper (except A/E drawings and renderings).

d. Drawings shall be printed no larger than 36" x 54".

e. Supplemental materials in alternate formats may be allowed to describe the proposal in more detail.

4. Address all submissions to Texas Facilities Commission, Attn.: Planning and Real Estate Management Division, 1711 San Jacinto Blvd., 4th Floor, Austin, TX 78701, in a sealed envelope marked:

DO NOT OPEN IN MAILROOM

Request for Information/Proposal/Business Plan

RFP Number _____

Proposer's Name

Mailing Address

Submittal Deadline

Opening Date Time

5. To the greatest extent possible, the conceptual stage proposal shall be sufficient to convey the experience and capacity of the development team, the overall quality and character of the qualifying project, as well as the financial and implementation strategies to ensure successful completion of the qualifying project. The proposal should be organized and tabbed in accordance with this Section.

6. The proposal shall provide, at a minimum, the following unless the RFP expressly states otherwise.

A. TAB 1: Cover Letter and Executive Summary.

Provide a cover letter, signed by an authorized representative of the private entity, including the information detailed below:

1. Identification

a. Identify the private entity or consortium of private entities who will be directly involved in the qualifying project;

b. Identify the principal(s): include the title, mailing address, phone number, and email address;

c. Identify the person(s) in charge of negotiations, key personnel who will be involved in decision making, and the representative authorized to sign on behalf of the private entity; and

d. Identify any persons known to the private entity who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the qualifying project.

2. Private Entity Contact Information

a. Physical address (if a consortium, include the address of each partner or member);

- b. Mailing address (if a consortium, include the address of each partner or member); and
- c. Primary phone and facsimile number.

Include a three (3) to five (5) page executive summary that highlights the key components of the qualifying project; including but not limited to a description of the private entity, its qualifications and experience with similar projects, highlights of the proposal and qualifying project analyses, and the community impact and benefits of the qualifying project.

B. TAB 2: Private Entity and Team.

1. Identify the Private Entity:

a. Identify the legal structure of the private entity or consortium of private entities and its members or principals making the proposal; and

b. To the extent the private entity is created, and for each member thereof, provide proof of authority to do business in Texas and, as applicable, a certificate of good standing from the Texas Comptroller of Public Accounts and Texas Secretary of State.

2. Identify the Team:

a. To the extent a team is created, provide a list including the company name, primary contact, title, address, telephone, and email of each team member and any selected or prospective professional or consultant which may include analysts, architects, engineers, contractors, legal counsel, marketing firms, real estate brokerage and property management firms;

b. Identify the firms that will provide design, construction and completion guarantees and warranties;

c. Provide an organizational chart that illustrates the management structure of the team and identifies the role of each team member participating in the development or operation of the qualifying project; and

d. Describe the management structure and the role that each team member, partner and any prospective design professional, consultant or major subcontractor (\$1 million or more) will fulfill in the development or operation of the qualifying project.

NOTE: ALL MEMBERS OF THE PROPOSER'S TEAM, INCLUDING MAJOR CONTRACTORS AND CONSULTANTS KNOWN TO THE PROPOSER, MUST BE IDENTIFIED IN THE PROPOSAL SUBMITTED FOR THE CONCEPTUAL STAGE REVIEW. IDENTIFIED TEAM MEMBERS MAY NOT BE SUBSTITUTED OR REPLACED AFTER ENTERING INTO A COMPREHENSIVE AGREEMENT WITHOUT THE WRITTEN APPROVAL OF THE COMMISSION.

C. TAB 3: Qualifications and Financial Capacity.

The private entity must provide demonstrable experience in the development and operation of qualifying projects of similar complexity, scope and scale to the proposed. The submission must describe relevant experience with respect to the development and operation of other commercial or public-private partnership projects, clearly distinguishing the experience of the private entity (including joint venture partners) from that of consultants and other team members. To substantiate experience and ability to perform, the following information shall be provided:

1. Describe the length of time in business, business experience, public sector experience, and other engagements of the private entity or consortium of private entities;

2. Describe the design, construction and completion guarantees and warranties;

3. Include resumes and work experience of each team member;

4. For the private entity and each major subcontractor (\$1 million or more) that will be utilized in the qualifying project, list all prior projects for the past five (5) years. If a private entity or major subcontractor has worked on more than ten (10) projects during this period, it may limit its prior project list to ten (10), but shall first include all projects similar in scope and size to the qualifying project and, second, it shall include as many of its most recent projects as possible. The private entity and major subcontractors shall submit all evaluation reports or documents that are in their possession evaluating the performance of the private entity or subcontractor during the past five (5) years in terms of cost, quality, schedule maintenance, safety and other matters relevant to successful qualifying project development, operation, and completion. For each project identified, provide at least the following information, if applicable:

a. Client and Project Identification:

i. Client's name, project name, and project location;

ii. Primary contact name, address, telephone number, and e-mail address;

iii. Role of the private entity or major subcontractor in the project;

iv. Project description including year completed, type, size, unit mix, and tenants; and

v. Photographs and plans.

b. Describe the experience of the private entity (or consortium of private entities), key principals and project managers of bringing the project to completion on budget and in compliance with design, land use, service and other standards;

c. Provide the performance schedule from contract to completion including stabilization;

d. Identify the construction lender and briefly describe the development cost, explaining the approach and type of financial structure used to finance the project, and identifying the sources and amounts of debt and equity, and public subsidies and incentives, if any;

e. Public Involvement: Describe the public involvement process and challenges or obstacles, if any, arising therefrom, and how the private entity overcame such impediments; and

f. Public Sector Identification: Identify the affected jurisdiction(s) involved in the projects, including references and contact information.

5. Provide at least three (3) development and financial references (name, title, entity, telephone number, and contractual relationship) that can be contacted with respect to current or past project experience;

6. Include a qualification statement that reviews all relevant information regarding technical qualifications and capabilities, resources and business integrity of the private entity, including but not limited to: (a) bonding capacities; and (b) insurance coverage.

7. Provide a qualification statement that includes a mandatory disclosure by the private entity for the past five (5) years regarding any of the following conduct:

- a. Bankruptcy filings;
- b. Liquidated damages;
- c. Fines, assessments or penalties;
- d. Judgments or awards in contract disputes;
- e. Contract defaults and/or contract terminations;
- f. License revocations, suspensions and/or other disciplinary actions;
- g. Prior debarments or suspensions by a governmental entity;
- h. Denials of prequalification or findings of non-responsibility;
- i. Safety past performance data, including fatality incidents;
- j. Experience ratings;
- k. Modification ratings;

- l. Recordable injury rate;
- m. Workday incidence rate;
- n. Alleged violations of any federal, state or local civil law;
- o. Alleged violations of any federal, state or local criminal law;
- p. Criminal indictments or investigations;
- q. Legal claims filed by or against the private entity; and
- r. Claims on payment and performance bonds.

8. Provide a copy of all notices of default, termination, claims of damage received on projects, and claims against performance and payment bonds, received within the past five (5) years, if any;

9. For each major subcontractor that will perform construction or design activities, provide a sworn certification by an authorized representative of the private entity attesting to the fact that the private entity is not currently debarred or suspended by any federal, state or local government entity;

10. Financial Capacity. Establish and demonstrate access to financial resources, such as the ability to raise equity and secure debt capital, to deliver the qualifying project in a professional and timely manner. To demonstrate financial resources, each proposal must provide the information listed below:

a. Portfolio: Composition of current real estate portfolio, including the size, value, years of ownership, and asset performance compared to initial proforma statements.

b. Pending Projects: A listing and description of all pending projects under enforceable funded contracts, including the status, development schedule, financing method, sources and amounts, and financial commitments required of the private entity.

c. Reports and Certified Financial Statements: Provide the most recent credit report or Dun & Bradstreet report and certified financial statements for the past four (4) years of each private entity (or consortium of private entities) and each partner with an equity interest of twenty percent (20%) or greater. Certified financial statements shall include balance sheets, income statements, and statements with changes in financial position of any parent organizations and any materially relevant subsidiaries, identification of any projects with negative cash flows, amount of developer's recourse debt, any non-performing loans, and the amount of guarantees and contingent liabilities.

d. **Statement of Public Trading:** If the private entity is publicly traded, include as part of the electronic media, the stock exchange and trading symbols and a copy of the most recent 10K.

e. **Funding Source Action:** Disclose whether any funding source or financial institution has taken or threatened to take adverse action against the private entity, such as loan acceleration, foreclosure, terminating or restricting use of funds, during the past five (5) years.

D. TAB 4: Proposal.

Provide an overview of the qualifying project, including the conceptual design of any facility or a conceptual plan for the provision of services. The conceptual design for facilities, at a minimum, shall include concept renderings, a concept site plan, and elevations that collectively illustrate the location, size, and context of the qualifying project. The proposal must be accompanied by the following, unless waived by the Commission:

1. A topographic map, with a 1:2,000 or other appropriate scale, indicating the location of the qualifying project;

2. A description of the qualifying project, including: (a) a conceptual design of any facility or a conceptual plan for the provision of services or technology infrastructure; and (b) a schedule for the initiation and completion of the qualifying project, featuring the proposed major responsibilities and timeline for activities to be performed by the governmental entity and the private entity, and which includes the information listed below:

a. The preliminary programming of facilities, including, if any, the mix of uses, square footage(s), total parking spaces, parking allocations (shared or exclusive), and types of parking (e.g. structured or surface);

b. A concept design (plan, computer aided model, aerial sketch, photomontage, etc.) that characterizes the context of the urban design of the qualifying project and concept drawings that illustrate the relationship of the qualifying project to the principle street and surrounding developments;

c. A concept site plan that includes landscape and urban design concepts, all major pedestrian entrances, horizontal and vertical circulation systems, wall openings, all proposed outdoor areas, and a circulation plan showing how the qualifying project relates to public rights-of-way to and within the site, for walking, cycling, public transportation, and motor vehicles; and

d. Elevations including exterior building elevations, illustrating massing, openings, materials, colors, and related elements, and any roof top structures or equipment.

3. A statement of the method the private entity proposes for securing necessary property interests required for the qualifying project;

4. A description of any current plans for the development of facilities or technology infrastructure to be used by a governmental entity that are similar to the qualifying project proposed by the private entity, if any, for each affected jurisdiction;

5. A list of all permits and approvals required for the development and completion of the qualifying project from local, state, or federal agencies;

6. A list of any facilities that will be affected by the qualifying project and a statement of the private entity's plans to accommodate the affected facilities;

7. A statement on the private entity's general plans for financing the qualifying project, including the sources of the private entity's funds and identification of any dedicated revenue source or proposed debt or equity investment for the private entity;

8. The names and addresses of the persons who may be contacted for further information concerning the request;

9. A description of the type and amount of User Fees, Lease Payments, and other Service Payments over the term of any applicable interim or comprehensive agreement and the methodology and circumstances for changes to the User Fees, Lease Payments, and other Service Payments over time;

10. A statement of the specific public purpose served by the qualifying project and/or the needs identified in the particular RFP (see VIII.A., of these Guidelines for guidance);

11. A preliminary schedule including permits and approvals from any federal, state, or local agencies, to the extent such are required, and timing of any contemplated requests for federal, state, or local resources, and the initiation, construction phasing, completion and opening of the qualifying project including major milestones and the proposed major responsibilities and timeline for activities to be performed by the Commission and the private entity;

12. A statement describing the qualifying project's compliance with the Commission's best value determination; and

13. Any additional material and information the Commission reasonably requests, which may include the following:

a. Describe the proposed business arrangements (i.e., performance based infrastructure, participation rent, concessions, parking management agreements, service agreements, etc.).

b. Describe the plan for the development, financing and operation of the qualifying project showing the anticipated schedule of which funds will be required.

c. Describe the implementation strategy for the qualifying project.

d. To the greatest extent possible the overview must describe the following items: (i) operational and management plan, if applicable; (ii) anticipated cost per square foot, phase, and use; (iii) existing conditions and anticipated site preparation; (iv) other opportunities that will benefit the viability of the qualifying project; (v) adjacent uses and emerging projects that impact the value or influence the use of the qualifying project; (vi) connections to public transportation; and (vii) availability and existing capacity of public infrastructure and required extensions or improvements.

e. State any contingencies or conditions requested by the private entity.

f. Identify and describe any federal, state or local funding or resources that the private entity contemplates requesting for the qualifying project. Describe the total commitment, if any, expected from governmental sources and the timing of any anticipated commitment, both one-time and ongoing.

g. Identify any additional terms or conditions to be included as part of the negotiation process. Include discussion of any trades or swaps of property and special legislation or plan amendments required to facilitate the qualifying project.

E. TAB 5: Project Analyses.

In this Section include the project analyses that support the business case of the qualifying project. The Project Analyses Section shall be categorized into four sub-tabbed sections as follows: (1) location and site analysis, (2) marketing and competitive analysis, (3) financial analysis, and (4) political and legal analysis.

1. Location and Site Analysis.

a. Describe how the proposed design of the improvements and the attributes of the site will demand the maximum income to generate the maximum financial, economic, and social benefits; and

b. List any public utility facilities that will be affected by the qualifying project and state the plans to accommodate the affected facilities.

2. Market and Competitive Analysis. Provide a market study that supports the revenue assumptions and viability of the qualifying project. To indicate feasibility, forecast the supply and demand relationship, including but not limited to, geospatial data and geographic information, demographic and psychographic data, traffic counts, rent levels, absorption rates, and identify underserved trade areas for the project type. Include any supporting due diligence studies, analyses, or reports. Submit detailed market information for any specialized or non-standardized use.

3. Financial Analysis.

a. Explain the financing plan of the qualifying project including identifying the source(s) and amount of debt and equity to be used to capitalize the qualifying project, and the relationships (e.g., outside lender, parent company, etc.). In TAB 8: Addenda, include each of the following:

- i. Loan commitment letters and contact information for funding sources;
- ii. The sources and anticipated amounts of working capital to cover operating costs and to adequately maintain operations from the start-up through completion; and

iii. Letters from lending institutions, not more than three months old, demonstrating the existence of liquid assets or suitable unencumbered lines of credit to carry out the predevelopment activities. Evidence of the private entity's liquid assets or some acceptable form of equity shall be equal to the equity requirements of the prospective construction lender.

b. List all underlying assumptions incorporated in the plan and the methodology thereof.

c. Using standard estimation techniques, provide a development budget detailing any anticipated land acquisition(s), anticipated pre-development costs, and hard and soft costs from construction through occupancy.

d. Provide a discounted cash flow analysis for the duration of the qualifying project, including: estimates of costs, operating expenses, capital reserves including replacement and re-tenanting reserves, net operating income, debt service, partnership percentages, disposition benchmarks, and calculations of net present value and internal rate of return.

e. Include a sensitivity analysis depicting the impacts due to escalations of expenses and revenue growth, and changes in financing terms or interest rates.

f. Indicate if there is a method to refinance for cost savings. Indicate which party would receive the benefit of any cost savings from a refinancing (e.g., would the savings go to the State, would the savings be shared and to what extent, or would the private entity be sole beneficiary).

g. Outline the financial penalties, if any, that would result should the State terminate a qualifying project early or restructure the cash flows.

h. Identify the need, if any, for the State to provide either its general obligation or moral obligation backing. The underlying assumptions should address this need and/or state that the credit would be via a "Service Agreement", for example. Any debt issuance should be expected to receive an investment grade rating from a nationally recognized bond rating agency. If the unenhanced rating is not investment grade, the State may require the use of credit enhancements.

i. If the private entity has chosen an underwriter, provide a breakout of the fees to any underwriting firms and the type of obligation the firms are using with a financing component. Be

specific as to tax-exempt, taxable, floating rate, fixed rate, etc. If the private entity has not yet chosen an underwriter, the Commission reserves the right to have input in underwriter selection.

4. Political and Legal Analysis.

a. Explain the extent to which the project meets the objectives and priorities of the Commission and aligns with any applicable Commission plans and design guidelines or zoning requirements, including the Capitol Complex master plan developed under Section 2166.105, Texas Government Code;

b. Identify allocations of risk and liability, and assurances for timely completion of the qualifying project;

c. Identify the proposed risk factors and methods for dealing with these factors including a description of methods and remedies associated with any financial default;

d. Identify and describe any work to be performed by the State; and

e. State assumptions related to ownership, legal liability, law enforcement and operation of the qualifying project and the existence of any restrictions on the State's use of the qualifying project.

F. TAB 6: Community Impact.

1. State the community benefits, including the economic impact and tax revenues, the qualifying project will have on the State and affected jurisdictions;

2. Estimate the number of jobs generated for area residents and level of pay and fringe benefits of such jobs;

3. Project the number and value of subcontracts generated for area subcontractors;

4. Identify any anticipated public support or opposition for the qualifying project and any anticipated support or opposition by any affected jurisdiction. Support from the public or affected jurisdictions should be demonstrated through resolution of organizations, minutes of meetings, letters, or other official communications;

5. Identify any anticipated adverse social, economic, environmental and transportation impacts of the qualifying project, design standards and any applicable ordinances of affected jurisdictions. Specify the strategies or actions to mitigate known impacts of the qualifying project. Indicate if environmental and archaeological assessments have been completed;

6. Identify the projected positive social, economic, environmental and transportation impacts of the qualifying project, design standards and any applicable ordinances of affected jurisdictions; and

7. Identify contingency plans for addressing public needs in the event that all or some of the qualifying project is not completed according to projected schedule.

G. TAB 7: Miscellaneous.

Use this Section to present additional information such as letters of recommendation, letters of interest from prospective lenders or tenants, additional information concerning the development team, and other information that supports the proposal.

H. TAB 8: Addenda.

Use this Section to present any item cited or referenced in the proposal, including the materials required by the financial analysis, IV.F.3(a), of these Guidelines.

V. PROPOSAL PREPARATION AND SUBMISSION: Detailed Stage (Part 2)

Detailed evaluation stage submissions shall supplement the conceptual evaluation stage submissions. Submissions for the detailed stage evaluation shall be consistent with the format outlined in Section IV., of these Guidelines, and shall include omitted submittals, substantial changes resulting from negotiations and refinements, or tasks identified during conceptual stage evaluation, unless a waiver of the requirement or requirements is agreed to by the Commission.

Unless previously submitted, the following items shall be submitted as part of the detailed stage submission:

1. Include a lifecycle cost analysis specifying methodology and assumptions of the qualifying project and the proposed start date, anticipated commitment of all parties, equity, debt, and other financing mechanisms, and a schedule of revenues and costs. The lifecycle cost analysis shall include, but not be limited to, a detailed analysis of the projected return, rate of return, expected useful life of the facility, and estimated annual operating expenses.

2. Detailed analysis of the financial feasibility of the qualifying project, including its impact on similar facilities operated or planned by the Commission. Include a detailed description of any financing plan for the project, a comparison of that plan with financing alternatives available to the State, and all underlying data supporting any conclusions reached in the analysis of the selection by the private entity of the financing plan proposed for the qualifying project.

3. Additional material or information that the Commission deems appropriate and requests.

NOTE: THE PRIVATE ENTITY, AT ITS DISCRETION, MAY INCLUDE ITEMS REQUIRED IN THE DETAILED STAGE SUBMITTAL AS PART OF ITS CONCEPTUAL STAGE SUBMITTAL.

VI. PROPOSAL EVALUATION AND SELECTION CRITERIA.

A. Preliminary Review.

Within thirty days (30) of receiving a proposal, the Commission's Planning and Real Estate Management Division will complete a preliminary review to determine whether to recommend the proposal for conceptual evaluation based on appropriateness of the proposal and compliance with the submittal requirements of the Guidelines. Thereafter, if recommended and with approval of the Executive Director, the Planning and Real Estate Management Division will commence conceptual evaluation of the proposal. Upon completion of conceptual evaluation of the proposal, the Planning and Real Estate Management Division will submit a recommendation to the Executive Director. The Executive Director will consider the recommendation and determine if the proposal will be presented to the Commissioners so that at a subsequent general meeting or any special meeting, the Commissioners may determine whether or not to undertake a detailed evaluation of the proposal.

If the Commissioners vote against undertaking the detailed evaluation of the proposal, the Commission shall cease evaluation of such proposal. The Commission retains the right to reject any proposal at any time prior to the execution of an interim or comprehensive agreement.

B. Conceptual and Detailed Evaluation (Two-Part Process).

The format for submissions at the conceptual evaluation stage is found at Section IV., of these Guidelines.

1. At the conceptual evaluation stage (Part 1) of review, the Commission will determine whether it will proceed using:

a. Standard procurement procedures consistent with the Commission's procurement policies; or

b. Guidelines developed by the Commission and adopted as required by the Act.

2. After reviewing the proposal, the Commission may determine:

a. Not to proceed further with any proposal; or

b. To proceed to the detailed evaluation stage (Part 2) of review with the proposal.

3. Discussions between the Commission and private entities about the need for infrastructure improvements shall not limit the ability of the Commission to later decide to use standard procurement procedures to meet its infrastructure needs. The Commission retains the right to reject any proposal at any time prior to the execution of an interim or comprehensive agreement.

C. Qualifications and Experience.

Factors to be considered in either stage of evaluation to determine whether the private entity possesses the requisite qualifications and experience will include, along with the information specifically required under Section IV., the following:

1. Experience working with the public sector on public-private real estate development projects;
2. Experience, training and preparation with projects of similar size, scope and complexity;
3. The extent of personnel, logistical resources, bonding capacity, and the ability to complete the qualifying project in a timely and professional manner;
4. Demonstrated record of successful past performance, including timeliness of project delivery, compliance with plans and specifications, quality of workmanship, cost-control and project safety;
5. Demonstrated compliance with applicable laws, codes, standards, regulations, and agreements on past projects;
6. Leadership structure;
7. Project manager's experience;
8. Management and operational plans;
9. Financial condition and capacity; and
10. Project ownership.

D. Project Characteristics.

Factors to be considered in evaluating the qualifying project's characteristics may include:

1. Project scope and scale, land use and product mix;
2. The timing of the qualifying project;
3. Data and reports resulting from project analyses;
4. Operation of the qualifying project;
5. Technology; technical feasibility;

6. Conformity to laws, regulations, and standards;
7. Environmental impacts;
8. Condemnation impacts;
9. Federal, state and local permits; and
10. Maintenance of the qualifying project.

E. Project Cost and Financing.

Factors to be considered in evaluating whether the proposed financing allows adequate access to the necessary capital to finance the qualifying project include:

1. Cost and cost benefit to the State;
2. Financing and the impact on the debt or debt burden of the State;
3. Financial plan, including its overall feasibility and reliability; operator's past performance with similar plans and projects; the degree to which the private entity has conducted due diligence investigatory analysis of proposed plan and the results of such inquiries or studies;
4. Estimated project cost and life-cycle cost analysis; and
5. The identity, credit history, past performance of any third party that will provide financing for the qualifying project and the nature, amount, and timing of their commitment, as applicable.

NOTE: IN THE EVENT THAT ANY QUALIFYING PROJECT IS FINANCED THROUGH THE ISSUANCE OF OBLIGATIONS THAT ARE DEEMED TO BE TAX-SUPPORTED DEBT OF THE STATE, OR IF FINANCING SUCH A QUALIFYING PROJECT MAY IMPACT THE STATE'S DEBT RATING OR FINANCIAL POSITION, THE STATE SHALL SELECT ITS OWN FINANCE TEAM, SOURCE, AND FINANCING VEHICLE.

F. Community Impact.

Factors to be considered in evaluating the qualifying project's community impact and compatibility include:

1. Community benefits, including the economic impact the qualifying project will have on the State and affected jurisdictions in terms of tax revenue, the number of jobs generated and level of pay and fringe benefits of such jobs;

2. Stakeholder input;
3. Community support, opposition, or both;
4. Compatibility with existing and planned facilities; and
5. Compatibility with local, regional, and state economic development efforts.

G. Other Factors.

Other factors that may be considered by the Commission in the evaluation and selection of proposals include:

1. The extent the offered consideration generates value and returns to the State and benefits to the public, including in-kind consideration greater than the fair market value of the asset;
2. The proposed cost of the qualifying project;
3. The general reputation, industry experience, and financial capacity of the private entity;
4. The proposed design of the qualifying project;
5. Opportunity cost of taking an alternative action;
6. The private entity's compliance with a minority business enterprise participation plan or good faith effort to comply with the goals of such plan;
7. The private entity's plans to employ local contractors and residents; and
8. Other criteria that the Commission deems appropriate.

VII. NOTICE, POSTING AND HEARING REQUIREMENTS.

A. Initial Review of Qualifying Project Proposal.

1. The Commission staff will conduct an initial review of each qualifying project proposal submitted to the Commission and provide to Commission members a summary of the review, including an analysis and recommendations. To guide the initial review of each substantially complete qualifying project proposal received by the Commission, the review criteria is:

- a. The extent to which the qualifying project meets a public need;
- b. The extent to which the project meets the objectives and priorities of the commission and aligns with any applicable Commission plans and design guidelines or zoning requirements,

including the Capitol Complex master plan developed under Section 2166.105, Texas Government Code;

- c. The technical and legal feasibility of the project;
- d. The adequacy of the qualifications, experience, and financial capacity of a private entity or other person submitting the proposal;
- e. Any potentially unacceptable risks to the State; and
- f. Whether an alternative delivery method is feasible and more effectively meets the State's goals.

2. Subject to Subsection (3), the Commission shall use a value for money analysis in evaluating each qualifying project proposal to:

- a. Conduct a thorough risk analysis of the proposal that identifies specific risks shared between the State and the private entity and subjects the risks to negotiation in the contract;
- b. Determine if the proposal is in the best long-term financial interest of the State; and
- c. Determine if the project will provide a tangible public benefit to the State.

3. If Commission staff determines that a value for money analysis is not appropriate for evaluating a specific qualifying project proposal, the staff shall submit to the Commission a written report stating the reasons for using an alternative analysis methodology.

4. The Commission shall coordinate with the Commission's office of internal audit for review and receipt of comments on the reasonableness of the assumptions used in the value for money analysis or alternative analysis methodology used to evaluate a qualifying project proposal under this Section.

B. Initial Public Hearing on Qualifying Project Proposal.

1. Before submitting a detailed qualifying project proposal to the Partnership Advisory Commission, the Commission must hold an initial public hearing on the proposal.

2. The Commission will post a copy of the detailed qualifying project proposal on the Commission's website and the State's official Internet website before the required public hearing and, before posting the proposal, redact all information included in the proposal that is considered confidential under Section 2267.066(c), Texas Government Code.

3. After the hearing, the Commission shall modify the proposal as the Commission determines appropriate based on the public comments and include the public comments in the

documents submitted to the Partnership and provide any additional information necessary for the evaluation required under Chapter 2268, Texas Government Code.

C. Municipal Project.

Not later than the 30th day before the date the Commission is scheduled to meet and vote on a project to develop or improve State property in a municipality, the Commission staff must:

1. Place the project on the Commission's meeting agenda to provide the public with notice of the meeting and an opportunity to comment; and
2. Present sufficient information to Commission members to enable the members to adequately prepare for the meeting and to address the members' questions and concerns.

D. Additional Requirements.

In accordance with Sections 2267.006 and 2267.0061 through 2267.0067, Texas Government Code, inclusive:

1. If the Commission intends to develop or operate a qualifying project under the Act, the Commission may adopt a development plan on the real property associated with the project. The purpose of a development plan is to conserve and enhance the value of real property belonging to the State, taking into consideration the preservation of the health, safety, and general welfare of the communities in which the real property is situated. The plan must address local land use planning ordinances, which may include the following: (a) allocation and location of specific uses of the real property, including residential, commercial, industrial, recreational, or other appropriate uses; (b) densities and intensities of designated land uses; (c) the timing and rate of development; (d) timely delivery of adequate facilities and services, including water, wastewater collection and treatment systems, parks and public recreational facilities, drainage facilities, school sites, and roads and transportation facilities; or (5) needed zoning and other land use regulations. The plan must comply with existing rules, regulations, orders, or ordinances for real property development to the extent the rules, regulations, orders, or ordinances are not detrimental to the interests of the State as determined by the special board of review.

2. If the Commission is requested to prepare a development plan under Section 2267.006, the Commission shall notify the local government to which the plan will be submitted under Section 2267.0062, of the Commission's intent to prepare a development plan. The development plan adopted under Section 2267.006 shall be submitted to any local government having jurisdiction over the real property in question for consideration. The Commission shall provide the local government with information relating to: (a) the location of the real property to be offered for sale or lease; (b) the highest and best use of the real property; and (c) the process for preparing the development plan under Section 2267.006 and the process provided under Sections 2267.0065 and 2267.0066 for the special board of review.

3. Not later than the 30th day after the date the local government receives the notice provided required by (2) above, the local government may request the State Entity to hold a public hearing to solicit public comment. If requested by the local government, the Commission shall hold a public hearing. The local government shall provide notice of the hearing to real property owners in at least the same manner that notice is provided for adopting zoning regulations or subdivision requirements in the local government's jurisdiction. The State Entity shall set the agenda for the hearing, which must be completed not later than the 120th day after the date notice is provided under (2) above. If the local government does not request a public hearing, the Commission may hold a hearing to solicit public comment. The Commission shall provide notice of the hearing in the same manner that a local government is required to provide notice as set out above. The Commission shall set the agenda for the hearing and must complete the hearing not later than the 120th day after the date the notice is provided under (2) above. Requirements for the public hearing are set out in Section 2267.0061(d).

E. Submission of Qualifying Project Contract to Contract Advisory Team.

1. Not later than the 60th day before the date the Commission is scheduled to vote on approval of a qualifying project contract, the Commission must submit to the Contract Advisory Team established under Subchapter C, Chapter 2262, Texas Government Code, documentation of the modifications to a proposed qualifying project made during the Commission's evaluation and negotiation process for the project, including a copy of:

- a. The final draft of the contract;
- b. The detailed qualifying project proposal; and
- c. Any executed interim or other agreement.

2. The Contract Advisory Team shall review the documentation submitted under Subsection (1) and provide written comments and recommendations to the Commission. The review must focus on, but not be limited to, best practices for contract management and administration.

3. Commission staff shall provide to the Commission members:

- a. A copy of the Contract Advisory Team's written comments and recommendations; and
- b. The staff's response to the comments and recommendations.

VIII. SELECTION OF PROPOSAL BY THE COMMISSION.

A. Selection of a Proposal.

The Commission may request proposals or invite bids for the development or operation of a qualifying project. The Commission shall make a best value determination in evaluating the

proposals received and consider the total project cost as one factor in evaluating the proposals. The Commission is not required to select the proposal that offers the lowest total project cost. The Commission may consider the following factors:

1. The proposed cost of the qualifying project;
2. The general reputation, industry experience, and financial capacity of the proposer submitting a proposal;
3. The proposed design and overall quality of the qualifying project;
4. The eligibility of the project for accelerated selection, review, and documentation timelines under these Guidelines;
5. Comments from local citizens and affected jurisdictions;
6. Benefits to the public;
7. The proposer's good faith effort to comply with the goals of a historically underutilized business plan;
8. The proposer's plans to employ local contractors and residents;
9. For a qualifying project that involves a continuing role beyond design and construction, the proposer's proposed rate of return and opportunities for revenue sharing;
10. The relationship and conformity of the qualifying project to a state or local community plan impacted by the qualifying project or to the uses of property surrounding the qualifying project;
11. The historic significance of the property on which the qualifying project is proposed to be located;
12. The environmental impact of the qualifying project; and
13. Other criteria that the Commission considers appropriate including the Center's role in the review, analysis, or evaluation of the qualifying project.

The Commission may approve a qualifying project if the Commission determines that the project serves a public purpose. The Commission may determine that a qualifying project serves a public purpose if there is a public need for or benefit derived from the type of project proposed, the estimated cost of the project is reasonable in relation to similar facilities, and the private entity's plans will result in the timely development or operation of the project. The Commission must include in the comprehensive agreement for the qualifying project a written declaration of the specific public purpose served by the project.

B. Oversight Committee.

On completion of the negotiation phase for the development of a comprehensive agreement and before a comprehensive agreement is entered into, the Commission shall: (1) for each qualifying project proposal, post on the Commission's Internet website the oversight committee's review report and other evaluation documents; and (2) before posting the report and documents required under Subdivision (1), redact all information included in the report and documents that is considered confidential under Section 2267.066(c), Texas Government Code.

C. Submission to Partnership Advisory Commission.

Before completing the negotiation and entering into an interim or comprehensive agreement, the Commission must submit copies of detailed proposals, including drafts of any interim agreement and the comprehensive agreement, to the Partnership Advisory Commission in accordance with Chapter 2268, Texas Government Code.

D. Final Vote.

The Commission shall hold a public hearing on the proposal during the proposal review process not later than the 30th day before the date that it enters into an interim or comprehensive agreement. The public hearing shall be held in the area in which the proposed qualifying project is to be performed. On completion of the negotiation phase for the development of an interim or comprehensive agreement and before an interim agreement or comprehensive agreement is entered into, the Commission must make available the proposed agreement in a manner provided by Section 2267.066, Subsection (a) or (b), Texas Government Code.

After making the proposed comprehensive agreement available as required by Section 2267.066, Subsection (e), the Commission shall hold a public hearing on the final version of the proposed comprehensive agreement and vote on the proposed comprehensive agreement after the hearing. The hearing must be held not later than the 10th day before the date the Commission enters into a comprehensive agreement with a contracting person.

IX. INTERIM AND COMPREHENSIVE AGREEMENTS.

The Planning and Real Estate Management Division is responsible for negotiating any interim or comprehensive agreement. An oversight committee consisting of the Planning and Real Estate Management Division and independent attorneys, advisors or consultants, if any, will review the terms of the proposed interim or comprehensive agreement. Review criteria shall include, but not be limited to, the scope, total cost, and duration of the qualifying project. Timelines for the work of the oversight committee will be developed consistent with the scope of the qualifying project.

Any interim or comprehensive agreement shall define the rights and obligations of the State and the contracting person with regard to the qualifying project. Prior to entering a

comprehensive agreement, an interim agreement may be entered into that permits a private entity to perform compensable activities related to the qualifying project. Prior to developing or operating the qualifying project, the private entity shall enter into a comprehensive agreement with the Commission. The comprehensive agreement must provide that a security document or other instrument purporting to mortgage, pledge, encumber, or create a lien, charge, or security interest on or against the contracting party's interest may not extend to or affect the fee simple interest of the State in the qualifying project or the State's rights or interests under the comprehensive agreement. Any holder of debt shall acknowledge that the mortgage, pledge, or encumbrance or a lien, charge, or security interest on or against the contracting party's interest is subordinate to the fee simple interest of the State in the qualifying project.

A. Minimum Interim Agreement Terms.

The scope of an interim agreement may include, but is not limited to:

1. Project planning and development;
2. Design and engineering;
3. Environmental analysis and mitigation;
4. Surveying;
5. Ascertaining the availability of financing for the proposed facility through financial and revenue analysis;
6. The timing of the negotiation of the comprehensive agreement; and
7. Any other provisions related to any aspect of the development or operation of a qualifying project that the parties deem appropriate prior to the execution of a comprehensive agreement.

B. Minimum Comprehensive Agreement Terms.

The Commissioners shall approve any comprehensive agreement entered into pursuant to the P3 program between the Commission and the contracting person. The Commission shall accept no liability for development or operation of the qualifying project prior to entering into a comprehensive agreement. Each comprehensive agreement shall define the rights and obligations of the Commission and the contracting person with regard to the qualifying project. The terms of the comprehensive agreement shall be tailored to address the specifics of the qualifying project and shall include, but not be limited to:

1. The delivery of letters of credit or other security in connection with the development or operation of the qualifying project, in the forms and amounts satisfactory to the Commission, and

delivery of performance and payment bonds in compliance with Chapter 2253, Texas Government Code, for all construction activities;

2. The review of plans and specifications for the qualifying project by the Commission and approval by the Commission indicating that the plans and specifications conform to standards acceptable to the Commission, except that the contracting person may not be required to provide final design documents for a qualifying project before the execution of a comprehensive agreement;

3. The rights of the Commission to inspect the qualifying project to ensure that the contracting person's activities are acceptable to the Commission in accordance with the comprehensive agreement;

4. The maintenance of a public liability insurance policy, copies of which must be filed with the Commission accompanied by proofs of coverage, or self-insurance, each in the form and amount satisfactory to the Commission and reasonably sufficient to ensure coverage of tort liability to the public and project employees and to enable the continued operation of the qualifying project;

5. The monitoring of the practices of the contracting person by the Commission to ensure proper maintenance of the qualifying project;

6. The terms under which the contracting person will reimburse the Commission for services provided;

7. The policy and procedures that will govern the rights and responsibilities of the Commission and the contracting person in the event that the comprehensive agreement is terminated or if there is a material default by the contracting person including the conditions governing assumption of the duties and responsibilities of the contracting person by the Commission and the transfer or purchase of property or other interests of the contracting person to the Commission;

8. The terms under which the contracting person will file financial statements prepared in accordance with generally accepted accounting principles on a periodic basis but not less than annually;

9. The mechanism by which User Fees, Lease Payments, or Service Payments, if any, may be established from time to time upon agreement of the parties. Any payments or fees shall be set at a level that are the same for persons using the facility under like conditions and that will not materially discourage use for the qualifying project;

10. A copy of any Service Contract;

11. A schedule of the current User Fees or Lease Payments;

12. Classifications according to reasonable categories for assessment of User Fees;

13. The terms and conditions under which the Commission may contribute financial resources, if any, for the qualifying project;

14. The terms and conditions under which existing site conditions will be assessed and addressed, including identification of the responsible party for conducting the assessment and taking necessary remedial action;

15. The terms and conditions under which the State will be required to pay money to the private entity and the amount of any such payments for the qualifying project.

16. A periodic reporting procedure that incorporates a description of the impact of the qualifying project on the State and affected jurisdictions; and

17. Other requirements of the P3 program or applicable law or that the Commission deems appropriate.

C. Additional Provisions for Comprehensive Agreement.

With respect to construction projects, the Commission generally anticipates addressing the following in the comprehensive agreement:

1. The contracting person will be expected to assume single-point responsibility and liability for all planning, designing, financing, construction, operation, and maintenance of the qualifying project.

2. The contracting person shall perform a comprehensive geotechnical investigation of subsurface conditions at the qualifying project site. The risk of inadequate geotechnical investigation or improper interpretation of the results of the geotechnical investigation will be allocated to the private entity in the comprehensive agreement.

3. The Commission encourages the private entity to propose a formula for the mutual sharing of cost savings realized during construction by virtue of value engineering initiatives, guaranteed maximum price with saving sharing provisions, trade allowances or otherwise. Mutually agreed upon terms for the sharing of such savings will be incorporated in the comprehensive agreement.

4. The Commission may enter into comprehensive agreements with private entities that have formed business associations such as joint ventures, limited partnerships and limited liability companies. However, in such cases, the Commission requires that one or more of the principal members of the business association provide a performance guaranty of all obligations undertaken in the comprehensive agreement. This requirement is in addition to the statutory requirement for a performance bond. Individuals, corporations and other businesses interested in entering public-private partnerships with the Commission under the P3 program must be willing

to provide this security if their proposal is submitted as part of a business association or other entity that limits the liability of its members, owners or partners. Any changes in the terms of the interim or comprehensive agreement as may be agreed upon by the parties from time to time shall be added to the interim or comprehensive agreement only by written amendment. The comprehensive agreement may provide for the development or operation of phases or segments of a qualifying project. Parties submitting proposals understand that representations, information and data supplied in support of, or in connection with proposals play a critical role in the competitive evaluation process and the ultimate selection of a proposal by the Commission. Accordingly, as part of the comprehensive agreement, the prospective contracting person and its team members shall certify that all material representations, information and data provided in support of or in connection with, a proposal are true and correct. Such certifications shall be made by authorized individuals who have knowledge of the information provided in the proposal. In the event that material changes occur with respect to any representations, information and data provided for the proposal, the prospective contracting person shall immediately notify the Commission of same. Any violation of this Section of the comprehensive agreement shall give the Commission the right to terminate the comprehensive agreement, withhold payment or other consideration due, and seek any other remedy available under the law.